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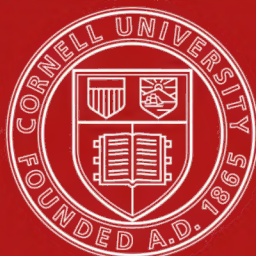
Digest

1912

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DIGEST

OF THE

AMERICAN AND ENGLISH ANNOTATED CASES

VOLUMES 1-20

WITH FULL INDEX TO THE NOTES AND
A TABLE OF CASES

EDWARD THOMPSON COMPANY
NORTHPORT, L. I., N. Y.

1912

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IN THE

American and English Annotated Cases.

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1. ANOTHER SUIT PENDING.

Action in personam in state court pending in rem proceeding in federal court.—A proceeding in rem pending in a federal court cannot be pleaded in abatement of an action in personam instituted in a state court between the same parties, the subject-matter not being the same in each action. *Trimble v. Kansas City, etc., R. Co. (Mo.)*, 1-363.

Quo warranto and injunction.—A quo warranto proceeding to try the title to a public office will not be dismissed on the ground that an action for injunction is pending between some of the parties, in a tribunal having concurrent jurisdiction, to restrain the defendants from exercising the duties of such office, as the cause of action and the parties are not the same. *State ex rel. Jernigan v. Stickley (S. Car.)*, 15-136.

Suit marked "ended" on docket.—The plea of another action pending in a court of concurrent jurisdiction will be overruled where it appears that a demurrer to the complaint was sustained by the judge of such court, and the case was in his handwriting marked "ended" on the docket, the judge stating that a formal order of dismissal is unnecessary. *State ex rel. Jernigan v. Stickley (S. Car.)*, 15-136.

2. DEATH OF PARTY.

Statutory provisions.—Under the Missouri statute changing the common-law rule that actions in tort do not survive the death of either the wronged or the wrongdoer, by providing for the survival of actions "for wrongs done to property, rights, or interest of another," but excepting, among other actions, "actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate," no action of tort to the person survives the death of either the wronged or the wrongdoer. *Bates v. Sylvester (Mo.)*, 12-457.

What law governs.—The question whether a common-law action for personal injuries survives the death of the plaintiff is a question not of procedure but of right, and must be determined by the law of the state where the action has been brought, though the injuries were inflicted in another state. *Martin v. Wabash R. Co. (U. S.)*, 6-582.

Action for personal injuries.—Under a statute providing for survival of "actions to recover damages for an injury to persons" (*Hurd's Rev. St. Ill. 1903, c. 3, § 123*) a cause of action for personal injuries survives

the death of the person injured, unless his death results from such injuries. *Martin v. Wabash R. Co. (U. S.)*, 6-582.

Actions for injuries to property—breach of duty by attorney.—Under the Indiana statutes, a cause of action against an attorney for a breach of duty injuriously affecting his client's property rights and interests, survives the death of either party. *Newman v. Gates (Ind.)*, 6-649.

—injury to property by act causing owner's death.—Where the walls of a city reservoir fall and cause simultaneously an injury to the property of a person and the death of the owner, and the city pays into the hands of a stakeholder a fund to cover the damages for the injury to the property, the owner's administrator and not his heir is entitled to the fund, as the cause of action for the injury to the property accrues during the lifetime of the owner and survives to his personal representative. *Mast v. Sapp (N. Car.)*, 6-384.

Death pending appeal.—An action for libel or slander does not abate on the death of the defendant after a verdict and judgment for the plaintiff unless the judgment is set aside or reversed, though the proceedings are stayed by an appeal and supersedeas. *Miller v. Nuckolls (Ark.)*, 6-513.

3. REVIVAL OF ACTION.

Time of revival.—Under the Rhode Island statute providing that "an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of said representatives or successor, unless in one year from the time it could have been first made," an order of revival may be made within one year after the death of the defendant, provided one year has not elapsed since the appointment and qualification of his executor. *First National Bank v. Hazie (R. I.)*, 8-1123.

ABBREVIATIONS.

F. O. B., see SALES, 2.

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Judicial notice of abbreviations, see EVIDENCE, 1 e.

Abbreviations in judicial documents.

—The use of abbreviations in judicial documents is dangerous and to be avoided. *Eichorn v. New Orleans, etc., R. Co. (La.)*, 3-98.

Use of "et al." in subpoena.—Although the words *et al.* are incapable of standing in the place of the names of the parties required by statute to be stated in a subpoena or a writ of error, yet when there is no statute or rule requiring the names of the parties to be indorsed on the copy of a subpoena, the words *et al.* may be used in indorsing the title of the cause on such copy. *Saddler v. Smith (Fla.)*, 14-570.

Judicial notice of meaning.—The abbreviation "Pres." for president is of such common use that courts will take judicial

notice of its meaning. *Griffin v. Erskine* (Iowa), 9-1193.

Parol evidence to explain.— Parol evidence is admissible to show that the abbreviation "Pt.," written after the name of the payee of a draft, was employed for the purpose of indicating that the payee was the president of the bank. *Griffin v. Erskine* (Iowa), 9-1193.

ABDUCTION.

Right of mother to sue.— The mother cannot maintain an action for enticing her infant child from the home when her husband and the father of her child is alive and resides with her. *Soper v. Igo* (Ky.), 11-1171.

ABERRATION.

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ABORTION.

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2. *INDICTMENT*, 241.
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 - a. *Admissibility*, 241.
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1. PERSONS LIABLE.

Aiding and abetting act.— In a prosecution for criminal abortion resulting in death, the defendant can be convicted even though it is not shown that he himself handled the instrument with which the criminal operation was performed, if he was present aiding and assisting in the operation for the purpose of procuring a miscarriage and any one else was using the instrument for that purpose. *Com. v. Sinclair* (Mass.), 11-217.

Woman as accomplice.— Where, under the statute against procuring a miscarriage, the woman on whom it is procured is not liable to indictment, she, by consenting to the unlawful operation, does not become an accomplice in the crime, and the person producing the miscarriage may therefore be convicted upon the uncorroborated testimony of the woman, though her attitude of consent

to the act should be considered upon the question of her credibility. *Thompson v. United States* (D. C.), 12x1004.

2. INDICTMENT.

Name or description of instrument used.— An indictment for abortion resulting in death which fails to give the name or description of the instrument alleged to have been used fails to set out the charge against the defendant with sufficient fullness to deprive him of his right to require a bill of particulars, and his absolute right to such bill is not affected by the fact that he has been tried twice before on the same charge and may already possess the information asked for. *Com. v. Sinclair* (Mass.), 11-217.

Where a count in an indictment for producing an abortion resulting in death charges, following closely the language of the statute, that the defendant with intent to procure the miscarriage of a named woman "did unlawfully use a certain instrument" upon her body, a motion to quash the indictment on the ground that the count contains neither a description of the instrument charged to have been used nor an averment that it was unknown to the grand jurors is properly overruled, as the defendant has the right, if the charge is not fully, plainly, and formally set out, to require the prosecution to file a statement of such particulars as may be necessary to inform him of the nature of the crime charged. *Com. v. Sinclair* (Mass.), 11-217.

3. EVIDENCE.

a. Admissibility.

Expert medical testimony.— Physicians who have qualified as medical experts and who attended and examined a woman after an alleged abortion had been produced on her are competent to testify as to their opinions concerning the kind of instrument used in the operation and the mode of using it which would produce the conditions they found. *Com. v. Sinclair* (Mass.), 11-217.

In a criminal prosecution for procuring the miscarriage of a pregnant woman, the opinion of a physician, based on the conditions observed in the examination of the woman, that there had been a recent miscarriage, is admissible. *Thompson v. United States* (D. C.), 12-1004.

Declaration of woman.— In a prosecution for criminal abortion resulting in death, testimony by physicians as to statements made to them by the deceased that she had been operated on to get rid of her pregnancy and that the operation had been followed by a miscarriage is inadmissible although given in connection with the opinions of the witnesses as to what the deceased was suffering from when they visited her after the alleged operation, and together with statements made to them by her as to her symptoms, sensations, and sufferings. *Com. v. Sinclair* (Mass.), 11-217.

Admissions by accused.— In a prosecution for criminal abortion resulting in death testimony that the defendant stated to the

witness "that he had a patient at the relief station who was very ill" and "that if anything happened it would be twenty years for him," and that one day after the death of the deceased defendant asked the witness to lend him two dollars, with the statement that he wanted to "go to Lynn," is properly admitted. *Com. v. Sinclair* (Mass.), 11-217.

False statement by accused.—In a prosecution for criminal abortion resulting in death, evidence of false statements made by the defendant, denying, in effect, that he had had any dealings with the deceased woman or remembered her, is admissible. *Com. v. Sinclair* (Mass.), 11-217.

Entries in account book.—In a prosecution for criminal abortion resulting in death, parol evidence that the defendant kept an account book which contained the name of the deceased woman, and which he denied having, is admissible. *Com. v. Sinclair* (Mass.), 11-217.

Connecting defendant with offense.—In a prosecution for criminal abortion resulting in death, evidence that the deceased woman had in her possession a slip of paper bearing the defendant's name, immediately before and after the operation, held competent. *Com. v. Sinclair* (Mass.), 11-217.

Former prosecution for like offense.—Where, in a prosecution for procuring a miscarriage, the only direct testimony to the commission of the offense is the testimony of the woman, and this is met by the practically unsupported denial of the defendant, it is prejudicial error to require the defendant to testify, on cross-examination, as to verdicts of guilty, afterwards set aside, which had been returned against him in a former prosecution for a like offense. *Thompson v. United States* (D. C.), 12-1004.

b. Presumptions and burden of proof.

Physical condition of woman.—The necessity of an abortion to save the woman's life is negative by showing that she was healthy and in normal condition at the time; but the good health and physical condition of the woman are not to be presumed, but must be affirmatively proved. *State v. Wells* (Utah), 19-631.

—necessity to save life.—In Utah, the burden of proving that an abortion was not necessary to save the life of the woman is imposed on the state by the statute (Comp. Laws 1907, § 4226) which defines the crime of abortion as procuring the miscarriage of a woman "unless the same is necessary to preserve her life." *State v. Wells* (Utah), 19-631.

c. Weight and sufficiency.

—proof of corpus delicti.—In Utah the *corpus delicti* of a criminal abortion is not proved merely by showing that the defendant performed an operation on a pregnant woman, in consequence of which she had a miscarriage, where the prosecution is under a statute (Comp. Laws 1907, § 4226) which defines the offense as procuring the miscarriage of a woman "unless the same is

necessary to preserve her life." *State v. Wells* (Utah), 19-631.

—necessity to save life.—The absence of the necessity of an abortion to save the woman's life is not established merely by showing that she was an unmarried woman twenty-five years old, that she was about four months advanced in pregnancy by the defendant at the time of the abortion, and that the defendant prior thereto had given her some pills, without any evidence as to the condition of her health or other physical conditions, or any evidence from which such conditions might be inferred. *State v. Wells* (Utah), 19-631.

ABSENCE.

Absence from land as abandonment of homestead, see *HOMESTEAD*, 6.

Absence of witness as ground for continuance, see *CRIMINAL LAW*, 6 d (2).

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ABSTRACTORS.

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ABSTRACTS OF TITLE.

1. *LIABILITY OF ABTRACTOR TO CUSTOMER*, 242.

2. *LIABILITY OF ABTRACTOR TO THIRD PERSON*, 243.

1. *LIABILITY OF ABTRACTOR TO CUSTOMER*.

Failure to exercise ordinary care.—Where an abstract of title purports to state the contents or substance of a deed, will, or other instrument, and there is nothing on the face of the abstract to indicate an error, the customer is justified in relying upon it without making an original investigation, and if there is an error in the abstract, through reliance upon which the customer sustains injury, he may hold the abstractor liable therefor, provided the error complained of is such as could have been avoided by the exercise of ordinary care and skill on the

part of one possessing qualifications adapted to the business of abstracting. *Equitable Bldg., etc., Assoc. v. Bank of Commerce, etc., Co. (Tenn.)*, 12-407.

— **failure to examine originals.**— An abstractor who interprets a note or memorandum of a will as devising an estate in fee to the person whose title he is investigating, and so reports to his client, without referring to the records to examine the original will, or the will as recorded in the county clerk's office, which would have shown that only a life estate was devised, is negligent, and is liable to his client for a loss occasioned thereby. *Equitable Bldg., etc., Assoc. v. Bank of Commerce, etc., Co. (Tenn.)*, 12-407.

— **scope of contract.**— Where the alleged defect in an abstract of title is in respect to a certain will referred to therein, and the abstractor claims that its contract was to furnish an abstract only of such instruments as were of record in the county register's office, and the certificate does in fact refer only to the register's office, where no wills are recorded, yet where the body of the abstract refers for the number of the will in question to the will book, and purports to state its substance, and this number is required to make the complement of the twenty-three instruments mentioned in the aggregate in the certificate, the contract of the parties must be held to apply to the will. *Equitable Bldg., etc., Assoc. v. Bank of Commerce, etc., Co. (Tenn.)*, 12-407.

2. LIABILITY OF ABSTRACTOR TO THIRD PERSON.

General rule stated.— An abstractor is liable only to the person to whom he furnished the abstract, and is not liable to a third person with whom the customer uses the abstract in procurement of money or property, unless there is a republication of the abstract to such third person. *Equitable Bldg., etc., Assoc. v. Bank of Commerce, etc., Co. (Tenn.)*, 12-407.

— **lender of money.**— The lender of money in reliance on a defective abstract of title furnished to the husband of the borrower by an abstract company without any knowledge of the purpose for which it was intended to be used, sustains no privity of contract with the abstract company and cannot maintain an action against it for a loss occasioned by such defective abstract. *Equitable Bldg., etc., Assoc. v. Bank of Commerce, etc., Co. (Tenn.)*, 12-407.

ABUSE OF PROCESS.

Necessity of proof of want of probable cause and malice.— In an action for damages for abuse of legal process it is necessary to allege and prove want of probable cause, but it is not necessary to allege or prove malice or that the proceeding has terminated in order to recover actual damages. Where punitive damages are claimed, it seems to be necessary to allege and prove malice, or facts from which the law will

infer malice. *Pittsburg, etc., R. Co. v. Wakefield Hardware Co. (N. Car.)*, 3-720.

Action in foreign jurisdiction.— Where a creditor brings suit against his debtor in a foreign jurisdiction for the sole purpose of vexation and oppression, the remedy of the debtor, if any, is at law for the malicious abuse of process, and not by suit in equity for an injunction. *Greer v. Cook (Ark.)*, 16-671.

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Franchise of gas company, see **GAS AND GAS COMPANIES**, 4 a.

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ACCESSORIES AND OTHER PARTICIPANTS IN CRIME.

1. WHO MAY BE AN ACCESSORY.
2. PROSECUTION AS PRINCIPAL.
3. TRIAL AND CONVICTION BEFORE PRINCIPAL.
4. ACCESSORY AFTER THE FACT.
5. PROSECUTION.

See ABORTION.

Aiding or abetting suicide, see SUICIDE.

Receiver of stolen goods as accessory to larceny, see RECEIVING STOLEN PROPERTY, 1.

1. WHO MAY BE AN ACCESSORY.

Persons incapable of committing offense.—A person may be guilty as a principal or as an accessory of a crime which he is personally incapable of committing alone. *State v. Burns* (Conn.), 16-465.

2. PROSECUTION AS PRINCIPAL.

Under Connecticut statute.—Under section 1583 of the General Statutes of Connecticut, which provides that "every person who shall assist, abet, counsel, cause, hire, or command another to commit any offense, may be prosecuted and punished as if he were the principal offender," a woman who abets, counsels, causes, hires, or commands a man to commit the offense of carnally knowing and abusing a female under the age of sixteen years, may be prosecuted, informed against, and convicted as if she were the principal offender. Such statute has done away with the common-law distinction between principals and accessories in felonies. *State v. Burns* (Conn.), 16-465.

Conviction under indictment as principal.—By virtue of the Minnesota statute one who at common law would be an accessory before the fact may be charged directly with the commission of the felony as principal, and the admission, on his trial, of evidence to show that he procured the crime to be committed is neither a variance nor a violation of a constitutional provision that in criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. *State v. Whitman* (Minn.), 14-309.

3. TRIAL AND CONVICTION BEFORE PRINCIPAL.

Principals in different degrees.—The rule that an accessory cannot be tried and convicted before his principal has been convicted has no application as between principals in the first and second degrees. *State v. Jarrell* (N. Car.), 8-438.

4. ACCESSORY AFTER THE FACT.

Accessory or accomplice.—One whose connection with stolen property did not commence until after the felonious taking had been consummated, and who in no manner participated in the larceny, is not an accom-

plise, but at most an accessory after the fact. *State v. Phillips* (S. Dak.), 5-760.

—mere knowledge of crime.—The mere fact that a person knows that a crime has been committed and does not give information thereof does not make him an accessory after the fact. *Levering v. Commonwealth* (Ky.), 19-140.

Necessity of indictment against principal.—Under the Arkansas statute (Kirb. Dig., § 1562) defining an accessory after the fact as one who, after a full knowledge that a crime has been committed, harbors and protects the person "charged with or found guilty of the crime," it is not necessary to constitute an accessory after the fact that an indictment or other judicial proceeding should be pending against the principal at the time he is harbored by the alleged accessory. *State v. Jones* (Ark.), 18-293.

Corroboration of testimony.—An accomplice after the fact is not an accomplice within the meaning of a statute providing that conviction cannot be had upon the uncorroborated testimony of an accomplice. *State v. Phillips* (S. Dak.), 5-760.

5. PROSECUTION.

Jurisdiction.—Under the Tennessee statutes, one who has procured to be performed without the state a criminal abortion resulting in death, cannot be prosecuted within the state as an accessory before the fact to the murder, though the death occurred within the state, where it does not appear that the principal felon consummated the offense within the state through the intervention of an innocent or guilty agent, or by any other means proceeding directly from himself. *Edge v. State* (Tenn.), 10-876.

Allegation of knowledge of crime.—An indictment against an accessory after the fact need not set forth specifically the facts showing that the defendant had knowledge of the crime committed by the principal. *State v. Jones* (Ark.), 18-293.

Proof of participation in offense.—Joint participation in furnishing prisoners with implements with which to break jail is shown by evidence that both defendants were present and acting together at the time the acts charged were done, though one of the defendants gave some implements to the prisoners at one time, and the other defendant gave them other implements at another time. *State v. Ballew* (S. C.), 18-569.

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Accident insurance, see INSURANCE, 8 a.

Burden of proving accident in prosecution for murder, see HOMICIDE, 4 b.

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Duty of master to provide against unforeseen accidents, see MASTER AND SERVANT, 3 b.

Killing by accidental discharge of concealed weapon, see **HOMICIDE**, 4 b.
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1. WHO IS AN ACCOMPLICE.
2. CORROBORATION OF TESTIMONY.

See **ABORTION**.

Request for leniency to accomplice as evidence to impeach accomplice's testimony, see **CRIMINAL LAW**, 6 n (1).

Right to continuance after repudiation of promise of immunity, see **CRIMINAL LAW**, 6 d (1).

1. WHO IS AN ACCOMPLICE.

General test.—The general test to determine whether a witness is an accomplice is whether he himself could have been indicted for the offense, either as principal or accessory. If he could not, then he is not an accomplice. *State v. Gordon* (Minn.), 15-897.

The test of an accomplice is whether the person so charged could be convicted as a principal or as an accessory before the fact, or as an aider or abettor on the evidence. *Levering v. Commonwealth* (Ky.), 19-140.

Conscious assistance of principal.—Where the evidence furnishes ground for the inference that a person alleged to be an accomplice did not consciously assist in promoting the defendant's design, and that consequently such person was not an accomplice, the appellate court cannot say that the trial court was wrong in its conclusion to that effect. *State ex rel. Webb v. District Court* (Mont.), 15-743.

Knowledge of intended crime.—A person is not an accomplice merely because he knows that the accused intends to commit the crime. *Levering v. Commonwealth* (Ky.), 19-140.

2. CORROBORATION OF TESTIMONY.

Necessity.—Under the Minnesota Revised Laws of 1905 a conviction cannot be had upon the testimony of an accomplice unless

sufficiently corroborated. *State v. Gordon* (Minn.), 15-897.

Sufficiency.—On the trial of an indictment for furnishing prisoners with implements to break jail, the testimony of one of the prisoners that the defendants gave one of the other prisoners a cold chisel, a hammer, and a bunch of keys, and that such implements were used by the prisoners in making their escape, is corroborated by proof that the defendants visited the prisoners at the jail, that the prisoners had escaped through a hole made by cutting a bolt with some implements, and that the bolt was not cut with a hatchet left by the jailer in the cell, as testified to by one of the prisoners, and by the absence of evidence that any one else had an opportunity of furnishing the prisoners with any implements. *State v. Ballew* (S. C.), 18-569.

In a prosecution for larceny, in which the defendant's accomplices testified for the state, corroborating evidence examined and held sufficient to sustain a conviction, within the rule that such evidence is sufficient if, independently of the testimony of the accomplice, it tends in some degree to establish the guilt of the accused, although, standing alone, it is not sufficiently weighty to make out a *prima facie* case. *State v. Whitman* (Minn.), 14-309.

An accessory after the fact is not an accomplice requiring corroboration of his testimony. *Levering v. Commonwealth* (Ky.), 19-140.

Cautioning instruction to jury.—Although a defendant may be convicted upon the uncorroborated testimony of an accomplice, yet where the trial court instructs the jury that if they believe the testimony of such accomplice they may convict, and fails to caution them against such a conviction, the appellate court will set aside the conviction if it is based upon such uncorroborated testimony. *Rex v. Tate* (Eng.), 15-698.

Province of jury.—Whether a witness is an accomplice requiring corroboration to support a conviction is a question of fact for the jury, and hence an instruction that under the Indian Territory statute (Mansf. Dig., § 2259, Ann. St. 1899, § 1602), a conviction cannot be had on the testimony of an accomplice, unless corroborated, is sufficient, and it is not error to refuse a further charge that a certain witness is an accomplice. If defendant regards the word "accomplice" as a technical one requiring a definition by the court, he should so request, but should not ask an instruction that a certain witness is an accomplice, that being a question for the jury. *Driggers v. U. S.* (Okla.), 17-66.

ACCORD AND SATISFACTION.

Accepting part payment in full satisfaction, see **PAYMENT**, 3.

Compromise of claim, see **COMPROMISE AND SETTLEMENT**.

Receipt of wages by discharged seaman, as satisfaction of claim for wrongful discharge, see **SEAMAN**, 3 b.

Settlement with creditor by transfer of stock of merchandise, see FRAUDULENT CONVEYANCES, 3 b.

Accepted promise without consideration.—A debt is not extinguished by the debtor's mere promise to perform some act in satisfaction thereof where the new promise, though accepted by the creditor, only binds the promisor to do what he is already legally bound to do. *Mantley v. Vermont Mutual Fire Ins. Co. (Vt.)*, 6-562.

Accepted promise supported by sufficient consideration.—A debt is extinguished by the creditor's acceptance of the debtor's mere promise to perform some act in the future in satisfaction of the debt, provided the new promise is supported by a sufficient consideration and is otherwise legally binding. *Manley v. Vermont Mutual Fire Ins. Co. (Vt.)*, 6-562.

Accord without satisfaction.—Where, after a loss under a fire insurance policy, the parties agree that the insurer shall pay and the insured shall accept a sum which is the same as the insurer is bound to pay under the policy, and which is payable in the time and manner specified in the original contract, there is an accord but not a satisfaction, and the agreement is revocable by either party at any time before the full performance. *Manley v. Vermont Mutual Fire Ins. Co. (Vt.)*, 6-562.

ACCOUNTS AND ACCOUNTING.

1. SUIT FOR ACCOUNTING.

2. ACCOUNT STATED.

Admissibility of account books in evidence, see ABORTION; EVIDENCE, 9 b (1).

Conclusiveness of balance shown by bank pass book, see BANKS AND BANKING, 5 b (1).

Entries in account books as hearsay, see EVIDENCE, 3 a.

Falsification of books, see FORGERY, 1 a.

Limitation of actions on mutual accounts, see LIMITATIONS OF ACTIONS, 4 a (2) (a).

Long accounts as ground of equity jurisdiction, see EQUITY, 2 f.

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Secret profits made by promoters, see CORPORATIONS, 6 b.

Accounting by Persons in Particular Relations.

See AGENCY, 2; EXECUTORS AND ADMINISTRATORS, 11; GUARDIAN AND WARD, 3; PARTNERSHIP, 8 b.

Rights and liabilities of tenants in common *inter se*, see JOINT TENANTS AND TENANTS IN COMMON, 2.

1. SUIT FOR ACCOUNTING.

Right of defendant to affirmative relief.—In an equity suit for an accounting the bill imports an offer on the part of the complainant to pay any balance that may be found against him, and the respondent is entitled to affirmative relief to recover any balance found in his favor, although he does not file any cross-bill or set up any matter in lieu of such cross-bill. *Downes v. Worch (R. I.)*, 13-647.

2. ACCOUNT STATED.

As defense to action on item not included.—A stated account and a settlement based thereon is no defense to an action on items due at the time the account was rendered, but which admittedly were not included therein. *Newhall v. Field (N. Mex.)*, 12-979.

Variance between pleading and proof.—In an action on account stated, there is no variance between an allegation of an unconditional promise to pay, and evidence of the debtor's promise to pay "when able," where it does not appear that the debtor has been discharged in bankruptcy, as when an account is stated the law implies a promise to pay, and a promise to pay when able means to pay at once. *Mattingly v. Shortell (Ky.)*, 8-1134.

Recovery on quantum meruit.—In an action on an account stated, it is erroneous to give an instruction permitting the jury to find for the plaintiff on a *quantum meruit*, as when an account is stated between a debtor and his creditor it constitutes the cause of action, and must be proved as alleged, and if it is not so proved there is a variance. *Mattingly v. Shortell (Ky.)*, 8-1134.

Items left for future adjustment.—Parties holding mutual and open claims against each other may agree as to some of such items, leaving other items for future adjustment, and an action upon an account stated may be maintained for the balance arrived at from the items considered. *Ingle v. Angeel (Min.)*, 20-625.

Right of set-off.—In such action the party against whom the balance is claimed may offset against it any balance which he claims from the items not included in the settlement. *Ingle v. Angeel (Minn.)*, 20-625.

ACCRUAL.

"Arisen" used in sense of accrual, see LIMITATION OF ACTIONS, 1 c.

Cause of action, see ACTIONS.

Damages accruing pending action, see DAMAGES, 6.

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See CHARITIES, 6; PERPETUITIES AND TRUSTS FOR ACCUMULATION.

ACCUSATION.

Necessity for formal accusation, see **CRIMINAL LAW**, 6 g.

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Comments on failure to testify, see **CRIMINAL LAW**, 6 p.

Instructions as to failure of accused to testify, see **CRIMINAL LAW**, 6 q (4).

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1. WHO MAY TAKE ACKNOWLEDGMENT.

Deputy clerk of county court.—Under the Tennessee statutes, a legally appointed deputy of a clerk of the County Court may take the privy examination of a married woman to a conveyance of her separate estate; and the acknowledgment of such conveyance may be taken and certified by the deputy either in his own name or in that of his principal. *Wilkerson v. Dennison* (Tenn.), 3-297.

Notary after expiration of term.—Validity of an acknowledgment taken by a notary public after expiration of his term. *Sandlin v. Dowell* (Ala.), 5-459.

Notary who has not filed signature.—It seems that the failure of a notary public to file his autograph signature in the office of the county register as required by statute is an irregularity which does not invalidate acknowledgments taken by him. *Matter of Townsend* (N. Y.), 16-921.

Stockholder or officer of corporate grantor.—The acknowledgment of a deed

of trust, executed by a corporation grantor to secure the payment of promissory notes, is a ministerial act. Where although such an instrument is acknowledged before a notary public who, to the grantor's knowledge, is at the time a director and treasurer of the grantor, and also indebted for unpaid subscriptions to its stock, there is nothing on the face of the instrument or acknowledgment indicating such relationship, the deed of trust is entitled to registration, and the registry thereof is notice to subsequent purchasers, incumbrancers, or lienors. *Ardmore Nat. Bank v. Briggs Mach., etc., Co.* (Okla.), 16-133.

2. THE CERTIFICATE.

a. In general.

Privy examination of married woman.—Certificate of privy examination of a married woman as to her execution of a mortgage held to be sufficient within the Alabama statute. *Sandlin v. Dowdell* (Ala.), 5-459.

b. Venue.

Sufficiency of caption alone.—The requirement of the Virginia statute that a certificate of acknowledgment shall show that it was taken within the territorial limits of the notary's jurisdiction is substantially satisfied by a certificate which bears a caption naming a certain city, county, and state, and which shows that it was taken before a notary of such city, though it does not in terms recite that it was taken within the limits of the notary's territorial jurisdiction. *Sullivan v. Gum* (Va.), 10-128.

Presumption of regularity.—Where an instrument has been acknowledged before an officer authorized to take acknowledgments within the limit of his territorial jurisdiction, it will be presumed that the acknowledgment was taken within those limits, although that fact is not stated in the certificate. *Sullivan v. Gum* (Va.), 10-128.

c. Errors and omissions.

Name of person acknowledging.—A certificate of acknowledgment substantially in statutory form is not insufficient because of the omission of the name of the person acknowledging the instrument from the blank space provided therefor. *Larsen v. Elsner* (Minn.), 2-989.

Official title of officer.—The validity of the probate of a deed is not affected by the fact that the officer before whom the probate was made omitted his official title in attesting the instrument. *McCreary v. Coggeshall* (S. Car.), 7-693.

d. Impeachment.

Sufficiency of evidence.—The evidence reviewed, in an action of ejectment, wherein the defendant produced a deed signed and acknowledged by the plaintiff as grantor, and held insufficient to impeach the acknowledgment or to sustain a verdict in favor of the plaintiff. *Ford v. Ford* (D. C.), 7-245.

Unsupported testimony of grantor.—The mere unsupported testimony of the

grantor in a deed bearing a certificate of acknowledgment that he did not sign or acknowledge the instrument is not sufficient to impeach the acknowledgment. *Ford v. Ford* (D. C.), 7-245.

3. LIABILITY FOR FALSE OR DEFECTIVE CERTIFICATE.

a. In general.

Error without negligence.—The clerk of the County Court, in taking the acknowledgment of a grantor or mortgagor, is not an insurer of the identity of the person making the acknowledgment, and is not liable in damages for an error in that respect if he exercises that diligence which a reasonably prudent and cautious man would exercise under the circumstances. *Commonwealth, use of Green, v. Johnson* (Ky.), 13-716.

Negligence of deputy.—The clerk of the County Court is liable in damages for a loss resulting from the negligence of his deputy in taking an acknowledgment. *Commonwealth, use of Green, v. Johnson* (Ky.), 13-716.

b. Evidence.

Burden of proof.—In an action against the clerk of the County Court for damages sustained by reason of a false certificate of acknowledgment given by his deputy, where it is shown as a fact that the person making the acknowledgment was an impostor, a *prima facie* case of negligence is made out and it devolves on the defendant to show that his deputy, in taking the acknowledgment, used due care and diligence to prevent fraud and imposition. *Commonwealth, use of Green, v. Johnson* (Ky.), 13-716.

Sufficiency.—Upon the question of the negligence of a deputy clerk in taking and certifying the acknowledgment of an impostor, the fact that the person making the acknowledgment was brought to the clerk's office by a business man of long standing and good reputation in the community and by him introduced as the person impersonated, is competent evidence tending to show due diligence on the part of the officer in certifying the acknowledgment, and the sufficiency of such evidence to overcome a *prima facie* case of negligence in making the false certificate becomes a question of fact. *Commonwealth, use of Green, v. Johnson* (Ky.), 13-716.

ACQUIESCENCE.

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Loss of right to rescind sale, see **SALES**, 5 a.

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- Enforcement of mechanics' liens, see MECHANICS' LIENS, 10.
- Enjoining civil actions or proceedings, see INJUNCTIONS, 2 e.
- Establishment of trust, see TRUSTS AND TRUSTEES, 1 a (4).
- Explosions, see EXPLOSIONS AND EXPLOSIVES.
- Failure of landlord to put tenant in possession, see LANDLORD AND TENANT, 5 d.
- False imprisonment, see FALSE IMPRISONMENT.
- Fees of justices, see JUSTICES OF THE PEACE, 5.
- Fire insurance policies, see INSURANCE, 5 m.
- FIRES, see FIRES.
- Foreclosure of mortgage, see MORTGAGES AND DEEDS OF TRUST, 13.
- Fraud, see FRAUD AND DECEIT.
- Indemnity contracts, see INDEMNITY.
- Infringement of copyright, see COPYRIGHTS.

Infringement of trademark or trade name, see TRADEMARKS, TRADE NAMES AND UNFAIR COMPETITION, 3 c.
 Injunction bonds, see INJUNCTIONS, 5 c.
 Injunctions, see INJUNCTIONS, 3.
 Injuries by automobiles, see MOTOR VEHICLES, 3.
 Injuries to or loss of passenger's effects, see CARRIERS, 6 i (4).
 Injuries to servants, see MASTER AND SERVANT, 3 n.
 Interference with contract relations, see INTERFERENCE WITH CONTRACT RELATIONS.
 Invasion of right of privacy, see PRIVACY, RIGHT OF.
 Judgments, see JUDGMENTS, 12.
 Libel or slander, see LIBEL AND SLANDER, 4.
 Maintenance, see CHAMPERTY AND MAINTENANCE.
 Malicious prosecution of actions, see MALICIOUS PROSECUTION.
 Malpractice by physician, see PHYSICIANS AND SURGEONS, 6 b.
 Medical services, see PHYSICIANS AND SURGEONS, 4 b.
 Municipal contracts, see MUNICIPAL CORPORATIONS, 7 g.
 Negligence generally, see NEGLIGENCE.
 Nuisances, see NUISANCES, 6.
 Partition, see PARTITION, 2 d.
 Penalties, see PENALTIES AND PENAL ACTIONS.
 Personal injuries, see ASSAULT AND BATTERY; CARRIERS; DAMAGES; HUSBAND AND WIFE; INNS, BOARDING HOUSES AND APARTMENTS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS; SHIPS AND SHIPPING; STREET RAILWAYS; STREETS AND HIGHWAYS.
 Premiums collected by insurance agent, see INSURANCE, 2 c.
 Price of liquor sold, see INTOXICATING LIQUORS, 10.
 Promissory notes, see BILLS AND NOTES, 11 b; 12.
 Quieting title, see QUIETING TITLE—REMOVAL OF CLOUD.
 Recovery of annuities, see ANNUITIES.
 Recovery of assessments, see BENEVOLENT OR BENEFICIAL ASSOCIATIONS, 6 c.
 Recovery of benefits from beneficial associations, see BENEVOLENT OR BENEFICIAL ASSOCIATIONS, 9.
 Recovery of fines, see FINES, 1.
 Recovery of real estate, see EJECTMENT.
 Reformation of instruments, see REFORMATION.
 Replevin bonds, see REPLEVIN, 9.
 Rescission of contracts, see CANCELLATION AND RESCISSION.
 Restraining prosecution of action, see INJUNCTIONS, 2 d (4).
 Right of privacy, see PRIVACY, RIGHT OF.
 Specific performance of contracts, see SPECIFIC PERFORMANCE.
 Trespass on property, see TRESPASS.

1. RIGHT TO SUE.

Motive of suit.—Only the legal rights of the parties to an action will be considered. The reason or motive of the plaintiff in asking for the enforcement of his rights is

not subject to inquiry. *In re Solicitor* (Can.), 19-488.

Absence of precedent as barring right to sue.—The absence of a precedent for an asserted right is not conclusive evidence that the right does not exist. Where the case is new in principle, the courts cannot give a remedy; but where the case is new only in instance, the courts should give relief by the application of recognized principles. *Pavesich v. New England Mut. L. Ins. Co. (Ga.)*, 2-561.

2. FORMS OF ACTION.

Form of action as affecting statutory limitation, see LIMITATION OF ACTIONS, 1 c.

a. Common-law actions.

Debt or assumpsit.—An action at law to recover an amount due on an unpaid judgment is properly an action of debt and not of assumpsit, and is governed by the principles applicable to a common-law action of debt on a judgment record, although under the state practice the action is styled in assumpsit. *Dubois v. Seymour*, (U. S.) 11-656.

Assumpsit or case.—Although the usual action to recover damages for breach of contract not under seal is assumpsit, an action on the case will lie where, at the time of the breach, a fraud is committed on the other party by the party violating the contract. *Bates v. Bates Machine Co. (Ill.)*, 12-174.

Abolition by statute.—It is provided by statute in Missouri that there shall be "but one form of action for the enforcement or protection of private rights and redress or prevention of private wrongs, which shall be denominated a civil action." *Ackerman v. Green (Mo.)*, 6-834.

Under the Oregon statutes abolishing all forms of action and requiring only that the complaint shall contain a concise statement of the facts constituting the cause of action, an action of tort by the holder of a theatre ticket to recover for a refusal to permit him to occupy the seat purchased may be allowed to stand as an action for breach of a contract, where the complaint states facts sufficient to constitute a cause of action for such breach, as the other allegations of the complaint may be treated as surplusage. *Taylor v. Cohn (Oregon)*, 8-527.

Though the Wisconsin code abolished the common-law distinctions between suits and actions and did away, entirely, with the name "suits" as the name of a class of judicial remedies, the essential character of such remedies has not been changed. A suit now is either an action or a proceeding in the nature of an action in court. *Milwaukee Light, etc., Co. v. Ela Co. (Wis.)*, 20-707.

b. Legal or equitable.

Quieting title.—The action to quiet title authorized by the Montana statute is an equitable action. *Larson v. Peppard*, (Mont.), 16-800.

Equitable defenses to legal cause of action.—A contention that a fiduciary relation existed between the parties to the contract sued on, and that it was therefore presumptively fraudulent and *prima facie* void, is not an equitable defense. *Zeigler v. Illinois Trust, etc., Bank (Ill.)*, 19-127.

c. Contract or tort.

Complaint alleging fraud and conversion.—If it appears that there was no original contract relation between the parties, the complaint, in an action by one bank against another, states a cause of action in tort where it charges a fraudulent procurement of a note from the plaintiff by a third person, the acquirement thereof by the defendant without consideration and with knowledge of the fraud, the collection of the note, and the conversion of the proceeds thereof by the defendant's receiver and the turning over of the assets to the defendant at the close of the receivership, and states that because of the "fraud and conversion" aforesaid the plaintiff has suffered damage in a specified sum. *German Nat. Bank v. Princeton State Bank (Wis.)*, 8-502.

d. *In rem* or *in personam*.

Action for services rendered.—A suit for services rendered is an action *in personam*, while a proceeding wherein a receiver was appointed and a claim made against the assets on account of the same services is a proceeding *in rem*. *Trimble v. Kansas City, etc., R. Co. (Mo.)*, 1-363.

Suit for specific performance.—An action for the specific performance of a contract to convey real estate is one *in personam*. *Silver Camp Min. Co. v. Dickert (Mont.)*, 3-1000.

e. Civil or criminal.

Mandamus as civil action, see **CHANGE OF VENUE**, 1 b.

Bastardy proceeding.—A bastardy proceeding is civil and not criminal in its nature, and is intended merely for the enforcement of a police regulation. Hence the finding of the issue against the defendant, that he is the father of the child, does not authorize the imposition of a fine. *State v. Addington (N. Car.)*, 11-314.

Habeas corpus.—A habeas corpus proceeding is civil and not criminal in its nature. *Fisher v. Baker (U. S.)*, 7-1018.

Action on forfeited bail bond or recognizance.—An action by the United States against a surety on a forfeited bail bond does not involve the guilt or innocence, or conviction or acquittal, of any person, and is not a criminal case of any grade, or a criminal proceeding, though it may be a proceeding arising in a criminal case, and therefore the United States may sue out a writ of error from a circuit court of appeals to review an adverse judgment rendered in such action by a circuit court. *United States v. Zarafonitis (U. S.)*, 10-290.

The state may except to the trial court's decision in a proceeding by the sureties on

a criminal recognizance to be discharged from liability, as the proceeding is civil in its nature. *Lamphire v. State (N. H.)*, 6-615.

Actions for violations of ordinances.—The Indian Territory statute, providing that no appeal can be taken in a civil action unless the appellant files a prescribed affidavit, applies to an appeal from a conviction for a violation of a municipal ordinance, as the prosecution for such violation is a civil action and not a criminal prosecution; and the required affidavit must be filed with the justice before whom the conviction is had. *Fortune v. Wilburton (Ind. Ter.)*, 5-287.

An Indian Territory statute, providing that no appeal can be taken in a civil action unless the appellant files a prescribed affidavit, applies to an appeal from a conviction for a violation of a municipal ordinance, as a prosecution for such violation is civil and not criminal in character. *Fortune v. Wilburton (U. S.)*, 6-565.

A prosecution for the violation of an ordinance passed by a county board of supervisors is criminal in nature, where the act charged would naturally be the subject of a criminal statute, and where there is a statute providing that the public prosecutor for the county shall conduct on behalf of the people all prosecutions of offenses against county ordinances; and the prosecution should be in the name of the state or territory rather than in the name of the county. *Territory ex rel. Oahu v. Whitney (Hawaii)*, 7-737.

An action to recover a penalty for the violation of a municipal ordinance is not a prosecution which must be conducted in the name and by the authority of the state. *Helena v. Kent (Mont.)*, 4-235.

3. COMMENCEMENT OF ACTION.

a. Accrual of cause of action.

Accrual of cause of action, see **LIMITATION OF ACTIONS**, 4 a (2).

Accrual of cause of action for breach of promise of marriage, see **BREACH OF PROMISE OF MARRIAGE**.

Accrual of cause of action on injunction bond, see **INJUNCTIONS**, 5 c (1).

Injury to lateral support.—A landowner does not suffer damages recoverable at law for injury to lateral support of his property until the earth is so much disturbed that it slides or falls. *Kansas City Northwestern R. Co. v. Schwake (Kan.)*, 3-118.

Sale of goods to be manufactured.—Where a contract for the sale of goods to be manufactured provides that the buyer shall order the goods as needed, the seller, on a refusal of the buyer to forward orders, may maintain an action for breach of the contract without first manufacturing the goods. *Gardner v. Deeds (Tenn.)*, 7-1172.

Goods sold on credit.—The seller of goods sold on credit cannot maintain an action for the purchase price until the term of credit has expired, where the credit was

given unconditionally, was not obtained by fraud, and was not based on an express consideration which has failed, though the buyer has refused to accept the goods. *Tatum v. Ackerman* (Cal.), 7-541.

b. Premature suits.

Premature suits as ground for plea in abatement, see PLEADING, 6.

Effect of amendment.—In an action against a contractor for the breach of a building contract, brought without obtaining the architect's certificate required by the contract, where a judgment for the plaintiff has been reversed on the ground that the action was prematurely brought, the defect is not cured by an amendment of the declaration alleging the procurement of the certificate since the reversal of the judgment, but not alleging that before the institution of the action the architect fraudulently refused to furnish the required certificate. *American Bonding, etc., Co. v. Gibson* (U. S.), 7-522.

Accrual pending suit.—The nonexistence of a cause of action when the suit is brought is a fatal defect which cannot be cured by an accrual of a cause while the suit is pending. *American Bonding, etc., Co. v. Gibson* (U. S.), 7-522.

Taking objection under general denial.—In an action for the price of goods sold on credit, an objection that the action is prematurely brought is open to the defendant under a general denial. *Freeman v. Hedrington* (Mass.), 17-741.

4. PERSONS ENTITLED TO SUE.

Natural or artificial persons.—To be entitled to recognition in the courts of Minnesota, a party must, in the absence of statutory provisions to the contrary, be either a natural or an artificial person. *St. Paul Typothete v. St. Paul Bookbinders' Union* (Minn.), 3-695.

5. JOINDER OF CAUSES OF ACTION.

Bill to compel distribution of assets of corporation and to have part of capital stock declared fictitious, see CORPORATIONS, 10 e.

Common-law and statutory causes of action, see MASTER AND SERVANT, 3 n (2).

Misjoinder of causes of action, see EXPLOSIONS AND EXPLOSIVES, 2; PLEADING, 5 b.

Causes calling for same judgment.—When the causes of action are of the same nature and the same judgment is to be given in all, they may be joined in one declaration. *Fisher v. Seaboard Air Line R. Co.* (Va.), 1-622.

Necessity that all parties be affected.—Except in cases to enforce mortgage and other liens, it is a prerequisite to the joinder of causes of action in a pleading that all causes should affect all the parties to the action. *Benson v. Battey* (Kan.), 3-283.

A cause of action for equitable accounting against two of the defendants in an action cannot be joined in a petition with a cause

of action at law to recover damages in tort against another defendant not affected by the first cause of action. *Benson v. Battey* (Kan.), 3-283.

Equitable and legal issues.—Under the Wisconsin practice there may be joined in the same complaint an equitable cause of action to obtain a reformation of a contract for the sale of land by the correction of a misdescription of the premises intended to be conveyed, and a legal cause of action to recover for injury done to the freehold by the severance of trees by the defendant after the making of the contract and before the conveyance. In such case the equitable issue will be first tried by the court and then the legal issue will be tried by a jury and appropriate relief will be granted in one judgment. *Krakow v. Wille* (Wis.), 4-1016.

Contract and tort.—A complaint in an action to recover for wheat delivered to the defendant, a milling company, is not bad for a misjoinder of causes of action, where it alleges that the wheat was delivered; that it was the custom and usage of the defendant to mix the wheat with other wheat of like kind and upon the payment of storage and for the sacks to deliver back merchantable wheat upon demand, or pay the market price thereof at the time of the demand; that the defendant sold the plaintiff's wheat after receiving it, and applied the proceeds to its own use; that the requisite amount for storage and for sacks was tendered and that a demand for the wheat or for payment therefor was made. Such petition does not join a cause of action on contract with one in tort, but states a cause of action on contract only, as it does not allege that the wheat was converted by the defendant unlawfully or wrongfully. *Savage v. Salem Mills Co.* (Oregon), 10-1065.

Injury to wife and property of husband.—Where the wrongful act of a stranger results in an injury to the wife and also to the property of the husband, the claim of damages for both injuries is properly laid in one complaint and in each count of the complaint. *Birmingham Southern R. Co. v. Lintner* (Ala.), 3-461.

Slander and malicious prosecution.—A cause of action for slander cannot be united with one for malicious prosecution or for malicious abuse of legal process. *Green v. Davies* (N. Y.), 3-310.

An action for damages caused by the acts of the defendants in conspiring to injure the plaintiff by maliciously and fraudulently instituting an action against him is an action for malicious prosecution and not for conspiracy and may not be joined with an action for slander. *Green v. Davies* (N. Y.), 3-310.

Different acts of negligence.—When several acts of negligence concur in giving rise to a single right of action, they may be united in the same complaint, under the Minnesota statute which permits several causes of action to be joined in the same pleading, when they arise out of the same transaction or transactions. *Mayberry v. Northern Pac. R. Co.* (Minn.), 10-754.

6. CONSOLIDATION OF ACTIONS.

Allowance of costs on consolidation, see COSTS, 9.

Reformation of pleadings.—Under the Montana statute providing for the consolidation of actions, when the order of consolidation is made, the court will require the pleadings to be reconstructed as in one suit, if necessary; and if the pleadings are ordered reformed, the complaint in the consolidated suit should state all the plaintiff's causes of action and the answer should present all the issues which the defendant has raised in the suits consolidated. *Handley v. Sprinkle* (Mont.), 3-531.

Single or separate judgments.—Under the Montana statute providing for the consolidation of actions, a consolidation merges all the actions consolidated into one suit in which there can be but one judgment which must settle all the issues involved. *Handley v. Sprinkle* (Mont.), 3-531.

7. SPLITTING CAUSES OF ACTION.

Divisibility of cause of action against stockholders for debts of corporation, see CORPORATION, 8 g (3).

Splitting demands, see SALES, 6 c (1).

An action for a tort, or based on a wrongful act, is single and indivisible, and gives rise to but one liability. *Kansas City, etc., R. Co. v. Shutt* (Okla.), 20-255.

ACT OF GOD.

Excuse for delay in transportation of passengers, see CARRIERS, 6 e (2).

Excuse for loss of or injury to goods in transportation, see CARRIERS, 4 d (1).

Tort of insane agent as act of God, see CARRIERS, 4 d (1).

ACTS.

Agent's acts as evidence of authority, see AGENCY, 3 b (2).

ADDITIONAL.

Additional bond on appeal, see APPEAL AND ERROR, 18 d.

Additional compensation for extra services, see MASTER AND SERVANT, 1 d.

Additional compensation for increased duties imposed on public officer, see PUBLIC OFFICERS, 6 b.

Increased pay for additional duties imposed on judge, see JUDGES, 2.

ADEMPMENT.

Of legacies, see WILLS, 10 g.

ADEQUATE REMEDY AT LAW.

Alleging inadequacy of remedy at law in bill for injunction, see INJUNCTIONS, 3 c (1),

Inadequacy of legal remedy as ground for equitable relief generally, see EQUITY, 2 b.

Inadequacy of legal remedy as ground for injunctive relief, see INJUNCTIONS, 1 c; LABOR COMBINATIONS, 11; TAXATION, 8.

Inadequacy of legal remedy as ground for mandamus, see MANDAMUS.

Inadequacy of legal remedy as ground for rescission or cancellation of contracts, see CANCELLATION AND RESCISSION, 2.

Inadequacy of legal remedy at law as ground for specific performance, see SPECIFIC PERFORMANCE, 1.

Interference with right to hunt wild fowl, see GAME AND GAME LAWS, 1.

ADJOINING LANDOWNERS.

Discharge of surface water on adjoining premises, see WATERS AND WATERCOURSES, 2 b.

Duty of canal company to adjoining landowner, see CANALS, 1.

Injuries by blasting on adjoining premises, see EXPLOSIONS AND EXPLOSIVES, 4.

Limitation of action for injury to subjacent support, see LIMITATION OF ACTIONS, 4 a (2) (a).

Malicious erection of fences, see FENCES, 1 b.

Rights to party walls, see PARTY WALLS.

Waste of natural gas as injury to adjacent owner, see GAS AND GAS COMPANIES, 6.

Lateral support — effect of weight of buildings.—A private party is liable for damages caused to an adjoining lot by his removal of lateral support to such an extent that the lot in its natural state would settle or crumble, but for nothing more. If his removal of lateral support would not have caused the adjoining lot to settle or crumble in its natural state, he is not liable for damages which result because the superincumbent weight of buildings or other ponderous things contribute to the settlement of the lot. *Johnson v. St. Louis* (U. S.), 18-949.

Subjacent support — measure of damages.—In an action by a surface owner to recover damages for subsidence resulting from the working of minerals under or adjoining his property, the depreciation in the market value of the property attributable to the risk of future subsidence is not a proper element of the damages recoverable. *West Leigh Colliery Co. v. Tunnicliffe* (Eng.), 10-74.

In an action by a surface owner to recover damages for subsidence resulting from the working of coal mines under and adjoining his property, the depression in the market value of the property attributable to the risk of future subsidence is a proper element of the damages recoverable. *Tunnicliffe v. West Leigh Colliery Co.* (Eng.), 5-755.

ADJOURNMENTS.

Adjournment of survey in proceeding to lay out highway, see **STREETS AND HIGHWAYS**, 2 c.

Answer in justice's court after adjournment, see **JUSTICES OF THE PEACE**, 3.

By legislature, see **STATES**, 3.

ADJUSTMENT.

Fire losses, see **INSURANCE**, 5 l.

Mutual claims, see **ACCOUNTS AND ACCOUNTING**.

ADMINISTRATION.

Probate of will after grant of administration, see **WILLS**, 7 b.

ADMINISTRATION BONDS.

See **EXECUTORS AND ADMINISTRATORS**.

ADMINISTRATIVE ACTS.

Restraining administrative acts, see **PROHIBITION**, 1.

ADMINISTRATIVE OFFICERS.

Liability to prohibition, see **PROHIBITION**, 3.

ADMINISTRATORS.

See **EXECUTORS AND ADMINISTRATORS**.

Administrators *de bonis non*, see **EXECUTORS AND ADMINISTRATORS**, 14.

Administrators *pendente lite*, see **EXECUTORS AND ADMINISTRATORS**, 16.

Administrators with the will annexed, see **EXECUTORS AND ADMINISTRATORS**, 15.

ADMIRALTY.

See **SALVAGE; SEAMEN; SHIPS AND SHIP-PING; TOWAGE**.

Review of evidence on appeal, see **APPEAL AND ERROR**, 12 h (1).

Jurisdiction in tort.—A shore dock, bridge, abutment, protection piling, and pier, are structures connected with the shore and land commerce, and an injury to such structures caused by a vessel negligently adrift is not a maritime tort of which a court of admiralty has jurisdiction. *Cleveland Terminal, etc., R. Co. v. Cleveland Steamship Co.* (U. S.), 13-1215.

Contribution.—A court of admiralty has jurisdiction of a libel to enforce contribution from the owner of one of two vessels, which were both at fault for a collision with a third, in favor of the charterer of the other vessel at fault, who has paid a

judgment recovered against him in a suit at common law, founded upon the wrong, to which the other wrongdoer was not made a party. *The Ira M. Hedges* (U. S.), 20-1235.

Verification of pleadings.—Where a pleading in admiralty filed on behalf of several passengers of a vessel claiming damages for mistreatment is verified by one of the number only, such verification, though not in conformity with a rule of the court, is an irregularity only, and, where not objected to in the trial court, is not ground for reversal of judgment in favor of each claimant by the appellate court. *Northwestern Steamship Co. v. Ransom* (U. S.), 20-1015.

ADMISSION OF ATTORNEYS.

See **ATTORNEYS AT LAW**, 1.

ADMISSIONS AND DECLARATIONS.

See **EVIDENCE**, 10 d.

Actions on fire insurance policy, see **INSURANCE**, 5 m (10).

ADMISSION.

Admission in pleading, see **PLEADING**, 4 a (4).

Criminal cases, see **CRIMINAL LAW**, 6 n (11).
Effect of demurrer as admission, see **PLEADING**, 5 e.

Proof of partnership, see **PARTNERSHIP**, 1 b.

ADOPTED STATUTES.

See **STATUTES**, 4 k.

ADOPTION OF CHILDREN.

Right of adopting parent to sue for death of adopted child, see **DEATH BY WRONGFUL ACT**, 6.

Construction of statute.—Statutes relating to the adoption of children are not exclusive so that no right to take property by an adopted child may be created in any other way. *Chehak v. Battles* (Iowa), 12-140.

Adoption of adults.—The word "child" in the Alabama statute relating to the adoption of children refers to the status of the person adopted and not to the age of such person, and an adult may be adopted under the statute. *Sheffield v. Franklin* (Ala.), 15-90.

Specific performance of contract for adoption.—Although an instrument of adoption is not valid because not acknowledged by all the parties and recorded, the surrender of a child by its parents to others, who at the time agree to adopt the child as their own and make it their heir, is a valid consideration for the contract of adop-

tion, and the child, for whose benefit the contract is made, may maintain an action for the specific performance of such contract. *Chehak v. Battles* (Iowa), 12-140.

Such a contract is not affected by the statute of frauds, part of the consideration—the surrender of the child—being paid at the time of the contract; nor is the contract in the nature of a testamentary disposition of property and contrary to the statute relating to the execution of wills. *Chehak v. Battles* (Iowa), 12-140.

Second adoption.—Under the New York Domestic Relations Law, providing that an adopted child may be adopted directly from its foster parents by another person “in the same manner as from parents, and as if such foster parents were the parents of such child,” the natural parents of a legally adopted child absolutely cease in law to have any right or authority regarding such child, and in case of a second adoption after the death of the foster parents, it is not necessary to give notice to or obtain the consent of the natural parents or the survivor of them. *Matter of Macrae* (N. Y.), 12-505.

Right of adopted children to inherit.—The Michigan statute providing that on the adoption of a child he shall become an heir at law of the adopting parents, the same as if he were in fact the child of such parents, does not make the child an heir of a brother of the adopting parent. *Van Derlyn v. Mack* (Mich.), 4-879.

An adopted child has no right to succeed to the estate of any member of the adopting family other than the adopting parent, and the adopted child does not succeed to the estate of the ancestors or collateral kin of the adopting parent, or to the estate of children born to the adopting parent. *Hockaday v. Lynn* (Mo.), 9-775.

An adopted child does not by reason of his adoption become heir to the real property of a brother of his adopting parent who dies intestate after the death of such parent, and therefore the adoption does not make the child an heir by representation of the property which might have come to his adopting parent had such parent survived his brother. *Hockaday v. Lynn* (Mo.), 9-775.

Right of adopted child under limitations in default of “children.”—Where property is bequeathed to a person for life and after his death to any child or children that he may leave surviving him, and in default of any child or children of the life beneficiary the property is to become a part of the testator’s residuary estate, the residuary legatees under the will are “remaindermen” within the meaning of the New York statute (Consol. Laws, c. 14, § 114) providing that an adopted child shall not be deemed the child of the adopting parent so as to defeat the rights of remaindermen under limitations of property dependent on the adopting parent dying without heirs, *Matter of Leask* (N. Y.), 18-516,

A limitation in a will to the “child or children” of a life beneficiary under the will is not a limitation to an adopted child under the New York Domestic Relations Law (Consol. Laws, c. 14, § 114) providing that adopted children shall have the right to inherit from their foster parents, “but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen.” *Matter of Leask* (N. Y.), 18-516.

Collateral attack on decree of adoption.—A decree of adoption rendered in proceedings regular on their face and by a court of competent jurisdiction is nevertheless subject to collateral attack on a writ of habeas corpus for the possession of the adopted children by a parent who was not a party to the decree of adoption and had no notice or knowledge thereof until after the decree had been rendered. *Beatty v. Davenport* (Wash.), 13-585.

Extraterritorial effect of adoption.—Statutes relative to the adoption of children which confer on an adopted child the right of inheritance of the property of the adopting parent in the state of adoption, have no extraterritorial operation, and consequently, where a person who has adopted a child in the state of Georgia, under a statute of that state conferring such right of inheritance, afterwards removes to Alabama, and dies there, the adopted child has no right of inheritance in the latter state by virtue of such adoption. *Brown v. Finley* (Ala.), 16-778.

Law of comity.—The legal status of an adopted child, acquired by the law of adoption, is by the law of comity recognized in every other jurisdiction where such status becomes material in determining the right to take property by will or inheritance. *Matter of Leask* (N. Y.), 18-516.

Revocation of adoption.—To warrant a finding of undue influence by one person in inducing another person to adopt a child, it must appear that the person exercising the influence so far dominated the will of the person upon whom it was exercised as to substitute his will for that of the latter, with the result that the action brought about by the influence was not in reality the act of the person whose act it was in form, but the act of the person exercising the influence. *Phillips v. Chase* (Mass.), 17-544.

In a proceeding to revoke a decree of the Probate Court by which a married woman was declared to have adopted a son of her husband by a former marriage, evidence that the woman was a nervous invalid prior to and at the time of her marriage to the child’s father, and continued in poor health to the time of her death, which occurred some sixteen years after the adoption; that the husband had been her physician prior to the marriage, and continued to act as such thereafter; that within three months

after the marriage he threatened to desert her if she did not adopt his son; that there were certain circumstances in her life, connected with a former marriage and known to her husband, which made such threat particularly terrifying to her; that up to the time of the adoption her acquaintance with her husband's son had been casual only; and that after the adoption had taken place she frequently referred to it bitterly, and said that she had been forced to do it against her will—warrants a finding by the jury that the adoption was procured by the undue influence of the husband. *Phillips v. Chase* (Mass.), 17-544.

In such a proceeding, where one of the issues submitted to the jury is whether the adopting parent was unduly influenced by her husband "or any other person" in the making of the adoption, and where there is no evidence of undue influence by any person other than the husband, the answer "yes," given by the jury on such issue, will be construed as a finding that the adoption was procured by the undue influence of the husband. *Phillips v. Chase* (Mass.), 17-544.

In such a proceeding, findings by the jury that the adoption was not made by the adopting parent of her own free will, and that she was unduly influenced in making it, necessarily imply that the procuring of the adoption also constituted a fraud on the court. *Phillips v. Chase* (Mass.), 17-544.

When a married man so dominates his wife's will as to force her against her will to bring a petition in court for the adoption by her of his son by a former marriage, he commits a gross fraud on his wife, and such a fraud on the court that the decree of adoption should be set aside. *Phillips v. Chase* (Mass.), 17-544.

Revocation after death of foster parent and child.—In such a case as that above considered, where the wife and the adopted child have both died, and the husband, as heir of the child, claims the property which descended to the latter on the wife's death, the decree of adoption may be revoked by the probate court on petition by the wife's next of kin, on the principle that the husband, through whose fraud and undue influence it was procured, should not be permitted to profit by his own wrong. It is no defense to such a petition that the adopted child was innocent of any participation in the wrong by which the adoption was procured; nor can the respondent object that the petitioners should have proceeded by a bill in equity instead of by a petition in the probate court. The remedy by bill in equity is proper where the fraud committed by a defendant entitles him without disentiing the plaintiff; but in the case of an adoption procured by fraud the decree which entitles the party perpetrating the fraud also disentiing the next of kin of the adopting parent, and they can obtain no relief until the decree of adoption is set aside. *Phillips v. Chase* (Mass.), 17-544.

ADULTERATION.

See **FOOD**.

Sufficiency of information.—An information for the violation of an ordinance against the sale of adulterated milk is sufficient where it specifically informs the accused of the time, place, and particular in which he has violated the ordinance. *St. Louis v. Liessing* (Mo.), 4-112.

ADULTERY.

See **FORNICATION**.

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Definition.—The sexual intercourse of a married man with a woman other than his wife, whether married or single, is adultery on his part within the meaning of the Kansas statute making adultery a misdemeanor. *Bashford v. Wells* (Kan.), 16-310.

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1. IN GENERAL.

In case of partial intestacy.—The Iowa statute providing for bringing into hotchpot advancements given by an "intestate" to his heir, does not apply where the ancestor has left a will disposing of part of his property. *Gilmore v. Jenkins* (Iowa), 6-1008.

No presumption from inequality of gifts.—The mere fact that a parent has given property to one child and not to another, or more to one than to another, is not sufficient to charge the favored child in the distribution of the parent's estate. *Elliott v. Western Coal, etc., Co.* (Ill.), 17-884.

Deed to son-in-law as advancement to daughter.—A deed of gift by a father-in-law to his son-in-law, accepted by the latter, which contains a provision clearly indicating that it was the intention of the grantor that the property so conveyed was

to be an advancement to his daughter, the wife of the grantee, is an advancement to her, notwithstanding she may have been ignorant not only of the fact that the deed contained such a provision, but even of the existence of the deed altogether. *Ireland v. Dyer* (Ga.), 18-544.

Under the evidence in the case the jury could have found that the plaintiff had not received her distributive share of the estate, after deducting from that distributive share the value of the advancement made to her; therefore it was error for the court to direct a verdict in favor of the defendant. *Ireland v. Dyer* (Ga.), 18-544.

Validity of release of interest by heir.

—Where a father pays a certain sum of money to his adult son, and the latter executes an instrument in writing whereby he acknowledges the receipt of such sum as an advancement, in full of his distributive share in his father's estate, and agrees not to take, claim, or receive anything further out of said estate at or after his father's death, such instrument is valid, and estops the son from claiming any share in the estate upon the father's death intestate. In re *Simon* (Mich.), 17-723.

Note executed by parent to child.—In view of the Kentucky statute regulating the subject of advancements, a parent cannot require payments to be made from her estate to certain children by executing in their favor promissory notes reciting a valuable consideration, where in fact no consideration exists except natural love and affection. *Sullivan v. Sullivan* (Ky.), 13-163.

2. SUFFICIENCY OF EVIDENCE TO ESTABLISH.

Oral declarations of donor.—Section 7 of chapter 39 of the Revised Statutes of Illinois provides that "no gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing by the intestate, as an advancement, or acknowledged in writing by the child or other descendant." Inasmuch as advancements, under this statute, cannot be evidence by parol declarations or statements, no material or essential part of the proof necessary to establish an advancement can be supplied by parol testimony. *Elliott v. Western Coal, etc., Co.* (Ill.), 17-884.

Prior to the above statute, it was a question of intention whether a gift by a parent to a child was an advancement, and the donor's oral declarations, made at the time of the gift, as to his intentions, were admissible as part of the *res gestæ* characterizing the act of giving. Since the statute, it is still a question of intention, but the statute has prescribed the manner of proof of the intention. *Elliott v. Western Coal, etc., Co.* (Ill.), 17-884.

Subsequent written declaration of donor.—Where a father conveys land to his daughter, by a warranty deed absolute on its face and containing nothing to show that the conveyance is intended as an advance-

ment, he cannot at a later time derogate from his grant by executing a separate instrument in writing, not a will, declaring that the land so conveyed is the daughter's full "heirship" in his real estate; nor is such instrument competent evidence to prove that the gift was intended as an advancement. The intention which will characterize a gift as an advancement is the intention of the donor at the time of making the gift, expressed in the manner required by the statute. *Elliott v. Western Coal, etc., Co.* (Ill.), 17-884.

ADVANCES.

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ADVERSE POSSESSION.

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1. SUBJECTS OF ADVERSE POSSESSION.

- a. Property of individuals.

Minerals.—Where the title to underlying coal has been severed from the title to the surface of the land, no title to the coal can be acquired by adverse possession of the surface. *Wallace v. Elm Grove Coal Co.* (W. Va.), 6-140.

Part of building.—Possession of an upper room in a building supported entirely by portions of the story beneath may ripen into title thereto by adverse possession under the provisions of the statute of limitations. *Iredale v. Loudon* (Can.), 12-863.

Where one of several owners of land with a building thereon sells his interest to a

co-owner, and occupies a second story room in said building reached by a street door to which he has the only key, and, after first paying rent, remains in exclusive possession of the room, the stairway leading to it, and the street door landing, for twelve years without paying rent, during which time the annual tax bills for the whole premises are generally left in his room and are sent by him to the managing owner who pays them, the occupant acquires title under the statute of limitations to the room and to so much of the structure as rests on the soil to which he has acquired title. *Iredale v. Loudon* (Can.), 12-863.

b. Property subject to public use.

Railroad right of way.—Whether in any case a railroad company can be deprived of its right of way by adverse possession, *quære*. *Roberts v. Sioux City, etc., R. Co.* (Neb.), 10-992.

The use for agricultural purposes, such as the grazing and cultivation by adjoining landowners of otherwise unused and unfenced parts of the right of way of a railroad company, is not inconsistent with or adverse to the enjoyment of an easement. *Roberts v. Sioux City, etc., R. Co.* (Neb.), 10-992.

The general public has the same interest in the preservation and maintenance of railroads as it has in the maintenance of other highways, and the title to a part of the railroad's right of way, while the road is being operated as a common carrier, cannot be divested by adverse possession. *McLucas v. St. Joseph, etc., R. Co.* (Neb.), 2-715.

The United States Supreme Court has decided that a congressional grant of a right of way for the construction of a railroad is on an implied condition which is inconsistent with the acquisition of any part thereof by a private individual or corporation. *McLucas v. St. Joseph, etc., R. Co.* (Neb.), 2-715.

The right of way of the Grand Island Railway Company having been acquired by grant from the general government for the construction of a railroad, the statute of limitations is not a defense to an action by the said company to recover possession of a strip of land within such right of way. *McLucas v. St. Joseph, etc., R. Co.* (Neb.), 2-715.

c. Public lands.

One claiming title to land by adverse possession for a period of ten years as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant. *Boe v. Arnold* (Ore.), 20-533.

2. INTENT OF OCCUPANT.

Possession by squatter.—The good faith of the occupant is to be considered on the question of adverse possession. The facts that the improvements made by the occupant were made at a time when he was

a mere "squatter," that a change in the deed was made, that the deed was not recorded, that no taxes were paid, and that only a small part of the tract was cleared and improved in twelve years, all bear strongly upon the good faith of the claim of adverse possession. *Hunter v. Wethington* (Mo.), 12-529.

3. CLAIM OR COLOR OF TITLE.

Color of title defined.—Color of title is that which in appearance is title, but which in reality is no title at all. *Knight v. Grim* (Va.), 19-400.

Record in condemnation proceeding or color of title.—The record of a condemnation proceeding in which a final order has been entered is admissible in evidence to show color of title, though it may be insufficient to show a good title. *Knight v. Grim* (Va.), 19-400.

Color of title is not afforded by the record of condemnation proceedings prior to the final order confirming the report of the commissioners. *Knight v. Grim* (Va.), 19-400.

Deed by administrator.—A deed by an administrator conveying land of the decedent pursuant to a void order of sale is nevertheless sufficient to set the statute of limitations running in favor of the grantees against the heirs of the decedent from the date of the delivery of the deed. *Millican v. McNeill* (Tex.), 20-74.

Identification of land described in deed.—A deed describing land conveyed by the name of the tract is admissible in evidence to show color of title in the defendant in ejectment, where there is evidence that there was such a tract capable of definite location. *Cadwalader v. Price* (Md.), 19-547.

4. NOTICE OF ADVERSE CLAIM.

The occupancy, by an individual, of parts of the right of way of a railroad company obtained by condemnation proceedings, with the elevators, granaries, coal sheds, and similar structures, used in carrying on his business, and by the company as a common carrier, for convenience in handling his shipments, will not be treated as adverse or under claim of title, unless actual notice of such claim is brought home to the company, or his conduct is such as will as a matter of law constitute such notice; and in the absence of such notice or conduct, the erection and maintenance of such buildings without an express agreement therefor will be regarded as being with the permission, consent, or license of the company, and subject to its rights to resume the possession of the ground whenever necessity requires its use for railroad purposes. *Roberts v. Sioux City, etc., R. Co.* (Neb.), 10-992.

5. HOSTILITY OF POSSESSION.

a. Possession consistent with rights of others.

Possession under deed from life tenant.—The possession of a purchaser from a life tenant is not adverse to the remainder-

man until the termination of the life estate, and the statute of limitations does not begin to run against the remainderman until that time. *Porter v. Osman* (Mich.), 3-687.

A conveyance of a decedent's land made under a void order of sale by an administrator who has an undivided life interest in the land conveyed, as to which the deed operates by way of estoppel, does not start the statute of limitations running against the heirs of the decedent until the death of the administrator. *Millican v. McNeill* (Tex.), 20-74.

Possession under deed from tenant by curtesy.—One who holds possession of land by deed from the tenant by curtesy can acquire no title by adverse possession during the life of the grantor, as the statute of limitations does not begin to run against the heirs of the deceased wife until the death of the husband. *Wilson v. Frost* (Mo.), 2-557.

b. Possession by grantor after conveyance.

Possession by grantor.—Where a grantor remains in possession after conveying his interest in the land, his possession is subservient to the grantee, and a clear, positive, and continuous disclaimer and disavowal of such relation, and the assertion of an adverse right to the knowledge of the grantee, are indispensable to change the character of the grantor's possession and to render it adverse to the grantee. *Schaubuch v. Dillemoth* (Va.), 15-825.

Extending Possession to Fixed Boundaries.

Possession by mistake.—The possession of one claiming to own land to a fixed boundary is adverse to the adjoining proprietor, though the occupant at the time believed that the boundary fixed was the true boundary line. *Krause v. Nolte* (Ill.), 3-1061.

When it appears in an action of ejectment that the owner of a tract of land, after conveying fifty acres thereof, placed a fence on what he supposed to be the true boundary line, in the belief that the tract west of the fence contained the grantee's fifty acres, whereas it contained only thirty-three acres, the grantor's possession of the seventeen acres east of the fence is not adverse, unless he intended to claim such land as his own even though the fence was not on the true boundary line. *Schaubuch v. Dillemoth* (Va.), 15-825.

In such a case the defendant is not prejudiced by evidence introduced by the plaintiff to the effect that the southern and western boundaries of the plaintiff's land would be exactly the same whether it contained fifty or only thirty-three acres. *Schaubuch v. Dillemoth* (Va.), 15-825.

In such a case verbal admissions of the defendant tending to show that if there was not fifty acres in the tract west of the fence, he recognized the right of those claiming under his grantee to have the boundary line so located that such tract would contain that quantity of land, tend to throw light upon the defendant's intention or motive in

occupying the land in controversy, and are therefore admissible. *Schaubuch v. Dillemoth* (Va.), 15-825.

c. Weight and sufficiency of evidence.

Evidence examined and held sufficient to sustain a finding of open, notorious, exclusive, and adverse possession of land under a claim of ownership. *Ater v. Smith* (Ill.), 19-105.

Evidence examined and held sufficient to show adverse possession of land. *Cadwalader v. Price* (Md.), 19-547.

6. TACKING POSSESSION.

Where one enters into possession of a part of a tract of land under color of title duly recorded, and conveys the land to subsequent grantees who enter but fail to record their deed, the latter may tack their possession to that under the former duly recorded deed and acquire a good prescriptive title at the expiration of the proper period. *Roberson v. Downing Co.* (Ga.), 1-757.

7. CLAIM TO PART OF TRACT.

When adverse possession is claimed of a part only of the lands sued for, the proper practice is for a survey to be made under a warrant issued by the court. *Cadwalader v. Price* (Md.), 19-547.

8. ABANDONMENT OF TITLE.

One who has acquired absolute title to land by adverse possession for the statutory period does not impair his title by thereafter paying rent to the owner of the title. *Martin v. Martin* (Neb.), 14-511.

ADVERTISEMENTS.

See NEWSPAPERS.

Advertising lotteries, see LOTTERIES.

Advertising obscene matter, see OBSCENITY.

Bill boards as violation of building restriction, see DEEDS, 3 c.

Calling for bids for public work, see MUNICIPAL CORPORATIONS, 7 d.

Enjoining designation of official newspaper, see INJUNCTIONS, 2 d.

Evidence of advertising by physician as affecting professional standing, see LIBEL AND SLANDER, 4 f (2).

Libelous advertisements, see LIBEL AND SLANDER, 2 a.

Power of municipality to exclude advertising trucks from streets, see MUNICIPAL CORPORATIONS, 5 f (2).

Power of municipality to regulate distribution of handbills, see MUNICIPAL CORPORATIONS, 5 f (2).

Printed advertisement of auction sale as memorandum required by statute of frauds, see FRAUDS, STATUTE OF, 3 e (3).

Prohibiting or regulating crying of wares on streets, see HAWKERS AND PEDDLERS, 2.

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 Right of landlord to post advertisements on premises, see **LANDLORD AND TENANT**, 5 b.
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 Use of flag for advertising purposes, see **CONSTITUTIONAL LAW**, 9 b 10.
 Use of state arms or seal for advertising, see **CONSTITUTIONAL LAW**, 8.

Municipal regulation of billboards.

— Under the Illinois City and Village Act, a municipality has ample power to regulate the construction and use of billboards. *Chicago v. Gunning System* (Ill.), 2-892.

The fact that billboards are placed on private property and not upon public streets will not protect those owning or using them against a reasonable regulation thereof by the municipality. *Chicago v. Gunning System* (Ill.), 2-892.

A municipal ordinance placing such extreme restrictions upon the erection and maintenance of billboards and imposing such an excessive license tax as to be prohibitive rather than regulative is unreasonable and void. *Chicago v. Gunning System* (Ill.), 2-892.

A city ordinance requiring that signs or billboards shall be constructed not less than ten feet from the street line is a regulation not reasonably necessary for the public safety and cannot be justified as an exercise of the police power. *Passaic v. Paterson Bill Posting, etc., Co.* (N. J.), 5-995.

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2. WHO MAY TAKE.
3. SUFFICIENCY.

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Charging crime on information and belief, see **CRIMINAL LAW**, 4.

Evidence in extradition proceedings, see **EXTRADITION**, 4.

Impeachment of verdict by affidavit of jurors, see **JURY**, 7; **TRIAL**, 8 l.

Institution of proceeding of affidavit, see **CONTEMPT**, 3 a.

Requirements of affidavit for attachment, see **ATTACHMENT**, 6 b.

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Sufficiency of affidavit to prove publication of summons, see **SUMMONS AND PROCESS**, 2.

Testimony in form of affidavit as ground for refusing continuance on account of absence of witness, see **CRIMINAL LAW**, 6 d (2).

Verification of informations, see **INDICTMENTS AND INFORMATIONS**, 3.

1. WHO MAY MAKE.

Agent or attorney.— Where the statute requires an oath to be made by a party to a proceeding, an affidavit made by the party's agent or attorney is not sufficient. *Martin v. Martin & Bowne Co.* (D. C.), 7-47.

2. WHO MAY TAKE.

Foreign notary.— Under the statute of 1899, an affidavit *in forma pauperis* before a foreign notary with his seal attached is receivable in the courts of Georgia and sufficient to prevent a dismissal of a bill of exceptions for failure to pay costs. *Simpson v. Wicker* (Ga.), 1-542.

Notary afterwards employed as attorney.— The Michigan statute making it unlawful for notaries public who are also attorneys to administer oaths in causes in which they are engaged professionally, does not invalidate a claim against a city for damages for personal injuries which is sworn to before a notary who subsequently brings a suit for the injuries as attorney for the claimant. *Allen v. West Bay City* (Mich), 6-35.

3. SUFFICIENCY.

Omission of venue or seal.— In the absence of a statute to the contrary, an affidavit is not rendered fatally defective by the fact that the venue is omitted, or by the fact that no notarial seal is attached to the jurat. *Meldrum v. United States* (U. S.), 10-324.

Reference to attached instrument.— An affidavit may be made as full and complete by reference to an attached instrument as if the matters stated in such instrument were set out in the affidavit itself. *Ausmus v. People* (Colo.), 19-491.

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1. CREATION AND INCIDENTS OF RELATION.

a. The contract in general.

Agency or joint adventure.—A contract between a real estate agent and a landowner, that if the agent finds a purchaser for the land he shall have as compensation for his services the amount the land sells for above a certain price, is an agency contract, and not a joint adventure. *Manker v. Tough* (Kan.), 17-208.

Acting for both parties.—Where the fact that an agent is acting for both parties is disclosed to the principals, the agency cannot be questioned. *Aiple-Hemmelman Real Estate Co. v. Spelbrink* (Mo.); 14-652.

b. Termination of agency.

Duration.—A contract of an agency to sell two tracts of land construed and held to create an agency for a period of sixty days as to each tract. *Beadle v. Sage Land, etc., Co.* (Mich.), 6-53.

Agency not coupled with interest—termination of agency.—The revocation of an agency uncoupled with an interest considered. *Rowan v. Hull* (W. Va.), 2-884.

Termination by operation of law.—To terminate a contract of agency by operation of law, there must be either a change in the law which will make the required acts illegal, a change in the subject-matter of the contract such as the destruction of the property by fire, or a change in the condition of the parties, as by death or insanity. *Hartford v. McGillicuddy* (Me.), 12-1083.

Partial cancellation of power of attorney.—Where a power of attorney covers several tracts of land, and a judgment ordering its cancellation and removal is rendered in a proceeding to remove a cloud from the title to one of the tracts, the power is merely canceled in so far as it affects the land referred to in the judgment, and it remains valid as between the parties and as to other lands affected thereby. *Priddy v. Boice* (Mo.), 9-874.

c. Evidence.

Declaration of agent.—Agency cannot be established by the declaration of the sup-

posed agent. *Florida East Coast R. Co. v. Lassiter* (Fla.), 19-192.

Circumstantial evidence.—An alleged agency need not be established by direct evidence, but it may be established by circumstances, such as the relation of the parties to each other and their conduct with reference to the subject-matter of the contract. *Lindquist v. Dickson* (Minn.), 8-1024.

d. Province of court and jury.

Where the evidence is conflicting as to the existence of an agency, the question is for the determination of the jury. *Neppach v. Oregon, etc., R. Co.* (Oregon), 7-1035.

2. RIGHTS, DUTIES, AND LIABILITIES INTER SE.

Duty of agent to account to principal.—A person occupying a confidential relation to another will be required to account to his principal for any gift, gratuity, or benefit received by him in violation of his duty, or any interest acquired adverse to his principal without a full disclosure, though it does not appear that the principal has suffered any actual loss by fraud or otherwise. *United States v. Carter* (U. S.), 19-504.

—accounting for money received for illegal purposes.—A principal who places money in the hands of an agent to be disbursed to others for an illegal purpose does not necessarily forfeit his right to such money, but may require the agent to account to him for such of it as has not been expended or appropriated to the unlawful purpose. *Ware v. Spinney* (Kan.), 13-1181.

Denial of principal's title.—While the general rule is that an agent who receives money for his principal is estopped to deny the title of the principal and must account for the money to him, this rule does not prevent the agent, when sued by his principal, from showing that he has been divested of the money by title paramount to that of the principal, or that he has paid the money over to one holding such a title. *Moss Mercantile Co. v. First Nat. Bank* (Oregon), 8-569.

3. RIGHTS, DUTIES, AND LIABILITIES AS TO THIRD PERSONS.

a. Authority of agent.

(1) In general.

Authority presumed from beneficial acts.—In a foreclosure suit brought by an assignee of a mortgage, where it is contended that the mortgage was not properly assigned because the authority of the agent who made the assignment is not shown, but it appears that the assignment was made for the benefit of the principal and that he has not questioned it, the agent's authority will be presumed until the contrary is made to appear. *Strayhorn v. McCall* (Ark.), 8-377.

Construction of written authority.—Letters of instruction to an attorney or agent are not given the rigid construction ordinarily given to formal powers of attorney, but are liberally construed against the

writer when the attorney or agent has acted in good faith. *American Bonding Co. v. Ensey* (Md.), 11-883.

Notice implied from written authority.—Where the act of an agent is one which requires authority in writing, those dealing with him are charged with notice of that fact and of any limitation or restriction on the authority of the agent contained in such written authority, and a contract beyond the scope of such authority, as thus limited or restricted, is not binding on the principal. *Frahm v. Metcalf* (Neb.), 13-312.

Acts in presence of principal.—An act done by an agent at the instance of and in the presence of his principal is in law the act of the principal; and if, at the instance and in the presence of a member of a partnership, the name of the partnership is signed by another person to a promissory note under seal, the note thus executed has the same legal effect as if such member had performed the physical act of signing. *Merchants, etc., Bank v. Johnston* (Ga.), 14-546.

(2) In particular transactions.

To make contracts.—Where the owner of goods held in storage directed the storage company to ship them to him by railroad, and an officer of the storage company sent the box containing the goods by a cartman to the railroad station accompanied by a complete shipping order, the agent of the railroad company had no right to assume that the cartman had the authority to alter or modify the terms of the order, and a presentation of the order signed by the storage company was a notice to the railroad company that the cartman had no authority to enter into a contract to exempt the railroad company from liability. *Russell v. Erie R. Co.* (N. J.), 1-672.

Limiting liability of carrier.—A drayman employed to deliver goods to a carrier for shipment has no authority, merely by virtue of such employment, to bind the shipper by a contract limiting the carrier's liability. *Benson v. Oregon Short Line R. Co.* (Utah), 19-803.

To exchange property.—In the absence of any trade usage to the contrary, the power given to an agent to sell does not carry with it or imply the power to barter or exchange. *Kearns v. Nickse* (Conn.), 10-420.

To receive payment.—Authority to an agent to sell goods does not of itself and alone apparently give to the agent authority to collect pay for the goods thus sold. *Scarritt-Comstock Furniture Co. v. Hudspeth* (Okla.), 14-857.

Possession of evidence of debt.—Possession of a note or other evidence of debt is not essential to the proof of an apparent or ostensible authority to receive payment of the principal of the debt as agent of the creditor. Such authority may be inferred from facts and circumstances other than the possession of the evidence of debt, though great weight is to be given to the fact that the alleged agent does not have such possession at the time of receiving the

payment. *Campbell v. Gowans* (Utah), 19-660.

—medium of payment.—In the absence of a custom to the contrary, an agent who has authority merely to collect cannot receive a check or draft or anything except money in payment. *Griffin v. Erskine* (Iowa), 9-1193.

In view of the universal custom of using drafts and checks as a means of payment, an agent appointed to make a collection may receive a draft or check as conditional satisfaction of the claim placed in his hands, unless he has instructions to the contrary, whenever he has good reason to believe that the paper received will be paid upon presentation. *Griffin v. Erskine* (Iowa), 9-1193.

To extend time of payment.—The land agent of a railroad company, who transacts the company's entire business in relation to the acquisition, sale, and disposition of its lands, who is held out by the company as its authorized representative in that respect, and whose authority and acts have never been disavowed or disapproved by his principal, may bind his principal by a valid agreement extending the time of payment allowed the purchaser in a contract for the sale of lands by the company. *Neppach v. Oregon, etc., R. Co.* (Oregon), 7-1035.

To compromise disputes.—Authority to an agent to sell goods does not carry with it authority to compromise differences which may arise between his principal and those to whom he sells goods, by reason of the goods not coming up to the standard represented; and where a purchaser relies upon a compromise with such an agent, the burden is on him to establish the agent's authority (if such fact be in dispute) to effect compromise in such case. *Scarritt-Comstock Furniture Co. v. Hudspeth* (Okla.), 14-857.

(3) Delegation of authority.

To secure medical attendance for servant.—An agent authorized by the master to secure medical attendance for a servant cannot delegate to the physician employed by him authority to employ other physicians as assistants at the master's expense. *Bond v. Hurd* (Mont.), 3-566.

b. Evidence of authority.

(1) Presumptions and burden of proof.

To receive payment.—Where the defendant alleges that the plaintiff's district agent accepted certain notes in full payment of an account, and such agent, when called by the defendant to establish his authority, denies not only that he received such notes in payment, but that he had authority to receive payment, and it appears that the purchaser had notice from the invoices of the goods that payments must be made to the plaintiff's treasurer, the evidence is insufficient to establish the authority of such agent to accept the notes in full payment, the burden of proof having been on the defendant. *American Car, etc., Co. v. Alexandria Water Co.* (Pa.), 15-641.

Where a traveling salesman sells goods by

sample or from catalogues and price lists, sending the orders to his principal to be filled, the presumption is that such agent has not the authority to collect for such goods; and where a purchaser, subsequent to the date of ordering goods through such an agent, makes payment thereon to him, he does so at his peril; and in litigation for the value of the goods, the authority of the agent to make such collections being denied by his principal, the burden is on the purchaser to prove that the agent had such authority; and where the court instructs that such purchaser should be given credit for all payments made to such agent, unless he had notice or knowledge of the fact that such agent had no authority to collect for goods so sold, and judgment is rendered charging such payments to the seller, it will be presumed that the erroneous instructions operated to the prejudice of the seller, and a new trial should be granted by reason thereof. *Scarritt-Comstock Furniture Co. v. Hudspeth* (Okla.), 14-857.

(2) Admissibility of evidence.

Acts and declarations of agent. — An agent's authority to bind the principal cannot be shown by the agent's acts or declarations. *Daniel v. Atlantic Coast Line R. Co.* (N. Car.), 1-718.

Declarations made by an agent after a transaction to which they relate are not binding on his principal, and are not admissible in evidence against the principal; and this is so though the agency is that of a husband for his wife. *Hartman v. Thompson* (Md.), 10-92.

(3) Weight and sufficiency of evidence.

Evidence examined and held sufficient to show that a loan broker had apparent authority to represent the lender in negotiating a loan and in receiving payments of interest from the borrower. *Campbell v. Gowans* (Utah), 19-660.

Province of court and jury. — Where an agent's appointment and authority, real or apparent, are admitted or are not in controversy, the court may declare whether they empowered the agent to perform the particular act in question, but where there is a dispute as to the appointment or as to the authority conferred, the fact of such appointment or authority must be found by the jury. *Neppach v. Oregon, etc., R. Co.* (Oregon), 7-1035.

c. Unauthorized or wrongful acts of agent.

Unauthorized contracts. — Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority, though in fact his act has not been authorized or ratified, the principal cannot be sued at law; but in equity, to the extent to which the money borrowed has in fact been applied in paying obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal. *Bannatyne v. MacIver* (Eng.), 3-1143.

False imprisonment. — An agent having

charge of a principal's property has no implied authority to cause the arrest of one whom he believes to have stolen the property, and in the absence of proof of authority or ratification by the principal, the latter is not liable in damages to the person arrested. *Daniel v. Atlantic Coast Line R. Co.* (N. Car.), 1-718.

A watchman employed by a corporation to guard its property has no implied authority to arrest a person, on a charge of attempted robbery, on a public street some distance from the corporation's premises; and therefore, in the absence of evidence of express authority, the corporation cannot be held liable for the action of the watchman in making an arrest and prosecuting the person arrested. *Thomas v. Canadian Pacific R. Co.* (Ont.), 8-324.

Malicious prosecution. — A corporation cannot be held liable for the act of its servant in instituting a malicious prosecution, unless the servant acted with its authority, express or implied. *Thomas v. Canadian Pacific R. Co.* (Ont.), 8-324.

In an action against a corporation for a malicious prosecution instituted by one of its servants, where it is not shown that the servant had any express authority to institute the prosecution, the burden is upon the plaintiff to show that the servant, from the nature of his duties, had implied authority to prosecute the plaintiff. *Thomas v. Canadian Pacific R. Co.* (Ont.), 8-324.

An action of malicious prosecution cannot be maintained against a corporation for the acts of one of its servants, who is also a constable, in making an arrest and instituting a prosecution in his capacity as a public officer, where there is no evidence to show that the corporation exercised any control over the servant's actions as constable; and this is so though the servant was appointed to office by the public authorities at the request of the corporation. *Thomas v. Canadian Pacific R. Co.* (Ont.), 8-324.

d. Liability of agent.

Unauthorized contracts. — Under the North Dakota statutes one who without authority executes a written contract in the name of his principal without believing that he has authority so to do is responsible as principal to third persons therefor, and an action is maintainable against him upon the contract as principal and for its breach. *Kennedy v. Stonehouse* (N. Dak.), 3-217.

Facts held to show an unauthorized contract for the sale of land by an agent in the name of the principal and to give the contracting party a right of action against the agent as principal for a breach of the contract. *Kennedy v. Stonehouse* (N. Dak.), 3-217.

Damages recoverable under the North Dakota statutes from an agent by one injured by breach of the agent's warranty of authority. *Kennedy v. Stonehouse* (N. Dak.), 3-217.

Prior action against principal as bar. — A creditor who is free to sue either prin-

principal or agent, and who elects to proceed against the principal, with full and correct knowledge both of the facts and law governing his case, cannot, after prosecuting his suit against the principal to judgment, bring another suit against the agent upon the same demand. *Murphy v. Hutchinson* (Miss.), 17-611.

Warranty by agent. — An agent making a sale may personally warrant the thing sold, and in such a case he is personally liable on the warranty, though he is acting for a known principal, and though the principal gives a similar warranty. *Dahlstrom v. Gemunder* (N. Y.), 19-771.

The liability of an agent on his personal warranty of a thing sold by him for his principal is discharged by the satisfaction of a judgment recovered by the purchaser against the principal who also warranted the thing sold. *Dahlstrom v. Gemunder* (N. Y.), 19-771.

e. Ratification.

Acceptance of benefits. — In order to constitute a ratification there must be an acceptance of the results of the act with an intent to ratify and with full knowledge of all the material circumstances. *Russell v. Erie R. Co.* (N. Y.), 1-672.

A railroad company which accepts a deed of land purchased by an agent cannot dispute the latter's authority to pay an additional consideration to that recited in the deed. *Windsor v. St. Paul, etc., R. Co.* (Wash.), 3-62.

Subsequent authorization. — Where an attorney having a claim for collection executes a bond and seizes goods of the debtor, and later, when the validity of the bond is questioned, writes his clients and receives from them a letter dated back to a time prior to the execution of the bond, authorizing the attorney to execute "any bond that may be necessary to get an order to seize and hold the stock of goods," such letter confers authority on the attorney to execute a new bond and procure a bonding company to sign it as surety, notwithstanding the fact that the goods have already been seized and the letter refers to such bond as "may be necessary to get an order," etc., the second bond being necessary to prevent a seizure and to keep it in force. *American Bonding Co. v. Ensey* (Md.), 11-883.

False representation of agency. — Where a person in obtaining a conveyance of land represents that he is the agent of another, but makes the purchase in his own name, and with his own money, and with the intention of acquiring the property for his own use and benefit, the named principal is not entitled to ratify the purchase and thereby acquire the benefit of the conveyance. *Virginia Pocohontas Coal Co. v. Lambert* (Va.), 13-277.

f. Notice to agent as notice to principal.

A traveling salesman, who merely solicits orders for goods which are not in his possession, has no implied authority to receive pay-

ment for goods sold by him; and therefore, in the absence of express authority to make the collection, notice to him in collecting an account from a dissolved partnership that the partnership debts have been assumed by one partner does not of itself constitute notice of that fact to his principal. *Moon Brothers Carriage Co. v. Devenish* (Wash.), 7-649.

Averment of knowledge by principal. — In an action of tort, if, as to the defendant, the relation of principal and agent is such that actual knowledge by the agent could be imputed by law to the principal, such relation should be set out or knowledge should be alleged in the principal and no mention made of the agent, and an allegation as to the knowledge of "the defendant, to wit, the defendant's agent," is not sufficient. *Davis v. Smith* (R. I.), 3-832.

g. Undisclosed agency.

(1) Rights of undisclosed principal.

Contract involving personal trust. — An undisclosed principal cannot compel the performance or recover damages for the breach of an executory contract made by his agent in the latter's own name, where such contract involves elements of personal trust and confidence as a consideration moving from the agent to the other party to the contract. *Birmingham Matinee Club v. McCarty* (Ala.), 15-237.

The above rule is applicable to an action by an undisclosed principal to recover damages for the breach of an executory contract, made in the name of his agent, for the sale of the principal's land, where it is stipulated in the contract that the ostensible seller shall by warranty deed grant an unencumbered title. *Birmingham Matinee Club v. McCarty* (Ala.), 15-237.

Where in such an action by an undisclosed principal it appears that he has received from his agent a part payment made by the defendant, judgment may, in response to a plea of recoupment, be rendered for the defendant for the amount paid by him. *Birmingham Matinee Club v. McCarty* (Ala.), 15-237.

Contract for benefit of several principals. — An undisclosed principal has no right to sue on a contract made by an agent for the benefit of that principal and other undisclosed principals, where the contract is not severable but consists of orders given by the several principals and "lumped" together by the agent in making the contract. *H. Midwood's Sons Co. v. Alaska-Portland Packers' Assoc.* (R. I.), 13-954.

A contract for the purchase of goods entered into by an agent for undisclosed principals, and consisting of orders given by the principals and "lumped" together by the agent in making the contract, does not become severable by the fact that the seller, knowing the goods are purchased for different parties located in different cities, agrees, for the convenience of all parties concerned, to ship separate carload lots to the customers, and draw direct on the customers for the ship-

rents. *H. Midwood's Sons Co. v. Alaska-Portland Packers' Assoc.* (R. I.), 13-954.

Equities of third persons. — Where an undisclosed principal sues on a contract made by his agent in the latter's own name with the defendant, who had no knowledge of an agency but supposed that the agent dealt for himself, the suit is subject to any defense or set-off acquired by the defendant against the agent before he had notice of the principal's rights; but if the defendant knew or had reason to believe that he was dealing with one who was the agent for some undisclosed third person, he cannot set off a claim against the agent. *Frazier v. Poindexter* (Ark.), 8-552.

Where a person has accepted from an agent notes for collection under an agreement to pay the money to a third person when collected, he has no right to apply the money to a debt due him by the agent and to refuse to pay it to the third person who is the agent's principal, even though when he made the agreement he had no information of the agency and believed that the notes belonged to the agent. *Frazier v. Poindexter* (Ark.), 8-552.

(2) Liabilities of undisclosed principal.

Contract under seal. — The rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal. *Van Dyke v. Van Dyke* (Ga.), 3-978.

If one lends money to another on his own credit and takes therefor a promissory note under seal, payable to the lender's order, the lender cannot afterwards disregard such note and render a third person liable for the money loaned on the ground that such person was the principal of the borrower, which fact was unknown to the lender at the time when the loan was made. *Van Dyke v. Van Dyke* (Ga.), 3-978.

Negotiable instruments. — A person whose name does not appear on a promissory note cannot be charged as an indorser thereof by parol proof that the nominal payee in accepting and indorsing it was acting as his authorized agent, where nothing on the face of the note suggests the existence of an agency. *New York Life Ins. Co. v. Martindale* (Kan.), 12-677.

Effect of judgment against agent. — Where a person contracts with another who is in fact the agent of an undisclosed principal, and after learning all the facts he brings an action on the contract and recovers a judgment against the agent, the judgment is a bar to a subsequent action against the principal; but an unsatisfied judgment against the agent is not a bar to a subsequent action against an undisclosed principal, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent. *Lindquist v. Dickson* (Minn.), 8-1024.

(3) Rights of agent of undisclosed principal.

Right to sue in own name. — Where an agent acting through a subagent makes a valid contract in his own name with a third

person without disclosing his principal, the contract is binding on the agent in his individual capacity, and he may maintain an action in his own name for a breach of the contract; and the Arkansas statute makes no change in the rule. *Shelby v. Burrow* (Ark.), 6-554.

A contract made by an agent in his own name through a subagent is not rendered invalid by the facts that the name of the principal is not disclosed and that the person contracted with believes that the agent is contracting for his own benefit. *Shelby v. Burrow* (Ark.), 6-554.

AGGRAVATION.

Damages for wrongful discharge of servant, see **MASTER AND SERVANT**, 1 e.

Matters for consideration in imposing sentence, see **CRIMINAL LAW**, 7 b (6) (e).

AGREED CASE.

Submission confined to issues of law.

— The New York statute authorizing the parties to a difference which might be the subject of an action to "agree upon a case, containing a statement of the facts upon which the controversy depends," and to present a submission thereof to a court of record which would have jurisdiction of an action brought for the same cause, was not intended to embrace issues where any disputed facts are involved, but is to be confined to causes depending wholly on questions of law; and where a submitted controversy necessarily involves the duty of drawing inferences from inconclusive, equivocal, or evidentiary facts before a legal conclusion can be formed, the issue is one which must be presented and decided in an action. *Marx v. Brogan* (N. Y.), 11-145.

Where the controversy submitted is whether a building proposed to be erected at a certain place in New York city is of such a character that its erection will violate a covenant designed to prevent the erection of a "tenement house," and the facts agreed on disclose the dimensions of the proposed building, its external appearance, its internal arrangements, the material of which it is composed, the estimated cost of the whole, and the rentals expected to be realized, the facts submitted are purely evidentiary in their nature, leaving the essential, decisive, and ultimate fact to be decided by the court, and hence the court is without jurisdiction of the controversy. *Marx v. Brogan* (N. Y.), 11-145.

AGREEMENTS.

See **CONTRACTS**.

Marriage agreement as consideration to support ante-nuptial contract, see **HUSBAND AND WIFE**, 2 a (2).

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AIDERS AND ABETTORS.

See ACCESSORIES AND OTHER PARTICIPANTS IN CRIME.
Participation in criminal homicide, see HOMICIDE, 2.
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ALCOHOL.

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ALCOHOLISM.

See DRUNKENNESS AND INTOXICATION.

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Burden of proving alibi, see CRIMINAL LAW, 6 n (1).
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ALIENATION.

Devises in restraint of alienation, see WILLS, 9 c.
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Transfer of homestead, see HOMESTEAD, 4.

ALIENATION OF AFFECTIONS.

See HUSBAND AND WIFE, 6.

ALIENISTS.

See EVIDENCE, 8 b (2).

ALIENS.

See NATURALIZATION.

Aiding invading army, see TREASON.
Right of administrator of alien to sue for death by wrongful act, see DEATH BY WRONGFUL ACT, 6 d.
Right of alien to hold land as tenant by curtesy, see CURTESY, 2.
Protection under copyright laws, see COPYRIGHT, 3.

Federal control. — That portion of the Act of Congress of Feb. 2, 1907, regulating the immigration of aliens into the United States, which provides that "whosoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purposes, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony," is unconstitutional, being an invasion of the police power reserved to the states under the constitution. While Congress has power to exclude aliens from the United States, to prescribe the terms and conditions on which they may come in, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers, it has no power to control generally the dealings of our citizens with resident aliens. *Keller v. United States (U. S.)*, 16-1066.

On a criminal prosecution for violation of the statute above mentioned, where the only offense charged or proved is that the defendants harbored in their house of prostitution an alien female, who was voluntarily leading the life of a prostitute, and who first entered such house about a year after her arrival in this country, having had no dealings with the defendants, and being entirely unknown to them prior to that time, the indictment should be quashed. *Keller v. United States (U. S.)*, 16-1066.

Right to hold realty. — Where land is granted to an alien, without capacity to acquire land by purchase under the laws of the state, the state has the right to declare a forfeiture or escheat of the lands by proceedings in the nature of office found, at all times prior to alienation of the property by the grantee and prior to the grantee's death; but such right of the state, if unexercised, is lost by the death of the grantee. *Abrams v. State (Wash.)*, 13-527.

Under the Washington constitution providing that an alien who has not made any declaration of intention to become a citizen of the United States may acquire title to real estate by inheritance, real estate granted by deed to an alien and not declared forfeited during the lifetime of the grantee descends upon the

grantee's death to his alien heirs. *Abrams v. State* (Wash.), 13-527.

Notwithstanding the Washington constitution prohibiting "the ownership of lands by aliens other than those who in good faith have declared their intention to become citizens of the United States" and providing that "all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void," the grantor of land to an alien, grantee, by a fee simple deed given for a valuable consideration, is divested of any right, title, or interest in the land conveyed, and, in any event, becomes estopped to deny the title of the grantee by standing idle for thirteen years while the property increases in value, and the grantee retains possession and makes valuable improvements thereon. *Abrams v. State* (Wash.), 13-527.

ALIMONY AND SUIT MONEY.

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Failure to pay alimony as contempt of court, see CONTEMPT 1 f.

Liability as affected by discharge in bankruptcy, see BANKRUPTCY, 9.

Liability of husband for counsel fees in divorce suit by wife, see HUSBAND AND WIFE.

1. IN GENERAL.

Basis of allowance — marital relations. — Alimony is only cognizable as between parties united by a marital relation that imposes upon the husband the legal duty to support the wife. *Chapman v. Parsons* (W. Va.), 19-453.

Statutory provisions exclusive. — The provisions of the Nebraska statute relative to alimony, its allowance, and the mode of its enforcement, are exclusive of all other ways and means. *Cizek v. Cizek* (Neb.), 4-464.

English law. — The rules as to what is alimony and as to the practice which still guides the court in dealing with applications for alimony are the same as were laid down

by, and which guided, the old ecclesiastical courts in considering applications for alimony. *Leslie v. Leslie* (Eng.), 13-750.

Under the English Matrimonial Causes Act of 1884, a wife who has obtained a decree for restitution of conjugal rights may, if the husband disobeys the decree, either apply for an alimentary provision and to have the same secured to her, or, if she elects to petition for a judicial separation, she may apply for alimony, and after she has obtained a decree, may ask for permanent alimony to be allotted to her; but it is not open to her, after she has elected to proceed for a judicial separation and after she has obtained a decree in that suit, to ask for an order and for security. *Leslie v. Leslie* (Eng.), 13-750.

Right of wife confined in prison. —

A wife sentenced for more than three years to prison, where she is supported at the expense of the state, is not entitled to an allotment of alimony or to an order directing an expensive and harassing inquiry at the expense of the husband with a view to the allotment of permanent alimony to her after her release. *Leslie v. Leslie* (Eng.), 13-750.

Liability to claims of creditors. — An allowance for support, adjudged in a divorce action, does not constitute indebtedness to the party in whose favor the allowance is made which can be reached by creditors of that party; but payments in money required by the judgment in a divorce action to be made by one party to the other as the portion of that other upon a division of the property of the parties may be reached by the creditors of that other. *Brenger v. Brenger* (Wis.), 19-1136.

Allowance in favor of husband. — A decree in a divorce suit by a husband against his wife directing her to pay him \$25 a month for "future support and maintenance," or, at her option, the sum of \$2,000, is a decree for alimony, and cannot be sustained as a division of the joint property of the parties, where such property does not exceed \$2,000 in value. *Brenger v. Brenger* (Wis.), 19-1136.

Independently of statutory authority there can be no allowance of alimony or in the nature of alimony made to a husband out of his divorced wife's estate or earnings. *Brenger v. Brenger* (Wis.), 19-1136.

2. JURISDICTION OF COURT.

Jurisdiction purely statutory. — Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute or it does not exist. *Cizek v. Cizek* (Neb.), 5-464.

Absentee defendant not personally served. — Where in an action for divorce the defendant is without the state and no personal service upon him is had within the state, the court has no power after a judgment by default to enter a decree against him for alimony and counsel fees. *Proctor v. Proctor* (Ill.), 2-819.

In an action for divorce against a non-resident defendant not personally served, the

court cannot make a decree vesting in the plaintiff an interest in the real estate of the defendant situate without the state. *Proctor v. Proctor* (Ill.), 2-819.

A judgment *in personam* for temporary alimony and attorney's fees cannot lawfully be rendered in a divorce suit brought against a nonresident husband, who is not served with process within the state, and does not appear in the case, but is only constructively served by publication. *Hood v. Hood* (Ga.), 14-359.

Reconsideration of motion.—The court may, at a term subsequent to its refusal to award temporary alimony in an action to annul a marriage, grant a motion for a reconsideration of the application for alimony, and award alimony on an additional showing. *Ricard v. Ricard* (Iowa), 20-1346.

Suit to set aside divorce.—There is no jurisdiction to award alimony as between parties divorced from bed and board, as incident to the pendency of an independent suit to set aside the decree of divorce for fraud, and before the decree is successfully assailed. *Chapman v. Parsons* (W. Va.), 19-453.

3. SUIT MONEY AND ALIMONY PENDENTE LITE.

a. Allowance in general.

Suit money.—When a petition is filed for divorce and alimony, or for alimony alone, the court may make such an order relative to the expenses of the suit as will insure to the wife an efficient preparation of her case, whether she is plaintiff or defendant in the suit. *Day v. Day* (Kan.), 6-169.

In an action for divorce brought by the wife, where it appears that the plaintiff is without means to prosecute her suit properly, and that the defendant has means with which to pay, the court will allow the plaintiff suit money and counsel fees. *Day v. Day* (Idaho), 10-260.

Character of pending suit.—In no suit but one seeking a divorce of some character is there jurisdiction to award alimony *pendente lite*. *Chapman v. Parsons* (W. Va.), 19-453.

b. Allowance in action to annul marriage.

Under New York statute.—In an action brought by a wife against her husband to annul their marriage on the ground that the husband was insane when the marriage was contracted, the New York supreme court has no power to make an order on application of the wife directing the payment of counsel fees and alimony *pendente lite* by the defendant. *Jones v. Brinsmade* (N. Y.), 5-378.

Counsel fees.—Even after the affirmance of a decree annulling a marriage, the appellate court will, if it appears that the woman is entitled to counsel fees, grant a motion for the allowance of such fees to her counsel. *Willits v. Willits* (Neb.), 14-883.

In such a case the court may also require the husband, if his circumstances warrant it, to pay reasonable suit money to enable the wife to make a defense, and to reimburse her for expenditures on behalf of the family during the existence of the marriage relation. *Willits v. Willits* (Neb.), 14-883.

c. Allowance pending appeal.

By trial court.—Under the Idaho statutes a district court retains jurisdiction in a divorce case after an appeal to allow costs, expenses, and attorney's fees in prosecuting the appeal. *Roby v. Roby* (Idaho), 3-50.

By appellate court.—Under the Idaho constitution an appellate court may order the payment of attorney's fees or suit money on appeal in a divorce case. *Roby v. Roby* (Idaho), 3-50.

An appellate court wherein a writ of error in a divorce action is pending may, in the exercise of its appellate jurisdiction, entertain a motion for an allowance for the support of the wife and her child pending the proceeding in error and for the prosecution thereof, and may make such order as the circumstances warrant. *Duxstad v. Duxstad* (Wyo.), 15-228.

On appeal from order granting temporary alimony.—On appeal by the defendant in a divorce suit from an order requiring him to pay alimony *pendente lite*, the appellate court has power to entertain a motion to compel the appellant to pay the appellee a sum of money to enable her to pay her counsel fees on appeal; and it will grant such a motion where the appellee is in a destitute condition, and there is a good reason why relief cannot be obtained in the trial court. *Lane v. Lane* (D. C.), 6-683.

d. Marriage as prerequisite.

Proof on motion.—In an application for temporary alimony and the expenses of the action, though the answer denies the fact of marriage, the court has the power, from the affidavits and other papers presented to it, to pass upon the question for the purpose of the application, and if the matters contained in such affidavits and papers, or shown by legitimate proofs before the court, make out in the judgment of the court a fair presumption of the marriage, the court has the power to grant alimony pending the action and the expenses of the action. *Fountain v. Fountain* (Ark.), 10-557.

On an application for temporary alimony in a wife's action for divorce, where the answer denies the fact of the marriage, but the plaintiff testifies that the ceremony was performed by one authorized to solemnize it, and then shows by affidavits of others and by the testimony of the defendant the constant cohabitation of the parties for years as husband and wife, these facts warrant a reasonable presumption that the parties were married, and show a strong probability that the plaintiff will succeed on a final hearing in establishing the marriage, and therefore justify the court in granting an order for temporary alimony and the expenses of the action. *Fountain v. Fountain* (Ark.), 10-557.

4. PERMANENT ALIMONY.

a. Nature.

Assignability.—Where a decree granting a wife a divorce allows her alimony payable in a gross sum, and awards her the care, custody, and education of the children, she

cannot assign the decree to a third person. *Fournier v. Clutton* (Mich.), 10-392.

A divorced wife may maintain a bill to set aside an assignment made by her of a decree in her favor for alimony, though she has made no formal tender of the amount paid her in consideration of the assignment, where it appears that before filing the bill she undertook to make the tender, but did not do so because the assignee said he would not accept it. *Fournier v. Clutton* (Mich.), 10-392.

b. Misconduct of wife as affecting allowance.

Adultery of wife. — Under the New York Code of Civil Procedure, which provides that in an action by a wife for separation and support "the defendant may set up in justification the misconduct of the plaintiff," a wife who has committed adultery is, notwithstanding the fact that her husband has likewise been guilty of adultery, not entitled to a judgment of support. *Hawkins v. Hawkins* (N. Y.), 15-371.

Such wife's right to a judgment of support is not strengthened by the fact that in a prior action for divorce by the husband the court refused, because of the adultery of the parties, to dissolve the marriage or to grant relief to either of them, and the decree in the divorce action does not bar the husband from urging the wife's adultery as a defense to her action. *Hawkins v. Hawkins* (N. Y.), 15-371.

Desertion by wife. — Under the statutes of this state, although a husband may obtain a divorce from his wife on the ground of wilful and continued desertion for more than three years before the filing of the suit, it is not an inflexible rule of law that the wife shall not be allowed alimony. On the other hand, it does not follow that the divorced wife would be entitled to alimony as of course, when her conduct has been grossly improper and caused her husband to obtain a total divorce from her. *Davis v. Davis* (Ga.), 20-20.

Submission of question to jury. — Under the facts of the present case, the judge should have submitted to the jury the question of whether alimony should be allowed to the wife, if a divorce should be granted to the husband. *Davis v. Davis* (Ga.), 20-20.

c. Allowance in action to annul marriage.

Not allowable in absence of statute. — In the absence of statutory authority, permanent alimony will not be allowed in a suit to annul a voidable marriage. *Willits v. Willits* (Neb.), 14-883.

Statutory authority to grant allowance. — Under a statute providing that a petition to annul a marriage shall be filed as in actions for divorce, and that the provisions of the statute relating to divorce shall apply, alimony may be allowed the defendant in an action by a husband for annulment of the marriage on the ground that the wife had another husband living, since a marriage is presumptively legal until the contrary is shown. *Ricard v. Ricard* (Iowa), 20-1346.

Support of children. — A court an-

nulling a marriage at the suit of a husband who was under the age of consent when the marriage was solemnized may require him to pay a reasonable amount for the support and nurture of the issue of such marriage. *Willits v. Willits* (Neb.), 14-883.

d. Mode of allowance.

Allowance of gross amount. — A court may, in its discretion, grant to a wife after divorce alimony in gross amount in lieu of a stated allowance. *De Roche v. De Roche* (N. Dak.), 1-221.

Allowance of real estate. — In suits arising under the provisions of the Nebraska statute, the district court has no jurisdiction to award real estate of the husband to the wife in fee as alimony, and a decree in so far as it attempts so to do is void and subject to collateral attack. *Cizek v. Cizek* (Neb.), 5-464.

e. Amount of allowance.

Amounts held proper. — In granting a divorce to the wife and awarding alimony for the support of her and a child, an allowance of \$3,000 for the wife, \$500 for the child, and \$500 attorney's fees, is fair and reasonable, where it appears that the wife has no estate and the husband has real property worth \$13,000. *Hooe v. Hooe* (Ky.), 13-214.

An award to a wife of \$7,000 in gross as alimony held not excessive under the circumstances. *De Roche v. De Roche* (N. Dak.), 1-221.

f. Lien of alimony.

Alimony payable in instalments. — Permanent alimony decreed in a fixed annual sum in an action wherein the defendant has appeared or has been served with process, is a personal decree and a lien on the defendant's land, though such alimony is payable in instalments in the future. *Goff v. Goff* (W. Va.), 9-1083.

Notwithstanding the Kansas statute making a judgment a lien on the real estate of the debtor within the county, an allowance of permanent alimony payable in instalments does not create a lien on any property of the husband unless the record affirmatively discloses that the court intended it to have that effect. *Scott v. Scott* (Kan.), 18-564.

No lien in absence of statute. — In the absence of a statute to the contrary, a decree for alimony in favor of a divorced wife is not a lien on the husband's property. *Kerr v. Kerr* (Pa.), 9-89.

g. Modification of allowance.

After life of decree. — Under the Massachusetts statute providing that decrees for alimony may be revised and altered, a final decree awarding weekly alimony to the wife for a specified period may be so revised after its expiration as to allow her alimony for an additional period, if her circumstances have so changed as to render such additional allowance just. *Smith v. Smith* (Mass.), 5-939.

After vacation of decree for fraud. — Where a decree for alimony is set aside for

fraud, the case then comes on for retrial upon the testimony to be adduced regarding the circumstances of the parties at the time of the original trial, and upon such evidence as to future circumstances as may be deemed important in determining the amount of the alimony to be awarded, *Graves v. Graves* (Iowa), 10-1104.

After assignment of decree. — A decree for alimony is not a negotiable instrument and is subject to attack or modification in the hands of a purchaser just as it is when standing in the name of the original plaintiff. *Cohen v. Cohen* (Cal.), 11-520.

Decree based on agreement. — Under the New Hampshire statute providing that "upon proper application and notice, the court may revise and modify any order made, and may make such new orders as may be necessary respecting alimony," a court has power to revise or modify a decree for alimony based upon a sealed agreement in writing between the parties to the divorce proceeding. *Wallace v. Wallace* (N. H.), 13-293.

Change in circumstances of parties. — The original decree as to alimony is conclusive upon the parties, upon the facts and circumstances existing at the time the decree was entered, or which might have been proved at that time, and no charge will be made therein except where there has been a change in the circumstances of the parties after the rendition of the decree. The decree is, however, subject to be set aside for fraud. *Graves v. Graves* (Iowa), 10-1104.

In providing for an allowance of alimony for an additional period after the expiration of the period in the original decree, an order granting an additional allowance "by reason of the present condition of the petitioner" is construed as finding that there has been a change in the petitioner's circumstances entitling her to have the original decree revised. *Smith v. Smith* (Mass.), 5-939.

Where wife remarries. — The remarriage of the wife in whose favor a divorce with a decree for regular payments of alimony has been granted places upon her the burden of showing the inadequacy of her support by her remarriage, and is *prima facie* cause to revise the judgment for alimony and cancel all payments accruing subsequent to her marriage. *Cohen v. Cohen* (Cal.), 11-520.

Procedure. — The failure of a complaint in an action by a wife for divorce to make any averment concerning the property of the husband or his ability to pay alimony is not a defect going to the jurisdiction and does not render a judgment for alimony based on such complaint void. In such a case the judgment may be erroneous as to amount and subject to reversal or modification on appeal, but it is not subject to collateral attack, nor has the lower court power to amend or modify it as to the excess as rendered without jurisdiction. It can be modified in the lower court only by proceedings under the statute or by proceedings in equity. *Cohen v. Cohen* (Cal.), 11-520.

Laches in application. — No laches in proceeding for the vacation of a decree for alimony is shown where the motion to vacate

is made within the period of limitation, and it appears that the wife agreed before the decree that she would not ask alimony, and did not allege in her complaint the ability of the husband to pay or pray specifically for an allowance, and that the husband had no actual knowledge of the allowance, and that the wife not long after the decree removed to another state and was there remarried nine months after the divorce without ever having demanded any payment on account of the allowance or giving notice thereof. *Cohen v. Cohen* (Cal.), 11-520.

h. Enforcement of decree.

Life of decree. — A decree for alimony does not become dormant because of the failure to issue an execution thereon for more than five years. *Lemert v. Lemert* (Ohio), 2-914.

In an action for divorce and alimony, or for alimony alone, the decree of the court requiring the husband to pay the wife a gross sum as alimony and making said sum a lien upon his real estate, situate in the county where the action is pending, does not become dormant because no execution is issued thereon for more than five years from the date of the decree. *Peeke v. Fitzpatrick* (Ohio), 6-824.

Foreign judgment, in general. — The Massachusetts statutes concerning the payment of alimony have no application to alimony awarded by the decree of a foreign court. *Page v. Page* (Mass.), 4-296.

A suit to enforce a foreign decree for future payment of alimony cannot be maintained unless the decree is final. *Page v. Page* (Mass.), 4-296.

Assumpsit on foreign judgment. — An action of assumpsit may be maintained on a foreign decree for alimony in so far as the decree awards costs and awards alimony and maintenance due and payable on its rendition, but notwithstanding the full faith and credit clause of the federal constitution the action cannot be maintained as to alimony awarded by the decree, but due and payable after its rendition. *Israel v. Israel* (U. S.), 8-697.

Debt of foreign judgment. — An action of debt may be maintained to enforce a decree of another state for the payment of alimony; and where the sum awarded is an accruing allowance, the action will lie to recover the amount accrued at the time the action is commenced. *Wagner v. Wagner* (R. I.), 3-578.

Action at law. — An action at law will not lie upon a decree for alimony, where the court which rendered the decree has the power by statute to modify it at any time. *Nixon v. Wright* (Mich.), 10-547.

Statute of limitations. — A decree ordering a husband to pay his divorced wife alimony in a gross sum and making said sum a lien on his lands is a continuing decree, and the statute of limitations does not bar an action brought by the wife within twelve years after the rendition of the decree to enforce the lien in her favor. *Peeke v. Fitzpatrick* (Ohio), 6-824.

Issues determinable. — In a suit to en-

force payment of the arrears of the alimony by a competent court of a foreign state, no question can be raised as to the propriety of the amount decreed. Page *v.* Page (Mass.), 4-296.

i. Foreign decree.

Full faith and credit. — A decree for the future payment of alimony is, as to instalments past due and unpaid, within the protection of the full faith and credit clause of the federal constitution, provided that no modification of the decree was made prior to the maturity of such instalments, unless by the law of the state in which the decree was rendered its enforcement is completely within the discretion of the courts of that state that they may annul or modify the decree, even as to overdue and unsatisfied instalments. *Sistare v. Sistare* (U. S.), 20-1061.

Decrees for the New York courts for the future payment of alimony are not subject to annulment or modification by those courts as to overdue and unsatisfied instalments, so as to deprive such decrees of the protection, as to past-due and unpaid instalments, of the full faith and credit clause of the federal constitution. *Sistare v. Sistare* (U. S.), 20-1061.

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1. EFFECT OF ALTERATIONS.

Alteration or destruction of deed. —

The alteration or destruction of a deed after its full execution does not, though it is done by consent of the parties, divest the original grantee of the title, or revest such title in the grantor. *Gibbs v. Potter* (Ind.), 9-481.

Insertion of forfeiture clause in deed.

— Where, after a deed has been delivered and has been deposited for registration, it is returned to the grantor because of uncertainty in description, and the grantor not only inserts words to identify the land properly, but, without the consent of the grantee, inserts a provision that the land shall be forfeited and returned to him in case a house of ill-fame shall be erected and maintained thereon, and the deed as thus altered is registered by the grantee, who fails to notice the forfeiture clause, the grantor can derive no right under the forfeiture clause so inserted by him. *Owen v. Mercier* (Ont.), 10-457.

Change of grantee's name. — Where a deed is altered, after its delivery, by the erasure of the grantee's name and the insertion of his wife's name as grantee, and the deed as thus altered is registered, it is not binding on the grantor, and does not transfer any title to the substituted grantee. *Perry v. Hackney* (N. Car.), 9-244.

Change made by stranger. — A change in a written contract made by a stranger thereto is not an alteration, but a spoliation which does not avoid it, and the obligee may enforce it in its original form, as if no change had been made. *Spreng v. Juni* (Minn.), 18-222.

Alteration made by agent. — The alteration of an instrument by an agent without authority to do so does not avoid the contract unless the alteration is ratified by the principal. *Spreng v. Juni* (Minn.), 18-222.

2. MATERIALITY OF ALTERATIONS.

Material alteration defined. — A material alteration of a written instrument is an intentional act done upon it, after it has been fully executed, by one of the parties thereto, without the consent of the other, which changes the legal effect of the instrument in any respect. *O. N. Bull Remedy Co. v. Clark* (Minn.), 18-413.

Words not changing effect. — An insertion in a purchase-money note for land, after delivery, of an additional word descriptive of the land, is an immaterial alteration which does not affect the obligation of the instrument. *Nance v. Gray* (Ala.), 5-55.

Changing rule of interest. — A promissory note may be vitiated by an unauthorized alteration made by inserting a lower rate of interest than that carried by the instrument as originally executed. *New York Life Ins. Co. v. Martindale* (Kan.), 12-677.

Where, in an action on a promissory note, liability on the note is denied by the maker, upon the ground that it has been altered by the addition of a clause making it bear interest at the rate of five per cent. per annum after maturity, whereas at the time of its execution it made no mention of interest, the refusal to instruct the jury that the note in the form in which the defendant claims it stood when he signed it would in virtue of the statute draw interest after maturity at the rate of six per cent. per annum, is material error. *New York Life Ins Co. v. Martindale* (Kan.), 12-677.

Inserting name of attesting witness. — The addition of the name of a witness to the signature of a paper, after its execution, without the knowledge or consent of the obligators, is a material alteration which invalidates the instrument and renders it inadmissible in evidence. *Shiffer v. Mosier* (Pa.), 17-756.

The above rule applies as well against a transferee or purchaser of the instrument as against the original obligee, especially where the instrument is not negotiable, and the transfer is made long after it is due. Even as to negotiable instruments, in the hands of a *bona fide* holder without notice, who has received the same for value and before maturity, the rule is that a material alteration is fatal. *Shiffer v. Mosier* (Pa.), 17-756.

Cross-marking material provision. — The cross-marking of a material provision in a written instrument, after its execution, by one of the parties thereto, without the consent of the other, with the intention of canceling or erasing it, constitutes a material alteration of the instrument. *O. N. Bull Remedy Co. v. Clark* (Minn.), 18-413.

3. FILLING BLANKS.

Amount of penalty in bond. — Where the amount of the penalty of a guardian's bond is inserted in an instrument after the sureties have signed the same and without their assent or ratification, the sureties are not bound thereby though the bond is a statutory one. *Rollins v. Ebbs* (N. Car.), 2-327.

Amount of promissory note. — In an action by the payees against the maker of a promissory note, where it appears that the defendant signed his name on a blank stamped piece of paper and intrusted the paper to a third person with authority to fill it up as a promissory note for a certain sum payable to the plaintiffs and to deliver it to the plaintiffs as security for an advance to be made by them, and it further appears that the third person fraudulently filled the paper up as a promissory note for a larger sum, and thereby obtained an advance of a larger sum from the plaintiffs, who had no notice of the fraud, the defendant is estopped to deny the validity of the note, and the plaintiffs are entitled to a judgment for the full amount thereof. *Lloyd's Bank v. Cooke* (Eng.), 8-182.

4. EVIDENCE.

Parol evidence of original form. — In a suit to reform a deed and to quiet title

to land covered thereby, where it is alleged that the plaintiff, after purchasing land and taking conveyance, voluntarily altered the instrument by erasure of his name and substitution of the defendant's name, for the purpose of giving the defendant a life estate in the property, and there can be no possible doubt of the particular terms of the deed before the alteration was made, it is competent for the plaintiff to introduce parol or secondary evidence to prove the contents of the deed before alteration. *Gibbs v. Potter* (Ind.), 9-481.

Parol evidence of alteration. — Parol evidence to prove that no seal was attached to a certain deed when the grantor signed it or when it was spread upon the public records, and that the seal was afterwards affixed, is admissible, not as varying the terms of a written instrument but as showing that the instrument in question is absolutely void for want of due execution. *Burnette v. Young* (Va.), 12-982.

Sufficiency of evidence. — Evidence considered and held sufficient to sustain the verdict. There were no reversible errors in the rulings of the trial court as to the admission in evidence of plaintiff's letters nor in its charge to the jury. *O. N. Bull Remedy Co. v. Clark* (Minn.), 18-413.

5. RATIFICATION OF ALTERATION.

Knowledge as condition precedent. — In order that any act by the obligor in a written instrument may be construed as a ratification of a material alteration therein, it must be shown that such act was performed with full knowledge of the alteration. *Shiffer v. Mosier* (Pa.), 17-756.

Ratification by one of several obligors. — Where an instrument signed by several persons has been materially altered without their knowledge or consent, a subsequent ratification of the instrument as altered, by one of the obligors, binds only the one so ratifying, and can have no effect as against his co-obligors. *Shiffer v. Mosier* (Pa.), 17-756.

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1. ANIMALS AS PROPERTY.

a. In general.

Ownership of offspring. — Where, in a replevin suit for the possession of a mare and her three colts, the jury finds upon sufficient evidence that the mare belongs to the defendant, and that the plaintiff has no interest whatever in her, the ownership of the mare carries the ownership of her offspring, in the absence of evidence to the contrary, and the court is justified in holding that a part of the verdict awarding the three colts to the plaintiff is against the evidence. *Dunning v. Crofutt* (Conn.), 14-337.

Mortgage as covering offspring. — A chattel mortgage of cows does not cover their calves in gestation at the time of the execution of the mortgage and born prior to foreclosure, there being no reference in the mortgage to the increase. *Demers v. Graham* (Mont.), 13-97.

Animals *feræ naturæ*. — Under the common law of England, the title to animals *feræ naturæ* or game is in the sovereign for the use and benefit of the people, the killing or taking and use of the game being subject to governmental control and regulation for

the general good. *Harper v. Galloway* (Fla.), 19-235.

b. Branding.

Right to record brand. — A brand consisting of a "horseshoe with bar under, on one or both jaws, and a horseshoe on one or both jaws," is not the same as or similar to another person's brand consisting of "a loop resembling a horseshoe in shape, with the points either up or down, on either or both jaws," within the meaning of the Oregon statute (Bell. & C. Comp. St., § 4202) providing that when a person has recorded a brand, no other person can record "the same brand or brand similar thereto," without the consent of the owner of the recorded brand. *Brown v. Moss* (Ore.), 18-541.

Sufficiency of record. — The Oregon statute (Bell. & C. Comp. St., § 4201) providing that when a certificate of brand is delivered to the county clerk in the form required, he shall "record said certificate in a book to be kept for that purpose," contemplates a record of the certificate in full, and an entry by the clerk merely of what he conceives to be the contents of the certificate is not sufficient. *Brown v. Moss* (Ore.), 18-541.

Brand as evidence of ownership. — Under the Oregon statute (Bell. & C. Comp. St., § 4204) making a recorded brand on an animal *prima facie* evidence of ownership in the person whose brand it may be, and providing that proof of the right to use such brand shall be made by a certified copy of the record thereof, the plaintiff in an action to recover the possession of horses may give in evidence a certified copy of the record of his brand duly made according to law, regardless of whether the brand was entitled to record. *Brown v. Moss* (Ore.), 18-541.

Under such statute the effect of such a brand as evidence is for the jury, and it is error for the court to exclude from evidence a certified copy of the record thereof on the ground that the brand was not entitled to record because the same or a similar brand had previously been recorded by another person. *Brown v. Moss* (Ore.), 18-541.

2. LIABILITY FOR INJURIES BY ANIMALS.

a. In general.

Owner responsible. — "The owner of an animal is responsible for the damage he has caused," and the burden is on the owner to prove that he was without the slightest fault and did all that was possible to prevent the injury. *Damonte v. Patton* (La.), 10-862.

Common carriers transporting wild animals. — A common carrier having a shipment of bears in its freight house awaiting delivery to the consignee is not the owner or keeper of the animals within the meaning of the rule that the owner or keeper of a wild animal is liable for injuries caused by it, irrespective of negligence, and the carrier in such case cannot be held liable for injuries caused by a bear except upon proof of negligence in the ordinary sense of that word. *Molloy v. Starin* (N. Y.), 14-57.

A common carrier accepting and transport

ing trained bears securely confined in cages, and having such bears in its freight house awaiting delivery to the consignee, with the fronts of the several cages, which are covered by an iron grating, facing towards each other so that there is no possibility of the animals doing any mischief unless a person voluntarily and unnecessarily exposes himself by going into the inclosure between the cages and too close to the grating, is not guilty of any negligence as respects the taking of reasonable precautions for the public safety, and is therefore not liable to a person who is upon the carrier's premises by sufferance, and who being impelled by idle curiosity inserts his person between the cages and is seized and injured by one of the bears. *Molloy v. Starin* (N. Y.), 14-57.

Communication of disease. — In the absence of statutory provisions, one who keeps upon his own premises animals suffering from a contagious disease is not liable for the communication of such disease to the animals of others, unless he knows that his animals are diseased and is guilty of some negligence in the manner of keeping them. *Eshleman v. Union Stock Yards Co.* (Pa.), 15-998.

b. Trespassing animals.

Ejection from premises. — Even though an owner of premises has knowledge of the traits and habits of a particular breed of dogs, and that one of such dogs would not kill or maim a domestic animal, such owner is, when such dog is in fact harassing, worrying, and annoying his gravid animals in such a manner as would be likely to cause him pecuniary loss, justified in using such force as is necessary to eject the dog from his premises and to cause a cessation of the injuries. *State v. Churchill* (Idaho), 16-947.

Where trespassing dogs are chasing, worrying, and frightening hogs and cattle, the owner of the premises in attempting to remove and eject the dogs therefrom has a right to act upon appearances. In other words, if there is apparent impending danger to his live stock, he is justified in the use of such force in ejecting the dogs as a reasonably prudent man would use under like circumstances in defense and protection of his property. *State v. Churchill* (Idaho), 16-947.

Right to kill. — The fact that a dog is a trespasser does not justify one in killing him, and whether the circumstances are such as to justify the killing is a question of fact for the jury. *McChesney v. Wilson* (Mich.), 1-191.

Where it clearly appears in a prosecution for maliciously killing dogs that the defendant was not acquainted with the owner of the dogs, and did not in fact know who was their owner, and that in wounding and killing the dogs he was not actuated by malice or a wanton or reckless spirit, but acted solely through a desire to remove the dogs from his premises, and to prevent their worrying, annoying, and terrorizing his live stock, he cannot be held criminally liable for malicious mischief. *State v. Churchill* (Idaho), 16-947.

Where the evidence as to such occurrence is direct and not circumstantial, the testimony of experts as to the habits and traits of the particular breed of dogs is inadmissible, unless it appears that the owner had at the same time knowledge of such habits and traits. *State v. Churchill* (Idaho), 16-947.

Liability of owner. — Where a dog invades and trespasses on the legal rights of a person and injures person or property, and such invasion and trespass is the result of the negligence of the owner, the owner of such dog is liable for the damages done. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Where a person takes a dog to a racetrack, or is in control of such dog at and near the track, and suffers or permits such dog to go on the racetrack and interfere with the riders in such race, and an injury results therefrom to a rider, the owner or person in control of such dog is guilty of negligence and is liable for the damages thereby sustained. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Duty to restrain animals. — Persons who are keepers, harborers, or custodians of dogs are required to exercise proper judgment as to the place where the dog is taken and the position in which the dog may be placed, and are responsible for the acts of such dog; and when dogs are taken to a place not suitable or proper or placed or suffered to be placed in a position where they become a dangerous agency, and an injury results therefrom, a jury is warranted in concluding that the owner, harborer, or person in control of such dog is guilty of negligence. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Injunction. — An injunction will be granted to restrain trespasses by chickens where it appears that repeated invasions have occurred in the past and are threatened for the future, and that a multiplicity of suits would be required to compensate the plaintiff in damages. *Keil v. Wright* (Iowa), 14-549.

c. Animals on highway.

(1) In general.

Horse led by halter. — A horse led by a halter and in charge of an attendant is rightfully in the street, and in the absence of a showing of negligence in management, or that the horse had ever shown vicious propensities, the owner is not liable for injuries to a passerby. *Eddy v. Union R. Co.* (R. I.), 1-204.

Cow frightening horse. — The owner of a cow at large in the public highway is not liable in damages to a person injured by being thrown from her vehicle by her horse taking fright at the cow getting up when she attempted to drive around it. *Marsh v. Koons* (Ohio), 14-621.

Purpose of Ohio statute. — The object of the Ohio statute making it unlawful for the owner of certain animals, including cattle, to suffer them to run at large in any public highway, and making him liable for all dam-

ages done by such animals on the premises of another, is not the safety of travelers on the highway, but the prevention of trespasses, and the owner of such an animal is not, merely because of the existence of the statute, liable in damages to a person injured by the frightening of her horse at the animal at large in the highway contrary to the statute. *Marsh v. Koons* (Ohio), 14-621.

(2) Runaway horses.

Horse left unfastened. — It is negligence for the driver of a horse and cart to abandon his seat and hold on the reins, and to go chasing his hat in the street, without fastening or otherwise securing the animal; and, where a horse thus left standing runs away, the owner will be held responsible for an injury inflicted by the runaway's collision with a third person without contributory fault. *Damonte v. Patton* (La.), 10-862.

It is not negligence *per se* to leave a horse standing unfastened and unattended in a highway. Whether such conduct constitutes negligence in a particular case is a question of fact for the jury or other trial tribunal; and in an action for personal injuries where the evidence shows that the defendant allowed a pair of quiet horses, attached to a wagon loaded with hay, to stand unfastened on a country road, with the reins thrown on the ground, while he attempted to adjust the load on the wagon, and that the horses, being startled by the fall of some of the hay from the wagon, ran away and injured the plaintiffs, who were driving along the highway in a buggy, a finding by the trial court that the defendant was not guilty of negligence will be affirmed. *Ryan v. McIntosh* (Can.), 17-806.

Collision with electric car. — Where a runaway horse hitched to a cart, without lights, on a dark, rainy night, dashes along the track of a street railway and collides with an electric car coming from the opposite direction, with the result that the motorman is knocked off and injured, the owner will be held liable; it appearing from the evidence that the motorman could not avoid the collision. *Damonte v. Patton* (La.), 10-862.

The motorman in charge of a street car who is running his car on schedule time is not chargeable with negligence for not anticipating and being prepared for the unexpected and improbable appearance on the track of a runaway horse at large through the negligence of his driver, and in contravention of the police ordinances. *Damonte v. Patton* (La.), 10-862.

Question for jury. — In an action to recover damages for personal injuries inflicted by a runaway horse, the question of the liability of the owner of the horse held to be properly left to the jury. *Koonz v. New York Mail Co.* (N. J.), 5-874.

d. Injuries by dogs.

Provocation as defense. — Where one's conduct toward a dog is knowingly such as is calculated to incite or provoke it to acts of damage, its naturally resulting action, in

so far as it involves consequences to the inciter or provoker, is to be regarded as his, and as not having reference to the dog in such manner as to be chargeable to its owner or keeper. *Kelley v. Killourey* (Conn.), 15-163.

Constitutionality of statute imposing liability. — The Missouri statute providing that "in every case where sheep or other domestic animals are killed or maimed by dogs, the owner of such animals may recover against the owner or keeper of such dog or dogs the full mount of damages, and the owner shall forthwith kill such dog or dogs," does not, by making the owner or keeper of dogs liable for their vicious habits regardless of his knowledge of their vicious propensities, deprive him of property without due process of law in violation of his constitutional rights. *Holmes v. Murray* (Mo.), 13-845.

Who a keeper of dogs. — A person is the keeper of dogs and liable under such statute for damages done by them where the dogs belong to such person's daughter, who keeps house for him, receiving wages for her services, and the dogs are kept at his house with his knowledge and consent. *Holmes v. Murray* (Mo.), 13-845.

Presumption against injury to keeper. — The right of action against the owner of a vicious dog arises from the knowledge by the owner of its vicious propensities, and such propensities having been established, there remains no presumption in law that the animal may not display them towards its keeper as well as against a stranger. *Emmons v. Stevan* (N. J.), 13-812.

Evidence. — In an action under the Missouri statute giving the owner of sheep or domestic animals killed by dogs a right of action against the owner or keeper of the dogs for the full amount of damages, evidence tending to show that the defendant was the owner of the dogs which killed the plaintiff's sheep and that the sheep were worth the amount demanded as damages, makes out a *prima facie* case and requires the submission of the issues to the jury. *Holmes v. Murray* (Mo.), 13-845.

In an action under such statute for the killing of sheep by dogs owned by the defendant or his daughter, where the evidence of the defendant is that neither his dogs nor the dogs of his daughter did the killing, evidence that the daughter had the dogs killed after the alleged killing of the sheep is inadmissible unless it is first shown that she did so with the defendant's knowledge and consent. *Holmes v. Murray* (Mo.), 13-845.

Variance. — In an action for personal injuries caused by the bite of a vicious dog, a variance between the allegation and proof as to the ownership of the dog held to be immaterial. *Grissom v. Hofius* (Wash.), 4-125.

Instructions. — Notwithstanding the Connecticut statute imposing liability for injuries inflicted by dogs, an instruction that the owner of a dog is not liable if a person was bitten in consequence of wrongfully, willfully, and persistently annoying, hurting, torturing, and provoking such dog, is prop-

erly granted. *Kelley v. Killourey* (Conn.), 15-163.

e. Injury to trespasser.

Vicious horse. — In an action for personal injuries, where the evidence shows that the defendant, a farmer, occupied a field which adjoined a railway station and was divided from a footpath by a wire fence, that he put into this field a horse which he knew to be bad tempered and to have bitten persons; that members of the public had previously, to the defendant's knowledge, for many years habitually crossed the field without leave, for the purpose of making a short cut from a point on the footpath, where they got over the fence, to a gate near the station; that the defendant had warned off persons crossing the field and had complained to the police of persons so crossing as trespassers, but had refused to take legal proceedings against any of them for trespass, assigning as a reason that some of them were his customers for milk; and that the plaintiff, while so crossing the field without leave from the defendant, was bitten by the horse, a judgment in favor of the plaintiff is erroneous. Under such circumstances, it cannot be held that the defendant's knowledge that the public habitually crossed the field without leave, as above mentioned, imposed upon him towards persons so crossing any duty not to keep an animal such as the horse in question in the field, or to take any care for their protection from risk of being injured by it, and, consequently, the defendant is not liable to the plaintiff in respect to the injuries sustained by the latter. *Lowery v. Walker* (Eng.), 17-553.

f. Injury to bailee.

Duty to disclose vicious propensities.

— The owner of an animal having vicious propensities which are directly dangerous, is bound to disclose them, if known to him, to a bailee. *Emmons v. Stevane* (N. J.), 18-812.

False representations by bailor regarding disposition. — A representation made to the bailee by the bailor of a vicious animal that such animal is of gentle dispositions when the bailor knows to the contrary, will render the bailor liable in an action against him by the bailee for injuries inflicted upon the latter by the animal, at least in the absence of proof that the bailee was chargeable with knowledge of its true disposition. *Emmons v. Stevane* (N. J.), 18-812.

g. *Scienter*.

Necessity of showing. — Whether a domestic animal is or is not rightfully in the place where it inflicts the injury is determinative as to the necessity of proof of knowledge on the part of the owner of the vicious propensities of the animal. *Eddy v. Union R. Co.* (R. I.), 1-204.

Knowledge of servant imputed to master. — The knowledge of employees that animals intrusted to their care are vicious is imputable to the owner, so as to render him

liable for injuries inflicted by one of the animals on a person who, without knowledge of the vicious propensities, is employed to assist in the care of the animals. *Gooding v. Shutes Co.* (Cal.), 18-671.

Animal likely to commit similar injury. — In an action for injuries committed by a dog it is not necessary that the same injury should have actually been committed by the animal to the knowledge of its owner, but knowledge by the owner that the disposition of the animal is such that it is likely to commit a similar injury to that complained of is sufficient to maintain the actions. *Scienter* need not be precisely similar, but that it is substantially so will suffice. *Emmons v. Stevane* (N. J.), 18-812.

(See notes, 1 Ann. Cas. 205; 4 Ann. Cas. 127.)

Animal rightfully or wrongfully at place of injury. — If domestic animals, such as oxen, horses, dogs, etc., injure any one in person or property while rightfully in the place where such injury is done, the owner is not liable for such injury unless he knew that such animal was accustomed to do such mischief; and in suits to recover damages for such injury, knowledge must be alleged and proved, for unless the owner knew that such animal was vicious or possessed such traits, he is not liable. If, however, he had such knowledge, he is liable. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

If domestic animals injure any person or property, while wrongfully in the place where the injury is done, the owner is liable, although he had no notice that such animal was accustomed to do such wrong or mischief. In such case the ground of action is that the animal was wrongfully in the place where the injury was done; and it is not necessary to allege or prove any knowledge on the part of the owner that such animal had previously been vicious. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Sufficiency of evidence. — In an action for personal injuries caused by the bite of a vicious dog, the evidence held sufficient to go to the jury upon the question of knowledge by the owner of the vicious disposition of the dog. *Grissom v. Hofius* (Wash.), 4-125.

h. Joint liability.

Minnesota statute. — The Minnesota statute does not change the common-law rule that where several dogs kill sheep and do other damage jointly the owner of each dog is liable only for the damages done by his animal, and a joint action will not lie against the owners of the dogs, as the statute merely relieves the plaintiff from the necessity of showing *scienter*. *Nohre v. Wright* (Minn.), 8-1071.

i. Damages.

Amount paid to physician. — In an action to recover damages for personal injuries inflicted by a runaway horse, it is not erroneous for the trial court to refuse to exclude from the consideration of the jury the services of the physician as an element of

damage. *Koonz v. New York Mail Co. (N. J.)*, 5-874.

3. LIABILITY FOR INJURIES TO ANIMALS.

a. Animals on highway.

Contributory negligence of owner. — Evidence reviewed, in an action against a town to recover damages for injuries sustained by the plaintiff's blind horse in consequence of a fall from a bridge having no guards or railings, and held insufficient to justify a trial court in holding that the plaintiff was guilty of contributory negligence as a matter of law in failing to take steps to prevent the horse from going on the bridge. *Howrigan v. Bakersfield (Vt.)*, 9-282.

b. Animals on railroad track.

Duty to watch for. — A railroad company owes no duty to the owner of animals wrongfully on the track to be on the lookout for them, and if they are injured before their presence is discovered, an action for damages will not lie. *Canadian Pac. R. Co. v. Eggleston (Can.)*, 3-590.

Negligent killing of dogs. — Dogs are personal property, for the negligent killing of which a railroad company is liable. *St. Louis, etc., R. Co. v. Rhoden (Ark.)*, 20-915.

In Florida, dogs are property and taxable as other personal property, and a railroad company is liable in damages for the negligent killing of a dog. *Florida Cent., etc., R. Co. v. Davis (Fla.)*, 3-274.

Under the Connecticut statute, a street railway company is not liable for the negligent but unintentional killing of a dog which was more than six months of age at the time of the killing and which was not registered as required by statute. *Dickerman v. Consolidated R. Co. (Conn.)*, 8-417.

Measure of damages. — Measure of damages recoverable against a railroad company for injuries to mules. *Southern R. Co. v. Gilmer (Ala.)*, 5-414.

Penalty for delay in paying damages.

— The Arkansas statute which requires railroad companies to pay for animals killed or injured by their trains within thirty days after service of notice by the owner, and which provides that, if payment is not made within the time specified, the owner shall be entitled to double the amount awarded to him by the jury, together with a reasonable counsel fee; in an action for damages, unless the amount awarded by the jury is less than the amount sued for, is valid. *St. Louis, etc., R. Co. v. Wynne (Ark.)*, 17-631.

c. Criminal liability.

Malicious or wanton killing or injuring in general. — A dog is the subject of larceny, and therefore the malicious or wanton killing of a dog is a crime denounced by a statute against maliciously or wantonly killing any animal "which it is made larceny to steal." *State v. Soward (Ark.)*, 13-79.

Malice as element of offense. — In view of the provisions of the Illinois criminal code which make cruelty to animals and malicious injury to domestic animals separate

and distinct offenses, subject to different punishments, it must be held that malice towards the owner of the animal killed or injured is an essential element of the latter offense. *People v. Jones (Ill.)*, 16-332.

Malice is the gist of a prosecution under the Idaho Revised Statutes (§ 7153) for the malicious killing or wounding of a dog, and in order to justify a conviction must be established to the satisfaction of the jury beyond a reasonable doubt. *State v. Churchill (Idaho)*, 16-947.

Under that portion of the Illinois statute relating to malicious mischief which makes it a criminal offense wilfully and maliciously to kill, wound, maim, disfigure, or poison any domestic animal belonging to another, it is not necessary, in order to sustain a conviction, to prove that the animal was killed or injured by the defendant with intent to destroy its life. Proof of such intent is necessary only where the indictment is based on the latter portion of the same statute, which makes it a like offense to expose any poisonous substance with intent that the life of any such animal shall be destroyed thereby. *People v. Jones (Ill.)*, 16-332.

In a prosecution for maliciously killing, wounding, or maiming dogs, the state must show either that the defendant entertained malice against the owner of the dogs, or that the killing, wounding, or maiming was characterized by such wanton and reckless disregard of the rights of property in others as to raise the presumption of malice from the manner of the commission of the act. *State v. Churchill (Idaho)*, 16-947.

Justification as defense. — An owner of property, when acting in its defense, is not restricted to the adoption of such measures as are absolutely necessary for its protection, but is justified in doing whatever appears to be reasonably necessary for that purpose, in the exercise of ordinary prudence and caution, and having regard to the circumstances of the particular case, and consequently, in a prosecution for maliciously injuring a domestic animal, where the defense is that the accused inflicted the injury in the protection of his own property, it is reversible error for the trial court to instruct the jury that they may find the defendant guilty unless they believe, from the evidence, that an ordinarily cautious and prudent man, situated as was the defendant, would have believed that the infliction of the injury "was absolutely necessary for the protection of his property." *People v. Jones (Ill.)*, 16-332.

Admissibility of evidence. — The rule allowing the introduction of evidence of the pedigree, traits, habits, and reputation of a particular dog, which prevails in civil actions for damages, is not applicable in a criminal prosecution for maliciously killing dogs, unless knowledge of the facts sought to be proved is brought home to the defendant. *State v. Churchill (Idaho)*, 16-947.

On the trial of an indictment for malicious mischief in castrating a bull, where the accused interposes the defense that he castrated the animal for the purpose of pre-

venting cross-breeding with his own cows, and there is evidence that a cross-bred calf is worth much less than a full-blood calf, it is error to exclude evidence offered by the defendant to show that a cow which has given birth to a cross-bred calf will permanently retain a tendency to cross-breed, since such evidence tends to show the seriousness of the injury to defendant's cows by having the bull loose among them, and, therefore, has a bearing on defendant's motive in doing what he did. *People v. Jones* (Ill.), 16-332.

In such a case, where the indictment is based on a statute which makes malice towards the owner of the animal an essential element of the offense, any evidence which fairly bears upon the question of malice is admissible, and hence it is error to exclude evidence tending to show the absence of malice on defendant's part, such as evidence that a bull which has once attacked a man will have a habit for a long time thereafter of attacking that particular man, and that the only known remedy is to castrate the animal. *People v. Jones* (Ill.), 16-332.

Sufficiency of evidence of malice. — Although malice towards the owner of the animal is an essential element of the offense of malicious injury to a domestic animal under the Illinois statute, it is not necessary, in a prosecution for such offense, to show that the defendant actually knew the owner of the animal, or to prove that he ever said or did anything to indicate malice against the owner, since malice may be inferred by the jury from the nature of the act itself and from the circumstances which accompany and characterize it. Such inference is one of fact for the jury, and not one of law for the court. *People v. Jones* (Ill.), 16-332.

Punishment. — In a criminal prosecution for malicious mischief in castrating a bull, where the evidence shows that the bull was worth only forty dollars, and that it was castrated without cruelty and unnecessary pain and in such a way that it became an ordinarily healthy and valuable steer, a verdict imposing a fine of \$550 against the defendant should be set aside as excessive. *People v. Jones* (Ill.), 16-332.

On a criminal prosecution for poisoning a horse, where the defendant is found guilty, and the value of the animal is shown to be over one hundred dollars, a sentence of imprisonment in the penitentiary for not less than three nor more than four years is proper under the Colorado statutes. *Jaynes v. People* (Colo.), 16-787.

4. ESTRAYS.

When horse is an estray. — The question whether a horse on a highway is a traveler or an estray depends upon whether his owner is guilty of contributory negligence. If the owner is not guilty of contributory negligence, the horse is a traveler; but if the horse is on the highway through his owner's negligence, he is not a traveler but an estray. *Howrigan v. Bakersfield* (Vt.), 9-282.

Municipal ordinances. — A municipality

may pass an ordinance providing that hogs shall not be allowed to run at large within the corporate limits. *Crum v. Bray* (Ga.), 1-991.

An ordinance for the seizure and sale of hogs running at large, after notice to the owner, is valid. *Crum v. Bray* (Ga.), 1-991.

5. CRUELTY TO ANIMALS.

Police power of state. — In the exercise of the police power of the state the legislature may enact proper laws for the prevention of cruelty to animals, and may designate agents or officers who may be charged with the execution of such laws. *Jenks v. Stump* (Colo.), 14-914.

Validity of statutes authorizing seizure. — Except in cases of emergency, or when public necessity or safety requires summary action, notice must be given to the owner of an animal supposed to be abandoned, neglected, or cruelly treated, and an opportunity must be afforded for the determination by a competent tribunal whether such animal is in fact abandoned, neglected, or cruelly treated, before it can be taken, before a lien can be created upon it, and before it can be sold. *Jenks v. Stump* (Colo.), 14-914.

The Colorado statute providing that any officer of the State Humane Society may take charge of any animal found abandoned, neglected, or cruelly treated, and shall thereupon give notice to the owner, if known, and may at the expense of the owner care for such animal until the latter takes charge thereof, and giving the State Humane Society a lien for such expense enforceable by selling the animal at public auction after giving the owner five days' notice, or, if he is unknown, after posting for ten days, deprives the owner of his property without due process of law, in that it fails to give the owner an opportunity to contest the legality of the seizure. *Jenks v. Stump* (Colo.), 14-914.

Docking of horses' tails. — A state has no power to prohibit the importing or bringing into the state of horses having docked tails, as such a prohibition would be an interference with interstate commerce. *Stubbs v. People* (Colo.), 13-1025.

The exclusive power of Congress to regulate interstate commerce deprives a state of any authority to prohibit the use in the state of horses having docked tails and brought into the state from another state or country, so long as such horses remain the property of the person importing them, and such horses are none the less protected as interstate commerce because they are used by the servant, agent, or partner of the owner, or by a member of his family. *Stubbs v. People* (Colo.), 13-1025.

6. DISEASED ANIMALS.

Destruction of diseased animals, see also **HEALTH**, 1.

Operation of federal statute. — The regulations of the United States Bureau of Animal Industry for the suppression of contagious diseases among domestic animals,

adopted pursuant to the Act of Congress of May 29, 1884, known as the Animal Industry Act, have no effect in a state in which such regulations have not been accepted by the authorities thereof. *Eshleman v. Union Stock Yards Co. (Pa.)*, 15-998.

The Act of Congress of May 29, 1884, known as the Animal Industry Act, which prohibits the transportation from one state or territory to another of live stock suffering from contagious diseases, expressly excepts from its provisions live stock suffering from splenetic or Texas fever which are being transported to market for slaughter, and permits such live stock to be unloaded on the way thereto to be fed and watered. The unloading of such live stock, even though there are "ticks" on them, at a stockyard to be fed and watered, is therefore not prohibited by the act. *Eshleman v. Union Stock Yards Co. (Pa.)*, 15-998.

Destruction without compensation. — Power "to maintain the city's cleanliness and health, and to this end to regulate the location of, and the inspection and cleaning of dairies, . . . and to adopt such ordinances and regulations as shall be necessary or expedient for the protection of health and to prevent the spread of disease," is a plenary delegation of police power in connection with the police of dairies, and invests the city council with all the authority which the state itself is possessed of to require dairy cows in a large city to be inspected, and, if found to be affected with tuberculosis, to be destroyed, without compensation to the owner. *New Orleans v. Charouleau (La.)*, 15-46.

It being shown that tuberculosis in a cow may be ascertained by a practically infallible test, and it being further shown that the presence of a cow so affected in a dairy in a city is a serious menace to the public health, the public authorities have the same right to require the destruction of such cow without compensation to the owner and without judicial inquiry as they have to require the destruction of decayed fish, meats, and vegetables. *New Orleans v. Charouleau (La.)*, 15-46.

Right of action for communicating disease. — A purchaser of cattle which are at the time suffering from a disease communicated to them through the negligence of a third person acquires no right of action against the latter. *Eshleman v. Union Stock Yards Co. (Pa.)*, 15-998.

Liability of stockyards company. — A stockyard company is liable only for ordinary neglect, and is not responsible for the communication of disease to cattle kept in the pens, where it does not appear that the cattle which were previously kept therein contaminated the pens, that the defendant failed to disinfect the pens, and that the cattle to which the disease is alleged to have been communicated received their infection from such pens. *Eshleman v. Union Stock Yards Co. (Pa.)*, 15-998.

ANIMUS TESTANDI.

See WILLS, 2.

ANIMUS FURANDI.

See LARCENY.

ANNEXATION.

Territory annexed by municipality, see MUNICIPAL CORPORATIONS, 3.

ANNUAL REPORTS.

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ANNUITIES.

Creation by will, see WILLS, 8 c (8).

Mode of creation — charge of land. — Where a father makes a will devising his land to his son subject to an annuity in favor of his daughter, but afterwards, on account of a doubt as to the validity of the will because the son is named in it as executor, conveys the land to the son and on the same day enters into a contract with the son by which the son covenants to pay the daughter an annuity, such annuity is a charge on the land. The deed and contract are intended to accomplish the same purpose as the will. *Dawson v. Dawson (Can.)*, 20-780.

Duration. — An annuity given to a charitable corporation without limitation or qualification as to duration will generally be considered as designed to continue during the life of the annuitant. *Merrill v. American Baptist, etc., Union (N. H.)*, 6-646.

Where a testator gives an annuity to a charitable corporation with the intention that it shall continue so long as the corporation shall exist and shall fulfil the purposes designed by its charter, the fact that the annuity may continue perpetually does not affect its validity, as charitable trusts are not within the rule against perpetuities. *Merrill v. American Baptist, etc., Union (N. H.)*, 6-646.

Right to capital sum. — Where a testator devises his residuary estate in trust for sale and conversion, and directs his trustees, after payment of his debts and of the funeral and testamentary expenses, to purchase in the name of his wife a government annuity of a specified sum for her life, and the wife survives the testator, the right to take the value of the annuity in cash instead of the annual payment vests in the wife on the testator's death, and upon her death a few days later, before the probate of the will or the purchase of the annuity, her legal representatives are entitled to a sum sufficient to have purchased the annuity at the date of the testator's death. *In re Robbins (Eng.)*, 10-485.

Arrears. — Where a testator devises land subject to the payment of an annuity to a

third person, and the will provides that the annuity shall be a lien on the land devised, an action against the devisee or his personal representatives to enforce payment of the annuity as a personal obligation, which does not seek to enforce the lien against the land, is governed by the statute of limitations applying to an ordinary action upon an implied contract, and therefore the plaintiff is only entitled to recover such instalments of the annuity as are not barred by that statute. *Stringer v. Stevens' Estate* (Mich.), 10-337.

Interest on arrears. — In an action to recover arrearages of an annuity created by will for the support and maintenance of the testator's wife, interest is recoverable; and this is so though the annuitant has died and the action has been brought by her administrator, and though the action is one at law to enforce the personal obligation of the devisee of the land upon which the annuity was charged, and not an equitable proceeding to enforce the lien of the annuity on the land. *Stringer v. Stevens' Estate* (Mich.), 10-337.

Enforcement by annuitant not party to agreement. — An agreement by which one party covenants with the other to pay an annuity to a third person who is not a party to the agreement is enforceable at the suit of the annuitant against the promisor. *Dawson v. Dawson* (Can.), 20-780.

ANNULMENT.

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1. NATURE OF PROCEEDINGS.

Beginning of new suit.—Under the West Virginia statute, an appeal from a circuit court to the supreme court of appeals is the beginning of a new, and not the continuation of an old, suit. *Wingfield v. Neall* (W. Va.), 9-982.

Appeal retained as writ of error.—A cause carried up on appeal in a case not appealable will be entered as pending on error, where the appearance of the appellee has been entered within the time limited for a writ of error, though without filing a brief. *Jensen v. Eagle Ore Co.* (Colo.), 19-519.

Error coram nobis.—In Mississippi the writ of *coram nobis* is applicable to criminal as well as to civil proceedings, but it cannot be invoked to revoke a judgment of conviction in a criminal action by showing that certain jurors, prior to having qualified as such, had formed or expressed opinions unfavorable to the defendant. *Fugate v. State* (Miss.), 3-326.

The only method of review of a criminal case, beyond a review of the events of the trial on writ of error or appeal, is an original proceeding in the trial court on writ of error *coram nobis*. *Beard v. State* (Ark.), 9-409.

2. RIGHT OF APPEAL.

a. In general.

After satisfaction of judgment.—In an action at law in which no equitable feature is involved a plaintiff who recovers judgment for less than the amount claimed, and who subsequently coerces by execution payment of the judgment, cannot, where there is no admission in the pleadings or the evidence that the amount of the judgment is due the plaintiff, and where the provisions of the judgment as to the amounts awarded and denied are connected and interdependent, appeal from the judgment as an entirety. *Adams v. Carter* (Miss.), 16-76.

b. In criminal cases.

Question of law involved.—The state or a municipality may appeal in any case

from a judgment acquitting a defendant, where a question of law has been decided adversely to either. *Gulfport v. Stratakos* (Miss.), 13-855.

Order quashing indictment.—The state has the right of appeal from an order quashing an indictment. *State v. Johnson* (S. Car.), 11-721.

Necessity of order allowing.—Under the Wyoming statute authorizing the commencement in the Supreme Court of proceedings to vacate, modify, or annul a judgment in a criminal case, by petition in error in the same manner as in civil cases, there is an absolute right of appeal to that court in criminal cases without any previous order by that court or any justice thereof. *Richardson v. State* (Wyo.), 12-1048.

Necessity of motion in arrest of judgment.—A writ of error lies to correct errors apparent on the record even though no motion in arrest has been filed in the trial court. *State v. Kelley* (Mo.), 12-681.

Appeal by United States.—In none of the provisions of the federal statute defining the appellate jurisdiction of circuit courts of appeal is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after a judgment below in favor of the defendant. *United States v. Zarafonitis* (U. S.), 10-290.

Motion to cancel fine.—A motion to cancel a fine imposed in a criminal case on the ground that the cause has abated by the death of the defendant is not a criminal case, and therefore the government may sue out a writ of error to review an order granting the motion. *United States v. Dunne* (U. S.), 19-1145.

c. Abridgment of right.

Constitutionality of statutes.—It is within the constitutional power of a legislature to provide in a city's charter that in all civil cases in which the fine imposed does not exceed a certain amount the judgment of the city court shall be final, and no appeal shall lie therefrom. *Chattanooga v. Keith* (Tenn.), 5-859.

The Australian commonwealth constitution act does not authorize the commonwealth parliament to take away the right to appeal to the king in council from a judgment of a state court, in an action to enforce payment of an income tax. *Webb v. Outrim* (Eng.), 7-84.

d. Separate appeals.

When necessary.—Separate actions, which have not been consolidated in the trial court, cannot be brought to the supreme court for review by a single appeal or writ of error or embodied in a single transcript; nor can the rule which forbids such consolidation in the appellate court be obviated by any stipulation between the parties or their counsel. *Mobile Improvement, etc., Co. v. Stein* (Ala.), 17-288.

3. JURISDICTION AND POWERS OF APPELLATE COURTS.

a. In general.

Cases involving constitutional questions.—Under the Virginia constitution, where the jurisdiction of the supreme court of appeals in a case depends solely upon the constitutional question involved, and such question is decided against the appellant, the court has no jurisdiction to pass upon the merits. *Postal Telegraph-Cable Co. v. Umstadter* (Va.), 2-511.

Where the record on appeal shows that exceptions were taken to instructions based upon the provisions of a statute and that among the reasons for a motion for a new trial was assigned the unconstitutionality of the statute as ground for challenging the correctness of the court's action in giving such instructions, the constitutionality of the statute is sufficiently involved to warrant the appellate court in passing upon the question. *Christy v. Elliott* (Ill.), 3-487.

In an action to enjoin a turnpike company from obstructing a public highway by maintaining toll gates and exacting toll from the public having occasion to use such highway, defended on the ground that the defendant has title to at least an easement in the highway and that the injunction would be a denial of due process of law and an impairment of the obligation of the defendant's contract with the state, and a taking of its property without just compensation in violation of the constitutional guaranties, a constitutional question is involved which must be passed upon, even though adversely to the defendant, and the case is one, therefore, of which the Missouri supreme court, rather than the court of appeals, has jurisdiction. *State ex rel. Hines v. Scott County Macadamized Road Co.* (Mo.), 13-656.

Cases involving franchises.—Under a statute authorizing appeals to the Illinois supreme court in cases involving a "franchise" an appeal from a judgment in a naturalization proceeding is properly taken to the supreme court, because such a judgment permits the petitioner to exercise the elective franchise or prevents him from doing so. *United States v. Hraskey* (Ill.), 16-279.

Cases involving questions of tort.—The question arising from a refusal of the trial court to set aside a verdict on the ground that it was excessive is one of fact and not of law, and for this reason cannot be reviewed on appeal by the Oregon supreme court. *Wolf v. City, etc., R. Co.* (Oregon), 15-1181.

Appeal not taken in time.—On appeal, where it appears that the appeal from the judgment was not taken within the time prescribed by statute, and that no valid appeal has been taken from the order denying a motion for a new trial, the appellate court is without authority or jurisdiction to examine the evidence for the purpose of ascertaining whether it is sufficient to support the verdict and judgment. *Trull v. Modern Woodmen of America* (Idaho), 10-53.

Determination of collateral questions.

— The supreme court of Colorado has jurisdiction to pass upon the effect of an agreement made in reference to the judgment brought up for review, when such agreement is made a matter of record in that court. *Ducey v. Patterson* (Colo.), 11-393.

Giving advice before judgment. — The Connecticut supreme court of errors will give advice to a trial court upon a reservation in respect to questions of law involved therein in advance of the time when the cause is ready for final judgment, where the questions presented are such as must certainly enter into the final determination of the cause and the advantages to be derived from a preliminary adjudication of them are manifest and distinct. *Southington v. Southington Water Co.* (Conn.), 13-411.

b. Amount in controversy.

Appealable amount in general.

Where, after an action has been brought against the makers and indorsers of a note for two thousand dollars, the makers sue the indorser in warranty, claiming that no consideration was given for the note, and asking that the indorser shall guarantee them against any judgment obtained in the main action, and also asking that an agreement under which the makers were to become liable for three thousand dollars shall be declared void, and, the two actions being tried together, judgment is given for the plaintiff in the action on the note, while the action in warranty is dismissed, the amount in dispute on appeal from the latter judgment is the principal of the note sued on, to which the costs of the action in warranty cannot be added in order to give the appellate court jurisdiction; and the agreement sought to be avoided by the plaintiffs in warranty is only a collateral matter to the issue raised on appeal, and cannot be considered in determining the amount in dispute. *Labrosse v. Langlois* (Can.), 13-392.

Consolidated actions. — In determining the jurisdiction of an appellate court with respect to the amount in controversy, the amounts involved in separate suits which have been consolidated cannot be added together. *Covington Bros. & Co. v. Jordan* (Ky.), 15-491.

Addition of interest. — Interest accruing after the commencement of an action; unless specially claimed as damages, cannot be added to the amount claimed in the declaration in determining the amount in controversy for the purpose of giving jurisdiction on appeal. *Labrosse v. Langlois* (Can.), 13-392.

Cases involving construction of statutes. — The supreme court of Indiana has appellate jurisdiction of a case involving less than fifty dollars where the construction of a statute is in question. *Stults v. Allen County* (Ind.), 11-1021.

The supreme court of Indiana has no authority to review on the merits an action to recover coroner's fees amounting to less than fifty dollars, but only the question of the con-

struction of the statute involved. *Stults v. Allen County* (Ind.), 11-1021.

Proceeding to sell decedent's real estate. — In a proceeding in the county court to sell the land of an insolvent estate of a decedent, where the court proceeds under the Tennessee statute according to the forms of chancery and does not follow the peculiar form of procedure provided by the Tennessee statute for the distribution of decedents' estates, an appeal lies directly from the county court to the supreme court, notwithstanding the fact that the county court has exclusive jurisdiction of the proceeding on account of the value of the estate. *Key v. Harris* (Tenn.), 8-200.

Statute enacted after judgment.

— For the purpose of determining whether the amount in controversy in a cause is sufficiently large to confer a right to take an appeal or to sue out a writ of error, a statute in force at the end of the term at which a judgment is rendered is controlling, though it has been passed since the rendition of the judgment. *Allison v. Wood* (Va.), 7-721.

Appeal by both parties. — The Iowa supreme court will not ordinarily strike an argument from the file because it does not strictly comply with the rules of that court, nor will the appeal of one party be dismissed because involving less than \$100, when both parties have appealed and the entire amount involved is about \$600. *Schultz v. Ford* (Iowa), 12-428.

c. Federal courts.

(1) In general.

Source of powers and practice. — The power and practice of the federal appellate courts are derived exclusively from the constitution, the acts of congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States, and they are neither controlled nor affected by the statutes of the states or the practice of the state courts. *Francisco v. Chicago, etc., R. Co.* (U. S.), 9-628.

The federal statute providing that the procedure in the federal circuit and district courts shall conform to the procedure in the state courts has no application to the practice or procedure of the federal appellate courts, or to matters relating to bills of exceptions, motions for new trials, or any other means adopted to secure a review of the judgments or decrees of the federal circuit or district courts, but its effect is limited to the practice and proceedings in the trial courts to secure the judgments of such courts. *Francisco v. Chicago, etc., R. Co.* (U. S.), 9-628.

(2) United States supreme court.

Exhaustion of remedy in state courts.

— Where the action of a state trial court in refusing to quash an indictment or a jury panel cannot under the state laws be reviewed by the state court of last resort, though the motion to quash was passed on

federal grounds, and where the accused is not entitled to remove the cause to the federal circuit court on the grounds of denial of equal civil rights, he has his remedy by a writ of error which will run from the supreme court of the United States to the highest state court in which a decision can be had after the state court of last resort has finally disposed of the matter of which, under the local law, it may take cognizance. *Kentucky v. Powers* (U. S.), 5-692.

Cases involving constitutional questions.—On a writ of error from the United States supreme court to review the decision of a state court upholding the constitutionality of a state statute, while the mere rejection in the state court of offer of proof does not strictly present a federal question, the exclusion of evidence upon the ground of the incompetency or immateriality under the statute may be regarded as showing what in the opinion of the said court is the scope and meaning of the statute. *Jacobson v. Com.* (U. S.), 3-765.

Denial of due process of law.—The decision of a state court on a question of law, however wrong and however contrary to previous decisions, is not an infraction of the fourteenth amendment of the United States constitution merely because it is wrong, or because earlier decisions are reversed. *Patterson v. Colorado ex rel. Attorney-General* (U. S.), 10-689.

Reasonableness of freight rates.—On writ of error from the United States supreme court to a state court in a case involving the question whether a state court has power to grant a shipper relief upon a finding that the rate of freight charged for an interstate shipment is unreasonable, where it appears that such rate has been filed and promulgated by the carrier under the interstate commerce act, there is a federal question presented which is sufficient to confer jurisdiction upon the supreme court. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.* (U. S.), 9-1075.

Denial of full faith and credit.—The federal supreme court has jurisdiction to review a decision of a state court of last resort denying a claim distinctly made by the defendant that giving full faith and credit to the judgment of a court of another state would prevent a recovery. *American Express Co. v. Mullins* (U. S.), 15-536.

Denial of federal immunity.—The failure of the state court to pass upon a federal right of immunity specially set up of record is not conclusive, but the Supreme Court of the United States will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. *Chicago, etc., R. Co. v. People* (U. S.), 4-1175.

Where a proposed action of a state drainage commission in requiring a railroad company to remove a bridge or culvert over a stream and replace it with another is sus-

tained by a judgment of the state court upon some ground of general or local law, without passing upon the questions whether the railroad company will be deprived of property without due process of law or will be denied the equal protection of the laws, as contended by the railway company, the supreme court of the United States has jurisdiction to re-examine the final judgment of the state court so far as it involves the federal right or immunity specially set up by the railway company. *Chicago, etc., R. Co. v. People* (U. S.), 4-1175.

Compliance with state constitution.—Where the supreme court of the United States, in reviewing a decision of a state court, determines that the provisions of the state constitution or laws involved in the cause do not contravene the constitution or the laws of the United States, it will not review a decision of the state court that the local provisions have been complied with. *Rawlins v. Georgia* (U. S.), 5-783.

Where the condemnation of land is held by the highest court of the state in which the land is situated to be authorized by the constitution and laws of the state, that aspect of the decision of the state court cannot be reviewed by the United States supreme court. *Hairston v. Danville, etc., R. Co.* (U. S.), 13-1008.

Matters of state cognizance.—The United States supreme court, in passing upon a writ of error to review a judgment of a state court granting a divorce, will consider federal questions only, and will not consider matters of state cognizance, such as the alleged fraud in contracting the marriage and the subsequent laches of the spouse seeking the divorce. Nor will the court consider the question whether it was erroneous for the state court to exclude from the evidence a record of a foreign divorce set up as a defense. *Haddock v. Haddock* (U. S.), 5-1.

Questions of local law.—On writ of error from the United States supreme court to review a judgment of a state court upon an information for contempt consisting in the publication of articles reflecting upon the motives and conduct of a state court in cases pending therein, objections that the information for contempt was not supported by an affidavit until after it was filed, that the cases referred to in the article complained of were not pending, and that the articles did not constitute a contempt, will not be considered by the supreme court, as they raise questions of local law purely. *Patterson v. Colorado ex rel. Attorney-General* (U. S.), 10-689.

Federal question not decisive of issues.—Where the judgment of a state court rests upon an independent separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, regardless of how a federal question raised on the record might be determined, the supreme court of the United States will affirm or dismiss as the one course or other may be appropriate, without considering that ques-

tion. Chicago, etc., R. Co. v. People (U. S.), 4-1175.

Direct appeal from circuit court.—In a suit brought by a waterworks company in a federal circuit court to enjoin a municipal corporation from depriving the complainant of its rights under an existing contract between the two corporations, which is not inherently invalid and which has not been broken by the complainant, an appeal from the decree of the circuit court may be taken directly to the supreme court of the United States. Vicksburg v. Vicksburg Waterworks Co. (U. S.), 6-253.

Where a jurisdictional question is certified to the federal supreme court from a decree of a federal circuit court dismissing a bill for want of jurisdiction, and the complainant in addition appeals from such decree directly to the supreme court on the ground that the case involves a constitutional question, the latter court is not limited in its decision to the question of the jurisdiction of the circuit court, but may decide the case on its merits. North American Cold Storage Co. v. Chicago (U. S.), 15-276.

A motion to quash an attachment in a United States circuit court on the grounds that the property is not subject to attachment and that the defendant has not been served with process, presents a question of jurisdiction which, under the circuit court of appeals act (Act March 3, 1891, c. 517, § 5; 4 Fed. St. Ann. 398), may be taken direct to the supreme court for review. Davis v. Cleveland, etc., R. Co. (U. S.), 18-907.

Effect of writ of error from circuit court of appeals.—The suing out of a writ of error from the circuit court of appeals to a circuit court is not a bar to a writ of error from the supreme court to the circuit court on the ground that the jurisdiction of the circuit court was in question. Davis v. Cleveland, etc., R. Co. (U. S.), 18-907.

Direct appeal from district court.—A decree of a district court of the United States dismissing a libel for salvage services, alleged to have been rendered in extinguishing a fire on a vessel in process of repair in a dry dock, on the ground that the vessel in question was not a proper subject of salvage services at the time when the services sued for were rendered, and was not rescued from any sea peril, is a decree dismissing a cause for want of jurisdiction within the meaning of the fifth section of the act of March 3, 1891 (4 Fed. St. Ann. 398), allowing a direct appeal to the supreme court of the United States. The Steamship Jefferson (U. S.), 17-907.

The jurisdiction of the United States supreme court of a direct appeal from a decree of a district court in admiralty dismissing a libel for contribution brought by a joint wrongdoer who had paid a judgment recovered against him in a suit at common law, founded on the wrong, to which suit the other wrongdoer was not made a party, cannot be defeated on the theory that the dismissal, though expressed to be for want of jurisdiction, was really on the merits, because pay-

ment of a judgment at common law is not ground for contribution from a wrongdoer not a party to the suit. The Ira M. Hedge (U. S.), 20-1235.

Sufficiency of certificate of jurisdiction.—The informality or insufficiency of a certificate of jurisdiction under the statute authorizing a writ of error directly to the supreme court from a circuit court (Act March 3, 1891, c. 517, § 5; 4 Fed. St. Ann. 398) is immaterial, where the record shows that the only question tried and decided in the circuit court was one of jurisdiction. Davis v. Cleveland, etc., R. Co. (U. S.), 18-907.

On a direct appeal from a federal district court to the supreme court of the United States, where it is apparent on the face of the record, irrespective of the recitals in the order allowing the appeal, that the only question decided below was one of jurisdiction, and where the decree appealed from shows on its face that the cause was dismissed for want of jurisdiction, the question of jurisdiction, if of such a character as to sustain the appeal, is sufficiently certified under the fifth section of the act of March 3, 1891 (4 Fed. St. Ann. 398), without separate certificate. The Steamship Jefferson (U. S.), 17-907.

(3) United States circuit court of appeals

Diversity of citizenship.—A United States circuit court of appeals has jurisdiction of an appeal from a circuit court of the United States, where the suit is based upon diversity of citizenship as well as upon an alleged violation of the federal constitution and where other than federal questions are involved. Meridian v. Farmers' Loan etc., Co. (U. S.), 6-599.

Appeals from interlocutory orders.—A United States court of appeals has jurisdiction of an appeal from an interlocutory order of a circuit court granting a preliminary injunction, though the cause is of such a nature that an appeal from the final decree will lie directly from the circuit court to the United States supreme court. Grainger v. Douglas Park Jockey Club (U. S.), 8-99.

Appeals from territorial courts.—A federal circuit court of appeals has jurisdiction to entertain a writ of error to review a judgment of the supreme court of a territory affirming a conviction for a crime other than a capital offense, whether the offense consists of a violation of a federal or a territorial statute. Miller v. Oklahoma (U. S.), 9-389.

Determining jurisdiction of circuit courts.—Federal circuit courts of appeals have no authority to pass upon questions challenging the jurisdiction of the circuit courts, as the statute creating the circuit courts of appeal does not give them such authority. Boston, etc., R. Co. v. Gok (U. S.), 9-384.

d. Appeals from intermediate appellate court

To New York court of appeals.—The New York court of appeals has no jurisdic-

tion of appeal from a decision of the appellate division on the law and facts where a material question of fact is involved; but where inferences from the uncontradicted evidence all point in one direction so that no reasonable mind could reach other than one conclusion, there is no question of fact and the court of appeals has jurisdiction of the appeal. *Matter of Totten* (N. Y.), 1-900.

Where a judgment in an action for damages has been unanimously affirmed by the appellate division of the supreme court of New York, it is sufficient to give the court of appeals jurisdiction of an appeal therefrom for the appellate division to certify that a question of law is involved which ought to be reviewed by the court of appeals without specifying the question for review. *Kurz v. Doerr* (N. Y.), 2-71.

The New York court of appeals may review a ruling by a trial court denying a defendant's motion to dismiss the complaint for a failure to state facts sufficient to constitute a cause of action, though the ruling has been unanimously affirmed by the appellate division of the supreme court. *Kelly v. Security Mut. Life Ins. Co.* (N. Y.), 9-661.

To Illinois supreme court.—Under the Illinois practice act, where an appellate court has rendered a judgment reversing the trial court without remanding the cause and has recited in its judgment the facts as found by it different from the finding of the facts by the trial court, such judgment is final and conclusive so far as the supreme court is concerned as to all matters of fact in controversy. *Malkan v. Chicago* (Ill.), 3-1104.

To Indiana supreme court.—A case which is transferred from the Indiana appellate court to the Indiana supreme court is pending in the latter court in like manner and to all intents and purposes as though it had been appealed directly to such court. *Kraus v. Lehman* (Ind.), 15-849.

A petition to transfer a case from the Indiana appellate court to the Indiana supreme court is sufficient if it appears therefrom that the opinion of the former court contains wrong declarations of legal principles upon points decided which contravene ruling decisions or precedents of the latter court. *Kraus v. Lehman* (Ind.), 15-849.

An objection to the sufficiency of a petition to transfer a case from the Indiana appellate court to the Indiana supreme court cannot be made upon a motion for the rehearing of the decision of the supreme court. *Kraus v. Lehman* (Ind.), 15-849.

e. Rules of appellate court.

Change pending appeal.—A change in the rules of an appellate court in respect to the manner in which errors claimed to have been committed at the trial should be specified in a motion for a new trial has no effect upon a case in which it is not possible to comply therewith by reason of the case having passed beyond the stage of a motion for a new trial. *Missouri, etc., R. Co. v. Smith* (U. S.), 10-939.

Abolition or impairment by legisla-

ture.—A party to an appeal who seeks the benefit of the Indiana statute providing for a review of the evidence on appeal of cases not triable by a jury must take it subject to the rules of the appellate tribunal regulating the conduct of its business, which rules cannot be abolished or impaired by the legislature. *Parkinson v. Thompson* (Ind.), 3-677.

f. Termination of jurisdiction.

Transmission of record to lower court.

—Under the Wisconsin statute providing that the clerk of the supreme court shall within sixty days after judgment transmit the papers "unless the supreme court, on application of either of the parties, shall direct them to be retained for the purpose of enabling such party to move for a rehearing," the jurisdiction of the supreme court is terminated, where the clerk transmits the record in less than sixty days without disobedience of any order or rule of court. *Ott v. Boring* (Wis.), 11-857.

The jurisdiction of an appellate court over a given cause terminates whenever, regularly, without inadvertence or fraud, it returns the record to the court from which the record came; and the appellate court thereafter has no power to vacate or modify its judgment, though it may correct the record so as to make it express that judgment properly. *Ott v. Boring* (Wis.), 11-857.

Under rule 42 of the Wisconsin supreme court, the right to a litigant to move to modify a final determination of that court is, like a motion for a rehearing, limited to the thirty days during which in all cases the records are required to be retained, although it is within the power of the court to enlarge the time within which any act may be done. *Ott v. Boring* (Wis.), 11-857.

4. APPEALABLE JUDGMENTS AND ORDERS.

a. In general.

Ex parte orders.—An appeal does not lie from an *ex parte* order, such as an order dismissing a cause without prejudice on an *ex parte* application of the plaintiff. *Wilson v. Martin* (Wash.), 10-37.

Order denying motion to court verdict.—The Wisconsin statute does not authorize an appeal to the supreme court from an order of the circuit court denying the plaintiff's motion to correct a verdict and enter a judgment in his favor. *Wolfram v. Schoepke* (Wis.), 3-398.

Order refusing leave to amend.—The refusal to allow the amendment of a pleading on the ground of want of power is appealable. *Lassiter v. Norfolk, etc., R. Co.* (N. Car.), 1-456.

Orders relating to receivers.—No appeal lies from the refusal of a court of equity to vacate an order appointing a receiver, such order being merely interlocutory, and there being no statute giving a right of appeal. *Gillett v. Higgins* (Ala.), 4-459.

Order awarding writ of assistance.—An appeal will lie from an order awarding a writ of assistance in a foreclosure proceed-

ing after the sale has been confirmed and deed ordered, subject to the conditions of an appeal from an order confirming the sale. *Escritt v. Michaelson* (Neb.), 10-1039.

Order dismissing action.—An order for the dismissal of an action is not an appealable order under the statutes of North Dakota, and an attempted appeal from such an order confers no jurisdiction on the supreme court. *Dibble v. Hanson* (N. Dak.), 16-1210.

An order dismissing an action as frivolous and vexatious is for the purposes of appeal an interlocutory order. *In re Page* (Eng.), 18-393.

Order sustaining demurrer to evidence.—A ruling sustaining a demurrer to evidence is an appealable order; that is, one which may be reviewed by independent proceedings in error begun immediately, without waiting for a final judgment to be rendered. *White v. Atchison, etc.*, R. Co. (Kan.), 11-550.

When a demurrer to a plaintiff's evidence is sustained, and thereafter a judgment is rendered in favor of the defendant for the costs of the action, in the absence of some special reason to the contrary this will be deemed a final judgment, although the entry neither refers to the defendant's going hence without day or to the plaintiff's taking nothing by his action nor contains any equivalent expression. *White v. Atchison, etc.*, R. Co. (Kan.), 11-550.

Order suspending default judgment.—An order by the superior court of Cincinnati, that a default judgment rendered by the same court at a previous term be suspended and execution thereon stayed until the case should be tried on its merits, and granting leave to defendant to file answer, is an order affecting a substantial right in a summary application after judgment, and is a final order within the meaning of section 6707, Revised Statutes, from which error may be prosecuted. *Van Ingen v. Berger* (Ohio), 19-799.

Refusal to require prosecution bond.—A refusal to require a prosecution bond is not a judgment upon the merits of the controversy materially affecting the ultimate result and is not appealable. *Christian v. Atlantic, etc.*, R. Co. (N. Car.), 1-803.

Void judgments.—A void judgment is reviewable on appeal. *Oregon R., etc.*, Co. v. *Eastlack* (Ore.), 20-692.

A party is entitled to appeal from and obtain a reversal of a void judgment brought to the supreme court on a case made. *Fleeman v. Chicago, etc.*, R. Co. (Kan.), 20-276.

Finality of decree.—A decree in equity which finally disposes of the entire merits of a cause is a final decree, and is not rendered interlocutory by the fact that it contains an order of reference to a master specifying the principles on which the accounts between the parties are to be stated; but a decree not complete in itself, but requiring further judicial action on the part of the chancellor, is interlocutory and need not be appealed from, though it contains an order of refer-

ence specifying the basis on which the accounts are to be stated. *Gray v. Ames* (Ill.), 5-174.

b. In habeas corpus proceedings.

Order denying writ.—A person in custody under a criminal charge is not entitled to have reviewed by appeal or error an order denying his petition for a writ of *habeas corpus*, as such order is not of final and conclusive character. *People ex rel. Magee v. McAnally* (Ill.), 5-590.

Final order.—A writ of error does not lie from the supreme court of the United States to the supreme court of the Philippine Islands, or to the district or the circuit court of the United States, to review the final order in a *habeas corpus* proceeding, the only mode of review being by appeal. *Fisher v. Baker* (U. S.), 7-1018.

Judgment awarding custody of child.—An appeal will lie from a judgment of the Kansas district court in *habeas corpus* proceedings determining the rights of conflicting claimants to the custody of a child. *Bleakley v. Smart* (Kan.), 11-125.

c. In bankruptcy proceedings.

Interlocutory decree granting injunction.—Under the provisions of the United States circuit court of appeals act that an appeal may be taken from an interlocutory order or decree of a district or a circuit court granting an injunction, an appeal lies from an interlocutory decree of a district court, exercising jurisdiction as a court of bankruptcy, awarding an injunction; and this is so though the appeal involves a question as to the jurisdiction of the district court to issue the injunction complained of, provided the circuit court of appeals would have jurisdiction of an appeal taken from a final decree in the case. *O'Dell v. Boyden* (U. S.), 10-239.

A petition by a trustee in bankruptcy to determine conflicting claims to an asset consisting of his bankrupt's membership in a stock exchange, is a hearing under "a proceeding in bankruptcy" within the meaning of the provision of the National Bankruptcy Act that the circuit courts of appeal shall have jurisdiction "to superintend and revise a matter of law" in proceedings of inferior courts of bankruptcy, and is not "a controversy arising in bankruptcy proceedings" within the provision of the statute that the circuit courts of appeal shall have appellate jurisdiction "of all controversies arising in bankruptcy proceedings;" and therefore an interlocutory decree awarding an injunction in such proceeding is not rendered appealable by the provision of the circuit court of appeals act giving the circuit court of appeals jurisdiction of an appeal from an interlocutory order granting an injunction in a case in which an appeal from a final decree may be taken. *O'Dell v. Boyden* (U. S.), 10-239.

d. In condemnation proceedings.

Order appointing appraisers.—In an eminent domain proceeding under the In-

diana statute, where the trial court overrules the defendant's written objections to the right of the plaintiff to maintain the proceeding, and enters an interlocutory order appointing appraisers, the defendant may take an appeal without first making a motion for new trial, as the statute makes no provision for such a motion. *Morrison v. Indianapolis, etc., R. Co. (Ind.), 9-587.*

e. In election contests.

Adjudication of no election.—In a local option election contest instituted by certain electors, an order by the contest board adjudging that "the return made by the board of canvassers in the matter of said election be, and it is, set aside, canceled, and held for naught," and further adjudging that "there was no election, and that no party is entitled to have any fact certified concerning said election," is a final order or judgment from which an appeal will lie under the Kentucky statute to the circuit court. *Erwin v. Benton (Ky.), 9-264.*

f. In contempt proceedings.

See also CONTEMPT, 6.

Decree dismissing petition.—A decree of the superior court denying and dismissing a petition to have trustees adjudged in contempt for failure to pay to complainant a sum directed to be paid to him by a prior decree, is a final decree from which an appeal lies to the supreme court. *Jastram v. McAuslan (R. I.), 17-320.*

g. In criminal cases.

Judgment on plea of guilty.—A judgment of conviction in a criminal case on plea of guilty by the accused, when properly entered, is equivalent to a judgment by confession, and, therefore, is not reviewable on appeal or writ of error. Before proceeding to make such a plea the foundation of a judgment, however, the court should see that it is made by a person of competent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded. Where this is not done, the judgment is improperly entered and may be reviewed on appeal. *Lowe v. State (Md.), 18-744.*

Where a person accused of crime has been summoned and called by the state's attorney as a witness for the state against an alleged accomplice, and has testified fully, truthfully, and at length on behalf of the state, and thereafter pleads guilty, and the court immediately enters judgment of conviction on such plea, without any investigation or consideration of the facts, it cannot be said that the judgment is properly entered and, therefore, nonappealable. *Lowe v. State (Md.), 18-744.*

h. Judgments for costs.

Case finally disposed of.—An appeal will lie in a case finally disposed of by a peremptory instruction for the appellee and the denial of the appellant's motion for a

new trial, although the only judgment entered is for the appellee's costs. *Willis v. Maysville, etc., R. Co. (Ky.), 13-74.*

Decree for extraordinary costs.—Appeal lies from a decree in equity merely awarding as costs to the successful party the sums retained by the receiver from the trust fund for his compensation and for attorney's fees, as such costs are extraordinary and not discretionary. *Nutter v. Brown (W. Va.), 6-94.*

i. Voluntary judgment of nonsuit.

Writ of error.—No writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit or dismissal rendered in a federal court at his request or with his consent. Such a judgment, however, rendered on the motion of the defendant and against the objection and protest of the plaintiff, is reviewable at the latter's instance. *Francisco v. Chicago, etc., R. Co. (U. S.), 9-628.*

Where at the close of a trial the defendant moves the court to instruct the jury to return a verdict in his favor, and the motion is granted, but before the instruction is given the plaintiff asks and is granted by the court leave to take an "involuntary" nonsuit, and judgment is rendered accordingly, the nonsuit is entered with the consent and at the request of the plaintiff, and he cannot maintain a writ of error to review it, as describing the nonsuit by a false epithet does not change its character. *Francisco v. Chicago, etc., R. Co. (U. S.), 9-628.*

5. PARTIES TO APPELLATE PROCEEDINGS.

a. Who may appeal.

Right of government to appeal, see CRIMINAL LAW, 5 a.

From judgment against garnishee.—Appeal may be taken by the principal defendant in an action from judgment against the garnishee. *Badger Lumber Co. v. Stern (Wis.), 3-802.*

From order against municipal council.—One of the members of the municipal council has a status to maintain an appeal from an order in the nature of a mandamus requiring the council to submit a local option law to the electors of the municipality. *In re Williams (Can.), 14-481.*

Party entering judgment.—The fact that the final judgment upon a verdict is entered on motion of the unsuccessful party does not preclude the latter from obtaining a review of errors in the court of last resort. *Carlson v. Benton (Neb.), 1-159.*

Party not prejudiced by decree.—When a bill for an injunction is dismissed upon the complainant's own motion at his own costs, the decree is wholly in favor of the defendant and he is not entitled to appeal. *Williams v. Breitung (Ill.), 3-506.*

When a bill for an injunction is dismissed upon the complainant's own motion at his own costs, the right of the complainant to file another bill for the same matter is not such prejudice to the right of the defendant

as to give him the right to appeal from the decree, and the appellate court will dismiss the appeal without passing upon the merits of the case. *Williams v. Breitung* (Ill.), 3-506.

Respondent who has obeyed mandamus.—A respondent in mandamus proceedings against whom a writ has been issued and who has performed its commands, after the allowance of a super-edeas and before his motion for a new trial has been disposed of, cannot review by appeal or proceeding in error the question whether the writ should have been granted, especially where the judgment complained of provides for his reimbursement for costs and where his official term has meanwhile expired. *Betts v. State ex rel. Jorgensen* (Neb.), 2-625.

Separate petitions in error.—On proceedings in error to review a judgment for the plaintiff in an action, where it appears that each of the defendants made a separate motion for a new trial, and it further appears from a fair interpretation of the record that all of the separate motions were ruled upon by the trial court, the reviewing court will not decline to consider separate petitions in error merely because the order overruling the motion used the singular noun "motion" instead of the plural noun "motions." *Goken v. Dallugge* (Neb.), 9-1222.

Separate appeals.—Where actions are tried together merely for convenience and the plaintiffs are not united in interest, but allege separate grievances, and the verdict is substantially separate as to each, there should be separate appeals. *Williams v. Carolina, etc., R. Co.* (N. Car.), 12-1000.

b. Joint parties.

Persons not parties below.—A writ of error must be sued out in the names of the parties to the proceedings below and in no other names. *Wuerzbarger v. Wuerzbarger* (Ill.), 5-628.

A writ of error will be dismissed if it joins as defendants in error persons whom the record does not show to have been made parties below, or to have an interest in the subject-matter of the proceedings; and an appellate court will not hear evidence to show that such persons have an interest in the proceedings. *Wuerzbarger v. Wuerzbarger* (Ill.), 5-628.

One who was not a party in the court below to a proceeding and judgment from which an appeal is prosecuted need not be joined as a party upon the appeal. *Carr v. Duhme* (Ind.), 10-967.

Husband and wife.—Where a bill filed against a husband and wife to foreclose a mortgage on their homestead is defended by the husband and wife on the ground that the certificate of acknowledgment is void, a decree of foreclosure is prejudicial to both, and on appeal therefrom the husband and wife may jointly assign the decree as error. *Sandlin v. Dowdell* (Ala.), 5-459.

Judgment against several jointly.—Where judgment in an action at law is rendered against several defendants jointly,

one of them cannot appeal alone except upon permission granted by the appellate court pursuant to his application for a writ of summons and severance. *Oldenburg v. Dorsey* (Md.), 5-841.

The Washington statute providing that upon an appeal the supreme court may affirm, reverse, or modify any judgment or order appealed from, as to any or all of the parties, and the statute providing that any party not appealing or joining in the appeal of his codefendant shall not derive any benefit from the appeal, except from the necessities of the case, have the effect of making every judgment which is capable of being reversed a several judgment for the purposes of an appeal; and therefore where one of several defendants in an action for tort, wherein the liability of the several defendants is independent and not interdependent, appeals from a joint judgment against all the defendants, the reversal of the judgment as to the appealing defendant does not necessarily operate as a reversal of the judgment as to the defendants not appealing. *Shreeder v. Davis* (Wash.), 10-77.

Joinder without consent.—Under the Illinois statute it is permissible for a plaintiff in error to join his coplaintiffs or codefendants in the writ of error without their consent; and if the parties whose names are thus used choose to abide by an erroneous judgment or decree and refuse to appear and assign errors, they must be summoned and severed, and then, after the severance, the writ may be prosecuted in the name of the said coplaintiff or codefendant alone. *Wuerzbarger v. Wuerzbarger* (Ill.), 5-628.

Effect of improper joinder.—The rule that a motion for a new trial is indivisible cannot be invoked to defeat the review of a meritorious petition in error filed by a minor defendant, whose guardian *ad litem* has inadvertently joined her with the mere nominal defendant who had no rights involved in the controversy. *Godfrey v. Smith* (Neb.), 10-1128.

Amendment to cure nonjoinder.—Where an administrator d. b. n. c. t. a. files in an equity court a petition for the construction of a will and for directions as to payment, stating that there are no debts and that the estate is ready for distribution, but that there are conflicting claims between persons claiming distributive shares under the will, the contest being between such persons, and after the verdict and decree some of the losing parties except and make defendants in error all in whose favor such verdict and decree are rendered, serving them with process, but not serving the other losing parties, such parties may, upon motion, be made plaintiffs in error, and upon such amendment a motion by the defendants in error to dismiss the writ of error because of the absence of such parties should be overruled. *Crossley v. Leslie* (Ga.), 14-703.

c. Substituted parties.

Personal representative of decedent.—Where, in an action by a member of a

partnership of attorneys to recover for professional services, a judgment is rendered against the plaintiffs on a counterclaim for breach of their duty as attorneys, and one partner dies thereafter, the personal representative of the deceased partner is a necessary party appellant to an appeal from the judgment on the counterclaim. *Newman v. Gates* (Ind.), 6-649.

6. NOTICE OF APPEAL.

Sufficiency.—Notice of appeal held sufficient. *Estate of Sanders* (Wis.), 5-508.

—error as to date of judgment.—A notice of appeal is not vitiated by the fact that it incorrectly states the date of the entry of the judgment, where no claim is made by the respondent that he has been misled or in any way prejudiced by the error. *Price v. Western Loan, etc., Co.* (Utah), 19-589.

—description of judgment.—A notice of appeal shows that the appeal is from the judgment in the case and not merely from the order denying a motion for a new trial, where it recites that the appeal is "from the judgment and the whole thereof, made, rendered and entered . . . on the 8th day of December, A. D. 1906, at which said time the court denied and overruled the defendant's motion for new trial;" the date given being that of the denial of the motion for a new trial, and not the date of the entry of the judgment which was Sept. 26, 1906. *Price v. Western Loan, etc., Co.* (Utah), 19-589.

Time for filing.—The provisions of the Montana statute that an appeal from a judgment of the justice of the peace to the district court shall be taken "by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party or his attorney," is mandatory, and therefore an appeal is not perfected unless the filing of the notice precedes or is contemporaneous with the service of the notice. *State ex rel. Hall v. District Court* (Mont.), 9-728.

Parties entitled to notice.—Under the Idaho statute requiring notice of an appeal to be served upon the "adverse party," the "adverse party" meant by the provision is any party who has an interest that would be prejudicially affected by a reversal of the judgment. *Nelson Bennett Co. v. Twin Falls Land, etc., Co.* (Idaho), 13-172.

In an action to recover damages for tort brought against several defendants, where at the close of the evidence for plaintiff a motion for a nonsuit is sustained as to one of the defendants, and the cause thereafter proceeds against the other defendants and a verdict is rendered against such defendants; and the judgment of the court is written upon two separate pieces of paper in favor of the defendant upon the motion for a nonsuit and in favor of the plaintiff against the defendants, against whom the verdict is rendered; and such papers are filed in court at different dates and entered in the judgment dockets at different dates; and the defendants, against

whom the judgment is rendered, appeal from the judgment or that part of the judgment rendered against them, and do not appeal from the judgment rendered on the motion for nonsuit, the defendant in whose favor the judgment of nonsuit is entered is not an adverse party as to that portion of the judgment from which the appeal is taken, and could in no way be prejudicially affected by a reversal of such part of the judgment, and need not be served with the notice of appeal. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Persons made parties defendant in an action to foreclose a mechanic's lien who take no part in the case, file no pleading and make no claim that they are entitled to any lien or that any amount is due them, and as to whom no finding is made for judgment rendered that either grants or denies them anything, are not adverse parties who are entitled to notice of an appeal from the judgment, although they make a general appearance in the case. *Nelson Bennett Co. v. Twin Falls Land, etc., Co.* (Idaho), 13-172.

7. TIME TO APPEAL.

a. In general.

Effect of death of party.—When the six months' limitation for an appeal has commenced to run, the subsequent death of the judgment plaintiff and the nonappointment of any personal representative until after the six months have expired will not permit the judgment defendant to appeal after such appointment is made. *Ropes v. Goldman* (Fla.), 7-393.

Extension by court.—Under the Ontario Mining Act, when the time for lodging a certificate of the setting down of an appeal has expired, and no certificate has been lodged, the appeal will be quashed on motion, the court having no power to extend the time. *In re Rogers* (Can.), 16-476.

Making or completing record.—The Connecticut statute providing that "all proceedings to make or complete the record on . . . appeal shall be suspended during the months of July and August" does not prevent either the court or counsel from filing the necessary papers to make or complete a record on appeal, during the months of July and August, to become operative upon the expiration of that period. *Young v. Lemieux* (Conn.), 8-452.

Method of objecting that time has expired.—The defense to a writ of error that the writ was not sued out until after the time limited by the statute for that purpose had expired, can be interposed only by plea. *Peterson v. Manhattan Life Ins. Co.* (Ill.), 18-96.

b. When time begins to run.

Rendition of judgment.—Under the Nevada statute providing that an appeal may be taken from a final judgment "within one year after the rendition of judgment,"

the time is computed from the date the judgment is pronounced by the court, and not from the subsequent date of its entry by the clerk. *Candler v. Washoe Lake Reservoir, etc., Co. (Nev.)*, 6-946.

Where a formal final judgment is rendered in writing and is not dated by a circuit judge, a writ of error thereto must be sued out within the statutory period from such date, and not from the date of the subsequent entry or record of the judgment by the clerk of the court. *Simmons v. Hanne (Fla.)*, 7-322.

Entry of judgment.—Where a formal judgment on a verdict is entered on the motion of the successful party, after a new trial has been refused, the ninety days within which an appeal may be taken under the Washington statute (Bal. Code, § 6502) runs from the date of the entry of such judgment and not from the date of the denial of the motion for a new trial, though the clerk enters judgment on the day that the verdict is rendered. *Jemo v. Tourist Hotel Co. (Wash.)*, 19-1199.

Passing of sentence and judgment.—A writ of error prosecuted within one year after the passing of sentence and judgment but more than a year after the plea of guilty had been entered by the defendant, is within the statutory period. *State v. Kelley (Mo.)*, 12-681.

Notice of judgment.—When no notice is given or shown to have come to a person entitled to appeal, an appeal may be taken at any time within six months from the entry of the order or decree. *Knutsen v. Krook (Minn.)*, 20-852.

The thirty days within which an appeal may be taken from an order, judgment, or decree of a probate court under the Minnesota statute (R. L. 1905, § 3874) commences to run from the time of notice of the order or judgment appealed from. *Knutsen v. Krook (Minn.)*, 20-852.

Intervening motion for new trial.—Under the Wyoming statute limiting the time to commence proceedings to reverse a judgment to one year after the rendition of the judgment, proceedings in error may be instituted within one year from the time a motion for a new trial is overruled, where such motion is necessary to the consideration of the questions involved in the appellate court. *Conrad v. Lepper (Wyo.)*, 3-627.

Where a demurrer to evidence is sustained, a motion for a new trial is neither necessary nor proper, and the fact that such a motion is filed will not enlarge the time within which a case may be made upon which to review the ruling on the demurrer. *White v. Atchison, etc., R. Co. (Kan.)*, 11-550.

c. Time for service of notice of argument.

How computed.—In the computation of the ten days' notice of argument required by rule 8 of the Minnesota supreme court, the day of service should be excluded, and the first day of the term included. *Excelsior v. Minneapolis, etc., R. Co. (Minn.)*, 17-550.

8. THE RECORD ON APPEAL.

a. What constitutes record.

Matters in bill of exceptions.—The final judgment rendered, the date of rendition, motions for a new trial and in arrest of judgment, and the rulings thereon, and the exceptions thereto, are a part of the record without a bill of exceptions, and cannot be brought into the record by a bill of exceptions. Such matters can be shown only by being copied into the transcript and duly certified by the clerk as a part of the record. *Malott v. Central Trust Co. (Ind.)*, 11-879.

Whatever is a part of the record proper without a bill of exceptions cannot be made a part of the record by a bill of exceptions, and if there is any conflict between the two as to such matters the record proper will control. *Malott v. Central Trust Co. (Ind.)*, 11-879.

Letter written by judge.—On appeal from an order granting a new trial, a letter written by the trial judge to the appellant's counsel some months after the granting of the new trial is not a part of the record. *Weisser v. Southern Pacific R. Co. (Cal.)*, 7-636.

The effect of a general order granting the defendant a new trial, which is entered on the minutes of the trial court, cannot be limited by a letter written by the trial judge to the plaintiff's counsel and filed at the time of the granting of the new trial. *Weisser v. Southern Pacific R. Co. (Cal.)*, 7-636.

Copy of evidence.—Upon a crown case reserved to the Ontario court of appeals under section 1014 of the Canada criminal code, the court has no right to consider a copy of the evidence, and such copy is improperly placed before the court. *Rex v. Beboning (Ont.)*, 13-491.

Certified statement of facts.—An appellate court will not consider an affidavit made by an appellant's counsel on a motion for a new trial if it is not embodied in any statement of facts certified by the trial court. *Taylor v. Modern Woodmen (Wash.)*, 7-607.

Completion by entry of judgment.—With the entry of judgment *non obstante veredicto*, the record is complete, and by that record the case must be judged on appeal, especially where no exception is taken to the action of the trial court in refusing to allow the finding of an additional exception after the judgment is entered. *Lewis v. Pennsylvania R. Co. (Pa.)*, 13-1142.

b. Transcript of record.

Duty to prepare properly.—It is the duty of a party resorting to an appellate court to see that his transcript of record is properly prepared, in compliance with the rules of court, and to make the errors complained of clearly to appear. *Clinton v. State (Fla.)*, 12-150.

Prior to the adoption of special rule 6 of the supreme court of Florida on March 2, 1905, rule 103, adopted at the April term 1873, governed in the preparation of transcripts and bills of exceptions in criminal

cases. Special rule 6 gives the plaintiff in error in criminal and *habeas corpus* cases the option to have the transcript of the record and bill of exceptions made up, settled, and certified, either in accordance with special rules 1, 2, and 3, adopted on March 2, 1905, or in compliance with such rule 103. The respective modes of procedure must not be blended, but one or other of such modes must be selected and followed. *Clinton v. State* (Fla.), 12-150.

Striking out improper matter.—A motion by the defendant in error to strike from the transcript of record in the appellate court the original papers and a transcript of the journal entries in another case between the same parties will be granted. *Union Stockyards Nat. Bank v. Maika* (Wyo), 14-977.

Sufficiency of certificate.—A clerk's certificate appended to a transcript on appeal, stating that "the foregoing pages contain a true, correct, and complete transcript of all the proceedings had, documents filed, and evidence adduced upon the trial of the above entitled and numbered cause, instituted in this court and now in the record thereof," is sufficient. The words "and now in the record thereof" will be construed as modifying the word "cause," and not "all the proceedings had, documents filed, and evidence adduced." *Houlton v. McGuirk* (La.), 16-1117.

Impeachment of certificate.—A certificate that a transcript of the record is correct is not impeached by a statement in the record from which an omission may be inferred or unless the record shows affirmatively that it is incomplete and incorrect. *Pinney v. First Nat. Bank* (Kan.), 1-331.

Time to file transcript.—The computation of time for filing a transcript in the supreme court of Nebraska on appeal from the district court, under section 675 of the code, requiring the transcript to be filed "within six months from the rendition" of the judgment is controlled by section 895 of the code which provides as follows: "The time within which an act is to be done, or herein provided, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." *Johnston v. New Omaha, etc., Elec. L. Co.* (Neb.), 20-1314.

Enlarging time to file.—By virtue of the liberal construction that will be given to the Oregon statute regulating the procedure for perfecting appeals, the trial court or judge may make an order enlarging the time in which to file the transcript after the notice of appeal has been given and before the appeal bond has been filed. *Wolf v. City, etc., R. Co.* (Oregon), 15-1181.

c. Abstract of record.

Sufficiency in general.—The rule of the Illinois supreme court requiring the party bringing a cause into court to furnish a complete abstract of the record, referring to the pages of the same by numerals on the margin, is not sufficiently complied with where the

abstract does not state the substance of the declaration nor make any other reference to it than to state that there is a declaration on a specified page of the record. *Christy v. Elliott* (Ill.), 3-487.

An appeal will not be dismissed on the ground that the printed abstract used in lieu of a transcript is insufficient to present the errors relied on for a reversal, where the appellant is permitted by statute to file such an abstract of the record as the rules of the appellate court require and the abridgment used is a sufficient compliance with the requirements of that court. *Keen v. Keen* (Ore.), 14-45.

Setting out instruction complained of as erroneous.—Where an appellant contends that an instruction given by the trial court was erroneous, such instruction should be set out in his abstract. *St. Louis, etc., R. Co. v. Raines* (Ark.), 17-1.

Contradiction by appellant.—An appellant cannot contend that certain of his requested instructions were refused or marked refused, where the respondent's additional abstract of record wherein is printed the whole bill of exceptions, including the signature of the judge, negatives this contention, and the appellant has failed to challenge the abstract as required by a rule of the supreme court. *Hunter v. Wethington* (Mo.), 12-529.

d. Amendment of record.

Requiring amendment below.—An appellate court is justified in refusing to exercise the discretionary power conferred upon it by statute to compel a justice from whose decision an appeal has been taken to amend his record, where the record is verified by the oath of the justice, and the motion to amend is supported only by the bare statement of the appellant's counsel that the record is defective. *Fortune v. Wilburton* (Ind. Ter.), 5-287.

A district court is without power to amend the docket of a justice's court. If the transcript does not speak according to the facts, and it becomes necessary to have it amended, the court should direct the justice to make the correction. *State v. O'Brien* (Mont.), 10-1006.

Amendment of certification of ground of judgment after writ of error and passing of term.—Where a judge of a United States circuit court sustains a demurrer to the plaintiff's plea to the jurisdiction and renders judgment for the defendant, certifying that the judgment is based solely on the ground that the controversy is between citizens of different states, and a few days later, after a writ of error has been filed and a new term has begun, the judge undertakes to amend the certificate on the ground that it was signed inadvertently under a mistake as to its nature and contents, and to certify instead that the question of jurisdiction was not passed upon and that the ground of the decision was that the plaintiff had no standing to maintain the action or file the plea, the alleged mistake is not

clerical, and it is extremely questionable whether the original certificate, which is an act of record, is on any different footing from judgments and the like when the term has passed, and whether the so-called amendment can be considered by the supreme court on the writ of error. *Patch v. Wabash R. Co.* (U. S.), 12-518.

Effect of correction.—It cannot be contended on appeal that the appellant did not except to the action of the trial court in overruling his motion for a new trial, where this objection has been removed by the correction of the record by a *nunc pro tunc* entry. *Mitchell v. Young* (Ark.), 10-423.

Striking out amendment.—A motion by an appellant to strike out an amendment to the abstract, filed by the appellee, on the ground that the same was not filed within the time prescribed by rule, and that it contains immaterial matter, will be overruled where the delay in filing was slight, and a sufficient excuse is presented therefor, and the amendment contains some matters material to the disposition of the case which are not discussed. *Collins v. Collins* (Iowa), 16-630.

c. Sufficiency of recitals.

Sufficiency to support assignments of error.—The question whether a judgment of a justice of the peace was properly reviewable in the circuit court by a special appeal, or only by *certiorari*, cannot be determined by the supreme court, where the proceedings in the justice's court appear from the record to have been regular, and the affidavit upon which the special appeal to the circuit court was based is not included in the record. *Dunkley v. Marquette* (Mich.), 17-523.

Grand jury duly sworn.—A recital, in the record on appeal in a criminal case, that the grand jurors were "duly" sworn is sufficient to support the indictment, and it is not necessary that the record should show the particular form of oath that was administered. *O'Donnell v. People* (Ill.), 8-123.

Order extending time for bill of exceptions.—An abstract on appeal need not contain in exact words an order extending the time for filing a bill of exceptions, but is sufficient if it contains the substance only. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

9. BILL OF EXCEPTIONS.

a. In general.

Necessity.—On appeal or writ of error to the supreme court, papers or documents used at the hearing in the court below cannot in strictness be examined unless they are made a part of the record by bill of exceptions or in other proper manner. *Bassing v. Cady* (U. S.), 13-905.

A petition in error will not be dismissed on motion of the defendant in error because of a failure to settle and file a bill of exceptions, where the only question to be determined is one of law, and it is properly pre-

sented by a transcript of the record of the proceedings of the lower court. *Johnson v. Emerick* (Neb.), 12-851.

Record examined on appeal and held to show no error, in the absence of a bill of exceptions and an assignment of error. *State v. Coleman* (La.), 8-880.

Matters not controverted.—Where counsel during the trial of an action states that a certain witness has testified at a former trial of the cause without objection, and the statement is accepted as true by the court and is not controverted by the opposing counsel, the fact that the witness testified at the former trial without objection sufficiently appears upon the record for purposes of appeal; and it is not necessary that counsel, in order to preserve the point, should exhibit to the court and have incorporated in the record a bill of exceptions showing that the witness testified upon the former trial without objection. *Elliott v. Kansas City* (Mo.), 8-653.

Time of giving leave to file.—Leave to file a bill of exceptions, given several days after a motion for a new trial has been overruled, is without authority and void, since the court can only grant such leave at the time and in the manner provided by the statute, which is at the time when the motion is overruled; and a bill of exceptions filed pursuant to such leave, in vacation, and after the expiration of the term of court at which the case was decided, cannot be considered as in the record. *Rose v. State* (Ind.), 17-228.

Time of signing.—Bills of exceptions are required to be signed at the term at which the trial is had, or within thirty days after the adjournment thereof, and after the expiration of such time there is no jurisdiction to sign such bills, nor can jurisdiction to do so be conferred by consent of parties. *Grove v. Charles Town* (W. Va.), 13-1011.

Certification by bystanders.—A bill of exceptions certified by bystanders in accordance with the provisions of the Arkansas statute must, in the absence of controverting affidavits, be taken to represent the true state of the record. *Boone v. Holder* (Ark.), 15-735.

Identification.—A bill of exceptions is part of the record if by its own matter and character it identifies itself as the bill mentioned in the order certifying its execution, though it bears no letter, number, or other mark of identification. *Bank of Ravenswood v. Wetzel* (W. Va.), 6-48.

Inclusion of pleadings.—The fact that the pleadings are copied in the bill of exceptions, which is accompanied by a statement that it includes all of the record, does not require a dismissal of the writ of error. *Crossley v. Leslie* (Ga.), 14-703.

Recording order showing execution.—Where a judge in vacation makes an order under the West Virginia statute showing that he has executed a bill of exceptions, and so certifies it to the clerk, the latter must record the order in the law order book and attest it, but it is not necessary that the bill, or any part of it, be literally recorded in said

book. *Bank of Ravenswood v. Wetzel* (W. Va.), 6-48.

Reference to annexed papers.—Where the stenographic report of the evidence is indorsed as a correct copy by the counsel for both parties to an action, is signed by the trial judge, and is securely attached by paper fasteners to the bill of exceptions, the bill and report are so articulated as to form one paper, and therefore a reference in the bill to the evidence will be construed as applying to the evidence contained in the report. *Kecoughton Lodge v. Steiner* (Va.), 10-256.

Impeachment of indorsements.—On a motion for rehearing of an appeal, the court cannot consider affidavits impeaching the correctness of statements indorsed upon the bill of exceptions by the trial judge, relative to occurrences on the trial. *Cravens v. State* (Tex.), 16-907.

b. Time to file.

How determined.—To determine the date when the final judgment was rendered and time given within which to file bills of exceptions, it is necessary to look to the record proper, which is controlling, rather than to the bill of exceptions. *Malott v. Central Trust Co. (Ind.)*, 11-879.

Recitals in bill.—The recital in a bill of exceptions of the day when it was presented to or signed by the judge must be taken as correct, but the general statement therein that the same was presented to the judge within the time allowed will be disregarded. *Malott v. Central Trust Co. (Ind.)*, 11-879.

Inclusion of public holiday.—The fact that the first day of a term of court, until which an appellant has been allowed to file his bill of exceptions, falls on a public holiday, affords no legal excuse for the appellant's failure to file the bill on or prior to that day. *Cartwright v. Liberty Tel. Co. (Mo.)*, 12-249.

Bill presented but not signed in time.—Under the Indiana Code of Civil Procedure, if a bill of exceptions is presented to the judge for his signature within the time allowed, and the date of presentation is shown in the bill of exceptions, such bill of exceptions is in the record, although it is signed and filed after the expiration of the time allowed. *Malott v. Central Trust Co. (Ind.)*, 11-879.

Leave to file after term.—Exceptions to the ruling of a court must be taken at the time the rulings are made, but time may be given by the court to a party taking the exceptions to prepare and file a bill of exceptions showing such rulings and exceptions, but not beyond the term, unless by special leave of the court. *Rose v. State (Ind.)*, 17-228.

Necessity of order-book entry.—If time is given beyond the term for the preparation and filing of a bill of exceptions, the fact must be shown by an order-book entry, and cannot be shown by a statement in the bill itself. *Rose v. State (Ind.)*, 17-228.

That leave was given during the term to file a bill of exceptions after the close of the

term must be shown by an order-book entry. The fact that the bill of exceptions was filed in the clerk's office, and the date of filing, cannot be shown by recitals in the bill. *Malott v. Central Trust Co. (Ind.)*, 11-879.

Sufficiency of order-book entry.—Where the order-book entry of the same day's proceedings in a cause shows the overruling of a motion for a new trial, and a proper exception to such ruling, and also shows that time was given beyond the term within which to file a bill of exceptions, and the bill of exceptions is filed within the time limited, it is in the record, even though such order-book entry shows that other steps in the cause intervened between the ruling on the motion for a new trial and the exception thereto, and the giving of time to file the bill of exceptions. Such an entry shows not only that the appellant excepted at the time of the overruling of the motion for a new trial, but that time was then given beyond the term, within which to file a bill of exceptions. *Rose v. State (Ind.)*, 17-228.

Motion for new trial.—The rulings of a court which constitute causes for a new trial and the exceptions thereto, if such rulings are assigned as causes for a new trial, are carried forward by the motion for a new trial to the time of the ruling thereon, when time may be given by the court within which to prepare and file a bill of exceptions containing such rulings and exceptions. *Rose v. State (Ind.)*, 17-228.

Extension of time for filing.—An order made in vacation, extending the time for filing a bill of exceptions, is "entered of record" as required by the Missouri statute (Ann. St. 1906, p. 720), where the substance of it is recited in the record with the statement that the order "is now filed and made a part of the records in said cause." Though the order should be spread at length on the record, this is not absolutely necessary. *Orchard v. Wright, etc., Store Co. (Mo.)*, 20-1072.

Where an appeal from the land court to the superior court is dismissed and exceptions are taken to the dismissal, and the superior court orders the exceptions to be entered in the supreme judicial court on or before a certain day, in default of which the exceptions shall be overruled and the orders excepted to affirmed unless the court for good reason shall extend the time, and, the exceptions having been entered after the time specified, the supreme judicial court dismisses them, on such dismissal the case is pending in the superior court, and it has power to revoke the order limiting the time for filing the exceptions and to enlarge the time therefor. *Old Colony St. R. Co. v. Thomas* (Mass.), 18-247.

c. Inclusion of all the evidence.

Necessity of statement or certificate.—Where a bill of exceptions is made up and authenticated under special rule 3 of the Florida supreme court and the bill of exceptions does not contain an authenticated statement that all the evidence is included therein,

such bill of exceptions will under the rule be treated as not embracing all the evidence. *Pope v. State* (Fla.), 16-972.

An assignment of error, based on the ground that no evidence was given in the trial court from which the jury could assess the damages awarded by them, will not be considered, where the bill of exceptions does not purport to set forth all the evidence given upon the trial and does not show that the evidence in question was wanting. *Mercantile Trust Co. v. Hensley* (U. S.), 10-572.

The master's finding of facts upon evidence taken before him cannot be impeached in the absence from the record of his certificate, or other competent proof, either that the evidence presented is the entire evidence that was before him, or that it was all the evidence which was before him relative to the specific finding or findings challenged. *Wheeler v. Abilene Nat. Bank Bldg. Co.* (U. S.), 14-917.

It is not necessary for a bill of exceptions to show affirmatively that it contains all the evidence, where it shows inferentially, and by natural implication from the language used, that it does contain all the evidence. *Mitchell v. Young* (Ark.), 10-423.

Sufficiency of statement or certificate.—A bill of exceptions held substantially to comply with the requirement that it must show that it contains all the evidence. *Rockwell v. Capital Traction Co.* (D. C.), 4-648.

The certificate of the presiding judge attached to a bill of exceptions, to the effect that the bill contains all the evidence offered by either party on the trial of the cause, is a sufficient certification that the bill contains all the evidence received or offered. *Sheibley v. Huse* (Neb.), 13-376.

Elimination of immaterial evidence.—Under the Montana statute providing for the settlement of statements and bills of exceptions, it is the duty of the court in settling the same to cut out all immaterial evidence, so that if the bill of exceptions or statement appears to contain all material evidence or the substance thereof given on the trial and referring to the points presented for review, the appellate court may consider the insufficiency of the evidence. *Handley v. Sprinkle* (Mont.), 3-531.

Certification of unsigned bill.—An order in vacation showing the execution of a bill of exceptions, not signed by the judge, is certified as a part of the record. A paper is presented, certified by the clerk, showing the same order, having indorsed upon it, "Enter: I. C. Herndon," who is judge. The bill is good as part of the record. *Fink v. Thomas* (W. Va.), 19-571.

d. Amendment.

Designation of exceptant.—Although a bill of exceptions stating that "the representatives of J. F. Hall & Co." excepted is not in itself a sufficient designation of the exceptants, yet where other portions of the bill of exceptions show to whom such designation is applied, a motion to amend by naming the plaintiffs in error more specifically, as they

appear in the pleadings set forth in the bill of exceptions, will be allowed. *Crossley v. Leslie* (Ga.), 14-703.

10. ASSIGNMENTS OF ERROR.

a. In general.

Necessity.—The supreme court of errors will not search the record for errors which have neither been pointed out in the assignments of errors nor designated by counsel in their briefs or oral argument. *State v. Burns* (Conn.), 16-465.

Although a federal circuit court of appeals may, in its discretion, take notice of and act upon a plain error in the absence of an assignment, it is not obliged to do so. *Kelley v. McNamee* (U. S.), 16-299.

The rule of the United States supreme court (Rule 35), that the court "may at its option notice a plain error not assigned," is not controlled by precedent, but gives the court discretion in each case to determine whether the point is of sufficient importance to require the application of the rule. *Weems v. United States* (U. S.), 19-705.

The supreme court of the United States will exercise the option reserved by Rule 35 of noticing error not assigned as required by the rules of practice, where the brief of the plaintiff in error specifies alleged errors, and the defendant in error makes no objection to the omission, but argues the case on the specifications of errors in the brief of the plaintiff in error. *Columbia Heights Realty Co. v. Rudolph* (U. S.), 19-854.

The rules as to assignments of errors on appeals or writs of error from the United States circuit courts to the supreme court apply to cases brought up from the District of Columbia court of appeals. *Columbia Heights Realty Co. v. Rudolph* (U. S.), 19-854.

Appeals from intermediate appellate courts.—On an appeal from a decision of an intermediate appellate court affirming a judgment of the trial court, the assignments must allege error on the part of such appellate court, and not merely that the trial court erred. *Gibson v. Bessemer, etc., R. Co.* (Pa.), 18-535.

Inclusion in brief.—Under the rules of the Missouri supreme court the failure of an appellant to include in his brief a separate assignment of errors does not require a dismissal of the appeal. *Perry v. Strawbridge* (Mo.), 14-92.

Assignment of errors not referred to in the brief of counsel for the plaintiff in error will be considered as abandoned. *Ætna Ins. Co. v. Lipsitz* (Ga.), 14-1070.

On a writ of error the reviewing court will not consider assignments of error made in a reply brief filed by counsel for the plaintiff in error, but not contained in the petition for the writ. *American Locomotive Co. v. Hoffman* (Va.), 8-773.

Joint assignments by several parties.—On appeal by several complainants from a decree dismissing a bill in equity where all are interested in procuring the reversal, it

is no objection that they assign errors jointly. *Hall v. Alabama Terminal, etc., Co. (Ala.)*, 5-363.

Assignments not filed in time.—Assigned errors going to the merits of the case and based upon a bill of exceptions not properly a part of the record, because filed after the time allowed by order of the trial judge when the final judgment was rendered, cannot be considered on appeal. *Nashville R., etc., Co. v. Trawick (Tenn.)*, 12-532.

Exceptions to assignments.—Where no exception is filed or taken by the appellee to an assignment of errors filed by the appellant, no formal joinder in error is necessary. *Jones-Downes Co. v. Chandler (N. Mex.)*, 13-710.

b. Sufficiency.

Pointing out particular errors.—Assignments of error which fail to point out the particular rulings excepted to are insufficient. *State v. Burns (Conn.)*, 16-465.

An assignment of error that the court erred in charging the jury as certified to in the printed record does not sufficiently point out the particular errors complained of and raises no question for the appellate court. *Chase v. Waterbury Sav. Bank (Conn.)*, 1-96.

An assignment of error that the whole charge as given is erroneous is too general and raises no question which the appellate court is bound to consider. *Dalton v. Knights of Columbus (Conn.)*, 11-568.

Upon assignments of error which are insufficient for failure to point out the particular rulings excepted to, the supreme court of errors may, in its discretion, review rulings which were duly excepted to below and which are pointed out by counsel in their briefs or oral arguments, but it is not obliged to do so. *State v. Burns (Conn.)*, 16-465.

On appeal to the Pennsylvania supreme court from a decision of the superior court affirming a judgment of the court of common pleas, an assignment that the superior court erred in overruling several assignments of error filed in that court violates the rule of practice (Rule 29) which requires each error relied on to be specified particularly and by itself. *Gibson v. Bessemer, etc., R. Co. (Pa.)*, 18-535.

When a defendant seeks a new trial upon the ground that the trial court erred in the admission of evidence against him, his counsel should, in their presentation of this ground for a new trial to the appellate court, point out the alleged improper evidence objected to, and also give the names of the witnesses, and so directly call the attention of the court to the ground of the objection that the error, if any, can be passed on intelligently; otherwise the court would not know what particular objection counsel was relying upon. *Johnson v. State (Okla.)*, 18-300.

In support of a motion for a new trial, upon the ground that the court erred in refusing to give the instructions requested by the defendant, or in misdirecting the jury as to the law of the case, counsel for the

motion should, in their presentation of this ground, point out the specific errors complained of. *Johnson v. State (Okla.)*, 18-300.

A ground of a motion for a new trial, assigning error on the admission of certain quoted testimony over the objection of the movant, without stating what the objection was on which the trial judge ruled, is so incomplete that this court cannot pass on it, although it may appear that a valid objection might have been made to such testimony. *McCray v. State (Ga.)*, 20-101.

Stating name of appellate court.—A failure to state in an assignment of errors the name of the court to which the appeal is taken is irregular, but where the appellate court has jurisdiction nevertheless it will consider the case upon the merits. *Emmons v. Harding (Ind.)*, 1-864.

Quotation of record.—An assignment of error that the trial court did not affirm a point of the defendant asking for an instruction to find for the defendant is defective in not setting out either the point referred to or the answer *totidem verbis*. *Boyce v. Union Dime Permanent Loan Assoc. (Pa.)*, 11-934.

Reference to record.—A reviewing court will not consider assignments of error based on the misconduct of a trial judge in a criminal prosecution in making prejudicial remarks, insinuations, orders, and rulings, if the assignments fail to specify the place in the record where the incidents complained of may be found. *Miller v. Oklahoma (U. S.)*, 9-389.

Quotation of instructions.—An appellate court will not consider an assignment of error based on the giving of an instruction, if the assignment does not quote in so many words the portion of the instruction complained of. *Murtland v. English (Pa.)*, 6-339.

Setting out testimony referred to.—An assignment of error as to the admission of evidence will not be considered that does not set out the testimony referred to nor give the page of the paper or book where it is printed in its regular order. *Boyce v. Union Dime Permanent Loan Assoc. (Pa.)*, 11-934.

Inaccurate reference to pleading.—An assignment of error that the court erred in overruling the several demurrers to the "complaint" when the demurrers overruled were addressed to the "amended" complaint, sufficiently raises on appeal the question of the sufficiency of the several paragraphs of the complaint, where the record shows that the demurrers were presented to the only complaint ever on file and there is no possible chance for a mistake in the identity of the complaint demurred to. *Chicago, etc., R. Co. v. Barker (Ind.)*, 14-375.

Assignment not conforming to rules.—An assignment of errors not conforming to the rules of the appellate court either in form or substance is not cured by the brief and argument submitted in support of such errors, when not filed within the time required by the rules. *Fort v. Fort (Tenn.)*, 11-964.

Erroneous assumption of facts.— This was not a suit between two corporations chartered in the District of Columbia under the general incorporation act of May 5, 1870. The incorporated supreme lodge of the plaintiff's association was a party, but that of defendants' association was not so. An assignment of error based on a contrary hypothesis was without merit. *Creswill v. Grand Lodge (Ga.)*, 18-453.

Assignments held sufficient.— A bill of exceptions setting forth the pleadings, and stating that no issue was presented except one of law involved in the construction of a will, that the presiding judge after directing a certain verdict made such verdict the decree of the court, and that certain named parties "except to the judgment and decree above set out, and now assign said judgment and decree as erroneous" on several grounds specifically stated, contains a sufficient assignment of error to withstand a motion to dismiss the writ of error. *Crossley v. Leslie (Ga.)*, 14-703.

In an action for the construction of a will, an assignment of error based on a decree directing the payment of a legacy authorizes the appellate court to determine whether the trial court has properly disposed of the fund, and if the appellate court is of the opinion that the trial court has erred, it may, upon remanding the case, determine what disposition should be made of the fund. *Mason v. Bloomington Library Assoc. (Ill.)*, 15-603.

An assignment of error by the defendants in an action showing that the judge who heard the cause and rendered the judgments complained of was related in a specified manner to the plaintiffs, and was thereby disqualified to sit as judge and to hear and determine the matters involved in the case is sufficient in form to raise the question of the disqualifications of the judge and the consequent invalidity of the judgments. *Bliss v. Caille Brothers Co. (Mich.)*, 12-513.

Assignments held insufficient.— The rule of the supreme court of Tennessee relating to assignments of error is not complied with by assignments of error alleging that the chancellor erred in allowing one defendant to withdraw his answer, in allowing a demurrer to be filed by both defendants before process was served on another person, and in sustaining the defendants' demurrer to the original and amended bills. *Fort v. Fort (Tenn.)*, 11-964.

11. DISMISSAL OF APPEAL.

a. In general.

Dismissal of writ of error on expiration of term of office involved in *quo warranto* proceedings, see *QUO WARRANTO*, 6.

Partial dismissal.— Where an appeal is taken both from a judgment and from an order denying a new trial, the fact that the motion for a new trial did not contain a specification of errors is not ground for a dismissal of the appeal from the judgment even if sufficient to warrant a dismissal of

the appeal from the order refusing a new trial. *Bond v. Hurd (Mont.)*, 3-566.

Effect of dismissal.— The dismissal of an appeal in the nature of a writ of error affirms the judgment of the lower court, because the appeal merely suspends the judgment pending the appeal, whereas the dismissal of a simple appeal in chancery leaves the effect of such dismissal, and the terms upon which it may be had, to the sound discretion of the appellate court. *Fort v. Fort (Tenn.)*, 11-964.

Imposition of terms.— Where, from a money judgment in favor of either party, an appeal is prosecuted under the Tennessee statute requiring security for the judgment as well as costs, the supreme court, upon a dismissal, will award to the appellee as a condition precedent to such dismissal the benefit of the security given by the appellant; but where there is no money judgment, and the decree is simply in dismissal of the complainant's action or bill, the court may impose such terms as it deems proper. *Fort v. Fort (Tenn.)*, 11-964.

b. Grounds of dismissal.

Amount in controversy insufficient.— When an appeal is taken from a personal judgment for a sum less than the jurisdictional sum provided by statute regulating appeals, the appeal must be dismissed for want of jurisdiction though the judgment is clearly erroneous. *Chapman v. Haley (Ky.)*, 4-712.

Failure to join representative of decedent.— An appellate court will dismiss for want of jurisdiction an appeal from a judgment against several plaintiffs on a counterclaim, unless the personal representative of a plaintiff who has died since the rendition of the judgment is joined as an appellant, provided the cause of action is one that survives. *Newman v. Gates (Ind.)*, 6-649.

Appeal not taken in time.— Where an appeal from an order denying a motion for a new trial is taken more than sixty days after the making and entry of the order, the appeal is ineffectual and will be dismissed on motion of the adverse party. *Trull v. Modern Woodmen of America (Idaho)*, 10-53.

The burden is on the party moving to dismiss an appeal, which it is claimed should have been taken within thirty days, to show notice of some kind to the appealing party of the entry of the order or judgment by the probate court. *Knutsen v. Krook (Minn.)*, 20-852.

Judgment compromised.— A motion to dismiss an appeal from a deficiency judgment rendered in an action to foreclose a mortgage, which is based on the ground that no appeal lies because the judgment has been compromised and settled by a stipulation between the parties, will be dismissed where the opposing counsel differ as to the terms of the stipulation. *Goodale v. Wallace (S. Dak.)*, 9-545.

Appeal ineffectual.— Where, pending an

appeal from an order denying an alternative writ of mandamus in a proceeding commenced against the clerk of the circuit court to compel the issuance of an execution on a judgment alleged to have been rendered in the circuit court, it affirmatively appears from the petition filed in the proceeding that the time within which an execution could have been issued on the judgment has expired and that the judgment is dormant, the appeal will be dismissed. *Norwood v. Clem* (Ala.), 5-625.

Appellant a fugitive from justice. — If after appeal to the supreme court a defendant convicted of felony becomes a fugitive from justice, the appeal will be dismissed. *State v. Scott* (Kan.), 3-511.

An appeal by the defendant in a criminal case will be dismissed where the defendant, pending the appeal, breaks jail and flees the jurisdiction of the court. *State v. Keebler* (N. Car.), 13-496.

Failure of lower court to make findings. — An appeal from the land court to the superior court will not be dismissed on the ground that the judge of the land court made no specific findings on the issues framed for the superior court, where the issues were not framed until after the findings had been made. *Old Colony St. R. Co. v. Thomas* (Mass.), 18-247.

Report of lower court insufficient. — The report of the judge of the land court on appeal to the superior court from a decision in favor of the petitioner in a registration case is sufficient to withstand a motion to dismiss the appeal where it briefly states the important matters that occurred at the hearing before him, and the failure of the report to deal with the issues in greater detail is due to the fact that the respondents had been twice defaulted and had failed to offer evidence of the matters averred in their answers. *Old Colony St. R. Co. v. Thomas* (Mass.), 18-247.

Agreement not to appeal. — An agreement founded on a valuable consideration, not to appeal from the judgment to be rendered in a pending suit between the parties, is valid and binding. *U. S. Consol. Seeded Raisin Co. v. Chaddock & Co.* (U. S.), 19-1054.

An objection that the parties had agreed not to appeal from the judgment may be made for the first time in the appellate court where the agreement was not filed in the trial court, and the appeal was allowed by that court in ignorance of the agreement. *U. S. Consol. Seeded Raisin Co. v. Chaddock & Co.* (U. S.), 19-1055.

Insufficiency of bond. — An appeal will not necessarily be dismissed because the appeal bond is insufficient. By the Utah statute (Comp. Laws 1907, § 3319) the court may permit the appellant to file a new bond. *Price v. Western Loan, etc., Co.* (Utah), 19-589.

Where a defendant, on conviction in a police court, offers an appeal bond signed only by himself, and the police judge approves it and discharges him from custody,

it is error for the district court to dismiss the appeal because the bond lacks the signature of a surety, although the statute provides that no appeal shall be allowed unless the appellant enters into a recognizance with good and sufficient security, to be approved by the police judge, for his appearance in the district court to answer the charge against him. *Ottawa v. Johnson* (Kan.), 9-707.

c. Right of appellant to dismiss.

Appeal from justice's court. — A party who appeals to a circuit court from a judgment rendered in the justice's court may dismiss his appeal against an objection by the opposite party. *Hart v. Minneapolis, etc., R. Co.* (Wis.), 2-793.

Payment of costs. — The appellant may, upon payment of costs, have his appeal dismissed at any time while the cause remains within the jurisdiction of the appellate court, without the consent or over the objection of the appellee. *Fort v. Fort* (Tenn.), 11-964.

Limitation of right. — The right of an appellant to dismiss his appeal is limited to the appeal. The case cannot be dismissed after judgment is pronounced. *Fort v. Fort* (Tenn.), 11-964.

12. EXAMINATION OF CASE ON APPEAL.

a. What is brought up by appeal.

In absence of bill of exceptions. — Where a bill of exceptions is not filed within the time allowed, nothing is presented for review on appeal except the record proper. *Cartwright v. Liberty Tel. Co.* (Mo.), 12-249.

Interlocutory orders. — In a proceeding in error brought to procure the reversal of a final judgment the supreme court may examine and pass upon the correctness of a prior ruling which is itself an appealable order, provided it was made within a year preceding the filing of the petition in error, and such ruling may be preserved for review in this manner by a case made served within ten days after the rendition of such final judgment, or within an extension of time granted during that period. *White v. Atchison, etc., R. Co.* (Kan.), 11-550.

An appeal from a judgment of conviction for crime rendered by a superior court does not bring up for review an order of that court quashing a writ to review a justice's judgment, from which order no appeal has been taken. *State v. Bringgold* (Wash.), 5-716.

Order granting new trial. — On writ of error to an order granting a new trial, the only questions to be considered are those involved in such order. *Owens v. Wilson* (Fla.), 19-267.

Order denying new trial. — An appeal taken from the denial of a new trial only, and not from the judgment, does not bring up for review the sufficiency of the findings to support the judgment. The appellate court, on such an appeal, is limited to a consideration of the grounds on which the mo-

tion for a new trial was based. *Fagan v. Lentz* (Cal.), 20-221.

Sufficiency of petition.—An objection that a petition does not state facts sufficient to constitute a cause of action raises a jurisdictional question reviewable on appeal although not raised by way of exception. *Cartwright v. Liberty Tel. Co.* (Mo.), 12-249.

Sufficiency of indictment.—Under the provisions of the District of Columbia code, a demurrer to an indictment on the ground that it does not set forth an offense may be considered by an appellate court, notwithstanding the fact that the defendant, when such demurrer was overruled, pleaded guilty, and went to trial on the plea of not guilty. *Crawford v. United States* (U. S.), 15-392.

Measure of damages.—The acceptance by the plaintiff from the defendant of the sum awarded by the decree of the lower court, the plaintiff's right to such sum not having been disputed by the defendant, is not a waiver of the plaintiff's right to have the appellate court determine whether he is entitled to a larger sum. *In re Youngerman* (Ia.), 15-245.

A question as to the proper measure of damages in an action of tort is not determinable on an appeal from a judgment of nonsuit, even though it is determined that the nonsuit was erroneous. *McLeod v. Pacific Tel. Co.* (Ore.), 16-1239.

Argument of counsel.—Where a paragraph of an answer, which has been stricken out by the court before trial, contains allegations of some matters which it would be competent for the defendant to prove, as well as other allegations which are incompetent, the action of the trial court in permitting defendant's counsel to read portions thereof in his opening address to the jury, and to state what he proposes to prove thereunder, will not be reviewed on appeal, unless the record points out the particular portions of the paragraph which were so read. *Kansas City Southern R. Co. v. Anderson* (Ark.), 16-784.

Where it is alleged in a motion for a new trial that the court erred in permitting counsel for the plaintiff, in argument to the jury, to make certain specified statements, and this ground of the motion is supported by the affidavits of the defendant's counsel, and counter-affidavits are filed reciting the language used, the appellate court will not disturb the conclusion of the trial court on the issue thus presented. *Cleveland, etc., R. Co. v. Hadley* (Ind.), 16-1.

Error in allowing improper remarks of counsel cannot be considered on appeal unless the matter is preserved in the motion for a new trial. *State v. Tharanot* (Mo.), 20-1122.

Denial of motion to direct verdict.—A motion to direct a verdict raises only a question of law as to the legal sufficiency of the evidence to sustain a verdict as against the party making the motion, and in the event of an adverse ruling and the submission of the question of fact to the jury, an

exception preserves the question of law for the consideration of the appellate tribunal. *Wolf v. Chicago Sign Printing Co.* (Ill.), 13-369.

Validity of minute entries.—A question as to the validity and legality of the verdict and judgment of the court below, based upon the minute entries, can be considered on appeal inasmuch as such entries are a part of the record without a bill of exceptions. *Nashville R., etc., Co. v. Trawick* (Tenn.), 12-532.

Qualification of jurors.—Notwithstanding the fact that at the trial of a criminal case a juror was challenged by the defendant on the specific ground that such juror was a salaried officer of the government, the appellate court will decide the question with reference to the general qualifications of the juror, for in criminal cases appellate courts are not inclined to be as exacting as in civil cases with reference to the specific character of objections. *Crawford v. United States* (U. S.), 15-392.

Portions of judgment not appealed from.—The dismissal by the trial court of a petition in so far as it relates to certain matters need not be considered on appeal where the plaintiff serves no notice of appeal from the action of the court in that regard. *Spiker v. Eikenberry* (Iowa), 14-175.

Questions raised by cross-bill of exceptions.—When the appellate court has before it both a main bill of exceptions and a cross-bill of exceptions, and the latter presents a question which is controlling upon the case as a whole, it will be disposed of first; and if the judgment therein excepted to is reversed, the writ of error issued upon the former will be dismissed. *Chidsey v. Brookes* (Ga.), 14-975.

Questions certified.—A question certified by a federal circuit court of appeals to the federal supreme court which does not propound a distinct issue of law, but in effect calls for a decision of the whole case, need not be answered by the latter court. *The Folmina* (U. S.), 15-748.

Questions reported.—Where a case comes to the Maine law court upon a report of the evidence, the necessity for a compliance with the rules of pleading must be considered as waived and the law court will consider the questions presented by the report. *Rush v. Buckley* (Me.), 4-318.

Issues not raised below.—An appellate court will not consider issues not properly raised and relied upon below. *Planters' Mutual Ins. Assoc. v. Hamilton* (Ark.), 7-55.

Judgments and orders rendered by a disqualified judge are not voidable merely but are void and subject to collateral attack, and the objection, although not taken before decision is rendered, is available on appeal. *Bliss v. Caille Brothers Co.* (Mich.), 12-513.

In an action by a broker to recover commissions on a sale of real estate the defendant cannot make the claim on appeal that the price at which the purchaser agreed to take the property was less than the broker

was authorized to ask, where that point was not raised in the trial court. *Notkins v. Pashalinski* (Conn.), 20-1023.

Questions not decided below.—On appeal from a judgment denying an application for a *habeas corpus* in extradition proceedings, where the appellate court upholds the legality of the arrest and the sufficiency of the affidavit for arrest, it will not decide questions that should be passed upon first by the judge of the lower court before whom the proceedings are pending and are to be prosecuted. *In re Harsha* (Ont.), 6-496.

Questions not argued.—Where one of the errors assigned is based upon the overruling of a motion for a new trial, and said motion consists of a number of grounds, an appellate court will consider only such grounds as are argued. *Spires v. State* (Fla.), 7-214.

Immaterial errors.—An assignment of error on the ground of the denial of the challenge of a biased juror need not be decided where a reversal of the judgment is required on other grounds. *State v. Hennessey* (Nev.), 13-1122.

Findings not incorporated in decision.—Facts found by the trial court upon the request of the parties are, regardless of whether they are incorporated in the decision proper, for the consideration of the appellate court to enable it, in reviewing the case, to apply the proper principles of law. *Elterman v. Hyman* (N. Y.), 15-819.

Grounds of decision below.—On appeal from an order granting a new trial, an appellate court, in examining the record for the purpose of ascertaining whether the new trial should have been granted is not restricted to the grounds specified by the trial court in its order, except upon the single question as to sufficiency of evidence when the evidence is conflicting. *Weisser v. Southern Pacific R. Co.* (Cal.), 7-636.

It is not a part of the duty of the supreme court to search for reasons to sustain an order of the trial court setting aside a verdict and directing a new trial, where neither the trial court nor the party in whose favor the ruling has been made has taken the trouble to make the grounds thereof a part of the record. *Hensley v. Davidson Bros. Co.* (Iowa), 14-62.

Assignments of error by appellee.—While a party granted a new trial by the trial court has no occasion to appeal, he is not precluded from showing by the record brought up on appeal by his adversary any and all errors committed in the trial of the cause, and all questions presented by the record, and necessary for the proper disposition of the case, will be passed upon. *Smart v. Kansas City* (Mo.), 13-932.

Conclusions of law.—A specification in a bill of exceptions, that the conclusions of law embraced in the findings are erroneous, is not available to the appellant on appeal from an order denying a new trial. The conclusions of law are always merged in and superseded by the judgment, and, even if

necessary thereto, they can be reviewed only on an appeal from the judgment, or from an order made under sections 663 and 663½ of the California Code of Civil Procedure. *Mentone Irrigation Co. v. Redlands Electric Light, etc., Co.* (Cal.), 17-1222.

Pertinency of issues framed for appellate court.—The official act of the judge of the land court in framing issues for the superior court on appeal establishes, *prima facie*, that the issues are pertinent and ought to be tried. *Old Colony St. R. Co. v. Thomas* (Mass.), 18-247.

Theory of case.—In order to determine the theory of a case as presented to the trial court, the appellate court will look to the entire record and the briefs of counsel and will construe the pleadings on the theory most apparent, most clearly outlined by the facts stated, and according to their general scope and tenor. *Knight, etc., Co. v. Miller* (Ind.), 18-1146.

Where a plaintiff is not entitled to recover on the theory presented at the trial, he cannot sustain a judgment in his favor on appeal on a theory not so submitted, though the petition is broad enough to cover such theory, and, if the verdict had been based thereon, it might have been sustained. *Woodson v. Metropolitan St. R. Co.* (Mo.), 20-1039.

b. Trial de novo.

Appeal from justice's court.—The district court to which a cause is appealed from a justice's court tries the cause *de novo*, and the appellant cannot be heard to insist that the district court should confine its action to a review of the errors and irregularities in the proceedings of the justice and determine the case accordingly. *State v. O'Brien* (Mont.), 10-1006.

Appeal from probate court.—Where an appeal is taken to the supreme judicial court from a decree of the probate court, the case involved in such decree is heard *de novo* in the appellate court. Ordinarily no answer is filed in the probate court by the respondent, but in cases where the appeal is taken by him the objections to the decree appealed from serve the same purpose as an answer. The purpose of such objections is to give notice to the adverse party of the issues which the appellant intends to raise, but it is not necessary to set out separately and particularly each error asserted and intended to be urged, as is the case under the eleventh rule of the United States circuit court of appeals. An objection that the decree appealed from is against the law gives the appellee notice that at least the appellant contends that the facts do not entitle appellee to any relief. *Phillips v. Chase* (Mass.), 17-544.

c. Examination of opinion of lower court.

For what purpose proper.—In reviewing a judgment, the appellate court will examine the lower court's opinion only for the purpose of ascertaining the arguments

made and the reasons given in support of the lower court's rulings and determinations, as the opinion is not a part of the judgment roll. *Morehouse v. Brooklyn Heights R. Co.* (N. Y.), 7-377.

d. Consideration of new evidence.

Documents not produced below.—An appeal to the supreme court of Canada must be decided solely upon the evidence contained in the case certified to the registrar by the clerk of the court whose judgment is appealed from, and therefore the supreme court will refuse an application by the respondent for leave to supplement the appeal case by the production of documents not produced at the trial below. *Red Mountain R. Co. v. Blue* (Can.), 9-949.

e. Rehearing.

Amendment to petition.—Where a petition for a rehearing on appeal is filed within the ten days' limit, and within six days after the filing of the petition counsel file a motion for leave to assign an additional reason as a ground for rehearing, it is within the power of the appellate court to permit the amendment. *Denver, etc., R. Co. v. Burchar* (Colo.), 9-994.

f. Second appeal.

Questions determined on prior appeal.—Assignments of error stated and held to raise no question not determined on a former appeal the decision in which is held binding. *Albright v. Territory* (N. Mex.), 11-1165.

Sufficiency of evidence.—Where an appellate court decides that certain evidence is insufficient to establish a fact in controversy, it will regard the question as *res judicata* on a subsequent appeal from a new trial upon substantially the same evidence, notwithstanding the introduction on the new trial of additional but merely cumulative evidence of the same character. *Westfall v. Wait* (Ind.), 6-788.

Sufficiency of complaint.—The decision of an appellate court upholding the sufficiency of a complaint based on a statute, the constitutionality of which is attacked, is binding upon such court on a subsequent appeal in the same case. *State v. Wisconsin Central R. Co.* (Wis.), 14-1061.

Examination of record on prior appeal.—On a second appeal, the appellate court, for the purpose of determining whether it is bound by its decision on the former appeal as to the sufficiency of the evidence, will look into the record upon the former appeal to ascertain what facts were before it. *Westfall v. Wait* (Ind.), 6-788.

g. Judicial notice of records.

Reversal in another case.—An appellate court in considering an appeal by a garnishee will take judicial notice of the fact that its records show that it has previously reversed the judgment in the principal action,

upon which the garnishment is based. *Chicago Herald Co. v. Bryan* (Mo.), 6-751.

h. Examination of questions of fact.

(1) In general.

In absence of general assignment of error.—An appellate court, in passing on the sufficiency of evidence to support a judgment, will consider such portions only of the evidence as refer to the particulars in which it is claimed the evidence is insufficient, where the assignments of error do not include any general assignment that the judgment is contrary to the evidence, but merely specify particulars in which it is alleged that "the evidence is insufficient to sustain the findings and decision of the court." *Candler v. Washoe Lake Reservoir, etc., Co.* (Nev.), 6-946.

On appeal from order denying new trial.—The right of a party who has appealed from an order denying a new trial, to have the evidence reviewed on such appeal, is not prejudiced by his failure to move under sections 663, 663½ of the California Code of Civil Procedure upon the ground that the facts found do not support the judgment. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Where record does not contain all the evidence.—An appellate court will not review a question of fact determined by a master, in stating an account, and approved by the trial court, unless it has before it all the evidence upon which the master acted. *McCourt v. Singers-Bigger* (U. S.), 7-287.

Where the return on an appeal on questions of law alone from the judgment of a municipal court to the district court does not purport to contain all of the evidence no question as to the sufficiency of the evidence to support the verdict can be raised in the district court. *Wellcome v. Berkner* (Minn.), 17-366.

In admiralty cases.—In an admiralty case the supreme court of Canada must weigh the evidence for itself unassisted by expert advice, and will, if the evidence requires it, reverse the judgment appealed from, on a question of seamanship or navigation. *Nanna v. Mystic* (Can.), 14-83.

Evidence most favorable to appellee.—In determining an assignment of error that the judgment is not sustained by the evidence, the appellate court will be controlled by the evidence in the record that is most favorable to the appellee. *Ohio Valley Buggy Co. v. Anderson Forging Co.* (Ind.), 11-1045.

(2) Power of appellate court to weigh evidence.

Illinois supreme court.—On appeal from a judgment for the plaintiff in an action by a servant against his master to recover for personal injuries, the appellate court, in considering the questions whether the appellee assumed the risk of injury or was guilty of contributory negligence, cannot weigh the

evidence and determine the questions according to the preponderance thereof, but can only determine whether there is any evidence fairly tending to negative the appellant's contention with respect to these questions; and the court cannot treat the questions as questions of law, unless it is prepared to say that inference of an assumption of the risk of contributory negligence is so clearly deducible from the facts that all reasonable minds would necessarily reach the same conclusion therefrom. *Jones, etc., Co. v. George* (Ill.), 10-285.

The supreme court of Illinois cannot, on appeal, disregard testimony given on the trial because of its improbability. The trial judge and the appellate court are required by law, upon the question being properly raised, to take into consideration the element of improbability in the evidence, and to grant a new trial if they regard the verdict as clearly against the preponderance of the evidence, but the supreme court cannot reject testimony, unless it is contrary to some natural law. *O'Callaghan v. Dellwood Park Co.* (Ill.), 17-407.

On appeal from the allowance or disallowance by the probate court of a claim against a decedent's estate, the decision of the appellate court as to the facts is conclusive on the supreme court, if the case was such as did not require the probate court to exercise its equity powers; but the supreme court must determine questions of fact as well as of law in any case where the equity powers of the probate court were involved. *Zeigler v. Illinois Trust, etc., Bank* (Ill.), 19-127.

Indiana supreme court. — The Indiana supreme court, on appeal, cannot weigh the testimony given on the trial. *Mason v. State* (Ind.), 16-1212.

The Indiana act of March 9, 1903, has no application to criminal cases, and no question is presented on appeal in criminal cases by assignments of error as to the weight of evidence. *Knox v. State* (Ind.), 3-539.

The Indiana statute providing for a review of the evidence on appeal of cases not triable by a jury construed. *Parkison v. Thompson* (Ind.), 3-677.

The Indiana act providing for a review of the evidence on appeal of cases not triable by a jury applies to suits or actions formerly within the exclusive jurisdiction of equity and wherein a trial by jury is denied by statute. *Parkison v. Thompson* (Ind.), 3-677.

In passing upon questions of fact under the Indiana statute providing for a review of evidence on appeal of cases not triable by a jury, the appellate court will consider not only the evidence set out in the record, but also the means afforded the trial court for determining the credibility of witnesses and the value of testimony; and if the evidence is oral and there is a substantial conflict, the judgment will not be disturbed. *Parkison v. Thompson* (Ind.), 3-677.

The application of the Indiana statute providing for a review of the evidence on appeal

of cases not triable by a jury may be invoked by the appellant under an assignment of error that the court erred in overruling a motion for new trial, where the record discloses that one of the grounds for such motion was insufficiency of evidence to sustain a decision. *Parkison v. Thompson* (Ind.), 3-677.

New York court of appeals. — Where on appeal the facts find ample support in the evidence and no exception is taken to any ruling of the lower court relating to the evidence, the only question presented for review is whether, upon those facts, the plaintiff or the defendant is entitled to the judgment. *McClure v. Leaycraft* (N. Y.), 5-45.

(3) Verdict of jury.

Verdict supported by some evidence.

— An appellate court, in reviewing a judgment, will only look far enough into the record to ascertain whether or not there is evidence to support the verdict, and will not determine whether the verdict is in accordance with the weight of the evidence. *Napach v. Oregon, etc., R. Co.* (Oregon), 7-1035.

An appellate court will not disturb a verdict of the jury merely on the weight of evidence. It is only when there is no evidence on one or more material points that the court can interfere on the ground of the insufficiency of evidence. *Indianapolis Traction, etc., Co. v. Klentschy* (Ind.), 10-869.

On appeal from a judgment wherein the successful party has given sufficient legal evidence to sustain a verdict in his favor, an appellate court will not review the evidence or reverse the verdict. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

A decision of a trial judge denying a defendant's motion to set aside a verdict and for a new trial, made upon the ground that the verdict was against the evidence and that the damages awarded were excessive, should be sustained on appeal, where the record shows that there was some evidence upon which the jury could reasonably have found in favor of the plaintiff and could properly have awarded him damages to the amount named in the verdict. *Wyeman v. Dedy* (Conn.), 8-375.

A verdict will be set aside for lack of evidence where the evidence reasonably supports it. *Loudenback v. Territory* (Okla.), 14-988.

A judgment of conviction cannot be reversed on the ground that the verdict is against the evidence or not supported by sufficient evidence. The reviewing court is limited to the question whether there was any evidence of the defendant's guilt. *Levering v. Commonwealth* (Ky.), 19-140.

A verdict will not be disturbed on appeal merely because the court would have reached a different conclusion from the jury, but only where the verdict is flagrantly against the weight of the evidence. *Bruner v. Sellbach Hotel Co.* (Ky.), 19-217.

Excessive verdict. — Although the supreme court has power to reverse a judgment

on the ground that the verdict on which it is based is excessive in amount, such power will rarely be exercised, since the question as to the propriety of the verdict in that regard is primarily for the trial court, which hears the evidence and sees the witness and the parties. *Hollinger v. York R. Co. (Pa. St.)*, 17-571.

Verdict based on conflicting evidence.

— On appeal from a denial of a motion for a new trial sought on the ground that the verdict for the plaintiff was contrary to the evidence, where it appears that the case for the plaintiff was supported only by his own evidence and that of one other witness, while the defense was supported by four witnesses, and that there was a sharp conflict in the evidence, an appellate court will not disturb the verdict. *Birmingham R., etc., Co. v. Mason (Ala.)*, 6-929.

Where a verdict is found by a jury on conflicting evidence, and is reasonably supported thereby, the cause will not be reversed by the appellate court on the ground that the same is contrary to the evidence, or not sustained by sufficient evidence. *Chicago, etc., R. Co. v. Mashore (Okla.)*, 17-277.

A verdict rendered on conflicting evidence will not be disturbed on appeal if there is legal evidence sufficient to sustain it. *Olson v. Day (S. D.)*, 20-516.

Where there is a substantial conflict in the evidence, and there is evidence in the record upon which the verdict rendered by the jury may be fairly based, the appellate court will not reverse the judgment on the ground of the insufficiency of the evidence. *Starke v. State (Wyo.)*, 17-222.

Verdict in criminal case. — The court of appeals will not disturb the verdict of a jury in a criminal case where there is any evidence upon which it can lawfully be based. *Stout v. Commonwealth (Ky.)*, 13-547.

Where the question of the sanity of an accused depends upon conflicting evidence, which has been submitted to the jury under proper instructions, the verdict of the jury must be taken as decisive of the question, so far as the reversal of the judgment is concerned. *Hamblin v. State (Neb.)*, 16-569.

It is the province of a jury in a criminal case to try the issue joined by a plea of guilty, and, if the evidence of the state uncontradicted will support a conviction, the appellate court will not ordinarily interfere with a verdict against the defendant. *Pumphrey v. State (Neb.)*, 18-979.

Directed verdict. — Where the trial court directs a verdict in favor of the defendant, the question of law before the supreme judicial court, on exceptions, is not as to the weight of the evidence, but whether there was any evidence which would have warranted a verdict in favor of the plaintiff; and on this question the plaintiff is entitled to have the case considered as it stood before the defendant's witnesses were called. *Lee v. Prudential Life Ins. Co. (Mass.)*, 17-236.

Verdict in eminent domain proceedings. — On an appeal in eminent domain proceedings instituted under the Montana statute,

an appellate court will not set aside a verdict on the ground that the damages are excessive, unless the evidence in the record shows that the findings of the jury are so obviously and palpably out of proportion to the injury done the defendant as to be in excess of the "just compensation" provided by the state constitution. *Yellowstone Park R. Co. v. Bridger Coal Co. (Mont.)*, 9-470.

An appellate court will not disturb a verdict for damages in an eminent domain proceeding on the ground that the evidence is not sufficient to sustain it, where it appears that most of the witnesses were practical farmers and business men who knew the lands in controversy, and where, while the statements of the witnesses are conflicting and unsatisfactory upon material points, the court is unable to say that the evidence as a whole does not give substantial support to the findings of the jury. *Yellowstone Park R. Co. v. Bridger Coal Co. (Mont.)*, 9-470.

Verdict reduced by trial court. — In an action to recover damages for personal injuries sustained by the plaintiff in consequence of the defendant's negligence, where it appears that the injuries were aggravated by the malpractice of the plaintiff's physician, the difficulty of eliminating from the aggregate damages the part due to the malpractice is great, but this difficulty will not induce an appellate court to hold that the verdict is void as resting on mere conjecture, especially where it appears that the trial court has reduced the amount of the verdict by nearly one-third. *Viou v. Brooks-Seanlon Lumber Co. (Minn.)*, 9-318.

Finding of freedom from contributory negligence. — Evidence reviewed, in an action by a servant against his master to recover for personal injuries, and held not to warrant the appellate court in saying that there was no evidence to support the finding of the jury that the plaintiff was free from contributory negligence and did not assume the risk of injury. *Jones, etc., Co. v. George (Ill.)*, 10-285.

Finding on issue of malice. — In an action for damages brought by a passenger against a carrier, the issue as to whether the defendant maliciously or wilfully mistreated and humiliated the plaintiff while she was a passenger on its train is a pure issue of fact, and the jury's determination thereof will be regarded as conclusive on appeal, unless the verdict has been set aside by the trial court. *Hutchinson v. Southern R. Co. (N. Car.)*, 6-22.

Necessity of motion for new trial. — Under the Utah statute errors dependent upon the evidence for determination in jury cases cannot be considered on appeal unless the court below has been afforded an opportunity by motion for a new trial to correct such errors. *Touse v. Consolidated R., etc., Co. (Utah)*, 4-299.

(4) Findings of court.

Findings supported by some evidence.

— An appellate court will not disregard a trial court's findings of fact, where there is

evidence to justify them. *Chadwick v. Phoenix Accident, etc., Assoc.* (Mich.), 8-170.

The findings of fact by a court have the force and effect of a verdict of the jury and will not be disturbed on appeal if there is any evidence to support them. *Savage v. Salem Mills Co.* (Oregon), 10-1065.

A trial and finding by a court without a jury in an action at law is reviewable to the same extent and by the same procedure, and not otherwise, as a trial and verdict by a jury, with the single exception that when the finding is special the question whether the facts found sustain the judgment is open to consideration in the appellate court. *Chicago Great Western R. Co. v. Minneapolis, etc., R. Co.* (U. S.), 20-1200.

Findings of fact which are not against the clear preponderance of the evidence are to be regarded as verities on appeal. *Estate of Ferguson* (Wis.), 17-1189.

A finding of fact by a chancellor when based on sufficient evidence will not be reversed, in the absence of error. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

On appeal from a judgment in an action at law tried by the court, the only question reviewable is whether there is any substantial evidence to sustain the finding of the court, which is a question of law. The question of fact whether the finding is supported by the weight of the evidence, or by sufficient evidence, is not open to consideration in the appellate court. *Chicago Great Western R. Co. v. Minneapolis, etc., R. Co.* (U. S.), 20-1200.

Where a territorial judge sees the witnesses who testify in a cause tried before him, the full court of the territory will deal with his finding of facts as it would with the verdict of a jury, and will not go beyond the questions of the admissibility of evidence and whether there is any evidence to sustain the finding; and the supreme court of the United States will go no further except in an unusual case. *Halsell v. Renfrow* (U. S.), 6-189.

On appeal from a judgment on findings of the court in a case tried without a jury, the appellate court will not consider the testimony further than to ascertain if there was any competent evidence to support the findings. *Seffert v. Northern Pacific R. Co.* (Oregon), 13-883.

Where the parties waive a jury and submit the law and facts to the court, its judgment upon the facts is entitled to the same force and effect as the verdict of a jury, and will not be disturbed unless flagrantly against the evidence. *Commonwealth, use of Green, v. Johnson* (Ky.), 13-716.

Findings based on conflicting evidence. — When the evidence is conflicting, the findings of fact by the trial court will not be disturbed on appeal. *Barnes v. Western Union Tel. Co.* (Nev.), 1-346.

Where there is a direct conflict between the evidence of the plaintiff and the defendant in an action, and there is evidence to support a finding of the issues and a judgment for one party, the judgment will not be disturbed on appeal. *Doherty v. Healy* (Colo.), 10-958.

On appeal in an equity case the appellate court is not bound by the findings of fact of

the trial court on conflicting evidence. *Campbell v. Gowans* (Utah), 19-660.

Decision based on conflicting inferences. — Where the decision of the trial court is based on conflicting inferences reasonably deducible from the evidence, it is as conclusive on the appellate court as though based directly upon conflicting evidence. *Mentone Irrigation Co. v. Redlands Electric Light, etc., Co.* (Cal.), 17-1222.

Findings directly contrary to evidence. — An appellate court is not bound by the trial court's decision that the person who wrote down the testimony of one witness and acted as notary in taking the depositions of another witness was a disinterested person, where the facts admit of only the opposite conclusion. *Knickerbocker Ice Co. v. Gray* (Ind.), 6-607.

Inconsistent findings. — Where findings of fact are so inconsistent that it is impossible to harmonize them, it is the duty of the appellate court to accept those which are most favorable to the appellant. *Elterman v. Hyman* (N. Y.), 15-819.

Construction in favor of consistency. — As between two possible constructions of a finding of fact made by the trial court, the appellate court will adopt the one which renders such finding consistent with the evidence, and with the other findings, rather than one which makes it contrary to the evidence and to repeated concessions by both parties on the trial. *Mentone Irrigation Co. v. Redlands Electric Light, etc., Co.* (Cal.), 17-1222.

Findings not conclusive. — The rule giving great weight, in the appellate court, to the finding of the trial court on a question of fact, lays no restraint upon the power of the former to ascertain, by full and careful investigation and analysis of the evidence, what the facts and circumstances are and whether the general finding is consistent therewith. *Berry v. Colburn* (W. Va.), 17-1018.

Judgment in criminal case. — Under the Alabama statute declaring the powers, etc., of the city court of Anniston, the supreme court, in reviewing a judgment of such city court convicting the defendant in a criminal libel cause tried without a jury, will not disturb the judgment unless it is plainly erroneous. *Tony v. State* (Ala.), 6-865.

Finding by master concurred in by chancellor. — A finding of fact by a master, concurred in by the chancellor, is not binding on the supreme court on appeal where it appears that such concurrence was based on an error of law. *Hord v. Holston River R. Co.* (Tenn.), 19-331.

Rule in United States supreme court. — The supreme court of the United States will not disturb an allowance of counsel fees out of a fund in court, where the circuit court and the circuit court of appeals have concurred in the amount allowed as reasonable. *United States v. Carter* (U. S.), 19-594.

(5) Judgment of intermediate appellate court.

Illinois appellate court. — The supreme court of Illinois, on appeal from a judgment

of the appellate court, is bound by the finding of the appellate court as to the ultimate facts involved, though the record contains a written stipulation by the parties embodying the evidentiary facts. *First National Bank v. Bank of Whittier* (Ill.), 5-653.

Under the Illinois practice, where an allowance of claim against an estate does not require the exercise of the chancery powers of the probate court, a judgment of affirmance by the appellate court is conclusive on the supreme court upon all the controverted questions of fact, the same as in other actions at law. *Schell v. Weaver* (Ill.), 8-339.

The supreme court of Illinois has nothing to do with the weight of evidence, and therefore in reviewing a judgment for the plaintiff it will consider the verdict of the jury and the judgment of the appellate court as final, if the evidence legally tends to prove the plaintiff's contention and is not of such nature that all reasonable minds would reach a conclusion to the contrary. *Lasher v. Colton* (Ill.), 8-367.

In an action attacking the validity of a tax sale on the ground that the assessment did not describe the property and was void, the question of the misdescription in the assessment is a question of fact, on which the judgment of the Illinois appellate court is conclusive, where the record fairly tends to show that the plat necessary to a description of the property was never made, or, if made, was never executed and recorded according to law. *Joliet Stove Works v. Kiep* (Ill.), 12-227.

Under the Illinois practice act, providing that if any final determination of any cause shall be made by the appellate court as a result of findings of fact concerning the matter in controversy different from the finding of the court from which such cause was brought, the judgment of the appellate court shall be conclusive as to all matters of fact in controversy, a finding by the appellate court in an action on a contract that the contract "was contrary to public policy and void" does not find any question of fact, but one of law, and the judgment of the appellate court upon such finding is not binding upon the supreme court. *Brush v. Carbondale* (Ill.), 11-121.

New York appellate division. — A verdict on a question of fact, unanimously affirmed by the appellate division of the New York supreme court, is conclusive on an appeal to the court of appeals. *Gaines v. Fidelity, etc., Co.* (N. Y.), 11-71.

An insertion, in an order of the appellate division of the New York supreme court reversing a judgment of the trial court, of a statement that the reversal is upon the facts does not raise a question of fact unless the examination of the record confirms such statement. *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.* (N. Y.), 2-782.

Federal circuit court of appeals. — In a suit in equity for an infringement of copyright and for an injunction, the United States supreme court will not reverse the findings of fact as successively made by the federal cir-

cuit court and the circuit court of appeals, unless they are shown to be clearly erroneous. *Dun v. Lumbermen's Credit Assoc.* (U. S.), 14-501.

(6) Reserved case.

Amendment of statement of facts. — Where a reserved case from a superior court, which purports to be a trial before the court, is an agreed statement of facts, the supreme court has no power to amend it, the only remedy of the party prejudiced thereby being an application to the superior court to discharge the case and grant a new trial. *State v. Carron* (N. H.), 6-486.

i. Error waived in appellate court.

Failure to argue point. — It is not sufficient merely to repeat an assignment of error, and submit that error was committed by the trial court. Unless the error complained of is so glaring or patent that no argument is needed to demonstrate it, counsel must call the attention of the appellate court to the specific points on which he relies to show error; otherwise such assignment will be treated as abandoned. *Tillman v. State* (Fla.), 19-91.

13. REVIEW OF EXERCISE OF DISCRETIONARY POWER.

Opening default. — An appellate court will not disturb an order vacating a judgment by default if it is satisfied that the trial judge acted well within his discretion in granting the order. *Everett Produce Co. v. Smith* (Wash.), 5-798.

Changing venue. — An application for a writ of *certiorari* to review an order for a change of venue refused, as the circumstances held not to show an abuse of discretion by the presiding judge such as would warrant a review of the order made by him. *Murphy v. District Court* (N. Dak.), 9-170.

When a change of venue has been granted in a criminal prosecution, and another county selected, it will be presumed that the discretion of the trial judge was exercised properly, and the burden is upon one attacking his order to show affirmatively a manifest case of abuse; and the appellate court will not, under its superintending power over inferior courts, revise the trial judge's order, in the absence of such showing, and in no case will it substitute and enforce its discretion as against the discretion of the presiding judge. *Murphy v. District Court* (N. Dak.), 9-170.

The ruling of the trial court on a motion for a change of venue is presumed to be correct and will not be interfered with on appeal except where the record clearly shows an abuse of discretion. *Elias v. Territory* (Ariz.), 11-1153.

Granting or refusing continuance. — The discretion of the trial judge in refusing a continuance asked for to enable a party to obtain witnesses alleged to have been located too late to take their testimony, will not be reversed where it appears that the party had one continuance, and it is not shown why

the witnesses were not found earlier. *Western Union Tel. Co. v. Woodard* (Ark.), 13-354.

A motion for continuance is addressed to the discretion of the trial judge; and this discretion will not be revised on appeal, in the absence of a showing that it has been abused. *Hiers v. Atlantic Coast Line R. Co.* (S. Car.), 9-1114.

The granting or refusing of a continuance to procure the testimony of an absent witness being discretionary with the trial court, its action is not assignable as error unless there is a manifest abuse of such discretion. *State v. Pirkey* (S. D.), 18-192.

Control of conduct of counsel. — The conduct of counsel during a trial is subject to the direction of the trial judge; and his discretion in that respect will not be controlled by the appellate court, unless it was manifestly abused to the prejudice of one of the parties to the action. *State v. Sheltrey* (Minn.), 10-245.

Ruling on motion for new trial. — The allowance or denial of a motion for a new trial, filed after a general verdict in a district court, is largely a matter of judicial discretion as to the findings of fact and the weight of evidence involved in the verdict; but alleged errors of law occurring upon the trial are not matters of discretion, and are fully subject to review in the supreme court. *Manker v. Tough* (Kan.), 17-208.

The action of a trial court in refusing a motion for a new trial is not the subject of review in an appellate court. *Paolucci v. United States* (D. C.), 12-920.

Granting new trial without conditions. — While the nonimposition of terms upon the granting of a new trial raises the presumption that the trial court deemed the verdict perverse, that presumption will not be indulged in where the record discloses some evidence to warrant the verdict, even though such evidence was contradicted so preponderantly as to justify the trial court in granting a new trial; and the appellate court will not consider the granting a new trial under such circumstances an abuse of discretion, but will sustain the order except in respect of the failure to impose terms. *Wolfgang v. Schoepke* (Wis.), 3-398.

Amendment of pleadings. — An appellate court will not revise the discretion of the trial court in refusing to permit the amendment of a pleading, where it appears that the application to amend was not made until after the filing of the trial court's decision. *Lamm v. Armstrong* (Minn.), 5-418.

Permission to file amendatory pleadings rests largely within the discretion of the trial court, and, unless there is a clear abuse of that discretion, its ruling will not be disturbed. *Kuchler v. Weaver* (Okla.), 18-462.

Decision as to sufficiency of pleading. — A judgment of a trial judge, holding that a petition has been framed in compliance with the Georgia statute of 1893, requiring all petitions to "set forth the cause of action in orderly and distinct paragraphs numbered consecutively," will not be reversed, unless it is apparent that there has been an utter dis-

regard of the provisions of the act. *Atlanta, etc., R. Co. v. Camp* (Ga.), 14-439.

Setting aside verdict as excessive. — Setting aside a verdict as excessive is a matter peculiarly within the province of the trial judge, and one that he is better qualified to pass on than the appellate court. *Morrell v. Lawrence* (Mo.), 11-650.

Suspension of sentence in criminal case. — In ordinary cases the decision of the trial court as to suspension of sentence in a criminal case, whether upon application of the defendant or of its own motion, is not reviewable by appeal, the matter being one which is confided to its discretion. But where an accomplice, under an agreement or understanding with the prosecuting officer, approved by or known to the court, that he shall be immune from further prosecution, testifies fully and truthfully as to the whole matter charged, the case is not an ordinary case, and does not come within the general rule above stated. *Lowe v. State* (Md.), 18-744.

Relevancy of evidence. — The question whether testimony is relevant rests in large measure within the discretion of the trial court, and its ruling in that regard is not the subject of appeal unless there has been an abuse of discretion. *McCrary v. Southern Ry.* (S. Car.), 18-840.

Refusing to confirm judicial sale. — A chancellor's decision refusing to confirm a sale by a commissioner of the chancery court will be reversed on appeal, if it is not a proper exercise of the chancellor's discretion. *George v. Norwood* (Ark.), 7-171.

Abuse of discretion. — Record and bill of exceptions examined, and held that in limiting the period of inquiry in this case there was no abuse of judicial discretion. *In re Winch* (Neb.), 18-903.

14. PRESUMPTIONS ON APPEAL.

a. In general.

Correctness of judgment below. — An appellant who invokes the Indiana statute providing for a review of the evidence on appeal of cases not triable by a jury has the burden of establishing clearly that the judgment appealed from is not fairly supported by the evidence, or is clearly against the weight of evidence, as it will be presumed that the judgment is correct; and if he fails to sustain this burden, the judgment will not be disturbed. *Parkison v. Thompson* (Ind.), 3-677.

It is the duty of a party resorting to an appellate court to make the errors complained of clearly to appear, if they in truth exist, every presumption being in favor of the correctness of the trial court. *Falk v. Kimmeler* (Fla.), 17-839.

Regularity of proceedings below. — In the absence of anything in the record of an affirmative character to the contrary, the presumption on appeal is that the proceedings in the trial court were regular. *Hobbs v. State* (Tenn.), 17-177.

Grounds of decision below. — Where a bill of complaint is demurred to on two

grounds, and the order sustaining the demurrer specifies one of the grounds as the basis of the ruling, but is silent as to the other ground, the appellate court will presume that the demurrer was sustained on the first ground. *Sequim Bay Canning Co. v. Bugge* (Wash.), 16-196.

Proper pleas interposed below.—Where the trial court has proceeded, without objection, on the theory that proper pleas have been interposed, the appellate court will consider the case on the same theory, even though the record fails to disclose any pleas. *Planters, etc., Packet Co. v. Webb* (Ala.), 16-529.

Recital of facts in judgment.—In reviewing a judgment rendered by a trial court for a contempt committed in its presence, the appellate court will conclusively presume that the judgment of the trial court recites all the facts constituting the alleged contempt, and where such contempt consists of the filing of a motion, the appellate court will presume that there was no objectionable conduct other than the filing of such motion, unless the face of the judgment discloses a finding that the attorney's manner in presenting the motion was discourteous or disrespectful to the court. *Johnson v. State* (Ark.), 15-531.

Correctness of abstract on appeal.—In the absence of proper objection it will be presumed on appeal that the abstract is correct and properly prepared. This rule will be relaxed only in exceptional cases. *State Finance Co. v. Mather* (N. Dak.), 11-1112.

Presumptions contrary to record.—No presumption will be indulged in favor of the validity of the proceedings of a court when such presumption does violence to the facts as presented by the record of the court. *Johnston v. Southern Pacific Co.* (Cal.), 11-841.

b. As to motions.

Correctness of order denying costs.—Where a trial court, after hearing evidence offered by both parties, denies a motion to tax the successful party with the costs of witnesses introduced by him in excess of the number allowed by statute to testify to the same fact, its decision will be presumed to be correct on appeal, unless error in the taxation is shown by the record. *Westfall v. Wait* (Ind.), 6-788.

Decision on motion for new trial.—Where nothing to the contrary appears in the record on appeal, it must be presumed that a motion for a new trial was properly overruled by the court below. *Rose v. State* (Ind.), 17-228.

Finding against facts alleged.—On appeal from a judgment of conviction in a criminal action, where it appears that upon a motion for a new trial on the ground of the alleged misconduct of the prosecuting attorney in his argument to the jury, affidavits in support of the motion were contradicted by the affidavit of the prosecuting attorney, thereby raising an issue of fact as to what was said in the argument, a ruling of the trial court denying the motion will be con-

sidered by the appellate court as a finding against the facts alleged in the motion. *State v. Campbell* (Kan.), 9-1203.

c. As to order of intermediate court.

Reversal on question of law.—Where an order of an intermediate court reversing a judgment of the trial court is silent as to the ground on which the reversal is ordered, the appellate court will presume that the judgment of the trial court was not reversed upon a question of fact, and that the facts as found were approved by the intermediate court. *McClure v. Leaycraft* (N. Y.), 5-45.

d. As to jury.

Reading of newspaper articles regarding case.—Where articles discussing the merits of a case are shown to have been published during a trial in newspapers of general circulation in the community, it cannot be presumed upon review, against the finding of the trial court, that they were read by the jury, if there is no direct evidence to that effect. *Fields v. Dewitt* (Kan.), 6-349.

Presumption that jury were sworn.—A judgment of conviction in a criminal case will not be reversed on the ground that the minute entry showing the arraignment, trial, and verdict fails to recite that the jury were sworn, where the objection on that ground was not taken in the court below, but is raised for the first time on appeal. In such a case, the appellate court is justified in presuming that the jury were in fact sworn, but that, by a clerical omission, the fact was not made a part of the minute entry. Moreover, such an objection, when not taken in the trial court, will be deemed to have been waived. *Hobbs v. State* (Tenn.), 17-177.

e. As to pleadings.

Demurrer not ruled upon below.—A demurrer not passed upon in terms by the trial court will be considered upon appeal as having been overruled. *Savings Bank of Richmond v. Powhatan Clay Mfg. Co.* (Va.), 1-83.

No application for amendment.—On appeal from a judgment upon the pleadings in an action, where the record does not disclose any application on the part of the appellant to the trial court for leave to amend his pleadings, it will be presumed that the appellant stood on his pleadings as they were originally filed. *Fishburne v. Merchants Bank* (Wash.), 7-848.

Amendment to conform to proof.—In an action of unlawful detainer, where the complaint alleges and the answer does not deny that written notice to vacate was given the defendant before the execution of the writ of possession, but the plaintiff introduces evidence tending to show that the notice was given, while the defendant testifies to the contrary, the appellate court, on appeal by the plaintiff from a judgment against him, will treat the answer as having been amended so as to conform to the proof, and will not reverse for an instruction based upon the theory that an issue was raised as

to the giving of the notice. *McElvaney v. Smith* (Ark.), 6-458.

f. As to evidence and rulings thereon.

Correctness of ruling below. — An action of a trial court in admitting or excluding evidence of transactions or facts claimed to be part of the *res gestæ* will be treated on appeal as a verity, unless it is manifestly wrong. *Johnson v. State* (Wis.), 9-923.

On an appeal in a libel for divorce brought by a wife, the appellate court will hold that it was proper to admit in evidence a letter written to the plaintiff by a third person which was found under a couch in the room from which the plaintiff moved when she left her husband, where it does not appear from the exceptions whether the letter was open when found or whether it was written before or after the marriage of the plaintiff to the defendant, as it must be assumed that the evidence satisfied the trial court that the letter was written after marriage and was found either open or without any envelope. *Purinton v. Purinton* (Me.), 8-205.

Admission for legitimate purpose. — An appellate court will presume that evidence which was admissible for one purpose but inadmissible for another was received only for the legitimate purpose, where there is nothing to the contrary in the record, and where the objection is a general one to the admission of the evidence for all purposes without specifying any purpose. *General Hospital Soc. v. New Haven Rendering Co.* (Conn.), 9-168.

Incompetent evidence disregarded by court. — A judgment in an action tried before the court without a jury will not be reversed on appeal because of the admission of incompetent evidence on the trial, unless the record shows affirmatively that the action of the trial court was influenced by such evidence. The presumption, in such a case, is that the incompetent evidence was disregarded by the court. *Matter of Wilson* (Kan.), 17-690.

On appeal from the decree of a chancellor, it will be presumed that he reached his conclusion only upon the competent evidence before him, and that he disregarded such evidence as was incompetent. *Strayhorn v. McCall* (Ark.), 8-377.

Prejudice from improper admission. — Where evidence of an influential character is erroneously allowed to go to the jury, there is a presumption of prejudice which, if un rebutted, requires the reversal of the judgment. *Ft. Wayne, etc., Traction Co. v. Crosbie* (Ind.), 14-117.

Prejudice from improper exclusion. — Where it affirmatively and conclusively appears, upon an appeal, that the trial court excluded evidence offered by the defeated party which was clearly competent, the judgment must be reversed. In such a case the appellate court cannot determine or say that the error was harmless, even though the trial judges recites in his opinion that the judgment or decree would have been the same

if the evidence had been admitted. *Blount v. Blount* (Ala.), 17-392.

Where material evidence is excluded, especially in a trial before a jury, a presumption of harm to the party complaining arises, and such exclusion will be deemed reversible error unless the absence of harm clearly appears from the record. *Crawford v. United States* (U. S.), 15-392.

Testimony based on knowledge. — An appellate court cannot presume that the witness who testified at a trial that he had knowledge of a certain fact meant that he had information thereof. *St. Louis Southwestern R. Co. v. White Sewing Machine Co.* (Ark.), 8-208.

Best method of examination adopted. — Where error is predicated of the action of the trial court in taking the testimony of deaf mutes through an interpreter by signs, instead of through written questions and answers, the appellate court, in the absence of a showing to the contrary, will presume that the trial court adopted the better method of taking the testimony. *Dobbins v. Little Rock R., etc., Co.* (Ark.), 9-84.

g. As to instructions.

Correctness of ruling below. — An appellate court will not hold it erroneous for a trial court to refuse an instruction concerning the effect of an "agreement in writing" which is not in the record, as it will be presumed that there was nothing in such agreement to justify the giving of the instruction. *Oldenburg v. Dorsey* (Md.), 5-841.

Compliance with statute. — On writ of error, when the record does not show affirmatively that the trial judge failed to comply with the statute requiring him to give written instructions to the jury when they retired, the reviewing court will not conjecture that the statute was not complied with. *Cunningham v. Springer* (U. S.), 9-897.

Instruction based on evidence. — An appellate court will presume that instructions, the giving of which is complained of, were not abstract, where the record does not contain the evidence upon which they might have been grounded, and there is no statement in the record to indicate that there was no such evidence. *Dobbins v. Little Rock R., etc., Co.* (Ark.), 9-84.

Erroneous instruction not cured. — In reviewing an action of a trial court in giving instructions which are faulty in some particulars, where the record does not contain the other instructions given on behalf of the appellee or those given on behalf of the appellant, the appellate court will not presume that the instructions complained of were cured by others, unless they are so defective as to be incapable of being so cured. *Dobbins v. Little Rock R., etc., Co.* (Ark.), 9-84.

h. As to findings.

That findings are correct. — When the finding of a trial court upon a question of fact is challenged upon appeal, all reasonable

presumptions are to be indulged in favor thereof, and it cannot be disturbed unless in the light of such rule it is so clearly contrary to the preponderance of evidence as to produce a conviction in the minds of the reviewers to a reasonable certainty that it is wrong. *Chase v. Hinkley* (Wis.), 5-328.

Where a cause in the federal courts is referred to a master to take proof and report upon certain questions, and this is done, and the court concurs in the conclusions of the master, they are to be taken as presumptively correct, and should be permitted to stand, unless some obvious error or mistake has intervened, either in the application of the law or in the consideration of the evidence. *Memphis v. Postal Tel. Cable Co.* (U. S.), 16-342.

It is not the duty of the supreme court to explore the record where the abstract on appeal is insufficient. Until the contrary is made to appear, it must be presumed that the findings of the court below are correct. *Nunn v. Lynch* (Ark.), 16-852.

That finding was made. — The granting of a temporary injunction to the plaintiff by the trial court on pleadings and affidavits is deemed, in the appellate court, a finding that the allegations of the complaint are true, and upon appeal from the order granting the writ the court will review the affidavits only to determine whether they tend to support the complaint. *Gray v. Building Trades Council* (Minn.), 1-172.

Presumption by the appellate court as to the finding of a fact not embraced within the pleadings, the findings in the record, and the proofs. *Falk v. American West Indies Trading Co.* (N. Y.), 2-216.

i. In criminal cases.

Correctness of record. — On appeal in a criminal cause, where the indictment is attacked for insufficiency, the appellate court will consider that the copy of the indictment as it appears in the record imports absolute verity, and will not resort to anything outside the record for the purpose of contradicting it. *Terrell v. State* (Ind.), 6-851.

Consideration of all facts by jury. — In reviewing a judgment of conviction in a criminal prosecution, a reviewing court will presume that whatever the prosecutor laid before the jury, against the protest of the defendant, helped to make up the weight of the prosecution which resulted in the verdict of guilty. *Miller v. Oklahoma* (U. S.), 9-389.

Sentence properly imposed. — Under the Montana statute providing that the time appointed by a trial court for pronouncing judgment after a conviction for felony "must be at least two days after the verdict, if the court intend to remain in session so long, but if not, then at as remote a time as can be reasonably allowed," where it appears on appeal that the defendant was sentenced on the day after the verdict against him was returned, the appellate court will presume, in the absence of a showing to the contrary, that the trial court did not remain in session

after the day the sentence was pronounced, or at least will not presume that the substantial right of the defendant was invaded or denied. *State v. Lu Sing* (Mont.), 9-344.

Record of former conviction before court. — Where, on appeal from a second conviction and sentence of a defendant serving a prior sentence for a different offense, it is objected that there is nothing to show that the lower court had before it the record of the former case, so as to justify it in imposing the cumulative sentence, and the record on appeal is entirely silent on that subject, it will be assumed that the lower court had before it the record of the former conviction and sentence, in the absence of appropriate averments to the contrary. *Rigor v. State* (Md.), 4-719.

Discharge of duty by official board. — Where a person is tried and convicted of a violation of an act licensing barbers, and a motion in arrest of judgment is afterwards sustained on the theory that the statute is unconstitutional, the validity of the statute and not the conduct of the board of examiners provided for by it is the only question presented upon appeal; and where the record on appeal does not disclose whether such board has promulgated suitable rules, the court will assume until the contrary appears that the board has properly discharged its duties in that regard. *State v. Briggs* (Oregon), 2-424.

Presumption forbidden by statute. — An Alabama statute declaring the powers, etc., of the city court of Anniston provides that as to the conclusiveness and judgment of that court on evidence, "the supreme court shall review the same without any presumption in favor of the court below on the evidence," and this provision applies to criminal as well as civil cases. *Tony v. State* (Ala.), 6-865.

15. REVERSIBLE ERROR.

a. In general.

Erroneous exclusion of evidence. — Where, in an action contesting a will on the grounds of undue influence and want of mental capacity, it is sought to prove, by the testator's attorney, the contents of a former will, and the declarations of the testator at the time of the preparation of the last will, and the trial court sustains the witness in refusing to answer, so that no one knows whether the evidence would affect the result, the party offering the evidence is denied the right to present his whole case, and the appellate court will not decline to interfere on the ground that no error can be committed in the exclusion of evidence which is not shown with certainty to be material. *In re Young* (Utah), 14-596.

Erroneous admission of evidence. — A judgment may be reversed for the erroneous admission of evidence, notwithstanding the fact that the bill of exceptions does not contain all the evidence. *Duggar v. Pitts* (Ala.), 8-146.

Improper instructions. — On an appeal

from a judgment for the plaintiff in an action based on negligence, where it appears that the evidence was conflicting and that vital issues of facts were raised thereby, the judgment will not be sustained unless such issues were properly submitted to the jury. *Denver, etc., R. Co. v. Burchard* (Colo.), 9-994.

Instructions invading province of jury. — A judgment will be reversed for the giving of an instruction invading the province of the jury to determine the weight of evidence, where the record shows a sharp conflict in some essential respects between the testimony of opposing witnesses, and there is nothing in the record to disclose that the instruction was not prejudicial to the appellant. *Muncie Pulp Co. v. Keesling* (Ind.), 9-530.

Defects in indictment. — A judgment of conviction in a criminal prosecution under a fatally defective indictment will be reversed on appeal, though the defendant has not demurred or moved in arrest of judgment. *State v. Dolan* (W. Va.), 6-450.

Assumption of facts not proven. — When it appears that a trial court in deciding a material question has considered as evidence testimony not in fact given, a new trial will be granted. *Stanley v. Steele* (Conn.), 2-342.

Insufficiency of special verdict. — Where the facts found in a special verdict are insufficient to support a judgment for the plaintiff by reason of the absence of findings on the matters in dispute essential to the complete determination of the issues, a new trial must be granted. *Beare v. Wright* (N. Dak.), 8-1057.

Failure of defense because of death of sole witness. — Where it appears that the defense fails because of the death of the only witness by whom the defendant could prove an affirmative defense, an appellate court is without power to relieve against such misfortune. *Higgins v. Evans* (Mo.), 3-465.

b. Error must be clearly shown.

New trial under Pennsylvania statute. — The statutory power of the supreme court of Pennsylvania to grant a new trial is exceptional in its character and is to be exercised only in very clear cases of wrong or injustice which the court below should have remedied. *Murland v. English* (Pa.), 6-339.

Petition for writ of error. — While upon a petition for writ of error or appeal a reviewing court is required to grant the writ prayed for unless the decision called in question is plainly right, it should not overrule a decision of a lower court refusing an injunction, unless it is manifest that the lower court erred in its refusal. *Townsend v. Norfolk R., etc., Co.* (Va.), 8-558.

Judgment of nonsuit. — On appeal from a judgment of nonsuit, where the evidence in the case does not furnish the basis for a judgment in favor of the plaintiff for any definite amount, the judgment will be affirmed. *Fitzpatrick v. Letten* (La.), 17-197.

Judgment setting aside verdict. — The supreme court will not revise a judgment of

the trial court setting aside a verdict and granting a motion for a new trial unless the evidence plainly and palpably supports the verdict. *Hervey v. Hart* (Ala.), 13-1049.

Determination of question of insanity. — A verdict of guilty, after the defense of insanity has been submitted to the jury as a question of fact on conflicting evidence, will not be disturbed on appeal as incorrectly determining the issue of insanity, where there is material evidence on that issue sustaining the verdict. *Elias v. Territory* (Ariz.), 11-1153.

Excessive damages. — Courts on appeal will not disturb a verdict on the ground of excessive damages unless the damages are so excessive as to indicate that the jury acted from prejudice, partiality or corruption. *Malott v. Central Trust Co.* (Ind.), 11-879.

Exclusion of evidence. — The court below held not to have erred in excluding evidence. *Green v. Freeman* (Ga.), 7-1069.

Special verdict and findings. — Special verdict of the jury and findings by the trial judge in the case at bar examined and held to show no ground for entering judgment against certain defendants as to whom the judgment of the trial court is affirmed with costs. *Tyler v. St. Louis Southwestern R. Co.* (Tex.), 13-911.

c. Error must be material.

Wrong reasons for judgment. — The supreme court does not review the reason for judgments. A judgment will be allowed to stand although the reasons wholly fail to sustain it or would logically lead to a different one. *Corgan v. George F. Lee Coal Co.* (Pa.), 11-838.

Intermediate errors not affecting merits. — Where the judgment of the court below is clearly right, under the facts established and the law applicable thereto, it will be affirmed, without regard to intermediate errors not affecting the merits. *Logansport v. Jordan* (Ind.), 17-415.

One cause of action not proved. — A general judgment on the whole evidence is unaffected by a failure to prove one or more causes of action where the others have been proven, and the judgment will not be reversed for such failure. *Leathe v. Thomas* (Ill.), 4-79.

One bad count in declaration. — Under the Maryland Code of 1904 providing that a judgment or verdict shall not be reversed "if there be one good count in the declaration," a judgment will not be reversed for any error in reference to one count of a declaration or the demurrer or plea thereto, where, for all that appears, the judgment may have been rendered by reason of matters offered under another count. *Alvey v. Hartwig* (Md.), 14-250.

Defects in bill of exceptions. — A judgment of conviction in a criminal case will not be reversed on the ground that the bill of exceptions fails to disclose who subscribed the district attorney's name to the information, where the bill shows that the district attorney was present at the prosecution and

assisted therein and thereby ratified the act of the person who subscribed his name to the information. *State v. Guglielmo* (Ore.), 7-976.

d. Error must be prejudicial.

(1) In general.

Compelling defendant's counsel to make opening statement as harmless error, see **CRIMINAL LAW**, 6 i.

Direction of verdict as harmless error, see **TRIAL**, 6 b.

Presumption of prejudice from excluding public from criminal trial, see **CRIMINAL LAW**, 6 c (2).

No reversal in absence of prejudice.

—A judgment will not be reversed for an error which has not in some way prejudiced the appellant's rights. *Crescent Hosiery Co. v. Mobile Cotton Mills* (N. Car.), 6-164.

Errors without prejudice to a litigant will not work a reversal of a judgment otherwise supported by the evidence and the law. *Hillgas v. Kuns* (Neb.), 20-1124.

An appellate court will not disturb a judgment for errors which did not prevent the appellant from making out a case in the trial court, or for rulings which, had they all been in the appellant's favor, would not have entitled him to a judgment. *Estate of Dolbeer* (Cal.), 9-795.

Errors relied upon to reverse a judgment must be prejudicial to the party complaining, and where, from an examination of the entire record, it is clear that the jury have disregarded erroneous instructions, and have rendered substantial justice by their verdict, which is based upon sufficient evidence and is not affected by the other errors complained of, the judgment will be affirmed. *Whitney v. Brown* (Kan.), 12-768.

In a negligence action for personal injuries, a verdict and judgment for the defendant, based on special findings of the jury that the defendant was not negligent and that the plaintiff was not in the exercise of due care at the time of the accident, will not be disturbed if either finding is supported by sufficient evidence and has been reached without error in the rulings, instructions, or admission of evidence, though there has been error in the other branch of the case. *Pitcher v. Old Colony St. R. Co.* (Mass.), 12-886.

Prejudice not remediable on appeal.

—Errors constituting a sufficient ground for setting aside a judgment and granting a new trial must be such that the appellant has been prejudiced, and the prejudice must be such as cannot be remedied on the appeal. *New Orleans Terminal Co. v. Teller* (La.), 2-127.

Error not influencing jury. — A new trial cannot be granted in a criminal case for the purpose of presenting evidence showing a mistake of one of the state's witnesses when the alleged fact was known to the accused and counsel in time to have shown it at the trial, and the error could not have appreciably influenced the jury. *State v. Quigley* (R. I.), 3-920.

Error in overruling challenges to jurors. — A judgment of conviction will not be set aside because of alleged error in overruling a party's challenges for cause to veniremen, where it appears that none of said persons sat upon the jury, and it does not affirmatively appear that they were peremptorily challenged by such party. *Pumphrey v. State* (Neb.), 18-979.

Rejection of juror. — An appellate court will not consider an exception to a rejection of a juror, where it appears that the excepting party did not exhaust his peremptory challenges. *Hodgin v. Southern R. Co.* (N. Car.), 10-417.

Failure to find on immaterial issue. — The failure of the trial court to find on an immaterial issue does not warrant the granting of a new trial. *Puckhaber v. Henry* (Cal.), 14-844.

Failure to make unnecessary finding.

—In an action on promissory notes where judgment must necessarily go against the plaintiff in view of a finding that the consideration is illegal, he cannot complain that the court failed to find on certain affirmative defenses tendered by the answer. *Union Collection Co. v. Buckman* (Cal.), 11-609.

Variance between pleading and proof.

—Under the Indiana statute, a reviewing court, on writ of error by a defendant to a judgment against him, will not reverse for a variance between the pleading and the proof, if it appears that the defendant was not injured or misled, especially if the defendant failed to call the trial court's attention to the variance. *Indianapolis Traction, etc., Co. v. Lawson* (U. S.), 6-666.

New trial ineffectual. — Where an action for permanent damage to real property is barred by limitation, and the statute is properly pleaded, the appellate court will not reverse a judgment for the defendant for an erroneous instruction as to permanent damage, as no good will result from the award of a new trial. *Cherry v. Lake Drummond Canal, etc., Co.* (N. Car.), 6-143.

Burden of showing prejudice. — Exceptions will be overruled unless they affirmatively show, without aid from extrinsic evidence, not only that the ruling was wrong, but that the party complaining was aggrieved, so that if the ruling would be justified or would be harmless to the complainant upon any possible but not improbable situation unexplained by the exceptions, the doings below will not be disturbed or condemned. *Purinton v. Purinton* (Me.), 8-205.

(2) Error in rulings on the pleadings.

Special pleas overruled. — Where special pleas have been erroneously overruled by the court upon demurrer, but the defendant has the benefit of them upon the trial, the error is harmless. *Virginia Bridge, etc., Co. v. Jordan* (Ala.), 5-709.

Demurrer overruled. — The overruling of a demurrer to a count claiming damages is not reversible error when no evidence is admitted to sustain the claim. *Columbia Nat. Bank v. MacKnight* (D. C.), 10-897.

If the defendant in an action for personal injuries, after the overruling of a demurrer on the grounds that the complaint did not allege the place of injury, pleads as a defense facts arising by reason of the law of the place where the accident occurred, then he is in no way prejudiced by the ruling of the court on the demurrer. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Motion to strike denied. — A judgment will not be reversed for the refusal of the trial court to strike out irrelevant allegations in the petition, where it is not shown and it does not appear that the defendant was prejudiced thereby. *Iola v. Birnbaum* (Kan.), 6-267.

The refusal of a trial court to sustain a motion to strike nonrecoverable damages from the complaint will not be reversed on appeal. *Woodstock Iron Works v. Stockdale* (Ala.), 5-578.

Information sustained in part. — Error cannot be predicated upon a ruling of the court that certain counts in an affidavit and information were sufficient when the defendant was acquitted on these counts. *Knox v. State* (Ind.), 3-539.

Refusal to quash defective counts of indictment. — The refusal to quash defective counts in an indictment is not reversible error, if there is a count sufficient to support the conviction. *People v. McCann* (Ill.), 20-496.

Error cured by amendment. — An erroneous ruling overruling a demurrer is error without prejudice, where the pleading assailed is afterwards amended, and the cause submitted and determined on the amended pleading. *Brown v. Brown* (Neb.), 8-632.

A judgment will not be reversed for error of the trial court in sustaining demurrers to certain counts in the complaint where the plaintiff is thereafter permitted to file other counts which substantially state the same cause of action, and under which all of the evidence which would have been relevant under the original counts is admissible. *Carleton v. Central of Georgia R. Co.* (Ala.), 16-445.

Refusal to require statement of defense in ejectment. — The refusal to require the defendants in ejectment to file a statement of the grounds of defense, if erroneous, is harmless where the plaintiffs are not thereby embarrassed, hindered, or prejudiced in prosecuting the action. *Knight v. Grim* (Va.), 19-400.

Refusal to permit amendment to plea where evidence in support thereof admitted. — The action of a referee in refusing to allow the defendant to file additional pleas during the trial of a case, if error, is without injury, where the defendant is permitted to introduce evidence to support the matters set up in the additional pleas proffered. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

Sustaining demurrer to count of complaint similar to others permitted to stand. — Error in sustaining a demurrer

to a particular count of a complaint is harmless where there are other counts so similar that evidence which would have supported or justified a verdict under such count would equally have supported the same verdict under the other counts. *Whaley v. Sloss Sheffield Steel, etc., Co.* (Ala.), 20-822.

(3) Error in admission of evidence.

Harmless error in admission of irrelevant evidence, see *CRIMINAL LAW*, 6 m (8).

No reversal in absence of prejudice.

— The reception of incompetent evidence which it affirmatively appears did not prejudice the party objecting thereto, does not constitute reversible error. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

A judgment will not be reversed on appeal because of the erroneous admissions of evidence on the trial, where it is clear that the error did not prejudice the appellant. *Eaton v. Blackburn* (Ore.), 16-1198.

Evidence favorable to appellant.

— The allowance by the trial court, over objection, of an improper question to a witness is not prejudicial error if the answer is favorable to the party objecting. *Green v. State* (Ala.), 15-81.

Evidence not affecting result.

— A judgment will not be reversed on appeal because of the erroneous admission of evidence on the trial, where it is apparent that the evidence in question did not affect the result. *Haurigan v. Chicago, etc., R. Co.* (Neb.), 16-450.

A judgment will not be reversed because of the action of the trial court in overruling an objection interposed by the defeated party to one of a series of questions addressed to a witness for the adverse party, where it is clear that the answer to that particular question did not prejudice the party objecting, even though the series of questions, taken as a whole, was of such a character that it would have been the duty of the court to exclude them on proper objection being made. *McCrorey v. Thomas* (Va.), 17-373.

Evidence on immaterial issue.

— A reviewing court will not consider assignments of error based upon the admission of evidence which was admitted and used solely upon the issue which has become immaterial by the verdict of the jury. *Cunningham v. Springer* (U. S.), 9-897.

Proof of admitted fact.

— The admission of incompetent evidence which merely goes to prove an admitted fact, and has no bearing upon any of the real issues of the case, is not ground for reversal. *Western Union Tel. Co. v. Woodard* (Ark.), 13-354.

Evidence of undisputed or indisputable fact.

— Error cannot be predicated on the admission of evidence to establish a fact which is admitted in the pleadings or which is presumed to exist. *Golden v. Northern Pacific R. Co.* (Mont.), 18-886.

Facts established by other evidence.

— A judgment of conviction in a criminal case will not be reversed on appeal because of the improper admission of evidence on the

trial, where the facts sought to be established by such evidence are also clearly established by defendant's own testimony. *Skaggs v. State* (Ark.), 16-622.

Error in admitting expert testimony is harmless where there is other competent evidence to the same effect. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

Verdict warranted by other evidence. — The admission of irrelevant testimony is not prejudicial error where the party objecting thereto offers no proofs and there is no conflict in the evidence received and the evidence sustains the verdict without the irrelevant testimony. *Waldner v. Bowden State Bank* (N. Dak.), 3-847.

Any other verdict impossible. — The appellate court is not obliged to determine the admissibility of evidence alleged by the appellant to have been erroneously received on the trial, where it appears from evidence properly in the record that the verdict of the jury could not have been different from what it was if the evidence in question had been excluded. *Carscallan v. Cœur D'Alene, etc., Transp. Co.* (Idaho), 16-544.

Decree sustained by other evidence. — Where the competent evidence in the record is sufficient to sustain the decree, it will not be disturbed on appeal because incompetent evidence appears in the record. *Patrick v. Kirkland* (Fla.), 12-540.

A decree in equity will not be reversed because of the fact that the record contains some incompetent evidence, if it contains sufficient competent evidence to sustain the decree, and the decree recites that the chancellor's findings were based upon the report of the master and the evidence contained therein, and the master's report states that he did not consider the incompetent evidence. *Champion v. McCarthy* (Ill.), 10-517.

Where testimony made incompetent by statute appears in a record, and there is also sufficient competent testimony, including that of the defendant, to sustain the decree against the defendant, he is not harmed by the appearance of such incompetent testimony in the record. *Patrick v. Kirkland* (Fla.), 12-540.

Trial without jury. — An appellate court will not reverse a judgment for an erroneous admission of evidence, where the trial was without the intervention of the jury and the record shows that there was abundant competent evidence to justify the finding of the court. *Pratt v. Davis* (Ill.), 8-197.

Rebuttal evidence. — It seems that where the judge at a trial has allowed rebutting evidence to be given, the court of criminal appeal will not quash a conviction upon the ground that it does not agree with the way in which the judge at the trial exercised his discretion, unless there was something in the rebutting evidence in the nature of a trap, which resulted in an injustice to the prisoner. *Rex v. Crippen* (Eng.), 20-653.

Hearsay evidence. — A conviction will not be reversed for the giving of hearsay evidence which was not responsive to the questions asked, where the court instructed the

jury not to consider it, and no prejudice therefrom appears. *State v. Osborne* (Ore.), 20-627.

(4) Error in exclusion of evidence.

Same evidence afterwards admitted. — Error in sustaining an objection to a question is without prejudice, if the same question is afterwards asked and answered. *Edwards v. State* (Nev.), 5-312.

Assuming that a ruling of the trial court excluding certain questions addressed to a witness on cross-examination is erroneous, the error is harmless where counsel is afterwards permitted to interrogate the witness fully in regard to the same matters, upon making him his own witness. *St. Louis, etc., R. Co. v. Raines* (Ark.), 17-1.

Same evidence previously given by witness. — A refusal to permit a witness to answer a proper question is not so prejudicial as to constitute reversible error where the witness has testified to substantially the same facts sought to be elicited by the question. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Facts found by jury. — The ruling of a trial court in sustaining an objection to a question put to a witness, even though conceded to be erroneous, will be considered on appeal as harmless error where it appears that the jury found as a fact the conclusion sought to be established by the question objected to. *Indianapolis Traction, etc., Co. v. Kidd* (Ind.), 10-942.

Testimony not affecting result. — It is no ground to reverse a judgment of nonsuit that the court excluded evidence which, even if admissible, would not have materially changed the scope and effect of the evidence which was admitted. *Stewart v. Savannah Electric Co.* (Ga.), 17-1085.

Although proof of a foreign record was erroneously rejected by the trial court, such ruling may be held to have been without prejudice to plaintiff, where it appears that if such record proof had been received, he would have failed to substantiate his cause of action by a fair preponderance of the evidence. *Miller v. Northern Pacific R. Co.* (N. D.), 19-1215.

Bill of exceptions not containing all evidence. — Upon a writ of error, where all of the evidence is not incorporated in the bill of exceptions, an appellate court is not warranted in holding that error was committed by the trial court in excluding proffered testimony, unless the relevancy and materiality thereof are clearly made to appear. *Falk v. Kimmerle* (Fla.), 17-839.

(5) Other errors in relation to evidence.

Question allowed but not answered. — An appellant cannot base an assignment of error on a question asked at the trial of a cause, which was not answered though an objection thereto was overruled. *District of Columbia v. Duryee* (D. C.), 10-675.

It is not reversible error to overrule an objection to a question where the witness does not answer. *Birmingham R., etc., Co. v. Baker* (Ala.), 18-477.

Evidence offered but not received. — It is no ground for a new trial in an action for assault and battery that the plaintiff's counsel persistently endeavored to prove the plaintiff's general reputation, where it appears that no witness testified as to his reputation. *Birmingham R., etc., Co. v. Mason* (Ala.), 6-929.

Withdrawal of incompetent evidence. — The admission of evidence applicable to one only of the counts of an indictment does not become prejudicial to the defendant on the quashing of such count where the evidence is thereupon withdrawn and the court instructs the jury not to consider it. *Rex v. Hughes* (Can.), 19-534.

Exclusion of evidence improperly admitted. — In an action for personal injuries resulting in a hernia, wherein physicians are allowed to testify on redirect examination in reference to strangulated hernia although the question is not raised either on direct or cross examination, and the testimony is subsequently stricken on the plaintiff's motion, the admission of such testimony and its subsequent exclusion cannot improperly influence the jury. *Gascoigne v. Metropolitan West Side El. R. Co.* (Ill.), 16-115.

Error cured by subsequent testimony. — A ruling by the trial court on the cross-examination of a physician on a trial for malpractice, that the witness need not give the technical names of certain muscles of the human body, to which he has referred in his testimony, does not constitute reversible error, where the witness is permitted to describe such muscles fully, and where counsel conducting the cross-examination has previously stated that he does not desire the technical names but only a general description. *Burton v. Neill* (Iowa), 17-532.

(6) Error in instructions.

Harmless error in general. — Harmless error in an instruction to the jury affords no ground for a reversal. *State v. Martin* (N. J.), 18-986.

Verdict manifestly correct. — The giving of an erroneous instruction is not reversible error where the evidence is undisputed and the jury find a correct verdict. *Woods v. Carl* (Ark.), 5-423.

A judgment for defendant will not be reversed on appeal because of error in an instruction given by the court below, when it is clear that a recovery by the plaintiff would have been unauthorized in any view of the case. *Munier v. Zachary* (Ia.), 16-526.

Where, in a suit for the price of goods sold and delivered, the evidence justifies a peremptory instruction for the plaintiff, and the verdict is for an amount warranted by the evidence, the defendant cannot complain of error in the instructions to the jury. *Cunningham Mfg. Co. v. Rotograph Co.* (D. C.), 13-1147.

Jury not misled. — A judgment of conviction for murder in the first degree will not be reversed for the giving of an instruction as to the credibility of witnesses and

the mode of impeaching them, though the instruction was technically erroneous, where it is not apparent that the jury could have been misled thereby, and it is obvious that the verdict was correct. *State v. Fuller* (Mont.), 9-648.

Prejudicial error does not follow from an erroneous instruction where it is evident that no harm resulted therefrom. Thus where a correct statement of the law has been repeatedly given in other instructions, a judgment of conviction in a criminal case will not be reversed because of the granting of an erroneous instruction that the jury shall not convict the defendant unless upon all the evidence "or want of evidence" the defendant's guilt is established beyond a reasonable doubt, the solecism in the language of the instruction being so obvious as to be impossible for the jury to have been misled. *Dillon v. State* (Wis.), 16-913.

Although the jury should conform to the instructions of the court upon matters of law, yet if it appears to the appellate tribunal that an instruction was erroneous, it will not grant a new trial because the verdict was contrary to such erroneous instruction. *O'Neill v. Thomas Day Co.* (Cal.), 14-970.

Error cured by other instructions. — In a prosecution under an indictment for killing an officer, the failure of the trial court to give a requested instruction to the jury to disregard the characterization of the accused by the prosecuting attorney in argument as "outlaw" is not prejudicial error where the instructions show the standing of the accused before the court and the nature of the offense with which he is charged. *State v. Horner* (N. Car.), 4-841.

Instructions must be considered as a whole, and when so considered, if they are substantially correct and could not have misled the jury to the prejudice of the accused, a judgment of conviction will not be reversed because some instruction considered alone may be subject to criticism. *State v. Megor-den* (Ore.), 14-130.

Instruction on abstract proposition of law. — An appellate court will not decide whether an instruction requested and refused embodies a correct statement of a proposition of law, where it seems that the refusal was based on the ground that the evidence did not show a state of facts that made the proposition determinative of the controversy. *Pratt v. Davis* (Ill.), 8-197.

Instruction as to immaterial matter. — An erroneous instruction to the jury on a matter not involved in the issue being tried, and which could not have misled them or affected them in their determination of the questions before them for decision, affords no ground for a reversal. *State v. Maioni* (N. J.), 20-204.

e. Error must appear from record.

(1) In general.

Denial of motion for nonsuit. — In an action for damages for negligent delay in delivering a telegram, an alleged ground of

nonsuit that the plaintiff failed to show that any claim for damages was presented within the time stipulated upon the telegram, need not be considered on appeal where the stipulation relied on does not appear on the telegram printed in the record. *Smith v. Western Union Tel. Co.* (S. Car.), 12-654.

Remarks by court. — A statement of the trial court to a witness held not reversible error, the ground of the objection not being sufficiently clear in the record. *Lingerfelt v. State* (Ga.), 5-310.

Where the court expresses an opinion as to improper testimony sought to be elicited from a witness on the stand, such action on the part of the court will not be held to be reversible error, unless the appellate court can say that it probably influenced the verdict of the jury. *Evers v. State* (Neb.), 19-96.

Remarks by prosecuting attorney. — On an appeal from a conviction for crime, an appellate court will not consider an assignment of error based upon alleged improper remarks made by the prosecuting attorney, where the remarks are not set out in the bill of exceptions, though they are assigned as a ground for a new trial. *State v. James* (Mo.), 5-1007.

Conversation by attorney with juror. — In a prosecution for murder, alleged error in the admission of testimony and the conduct of counsel for the state in conversing with a juror cannot be reviewed where the grounds of error are not verified by bill of exceptions. *Schwartz v. State* (Tex.), 11-620.

Misapprehension of facts by trial court. — On appeal from the Pennsylvania superior court to supreme court in a cause originating in the court of common pleas, the supreme court will review the judgment in the light of the record and will not consider a specification of error based on the superior court's misapprehension of facts resulting from the inadvertence of counsel in presenting the case. *Philadelphia v. Pennsylvania Institution, etc.* (Pa.), 6-437.

Verdict excessive. — A reviewing court will not set aside a verdict for the plaintiff in an action for damages for personal injuries on the ground that it is excessive and is contrary to the law and the evidence, where the record fails to disclose the trial court's reasons for denying a motion for new trial based on those grounds. *Bass v. Cleveland, etc., R. Co.* (Mich.), 7-718.

Judgment justified by record. — A judgment refusing in general terms to grant specific relief will be affirmed if the record shows that any valid objection was raised to the petition. *Marietta Chair Co. v. Henderson* (Ga.), 2-83.

Summoning bystander as juror. — An objection to the summoning and impaneling of bystanders in the place of regular jurors who had been excused is not available on appeal where the record does not show that the defendant had exhausted his peremptory challenges. *York v. State* (Ark.), 18-344.

(2) Error in rulings on the pleadings.

Overruling of demurrer. — An appellate court will not review the overruling of a demurrer where neither the demurrer nor its substance is set out in the brief of appellant's counsel. *Knickerbocker Ice Co. v. Gray* (Ind.), 6-607.

An assignment of error on appeal on the ground that the lower court improperly overruled a demurrer is bad where the record does not show that the demurrer was ever called up or acted upon by the lower court. *Mobile, etc., R. Co. v. Ridley* (Tenn.), 4-925.

Denial of motion to strike out plea. — An appellate court will not consider an assignment of error based on the trial court's denial of a motion to strike out the pleas, unless the motion, pleas, and rulings thereon are set out in the bill of exceptions. *Harrison v. Alabama Midland R. Co.* (Ala.), 6-894.

Denial of motion to quash information. — The overruling of a motion to quash an information in a criminal prosecution will not be reviewed on appeal, where the ground upon which the motion was based is not apparent upon the face of the information and is not incorporated in the record by a proper bill of exceptions. *Quillin v. Commonwealth* (Va.), 8-818.

(3) Error in rulings on the evidence.

Admission of evidence. — An assignment of error in exceptions *pendente lite* or in a motion for a new trial, that the court erred in refusing to rule out the testimony of a witness, does not present a question for review when the testimony in question is not set forth in connection with the assignment of error and no statement thereof is attached as an exhibit. *Georgia Co-operative F. Assoc. v. Borchardt* (Ga.), 3-472.

Exclusion of evidence. — An appellate court will not review a ruling excluding evidence where the record does not disclose the purpose for which the evidence was offered or the ground of objection to its exclusion. *Lambert v. Hamlin* (N. H.), 6-713.

An appellate court will not review alleged errors in the exclusion of evidence, where the record neither points out any specific evidence offered and excluded nor shows any exceptions to the action of the trial court, though the evidence is pointed out in the brief. *Priddy v. Boice* (Mo.), 9-874.

(4) Error in instructions.

Failure to instruct. — A judgment for the plaintiff in an action for damages for personal injuries will not be reversed for the failure of the trial court to instruct the jury on the question of contributory negligence, where the record fails to show any allusion to that question at the trial. *Bass v. Cleveland, etc., R. Co.* (Mich.), 7-718.

Alleged error in failing to give an instruction will not be reviewed where the instruction is not referred to in the "points and authorities" portion of the party's brief, and it is not pointed out what testimony the

instruction could have applied to. *Knapp v. State* (Ind.), 11-604.

Where the bill of exceptions shows that all the charges given by the court to the jury are not brought to the appellate court, a mere refusal to give a requested charge will not be held error, since, even if the requested charge is correct in terms, a charge sufficiently covering the point may have been given. *Thompson v. State* (Fla.), 19-116.

Giving or refusal of instructions. — An appellate court will not consider assignments of error based upon the giving or refusal of instructions, where the proper and specific exceptions to the trial court's rulings do not appear in the bill of exceptions; and this is so even though the record shows that such exceptions were incorporated in a motion for a new trial, and though the bill of exceptions contains a general exception to the denial of the motion, if it appears that some of the instructions complained of are correct statements of law. *Koch v. State* (Wis.), 5-389.

The giving and refusal of instructions in a criminal prosecution will not be reviewed on appeal unless the instructions have been made part of the record by incorporation in the bill of exceptions, though they have been copied into the record by the clerk of his own motion. *State v. Ruck* (Mo.), 5-976.

An appellate court will not consider assignments of error based on the giving and refusal of instructions where the record fails to show that all the instructions are embraced in the transcript. *Knickerbocker Ice Co. v. Gray* (Ind.), 6-607.

An appellate court will not review the action of the trial court in refusing instructions, where the rejected prayers, though contained in the transcript, are not contained in the bill of exceptions. *Phillips v. Washington, etc., R. Co.* (Md.), 10-334.

An assignment of error based on the refusal of an instruction will be disregarded, where the record does not show what prayers were granted by the trial court, as the rejected instruction may have been covered by the other instructions given. *Kecoughtan Lodge v. Steiner* (Va.), 10-256.

On appeal, an instruction will not be held erroneous on the ground that it ignores a "paper writing" between the parties, if such instrument is not in the record. *Oldenburg v. Dorsey* (Md.), 5-841.

Where evidence is admitted in the course of a trial for certain purposes, an exception to a paragraph in the charge of the court, which declares that this evidence was properly admitted for these purposes, in the absence of any request to the court to exclude any specific evidence or to limit its effect, and in the absence of any objection or exception to its admission, or of any specification of the particular evidence challenged, is unavailing, because in such a case the record fails to prove the error, and the presumption that the action of the court below was right must prevail. *Ware v. United States* (U. S.), 12-233.

Necessity for incorporating evidence.

— To review the giving of an instruction which attempts to state the law applicable to facts which the court says are shown by the evidence, it is not necessary that the evidence shall be in the record. *State v. Tillet* (Ind.), 20-1262.

f. Who may allege error.

Assignment of cross-error by appellee.

— On appeal by a complainant from a decree dissolving an injunction and allowing the defendant a certain sum for attorney's fees as damages on an injunction bond, where there is no cross-appeal by the defendant, the appellate court will not consider an assignment of cross-error based upon the amount allowed for fees. *Griffith v. Vicksburg Waterworks Co.* (Miss.), 8-1130.

g. Errors not available.

(1) Question not raised below.

Defense of statute of limitations not raised below, see **LIMITATION OF ACTIONS**, § 8 b (1).

General rule stated. — A question not presented for the consideration of the trial court cannot be made the subject of argument on appeal. *Keil v. Wright* (Iowa), 14-549.

An appellate court will not reverse a judgment for an order to which the attention of the trial court was not called. *Gardner v. Metropolitan St. R. Co.* (Mo.), 18-1166.

Points not raised in the pleadings and not passed on by the trial judge cannot be made for the first time in the bill of exceptions. *Whitney v. Central Georgia Power Co.* (Ga.), 19-982.

Irregularities not objected to below.

— Irregularities which are capable of being corrected in the trial court must be called to the attention of that court, or they will be deemed to have been waived. They cannot be objected to for the first time on appeal. *Hobbs v. State* (Tenn.), 17-177.

Fact assumed below. — In an action against a city and a street railroad company for the death of the plaintiff's decedent by an alleged obstruction on a sidewalk, where both the court and counsel for both parties at the trial assumed as a fact that the street on which the decedent fell was one of the public streets of the city and within its corporate limits, the defendants cannot object for the first time on appeal that there was no proof of such fact in the record. *Woodson v. Metropolitan St. Ry. Co.* (Mo.), 20-1039.

Matters not specified in objections to decree. — On an appeal to the supreme judicial court from a decree of the probate court revoking a former decree of adoption on the ground of undue influence, the defenses of laches, the statute of limitations, and ratification of the adoption by the foster parent are not properly open to the appellant, where no objections to the decree on

those grounds have been filed. *Phillips v. Chase* (Mass.), 17-544.

Constitutionality of statute.—The constitutionality of a statute permitting substituted service of process cannot be questioned for the first time on appeal. *Hass v. Leverton* (Iowa), 5-974.

The court on appeal will not consider the constitutionality of a statute involved in the proceeding, unless a question as to its constitutionality has been raised. *State v. Perkins* (Iowa), 20-1217.

The failure of the appellee to point out and rely upon a proposition, such as the unconstitutionality of a statute disclosed by the record, will not cause the appellate court to ignore such proposition if it will prevent a reversal of the judgment. *Kraus v. Lehman* (Ind.), 15-849.

Adoption of improper remedy.—The objection that the plaintiff has not pursued a proper remedy cannot be raised for the first time on appeal. *Savannah, etc., R. Co. v. Talbot* (Ga.), 3-1092.

A judgment rendered on the pleadings because the plaintiff's reply was frivolous will not be disturbed on appeal on the ground that the relief should have been in the form of an order striking out the reply as sham, where the propriety of the procedure was not questioned either in the trial court or on the argument of the appeal. *Dahlstrom v. Gemunder* (N. Y.), 19-771.

Legal action treated as equitable.—Where in an action at law the answer of the defendant sets up an equitable defense but asks no affirmative equitable relief, the court does not err in treating the case as one in equity; and where the defendant fails to preserve an exception to this action of the court but proceeds with the case as if it were properly cognizable in equity, he cannot, on appeal, assign the action of the court as error. *Kessner v. Phillips* (Mo.), 3-1005.

Suit by wrong party.—The objection that an action brought by a general guardian in his own name should have been brought in the name of the ward cannot be raised for the first time on appeal, as it is a matter of abatement. *Randall v. Lonstroff* (Wis.), 5-371.

Defect of parties.—In an action for personal injuries caused by the bite of a vicious dog, the question of a defect of parties when not raised by either demurrer or answer is waived and cannot be taken advantage of on appeal. *Grissom v. Hofius* (Wash.), 4-125.

By answering over after his demurrer for defect of parties has been overruled, a party waives his right to raise the question on appeal. *Adams v. Clark* (Colo.), 10-774.

Where the guardian of an infant is treated as the plaintiff by the parties and the lower court, he will be so regarded on appeal, and the parties will be held to that theory. *Campbell v. Fichter* (Ind.), 11-1089.

Misjoinder of parties.—The question of misjoinder of parties, or of causes of action, or of defect of parties must be prop-

erly taken advantage of in apt time in the trial court, or the same will be treated as waived in the supreme court. *Kansas City, etc., R. Co. v. Shult* (Okla.), 20-255.

Appellant not a party below.—Where in the winding up of insolvent corporations, the receiver institutes proceedings, by petition against certain stockholders for the enforcement of their liability for unpaid subscriptions to the extent required for the payment of the claims of certain creditors, and the trial court holds the stockholders liable to the extent required for the payment of the claims of some of the creditors, but excludes from the claims entitled to contribution the claim of a person who is also a stockholder, and such person is a party to the record but only as a defendant stockholder, and from the latter part of the decree such stockholder enters an appeal in due form and files his petition of appeal in the appellate court, and the respondents, who are the other delinquent stockholders, answer the petition of appeal but in their answers raise no question of the appellant's right to appeal, an objection which is first raised at the hearing of the appeal that the appellant had no such status as a party in the trial court as would entitle him to appeal from so much of the decree as denied relief to the receiver in respect to his claim, comes too late. *Easton Nat. Bank v. American Brick, etc., Co.* (N. J.), 10-84.

Sufficiency of declaration, complaint or petition.—The objection that a declaration is not sufficient to authorize a recovery cannot be raised for the first time on appeal. *Joliet Stove Works v. Kiep* (Ill.), 12-227.

An objection to the sufficiency of the allegations of the complaint is too late when made for the first time in the supreme court, where the complaint would be amended as a matter of course if objection had been made before. *First National Bank v. Warner* (N. Dak.), 17-213.

Where no objections are pointed out or urged by an appellant in regard to the sufficiency of the complaint, any question relative to its sufficiency will be considered as waived. *Morrison v. Indianapolis, etc., R. Co.* (Ind.), 9-587.

When a complaint is attacked for the first time in an appellate court, it will be upheld if the facts alleged are sufficient to bar another suit for the same cause of action. *Indianapolis Traction, etc., Co. v. Kidd* (Ind.), 10-942.

The question whether a petition states a cause of action or discloses grounds sufficient for the granting of equitable relief may be raised at any stage of the proceedings in the appellate court up to and including the filing of a motion for a rehearing. *Vila v. Grand Island Electric Light, etc., Co.* (Neb.), 4-59.

Complaint indefinite.—An indefinite allegation of a fact in a complaint cannot be first attacked on appeal, where the record shows that the evidence is positive as to the fact, and such evidence was not objected to. *Mitchell v. Monarch Elevator Co.* (N. Dak.), 11-1001.

Amendment improperly allowed.—The Maryland court of appeals will not review the action of the trial court in permitting the plaintiff in an action of assumpsit to file an amended declaration in trover, where no exception thereto is taken by the defendant. *Swartz v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.* (Md.), 16-1156.

New matter pleaded in reply.—An assignment of error that the court permitted the plaintiff to plead new matter in the reply to the surprise and prejudice of the defendants will not be considered on appeal when the objection was not raised below. *Allen v. Labsap* (Mo.), 3-306.

No replication to answer.—A decree will not be reversed for want of replication to an answer, where the defendant has taken depositions as if there had been a replication. *Kirchner v. Smith* (W. Va.), 11-870.

Pleading filed too late.—The plaintiff in an eminent domain proceeding under the Indiana statutes will not be heard to complain on appeal that the defendant filed his written objections to the proceeding after the expiration of the time prescribed by the statute, where it appears that the plaintiff failed to object to the filing at the time it was made. *Morrison v. Indianapolis, etc., R. Co.* (Ind.), 9-587.

Sufficiency of indictment or information.—A motion made by the defendant during or after the close of a criminal trial, for a directed verdict of acquittal because the evidence is insufficient to convict and because the crime charged has not been proven, challenges the evidence merely and not the indictment, and an exception to the denial of the motion will not authorize a consideration upon appeal of the sufficiency of the indictment. *People v. Weichers* (N. Y.), 1-475.

The objection that an information is insufficient to support a conviction for murder in the first degree may be raised for the first time on appeal. *State v. Lu Sing* (Mont.), 9-344.

Sufficiency of police court summons.—A summons issuing from a police court may be amended if defective, and will not be declared insufficient on appeal to the court of appeals where no question as to its sufficiency was raised in the police or in the circuit court. *Commonwealth v. Price* (Ky.), 13-489.

Improper admission of evidence.—An appellate court will not review rulings admitting evidence, unless the record shows objections and exceptions by the appellant to the introduction and admission of the evidence. *Priddy v. Boice* (Mo.), 9-874.

A verdict will not be disturbed on appeal because the jury considered improper evidence where such evidence was not objected to when offered and no motion to strike it out was made. *Stockham v. Malcolm* (Md.), 19-759.

An objection to testimony as involving a transaction with a decedent cannot be raised for the first time on appeal. *Alexander v. Tebeau* (Ky.), 18-1092.

Exceptions to the admission of evidence
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are waived if they are not urged on a motion for a new trial made in the cause. *Planters' Mutual Ins. Assoc. v. Hamilton* (Ark.), 7-55.

An appellate court will not consider an assignment of error based on the admission of evidence, where it appears that no objection was made or exception saved at the trial. *Little Rock R., etc., Co. v. Goerner* (Ark.), 10-273.

On writ of error a plaintiff in error will not be heard to complain of the admission of testimony in the trial court to which he made no objection or exception. *Goken v. Dallugge* (Neb.), 9-1222.

Where no objection is made or preserved to the offer of testimony or to the introduction or use of exhibits, no error can be predicated upon the admission of such evidence. *State v. Rennick* (Iowa), 4-568.

A party cannot complain in the appellate court of the testimony of a witness for the adverse party which was given without objection and without any motion to exclude such testimony after its objectionable character appeared on cross-examination. *Graham v. Mattoon City R. Co.* (Ill.), 14-853.

Improper limitation of evidence.—A plaintiff in error will not be heard to complain in a reviewing court that evidence admitted for a limited purpose was admissible for a broader purpose, where it appears that he failed to object in the trial court, either to the admission of the evidence for a limited purpose or to an instruction to the jury thus limiting it. *Cunningham v. Springer* (U. S.), 9-897.

Failure of proof as to damages.—An assignment of error based on the ground that no evidence was given in the trial court to enable the jury to assess the damages awarded will not be considered, where it does not appear that the plaintiff in error made any point on the trial in regard to the absence of such evidence, or that he asked the trial court to direct a verdict for him on account of its absence. *Mercantile Trust Co. v. Hensley* (U. S.), 10-572.

Improper question to witness.—A party who fails to object to a question propounded to a witness and fails to move to strike out the answer waives his right to have the propriety of the question reviewed on appeal, and the fact that he objects to the same question when repeated at a later stage of the trial does not entitle him to complain of the admission of the answer to which he has failed to object. *Graham v. Mattoon City R. Co.* (Ill.), 14-853.

Exception to deposition.—If a party wishes to rely upon an exception to a deposition, he must bring it to the attention of the trial court so that it may be acted on, and unless the record shows that this has been done it will be by the appellate court deemed to have been waived. *Kirchner v. Smith* (W. Va.), 11-870.

Testimony incompetent by statute.—Objections taken to testimony before a master should be called to the attention of the court before final hearing and the record

should show the rulings thereon if it is desired to have the appellate court consider them; but testimony made incompetent by statute should be disregarded by the trial court and by the appellate court. *Patrick v. Kirkland* (Fla.), 12-540.

Specific objection essential.—Only specific objections to the admission of evidence stated to the trial court are available on appeal. *Malott v. Central Trust Co.* (Ind.), 11-879.

Changing ground of objection on appeal.—In order to be available on appeal, an objection to evidence must be interposed on the proper ground in the trial court. A party will not be permitted to make one objection to evidence in the trial court and another objection in the appellate court. *McCrorey v. Thomas* (Va.), 17-373.

Exception essential.—Where a witness is permitted to testify over the objection, but no exception is saved to the ruling of the trial court, no question is presented to the appellate court for decision. *Cleveland, etc., R. Co. v. Hadley* (Ind.), 16-1.

Objection without exception.—The fact that no exception was taken to the action of the court in overruling an objection to an instruction precludes a review of the instruction. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

Exception without objection.—An exception to an instruction without having made an objection thereto does not present any question for review. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

Indefinite objection.—An objection on appeal, in a proceeding under the Indiana statute of 1907, to procure the seizure and destruction of intoxicating liquors, that the statute is unconstitutional as applied to intoxicating liquors because it authorizes the taking of property without due process of law, is too indefinite to present any question for review. *Rose v. State* (Ind.), 17-228.

Variance.—When a question of variance between the allegation and proof is not raised in the trial court, it cannot be entertained for the first time on appeal. *Ensley v. Mercantile Co. v. Otwell* (Ala.), 4-512.

An objection to a variance between the pleadings and the proof cannot be raised for the first time in the appellate court, and in the absence of an objection or a motion at the trial to exclude the objectionable evidence, a motion for a new trial grounded upon an alleged variance does not preserve the consideration of such variance as a question of law for review by the appellate court. *Gascoigne v. Metropolitan West Side El. R. Co.* (Ill.), 16-115.

Erroneous instructions in general.—Where an appellant has failed in the lower court to take exceptions to a charge of the court, alleged errors therein cannot be reviewed. *Kunkel v. Utah Lumber Co.* (Utah), 4-187.

A judgment will not be reversed for the giving of an erroneous instruction in the absence of an exception thereto. *Brown v. State* (Wis.), 7-258.

In an action for damages for breach of a contract, it is too late for the defendant to object for the first time on appeal to an instruction concerning the elements of the damages recoverable. *St. Louis Southwestern R. Co. v. James* (Ark.), 8-611.

In an action for damages for personal injuries in which no evidence as to the expense of medical attention is offered, the inadvertent error of the trial judge in telling the jury that they can "take into consideration the general expenses and medical attendance" is not reversible error where the defendant's counsel fail to call the court's attention thereto. *Worthy v. Jonesville Oil Mill* (S. Car.), 12-688.

Timely and proper exceptions must be taken in the trial court and properly reserved in the record on appeal before error predicated upon instructions will be considered on appeal. *State v. Megorden* (Ore.), 14-130.

Erroneous instruction in criminal case.—The accused in a criminal action cannot for the first time on appeal raise the objection that the court erred in instructing the jury as to the minimum punishment. *Manning v. State* (Tex.), 3-867.

On appeal from a judgment of conviction in a criminal prosecution an appellate court will not consider an assignment that the trial court erroneously declared the law upon the facts developed at the trial, where the record discloses an entire absence of any objections or exceptions to the giving or refusal of the declarations of law. *State v. Morgan* (Mo.), 7-107.

Charge too general.—It cannot be con- sidered that a charge was too general and therefore failed to direct the attention of the jury specifically to the issues involved, unless the appellant requested proper instructions of a more specific nature. *St. Louis, etc., R. Co. v. Jackson* (Ark.), 8-328.

Rulings on requests for instructions.—An appellate court will not review rulings granting and refusing requests for instructions, where the alleged errors in such rulings were not properly assigned in the motion for new trial. *Muncie Pulp Co. v. Kessling* (Ind.), 9-530.

Refusal of instructions.—Error predicated on the refusal of instructions will not be considered by an appellate court, where it appears that no request for such instructions was made. *Murtland v. English* (Pa.), 6-339.

The supreme court is not bound to review the action of the trial court in refusing to instruct the jury as requested, when no exception is taken to such refusal. *Union Pacific R. Co. v. Meyer* (Neb.), 14-524.

Failure to give instructions.—Error cannot be predicated of a failure of a trial court to give an instruction on any given question or issue, in the absence of a showing of a request for the omitted instruction. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

An objection to the failure of the court to instruct the jury upon all the law of the case cannot be sustained on appeal when it does not appear from the record that the court's

attention was called to the failure to do so at the time the instructions were read to the jury or that any exception was saved on that account. *State v. Welch* (Mo.), 4-681.

In an action to recover damages for personal injuries, where it appears that the plaintiff while sitting on the grand stand of an amusement field was struck by a bottle dropped from the band platform overhead, if the court instructs the jury that the defendant is liable for the negligence of its officers, but fails to instruct as to the negligence of the defendant's agents, servants, and employees, the plaintiff, if he fails to call the court's attention to the omission, cannot predicate error thereof on appeal. *Williams v. Mineral City Park Assoc.* (Iowa), 5-924.

Failure to direct verdict.—On appeal by a defendant in an action from a judgment rendered against him, the appellate court will not consider whether the evidence tends to support the plaintiff's cause of action, if the record fails to show that the defendant, at the close of the evidence, requested the instruction that the jury should find for him. *Godair v. Ham National Bank* (Ill.), 8-447.

Failure to make ruling.—An assignment of error cannot be based upon the failure of the trial court to make a ruling which it is not asked to make. *In re Kingman* (Ill.), 5-234.

Improper remarks by judge.—An appellate court will treat an appellant's objections to remarks made by a trial judge and to rulings admitting and excluding evidence as waived, where it appears that the objections were not sufficiently set forth in a motion for a new trial made in the cause. *Miller v. Nuckolls* (Ark.), 7-110.

Improper argument by counsel.—For improper argument by counsel to be available on appeal the opposing counsel must object thereto and save an exception to the overruling of the objection. *State v. Jeffries* (Mo.), 14-524.

The failure of a party to except to the action of the court in overruling a motion to discharge the jury and withdraw the submission of the cause on account of an improper statement by the opposing counsel, is a waiver of any right to challenge the correctness of the ruling. *Malott v. Central Trust Co.* (Ind.), 11-879.

Submission of interrogatories to jury.—A party who fails to object in the trial court to the submission of interrogatories to the jury may on appeal be presumed to have assented to such submission. *Freedman v. New York, etc., R. Co.* (Conn.), 15-464.

Correctness of findings.—An appellate court will not go behind a trial court's finding of fact in an action at law, but will merely inquire whether the findings support the trial court's conclusions of law, where no exceptions to the findings were taken below. *Snuffer v. Karr* (Mo.), 7-780.

Refusal to find.—An appellate court will not reverse a judgment for a trial court's refusal to make a finding of facts, where the bill of exceptions contained in the abstract of the record discloses that no objections or

exceptions were preserved to the refusal of the request for the finding, and it is expressly admitted by counsel for the appellant in their brief that there was no dispute at the trial about the facts. *O'Connor v. St. Louis Transit Co.* (Mo.), 8-703.

Failure to find.—An assignment of error that the chancery court of appeals failed to find certain facts, which it was not requested to include in its findings, will not be considered by the supreme court. *Marion Mfg. Co. v. Buchanan* (Tenn.), 12-707.

Verdict excessive or insufficient.—When no objection, by motion to set aside or otherwise, has been made in the trial court to a verdict rendered, subject to the action of the court upon a demurrer to the evidence, it cannot be disturbed in the appellate court on the ground of excessiveness or paucity of damages. *Uhl v. Ohio River R. Co.* (W. Va.), 3-201.

Amount found by referee excessive.—By failure to raise the question in the trial court that the amount found by a referee exceeds the *ad damnum* of the pleading, the objection is waived and cannot be taken advantage of on writ of error. *Leathe v. Thomas* (Ill.), 4-79.

Judgment not supported by pleadings.—The objection that a judgment is not supported by the pleadings or the findings of the trial court may be raised for the first time on writ of error. *Nichols v. Board of County Com'rs* (Wyo.), 3-543.

Decree void for want of jurisdiction.—Where a motion has been made in the lower court to vacate a decree for alimony, not on the ground that it is void as rendered without jurisdiction but only on the ground that justice and equity require that it shall be vacated, the supreme court cannot, on appeal, go beyond the motion appealed from and vacate the decree on the ground that it is void for want of jurisdiction. *Cohen v. Cohen* (Cal.), 11-520.

Irregularities in criminal prosecution.—It cannot be contended for the first time on appeal that a judgment of conviction for crime is void because of the failure of the foreman of the grand jury to indorse his name on the indictment, or because of the action of the trial court in ordering a special venire of petit jurors instead of causing the jurors on the regular list to be summoned. *Beard v. State* (Ark.), 9-409.

Arrest of witness for perjury.—The action of the trial court in a criminal case, in ordering, at the close of his testimony on the trial, the arrest of a witness for perjury, at the instance of the prosecuting attorney, does not present reversible error, where no objection is interposed by the defendant's counsel and no exception is taken. *Skaggs v. State* (Ark.), 16-622.

Denial of motion for new trial.—The denial of a motion for a new trial will not be reviewed on writ of error, where the bill of exceptions does not show an exception to the ruling. *Jacksonville Electric Co. v. Adams* (Fla.), 7-241.

Where a party moves for a new trial and

sets up in his written motion the specific grounds upon which he relies, he will not be heard on appeal to assign error on grounds not specified in the motion. *Lasher v. Colton* (Ill.), 8-367.

Property rights not triable in divorce.

— A decree for divorce is not rendered void by the fact that it requires the payment of a certain fund by the complainant to the defendant; and the complainant cannot assert for the first time on appeal that property rights should not be tried in a suit for divorce. *Carnahan v. Carnahan* (Mich.), 8-53.

Defects in abstract of title.— On appeal from a decree for the plaintiff in an action by the vendor for the specific performance of a contract to convey land, the appellate court will not consider objections to the abstract of title which were not called to the attention of the trial court. *Kettering v. Eastlack* (Iowa), 8-357.

Title of purchaser on foreclosure.

— The title of a purchaser at a foreclosure sale cannot be attacked on appeal on the ground that the property was purchased for the holder of the mortgage lien where no question was raised concerning it in the pleadings and proof in the lower court. *First National Bank v. Waddell* (Ark.), 4-818.

Qualifications of public officers.

— Where the board of trustees of a village make an order removing an officer without specifying any grounds for the removal, and thereafter apply to the court for a writ of mandate to compel the officer so removed to turn over to her successor in office the books, papers, and moneys in her hands belonging to the municipality, and allege that her removal was made upon the grounds that she had failed to make monthly reports as required by law, they will not be heard upon appeal to the supreme court to urge, as a ground for the issuance of the writ, that the officer was not qualified under the constitution to hold such office on account of her sex. *Kendrick v. Nelson* (Idaho), 12-993.

Validity of stipulation in telegraph blank.

— The validity of a stipulation printed on a telegraph blank and relied on in the argument before the appellate court to protect the telegraph company from liability for the nondelivery of the message, will not be considered by that court where the question of its validity was not raised on the trial by any instruction requested by the defendant, and the instruction requested by the defendant proceeded on an entirely different theory. *Western Union Tel. Co. v. Lehman* (Md.), 14-736.

(2) Sufficiency of objection or exception.

General objection to evidence.— In a criminal prosecution, objections to questions asked the defendant on cross-examination that the evidence sought is "incompetent, irrelevant, immaterial, and not cross-examination," are too general to save anything for review, where it appears that the evidence is material. *State v. Lu Sing* (Mont.), 9-344.

The objection to the admission of evidence

that "it is incompetent, irrelevant, and immaterial, and does not tend to prove any issue in the case" and "does not tend to prove the earning capacity of the decedent in this case" is too indefinite, uncertain, and general to present any question for review. *Malott v. Central Trust Co.* (Ind.), 11-879.

General objection to books of account.

— A general objection to the admission in evidence of the plaintiff's books of account, without stating the specific ground of the objection, will not be considered on appeal. *Andrew v. Haller Wall Paper Co.* (D. C.), 16-192.

Objection to evidence as immaterial.

— A ruling admitting evidence will not be reviewed on appeal where the only objection made to it was that it was immaterial. *State v. Ruck* (Mo.), 5-976.

Objection to competency of question.

— An objection to the competency of a question asked an expert witness does not save for review on appeal the question as to whether the witness is qualified to express an opinion in answer to the questions asked. *State v. Martin* (Oregon), 8-769.

An objection that a question propounded to a witness is "incompetent, irrelevant, and immaterial, upon the ground that a proper hypothesis or foundation had not been laid for asking the question," goes only to the competency of the question. *State v. Megorden* (Ore.), 14-130.

General exception to instructions.

— A single general exception to several instructions in gross will not be considered by the appellate court if any one of the instructions is good. *Wells v. Parker* (Ark.), 6-259.

An appellate court will not consider a general exception to the giving of a series of instructions, where one of the instructions is good. *Kansas City Southern R. Co. v. Morris* (Ark.), 10-618.

A general exception to the charge of the court upon the subject-matter of a number of requests is too vague to receive consideration on appeal. Specific exceptions to the particular propositions objected to are necessary to obtain appellate review. *Kelly v. Rutland R. Co.* (Vt.), 13-269.

General exceptions to ruling on demurrer.— Where a case was heard on general demurrer and the exceptions taken to the decision thereon do not show the particular point or points raised below, the supreme court will hear any question within reach of the demurrer. *Cushman, etc., Co. v. Boston, etc., R. Co.* (Vt.), 18-708.

General objection to instruction as a whole.— A general objection to an instruction as a whole is not sufficient to preserve for review on appeal the action of the trial court in giving the instruction, but the objectionable feature should be specifically pointed out. *Frazier v. Poindexter* (Ark.), 8-552.

Irrelevant objection to instruction.

— Where, in an action for damages for negligence, the issue as to the negligence of the defendant has been submitted to the jury by instructions not objected to, an objection by

the defendant to instructions as to the contributory negligence of the plaintiff for reasons which involve the question of the defendant's negligence is without relevancy and will not be considered upon appeal. *Dubiver v. City, etc., R. Co. (Oregon), 1-889.*

General exception to refusals to charge. — Exceptions to the refusal of the court to comply with requests to charge, without designating any special requests claimed to have been refused, are too general to require consideration on appeal. *Dronin v. Wilson (Vt.), 13-93.*

An appellate court will not consider a general exception to the refusal of a series of instructions, where one of the instructions is bad. *Kansas City Southern R. Co. v. Morris (Ark.), 10-618.*

Indefinite assignment of error. — Errors assigned and discussed but lacking the precision of specification in the exceptions on which they are founded, that is required by the rules of the District of Columbia court of appeals defining the practice in such cases, will not be considered by that court. *Morgan v. Morgan (D. C.), 13-1037.*

Striking out indefinite exception. — It is error to strike, on the ground that it is too general and indefinite, an exception of fact to an auditor's report in a case at law which assigns a specified finding of the auditor as being "contrary to evidence" or "without evidence to support it." *Anderson v. Blair (Ga.), 2-165.*

Time of making objections. — Objections to alleged errors, committed during a trial, must be made in apt time, so as to allow the trial court to rule upon the objections before action is taken. It is too late to complain after the trial is ended. *Johnson v. State (Okla.), 18-300.*

(3) Inconsistent attitude on appeal.

General rule stated. — Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Hence, where a party assumes a position and asserts a legal right in the district court, and there asks the benefit of that position, he is estopped from denying the legality of that position on appeal to the supreme court. *Morrison v. Atkinson (Okla.), 8-486.*

Questions involved in case. — An appellant cannot raise on appeal a question which he expressly stated at the trial below was not involved in the cause. *St. Louis Southwestern R. Co. v. White Sewing Machine Co. (Ark.), 8-208.*

Where, upon the trial of an action for ejectment, it is admitted by the parties that the only question involved is the validity of certain mortgages under which the defendant claims title, the plaintiff will not be heard to allege upon appeal, in support of the right to recover, a failure to show the legal foreclosure

of the mortgages. *Shreeves v. Caldwell (Mich.), 3-592.*

Existence of issues. — The trial of issues tendered by a pleading as though they had been properly made, in the absence of any plea, answer, or replication which raises them, estops the parties from subsequently denying, on appeal or error, that the issues were duly made, and from taking any advantage of the lack of the plea, answer, or replication. *Bank of Havelock v. Western Union Tel. Co. (U. S.), 5-515.*

A party accepting all the issues tendered by the petition and defending the case at the trial against all the theories presented will not be granted a new trial because such theories are inconsistent with one another. *Provident Loan Trust Co. v. McIntosh (Kan.), 1-906.*

Sufficiency of answer. — Where a plaintiff in an action treats an issue as properly tendered, and tries the case in the lower court on that theory without objection to the sufficiency of the answer, he will not be heard to say on appeal that the answer tenders no defense. *Cook v. Bagnell Timber Co. (Ark.), 8-251.*

Effect of demurrer. — A demurrer which is insufficient because not directed to the pleading as a whole will not be considered on appeal as a motion to strike out definite portions of the complaint where the demurrer was not submitted to the trial court on that theory. *Plymouth Gold Mining Co. v. United States Fidelity, etc., Co. (Mont.), 10-951.*

Admissibility of evidence. — On an appeal in an eminent domain proceeding, the appellant cannot assume the position concerning the admission of evidence which is the reverse of the position which he assumed in the trial court. *Yellowstone Park R. Co. v. Bridger Coal Co. (Mont.), 9-470.*

Evidence admissible for particular purpose. — Where there is a general objection to evidence which is admissible for a particular purpose, it is not reversible error to admit such evidence without restricting it to that purpose. *Schaubach v. Dillemath (Va.), 15-825.*

Phonographic reproduction as evidence. — In a condemnation proceeding instituted by a railroad company to determine the necessity for laying its tracks along a city street, and to assess the damages to an adjoining owner, even if it is erroneous to permit a phonograph to be operated in the presence of the jury to reproduce the sounds claimed to have been made in the operation of trains in proximity to the respondent's hotel, the error is not a reversible one, as the instrument's mild reproduction of the sounds cannot seriously prejudice the petitioner. *Boyne City, etc., R. Co. v. Anderson (Mich.), 10-283.*

Burden of proof. — In an action to recover damages for personal injuries sustained by the plaintiff in consequence of the defendant's negligence, where it appears that the plaintiff's injuries were aggravated by the malpractice of his attending physician, and that he has settled his claim against the

physician for the malpractice, the defendant, if he assumes without objection at the trial and in his motion for a new trial the burden of proving the amount of aggravation due to the malpractice, will not be heard on appeal to assert that this burden rested upon the plaintiff. *Viou v. Brooks-Scanlan Lumber Co.* (Minn.), 9-318.

Sufficiency of proof. — An objection first raised on the argument of a writ of error that the plaintiff failed to produce at the trial below any evidence of the essential fact cannot prevail if it appears that at the trial such fact was assumed without evidence. *West Shore R. Co. v. Wenner* (N. J.), 1-790.

In an action to recover damages for death by wrongful act, where the defendant has practically conceded on the trial that the accident complained of was due to its negligence, it will not be heard on appeal to contend that the instructions given by the trial court improperly enlarged the issues in the pleadings, and permitted a recovery by the plaintiff without proof of the particular negligence specified in the petition. *Macdonald v. Metropolitan St. R. Co.* (Mo.), 16-810.

Validity of ordinance. — In an action based on a city ordinance, where the defendant city alleges the validity of the ordinance in its pleadings and proceeds to trial on that theory, it will not be heard to say on appeal that the ordinance is invalid. *Chicago v. University of Chicago* (Ill.), 10-669.

Legality of schedule of freight rates. — On writ of error from the United States supreme court to a state court to review a judgment for the plaintiff in an action by a shipper against a railroad company to recover damages for the exaction of unreasonable freight charges or interstate shipments, where the jurisdiction of the supreme court is dependent upon the fact that there is a federal question involved in that the rates charged had been filed and promulgated under the provisions of the interstate commerce act, and it appears that the state court, in deciding the case, expressly declared that the course of the argument and the briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, the defendant in error cannot contend that what was conceded in the state court to be a lawful schedule of rates was not such. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.* (U. S.), 9-1075.

Period of lease. — A lessee against whom an action is brought for the possession of the premises cannot insist on appeal that the period of the lease ran from the time possession was surrendered by the lessor rather than from the date of the lease, where that point was not made in the court below, and a wholly inconsistent contention was advanced in that court by the lessee's counsel. *Gensler v. Nicholas* (Mich.), 14-452.

Ownership of property. — Where in an action against two persons composing a partnership an attachment is issued against one of the partners individually, and the wife of

said partner claims the property attached, and agrees by her counsel that the issue shall be whether the property is owned by the partnership or by her, and successfully resists the motion of the plaintiff's counsel to change such issue, she will not be heard to say on appeal that the instruction of the trial court to the jury to find that the partnership had no interest in the property subject to attachment should be sustained on the ground that there was no evidence of ownership in the claimant's husband as an individual. *Pelzer Mfg. Co. v. Pitts* (S. Car.), 11-665.

(4) Error caused by appellant.

Admission of improper evidence. — An appellant will not be heard to complain of the admission of improper evidence, if it appears that at the trial he resisted a motion to exclude the evidence, which was made by the opposite party after the evidence had been admitted. *Comer v. W. M. Ritter Lumber Co.* (W. Va.), 8-1105.

Improper consolidation of actions. — When actions have been consolidated, the legality of the consolidation cannot be reviewed in the appellate court when the appellant himself, by motion, caused the consolidation to be made. *Handley v. Sprinkle* (Mont.), 3-531.

Erroneous instructions. — An appellant will not be heard to complain that the trial court erroneously modified instructions given at his request, where it appears that the instructions were erroneous in their original as well as in their modified form. *Jones, etc., Co. v. George* (Ill.), 10-285.

Conflict between instructions. — The appellant will not be heard to complain that a proper instruction given by the trial court conflicted with erroneous instructions given at the appellant's request. *United Fruit Co. v. New York, etc., Transportation Co.* (Md.), 10-437.

Inconsistent instructions. — An appellant will not be heard to complain on appeal that some of the instructions given at his request upon the trial were inconsistent with instructions given at the request of the appellee, where it appears that the latter instructions were correct statements of law applicable to the facts established by the evidence and the appellant's instructions are not set out, either in full or in substance, in his brief. *Indianapolis Traction, etc., Co. v. Kidd* (Ind.), 10-942.

(5) Error favorable to appellant.

Improper admission of evidence. — A party to an eminent domain proceeding cannot complain on appeal of the ruling of the trial court admitting evidence, where the ruling was in his favor, whether or not the ruling was wrong. *Yellowstone Park R. Co. v. Bridger Coal Co.* (Mont.), 9-470.

Order of proof. — The order in which evidence may be introduced on a trial is within the discretion of the court, and when from all the evidence it is manifest that the court's rulings were right, no prejudicial error can

be asserted because at some time in the trial a ruling may not have been fully justified. *Knox v. State* (Ind.), 3-539.

Judgment too favorable. — The rule that an appellant is not entitled to assign as error that the judgment is too favorable to him precludes a defendant, who has appealed from a decree restraining him from using a trademark or trade name in certain specified states, from contending that the decree should have been rendered without geographical limitations within the United States. *Cohen v. Nagle* (Mass.), 5-553.

Conviction of lesser degree of crime. — The fact that the jury in a criminal action find the defendant guilty of a lower degree of offense than that established by the evidence is not a ground or cause for reversal on appeal from a judgment of conviction. *State v. Phinney* (Idaho), 12-1079.

Instructions. — The defendant in an action *ex delicto* cannot complain of an instruction limiting the plaintiff's right of recovery to one of the causes of action set up in the complaint instead of covering both. *Grimes v. Greenblatt* (Colo.), 19-608.

The defendant in an action for false imprisonment cannot complain of the action of the court in assuming, contrary to the fact, that the defense of justification has been interposed and in giving an instruction applicable to that defense. *Grimes v. Greenblatt* (Colo.), 19-608.

(6) Wrong reasons for correct decision.

General rule stated. — It is the duty of an appellate court to affirm a correct judgment regardless of the correctness of the reasons given for awarding it. *Jeffries v. Fraternal Bankers' Reserve Soc.* (Iowa.), 14-346.

Order granting new trial. — An order of the trial court granting a motion for a new trial will be affirmed on appeal if the whole record discloses that an error was committed in the trial, even though the particular reason assigned by the trial court for granting the motion is disapproved. *Smart v. Kansas City* (Mo.), 13-932.

16. DECISION OR JUDGMENT OF APPELLATE COURT.

a. In general.

Decision of appellate court as *res judicata*, see JUDGMENTS, 6 c.

Effect of reversal, see JUDICIAL SALES, 4.

Where party dies pending appeal. — Where an appellant dies after the submission of a cause to the appellate court, and that court finds that the decision of the trial court is correct, the judgment and order appealed from will be affirmed *nunc pro tunc* as of the date of the submission. *Estate of Dolbeer* (Cal.), 9-795.

Where it is brought to the attention of an appellate court, after it has reversed a judgment in a cause, that the appellee died after the taking of the appeal but before the rendition of the judgment of reversal, the court

will set aside such judgment and re-enter it as of the date of the submission of the cause. *Valparaiso v. Spaeth* (Ind.), 8-1021.

Where court changes pending appeal.

— Where an appellate court consisting of three judges is succeeded by a new court consisting of seven judges selected under the constitutional provision requiring that each decision shall be concurred in by at least three judges, a decision in a case argued before the old court but decided since the new court has come into existence is not valid if it is concurred in by but two judges. *Denver, etc., R. Co. v. Burchard* (Colo.), 9-994.

Where judges equally divided. — The case at bar being for decision by a full bench of six justices, and the justices being equally divided in opinion, the judgment of the lower court, holding the contract before the court to be illegal as in the nature of a lottery contract, is affirmed by operations of law. *Russel v. Equitable Loan, etc., Co.* (Ga.), 12-129.

Effect of affirmance. — When a judgment is approved by the supreme court all questions raised by the assignments of error and all questions that might have been so raised are to be regarded as finally adjudicated against the appellant or plaintiff in error, and the judgment affirmed must be regarded as free from all error. *People ex rel. Stead v. Superior Court* (Ill.), 14-753.

Effect of modification. — Where a judgment of the supreme court modifies and affirms the judgment of the lower court, it becomes final and binding, regardless of whether the mandate is ever entered of record in the lower court. *Smith v. Garbe* (Neb.), 20-1209.

Theory of cause. — Where a plaintiff is not entitled to recover on a theory on which the case is tried, but there is another theory on which a verdict for the plaintiff, under the facts, could be sustained, the judgment will be reversed and the cause remanded for a new trial after amendment of the petition to include such theory. *Woodson v. Metropolitan St. R. Co.* (Mo.), 20-1039.

Law of the case. — On appeal from a judgment of conviction in a criminal prosecution, a judgment of the appellate court on a former appeal holding an indictment to be sufficient in substance is the law of the case. *State v. Campbell* (Kan.), 9-1203.

b. Rendition of final judgment on reversal.

When proper in general. — When an appellate court, in reversing a judgment for the defendant, will render judgment for the plaintiff instead of remanding the cause for a new trial. *Big Horn Lumber Co. v. Davis* (Wyo.), 7-940.

Where there is no error in the amount fixed by the verdict of the jury, but the judgment is erroneous as to amount and as to the taxation of costs, the appellate court will not grant a new trial, but will vacate the erroneous judgment and enter the judgment which the trial court should have rendered. *Blackwell, etc., R. Co. v. Bebout* (Okla.), 14-1145.

Power of Philippines supreme court.—Under the Act of Congress establishing a civil government in the Philippine Islands and continuing the ordinary procedure in the courts of that country, the supreme court of the islands has the power to reverse a judgment of the court of first instance appealed from and itself convict the accused on appeal. *Trono v. United States* (U. S.), 4-773.

Evidence all in writing.—In Indiana, the supreme court has power to render a final decree in a cause in which the evidence is all written and which would have been of exclusively equitable cognizance under the law of the state prior to June 18, 1852. *State ex rel. Davis v. Board of Commissioners* (Ind.), 6-468.

Error in charge to jury.—When all the facts are before the appellate court, the case will not be remanded because of an error in the charge to the jury but will be finally disposed of. *Shreveport v. Youree* (La.), 3-300.

Error in refusal to amend special verdict.—Where the trial court has erred in refusing to amend a special verdict by changing the answer to a question therein, the appellate court will make the change and render a judgment accordingly when it does not appear that a new trial is necessary. *Ehleiter v. Milwaukee* (Wis.), 2-178.

Evidence insufficient to support recovery.—An appellate court on reversing a judgment for the plaintiff and setting aside a verdict for the insufficiency of the evidence and for the refusal of the trial court to exclude the evidence from the jury and direct a verdict for the defendant, will not remand the case for a new trial, but will render judgment for defendant, when it does not appear that injustice will be done thereby. *Ruffner v. Dutchess Ins. Co.* (W. Va.), 8-866.

c. Granting new trial.

When verdict should have been directed.—When, in an action against a railroad company for personal injury to a passenger, the evidence is such that a verdict for the plaintiff should be set aside, the circuit court, if asked, should direct a verdict for the defendant, and if it refuses, the appellate court will reverse judgment and verdict, and remand the case for a new trial, unless this court can see clearly that the plaintiff cannot better his case upon another trial. *Hoylman v. Kanawha, etc., R. Co.* (W. Va.), 17-1149.

Sufficiency of evidence doubtful.—Where a trial court dismisses the complaint in an action notwithstanding a verdict for the plaintiff, and an intermediate court affirms the judgment and expresses an opinion that the verdict is contrary to the evidence, the court of last resort, in reversing the judgment, will order a new trial instead of directing judgment in favor of the plaintiff upon the verdict. *Rand v. Iowa Central R. Co.* (N. Y.), 9-542.

Limitation of issues on new trial.—It is within the power of a reviewing court to qualify its order for a new trial by limit-

ing the retrial to that part of the case in which alone there is any error; and this power may be exercised in the case of a trial by jury when its exercise is necessary to the doing of justice between the parties. *Smith v. Whittlesey* (Conn.), 7-114.

d. Remanding for proper judgment or sentence.

Practice in Arkansas.—While the supreme court of Arkansas is empowered by statute to modify a judgment and render final judgment instead of reversing and remanding, the better practice is to reverse and remand with directions to the circuit court to enter judgment in conformity with the opinion. *Lenon v. Mutual Life Ins. Co.* (Ark.), 10-467.

Unauthorized sentence in criminal case.—Where there is no error affecting the merits of the trial of a criminal cause that will necessitate the grant of a new trial or vacation of the verdict found, but there is simply an unauthorized sentence imposed, an appellate court should reverse the judgment and sentence imposed, leaving the verdict to stand as a basis for a new and proper sentence, and should remand the cause for proper sentence. *Irvin v. State* (Fla.), 10-1003.

Where on appeal from a judgment of conviction in a criminal case it is determined that the sentence imposed by the trial court was improper, the cause will be sent back for a new trial on that account, but will be remanded for a proper judgment. *State v. King* (Wash.), 16-322.

e. Modification of judgment.

Reduction of amount of damages.—Where the damages awarded by the jury are excessive, but there is no error in the record requiring an unconditional reversal, the court will require the plaintiff to remit a part of the damages as a condition of affirmance. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

Where the jury in an action on contract, acting under an erroneous instruction by the trial court, have awarded the successful party damages to which he is not properly entitled, but the error does not affect the real controversy between the parties, and the amount of damages so allowed can be segregated from the rest of the verdict, the judgment will not be reversed absolutely, but will be affirmed upon condition that the successful party remit the damages improperly awarded. *Eaton v. Blackburn* (Ore.), 16-1198.

An appellate court is not authorized, instead of reversing a judgment, to enter a remittitur reducing the amount of the judgment to such a sum as it may deem proper. *Irvine v. Gibson* (Ky.), 4-569.

Where the verdict in an action to recover compensatory damages, the defendant's liability being conceded, is in the opinion of the appellate court so excessive as to evince passion, prejudice, and caprice on the part of the jury, the appellate court will require the plaintiff to enter a remittitur for such amount as will reduce the verdict to a proper sum

as a condition to allowing the judgment to stand; but a compliance with this requirement is optional with the plaintiff, and he may instead suffer a new trial. *Alabama Great Southern R. Co. v. Roberts* (Tenn.), 3-937.

On appeal from a verdict for the plaintiff in an action of tort, the court of appeal has no power, without the consent of the defendant, to fix the amount of damages which it considers reasonable and order a new trial unless the plaintiff shall consent to reduce the recovery to such amount. *Watt v. Watt* (Eng.), 2-672.

The practice of ordering a new trial of an entire case unless that part which is found to have been erroneously included in the judgment or verdict shall be remitted or surrendered is a correct and proper one beneficial to both parties. *Dunning v. Crofutt* (Conn.), 14-337.

Remission of judgment against one defendant.—Where the trial court enters judgment against one defendant for the entire amount of damages assessed by the jury against both defendants severally, the plaintiff may, on appeal, remit the part of the judgment assessed against the other defendant and have judgment for the amount assessed to the defendant against whom judgment has been rendered. *Nashville R., etc., Co. v. Trawick* (Tenn.), 12-532.

f. Imposing terms on successful party.

Retaining judgment as security.—An appellate court, in reversing the judgment of the lower court, has no power to put the appellant upon terms, he being the administrator of the persons against whom the judgment was rendered, by requiring him to enter his assent that the judgment shall stand as security for whatever damages may be found for the appellee upon a second trial and thus prevent the abatement of the action upon its return to the lower court by reason of the death of the defendant. *Irvine v. Gibson* (Ky.), 4-569.

17. EFFECT OF APPEAL.

Suspension or vacation of judgment below.—An appeal in the nature of a writ of error as prosecuted from the judgment of a law court operates as a mere suspension of the judgment of the lower court, superseding an issuance of execution during the pendency of such appeal, but a simple chancery appeal, on the contrary, brings up the facts as well as the law for examination and vacates the judgment of the lower court. *Fort v. Fort* (Tenn.), 11-964.

Tennessee statute.—The Tennessee statute making a judgment or decree of a court of equity a lien upon the property of the defendant, notwithstanding an appeal therefrom, to the same extent as a judgment at law, operates so to modify the common-law rule in respect to the judgments and decrees of chancery courts as to continue them in force upon an appeal where moneyed or other judgments are pronounced, but the effect of

the statute does not extend to any other class of judgments or decrees than those that constitute liens. *Fort v. Fort* (Tenn.), 11-964.

18. SUPERSEDEAS AND BOND.

a. In general.

On appeal in nature of writ of error.—Under the Tennessee statute the bond required of appellants and the proceedings in the appellate court are the same on an appeal in the nature of a writ of error as on a simple appeal, but the distinction is maintained that in the former case the judgment is merely suspended while in the latter case it is vacated. *Fort v. Fort* (Tenn.), 11-964.

In forcible entry and detainer.—Under the Oregon practice, an appeal from a judgment rendered in a justice's court in an action of forcible entry and detainer may be instituted and prosecuted to final determination by either party, but if the defendant appeals he must, in addition to the undertaking for the appeal, also give an undertaking for the payment to the plaintiff of twice the rental value of the premises of which restitution has been awarded. *Wolfer v. Hurst* (Oregon), 8-725.

In foreclosure suit.—The court making an order granting a writ of assistance in a foreclosure suit, after decree, sale, confirmation thereof and the execution of a sheriff's deed directing the sheriff to put the purchaser in possession of the premises, may in its discretion allow it to be superseded upon the condition that the appellant shall give a bond for the payment of a reasonable rent for the use and occupation of the premises during the pendency of his appeal. *Eseritt v. Michaelson* (Neb.), 10-1039.

Validity of bond as contract.—A bond given in an attempted appeal to the Nebraska supreme court from an order of a district court awarding a writ of assistance in a mortgage foreclosure proceeding, conditioned for the payment of rent, is valid as a contract where the obligor has by reason of the bond retained possession of the premises pending such appeal. *Eseritt v. Michaelson* (Neb.), 10-1039.

Waste bond under Nebraska code.—An order granting a writ of assistance in a foreclosure suit, after decree, sale, confirmation thereof and the execution of a sheriff's deed directing the sheriff to put the purchaser in possession of the premises, is a final order and is appealable; but is not such an order, within the meaning of the third subdivision of section 677 of the Nebraska code, as may be superseded by giving the waste bond therein provided for. *Eseritt v. Michaelson* (Neb.), 10-1039.

To whom payable.—On an appeal by the defendant in an action, the appeal bond is properly made payable to the plaintiff who has died subsequent to the judgment, rather than to the plaintiff's personal representatives. *Spencer v. Aetna Indemnity Co.* (Ill.), 12-323.

b. Sufficiency.

Burden of proof as to insufficiency.

— The onus of proof is with an appellee who seeks to have an appeal dismissed on the ground of insufficiency of the appeal bond. *Fitzpatrick v. Letten* (La.), 17-197.

Delay in objecting to sufficiency.

After the last bond for an appeal has been accepted, and when the ten days from the judgment have elapsed and a large part of the costs taxed in favor of the appellee has been paid, it is too late for appellee to affect appellant's right of appeal by calling the court's attention to the large amount of costs taxed and urging that the appeal bond is insufficient in amount. *Fitzpatrick v. Letten* (La.), 17-197.

Effect of insufficient justification.

The failure of the sureties on an appeal bond to justify by a sufficient affidavit as to their property qualifications is not a defect which nullifies the bond and requires the dismissal of the appeal, in the absence of any showing that the sureties are not financially competent. *Porter v. Western Union Tel. Co.* (Iowa), 12-585.

c. Amount.

In action where garnishment has issued.— On appeal by the plaintiff from a judgment in favor of the principal defendant in an action wherein a writ of garnishment has issued, the amount of the appeal and supersedeas bond is determined by the judgment in the principal action, without regard to the existence of the garnishment or the amount of the funds garnished. *Russell v. Graumann* (Wash.), 5-830.

Discretion of court.— It has always been held that the trial judge has discretion to fix the amount of the appeal bond, subject to the limitation that such discretion must not be arbitrarily exercised; and when it has not been arbitrarily exercised, it is not subject to review. *Fitzpatrick v. Letten* (La.), 17-197.

The trial court has discretion in the matter of fixing the amount of an appeal bond, if the plaintiff's action be nonsuited, and he has not been condemned for any amount, and is not ordered to deliver the property. There is no decision denying the discretion of the trial judge under such circumstances. *Fitzpatrick v. Letten* (La.), 17-197.

Inclusion of security for property sequestered.— In a judgment of dismissal, which does not order the delivery of any property or condemn the plaintiff to pay anything, the judge may fix the amount of the appeal bond without therein including an amount to secure the property which has been sequestered and attached, as the latter must be preceded by sufficient bond. *Fitzpatrick v. Letten* (La.), 17-197.

d. Additional bond.

Power of court to authorize.— An additional, supplemental, suspensive appeal bond may be authorized by the trial judge,

if timely offered. *Fitzpatrick v. Letten* (La.), 17-197.

Where a justice takes and approves an appeal bond, and allows the appeal, though the penalty of the bond is less than double the amount of the judgment appealed from, as required by the West Virginia statute (Code 1906, § 2115) the court should not dismiss the appeal as improvidently awarded, or pronounce the judgment prescribed by statute, without first ordering a new bond in sufficient penalty to be given by the appellant, within the time to be specified in such order, as provided by statute (Code 1906, § 2121). *Smith v. West Virginia Central Gas Co.* (W. Va.), 17-377.

The Minnesota supreme court has jurisdiction, after an appeal to it has been perfected, to direct the appellant to give a new supersedeas bond, and, in case of his default, to vacate the stay whenever it is made to appear that the original bond is clearly insufficient. *Bock v. Sauk Center Grocery Co.* (Minn.), 10-802.

New undertaking on further appeal.

— Under the Oregon statute providing that the defendant in an action for forcible entry and detainer cannot appeal from a judgment against him until he has given an undertaking for the payment of twice the rental value of the real property in question, a defendant who has given such an undertaking on appealing from a justice's judgment need not give a new undertaking upon appealing from the circuit court judgment affirming the justice's judgment. *Wolfer v. Hurst* (Oregon), 8-725.

e. Actions on appeal bonds.

Sufficiency of petition.— In an action on a supersedeas bond executed pursuant to appeal from a judgment of a trial court, and conditioned that the obligors shall pay whatever judgment may be rendered by the court upon the dismissal or trial of said appeal, a petition which merely alleges that the original judgment of the lower court was affirmed and is unpaid, without alleging that a money judgment was rendered by the appellate court, fails to state a breach of the bond. *German Nat. Bank v. Beatrice Rapid Transit, etc., Co.* (Neb.), 5-88.

What recoverable.— An appeal or supersedeas bond in an ordinary civil action or will contest, which provides for the payment of "all damages" which the obligee may sustain by reason of the appeal, does not entitle the obligee to recover as part of such damages attorneys' fees paid in resisting the appeal or writ of error. *Williams v. Fidelity, etc., Co.* (Colo.), 15-722.

19. Costs.

See also COSTS, 4.

a. In general.

On reversal for want of jurisdiction.

— Under the rule of the District of Columbia court of appeals providing that in case of reversal costs shall be awarded to the appellant "unless otherwise ordered by this

court," the court, in reversing a decree, will require each party to pay the costs incurred by him on appeal, where the reversal is for want of jurisdiction in the trial court but the question of jurisdiction was not raised by the defendant, as the complainant is at fault for having brought suit in a court without jurisdiction and the defendant is at fault in not having challenged the jurisdiction of the court. *Columbia Nat. Sand Dredging Co. v. Morton* (D. C.), 8-512.

The rule of the District of Columbia court of appeals that "in all cases where appeals shall be dismissed by this court, except where dismissal shall be for want of jurisdiction, costs shall be allowed to the appellee, unless otherwise agreed by the parties," has no application to a reversal of a decree rendered by a trial court which was without jurisdiction in the premises, as in such a case the court of appeals has jurisdiction of the appeal for the purpose of reversing the erroneous decree. *Columbia Nat. Sand Dredging Co. v. Morton* (D. C.), 8-512.

On dismissal for want of jurisdiction.

—An appellate court, on dismissing an appeal for want of jurisdiction, has no jurisdiction of power to render a judgment for costs of the suit. *Bice v. Boothsville Telephone Co.* (W. Va.), 13-1046.

Additional abstract filed by appellee.

—Upon the affirmance of a judgment by the appellate court, a motion to tax to the appellant the cost of an additional abstract filed by the appellee in order fully and fairly to present the questions at issue will be granted. *Graham v. Mattoon City R. Co.* (Ill.), 14-853.

Expense of unnecessary printing.

—Where an appellant has set forth the assignments of error at a greater length than is necessary for the proper presentation of appeal, the cost of printing such excess will be taxed to him, even though a reversal of the lower court is granted. *Dorr Cattle Co. v. Des Moines Nat. Bank* (Iowa), 4-519.

Liability of party not appealing.

—In an action against a railroad company and an insurer upon a contract of indemnity, under which both the indemnitor and the indemnitee have the right of appeal, if either party desires to appeal and the other does not, the real party appellant must pay the costs of the appeal. *Stephens v. Pennsylvania Casualty Co.* (Mich.), 3-478.

b. Damages for delay.

Under Kentucky civil code.—Under the Kentucky civil code providing that ten per cent. damages shall be awarded against the appellant upon the affirmance of a judgment for the payment of money the collection of which has been superseded, an order requiring a party to pay a certain amount to an officer of the court and permitting the adverse party immediately to withdraw such amount is a judgment for the payment of money, upon the affirmance of which, if superseded, damages must be awarded against the appellant. *J. M. Robinson, etc., Co. v. Corsicana Cotton Factory* (Ky.), 14-802.

Appeal frivolous.—Record examined and held to disclose a proper case in which to award the appellee damages on the ground that the appeal is frivolous and made only for the purpose of delay. *Jones-Downes Co. v. Chandler* (N. Mex.), 13-710.

To whom payable in criminal case.

The penalty, in the shape of damages equal to ten per cent. of the judgment appealed from, which is imposed by statute in Kentucky upon unsuccessful appellants, belongs entirely to the state in penal and criminal cases, and the court officers have no interest therein. *Commonwealth v. French* (Ky.), 17-601.

20. REHEARING OF APPEAL.

When properly denied.—An appellate court will not entertain an application for a rehearing, or for an amendment of its judgment on the ground of error of law apparent on the face of the judgment, where the error complained of was not called to its attention by the briefs or arguments on the hearing of the appeal. *Hunter v. Nelson* (N. Car.), 18-721.

Grounds of motion.—A petition for rehearing can be based only on points properly presented for decision at the original hearing. *Indianapolis, etc., R. Co. v. Branson* (Ind.), 19-925.

21. MANDATE AND PROCEEDINGS BELOW.

Restitution on reversal.—Where property is sold under a judgment which is subsequently reversed, the judgment creditor is responsible for the amount of money which he has received from the sale, together with interest on such amount. *Hess v. Deppen* (Ky.), 15-670.

Where property is sold under a judgment which is subsequently reversed, the judgment creditor may either allow the sale to stand and take the purchase money, or have the sale set aside and take the property itself. *Hess v. Deppen* (Ky.), 15-670.

If such sale is set aside, the purchaser should be charged with waste and rents, and should be adjudged to have a lien for all sums expended by him in the payment of valid taxes as well as for necessary repairs and improvements. *Hess v. Deppen* (Ky.), 15-670.

APPEARANCES.

Withdrawal of appearances as ground for new trial, see *NEW TRIAL*, 2 a (3).

Waiver of process by voluntary appearance, see *SUMMONS AND PROCESS*.

Special appearance to contest attachment.

—A nonresident whose property has been attached but who had not been served with process may appear specially to contest the attachment on the ground that the property was not subject to attachment. *Davis v. Cleveland, etc., R. Co.* (U. S.), 18-907.

Determination of nature of appearance from record.—It is not necessary for a defendant in appearing in a court of record

to quash a defective writ commencing an action, to cause the record to recite that his appearance is for that purpose only, in order, to avoid a waiver of defect in the jurisdiction of the court. In such a case, whether the appearance is general or special is to be determined by the record as it stands at the time the motion is made. *Fisher v. Crowley* (W. Va.), 4-282.

APPELLATE COURTS.

As to appellate courts generally, see **APPEAL AND ERROR**.

Appeals from intermediate appellate courts, see **APPEAL AND ERROR**, 3 d.

APPELLATE JURISDICTION.

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See **JUDGES**, 3 b.

APPOINTMENT.

Executors and administrators, see **EXECUTORS AND ADMINISTRATORS**, 2.

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APPORTIONMENT.

Apportioning local assessments, see **SPECIAL OR LOCAL ASSESSMENTS**, 6.

Apportionment of debts on division of county, see **COUNTIES**, 1.

APPRAISEMENT.

Distinction between appraisal and arbitration, see **ARBITRATION AND AWARD**, 1.

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Fixing value of waterworks in proceeding for acquisition by municipality, see **WATERS AND WATERCOURSES**, 4 e.

Fixing price in suit for specific performance, see **SPECIFIC PERFORMANCE**, 3 f (14).

Provision for appraisement in fire insurance policy, see **INSURANCE**, 5 1 (4).

APPRENTICES.

Validity of statute.—When the state as *parens patriæ* in a proper case, through its constituted officers or agencies, takes under its control an infant, the law authorizing such child to be bound to service under proper restrictions is not a violation of those provisions of the constitutions of Georgia and of the United States which prohibit slavery and involuntary servitude except as a punishment for crime after conviction thereof. *Kennedy v. Meara* (Ga.), 9-396.

The Georgia general assembly has authority to authorize a benevolent institution, to which an infant has been committed under statutory authority, to bind out to service the child committed to its care, such institution reserving the right of supervision to see that the child is properly cared for. *Kennedy v. Meara* (Ga.), 9-396.

Liability of apprentice on indenture.

—The rule that an action will not lie to enforce a covenant in an apprenticeship deed entered into by an infant applies only to covenants which it is sought to enforce during the currency of the apprenticeship. A covenant to do or abstain from doing something after the apprenticeship shall have ceased may, provided that the deed as a whole is for the apprentice's benefit, be enforced against him by action. *Gadd v. Thompson* (Eng.), 20-777.

A covenant by an apprentice not to engage in the business carried on by the master within ten miles of the master's place of residence for ten years after the expiration of the apprenticeship is reasonable where instruction in the business cannot be obtained on any other terms. *Gadd v. Thompson* (Eng.), 20-777.

APPROPRIATION.

Appropriating lost goods as larceny, see **LARCENY**, 1 b.

County funds, see **COUNTIES**, 2.

Municipal funds, see **MUNICIPAL CORPORATIONS**, 6.

Payment of compensation of public officers, see **PUBLIC OFFICERS**, 6.

Right of public officers to incur expenses in excess of appropriations, see **PUBLIC OFFICERS**, 5 c.

Right to appropriate water, see **IRRIGATION**.

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Approval of bills by executive, see **STATUTES**, 1 e.

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APPURTENANCES.

Appurtenances to vessels, see **SHIPS AND SHIPPING**, 1.

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ARBITRATION AND AWARD.

1. IN GENERAL,

2. STIPULATION IN INSURANCE POLICIES,

Power of municipality to submit to arbitration, see **MUNICIPAL CORPORATIONS**, 17.

Provision for arbitration in fire insurance policy, see **INSURANCE**, 5, 1 (4).

Statute of limitations as affected by arbitration agreement, see **LIMITATION OF ACTIONS**, 4 b (6).

1. IN GENERAL.

Enforcement of agreement to arbitrate.—Upon the failure of arbitrators to agree where there has been part performance of a contract and the arbitration was but an incident thereof, a court of equity will grant relief by substituting itself for the arbitrators. *Cooke v. Miller* (R. I.), 1-30.

Ousting jurisdiction of courts.—A mere general stipulation in a lease that differences between the parties shall be referred to arbitration does not prevent either party from resorting to the courts without such reference. *Lawrence v. White* (Ga.), 15-1097.

Authority of arbitrator.—The appointment of an arbitrator and agent by the owner of premises to settle a difference with a tenant as to the right of the latter to occupy a tenement house on the premises does not give the arbitrator authority to extend the tenancy. *Mead v. Owen* (Vt.), 13-231.

Refusal of arbitrator to receive evidence.—A party to an arbitration, who is injured by the misconduct of the arbitrators in refusing to hear pertinent and material testimony, may maintain a suit in equity to have the award set aside. *Cohn v. Wemme* (Oregon), 8-580.

Notwithstanding the Oregon statute authorizing the defendant to set forth by answer as many defenses as he may have, the defendant in an action to recover the amount of an award cannot set up as a defense the misconduct of the arbitrators in refusing to hear

pertinent and material testimony, as the defense is an equitable one and there is no statute authorizing an equitable defense to be interposed to an action at law. *Cohn v. Wemme* (Oregon), 8-508.

Duty of arbitrator to observe rules of evidence.—Arbitrators are bound to observe the rules of evidence no less than judges. *In re Enoch* (Eng.), 18-159.

Amendment of pleadings.—An arbitrator has a discretion as a judicial officer to allow an amendment of pleadings delivered by the parties in compliance with a direction given to them by him. *In re Arbitration*, etc. (Eng.), 20-600.

Rehearing before third arbitrator.—Where a third arbitrator is appointed by the original arbitrators upon their failure to agree, the parties in interest are entitled to notice of such appointment and of the time and place of the meeting of the original arbitrators and the third arbitrator to hear and determine finally the matter submitted, and to a reasonable opportunity to present their evidence and arguments to the third arbitrator, and unless such rights have been distinctly and unequivocally waived by the agreement or conduct of the parties, a failure to give the required notice or to afford such opportunity for the presentation of evidence invalidates the award. *Bray v. Staples* (N. Car.), 16-555.

Distinction between appraisal and arbitration.—The distinction between appraisal and arbitration is that an appraisal is generally a mere auxiliary feature of a contract of sale, the purpose of which is not to adjudicate but to avoid controversy, and as long as the appraisers act in good faith they have a wide discretion as to their methods of procedure and sources of information, while an arbitration presupposes a controversy to be tried and decided, the investigation of the arbitrators being in the nature of a judicial inquiry, and their failure to observe strictly rules of procedure rendering their award void. *Omaha Water Co. v. Omaha* (U. S.), 15-498.

2. STIPULATION IN INSURANCE POLICIES.

Arbitration as condition precedent to suit.—A provision in a policy of life insurance for submission to arbitration does not preclude the bringing of an action on the policy without such submission, where the agreement to arbitrate does not, either in express terms or by proper construction, make the award a condition precedent to the right to sue. *Chadwick v. Phoenix Accident, etc., Assoc.* (Mich.), 8-170.

A stipulation in a fire insurance policy for submission of the amount of damage to arbitration in case of a disagreement held to constitute a condition precedent to an action on the policy. *Graham v. German American Ins. Co.* (Ohio), 9-79.

Burden of proving offer to arbitrate.—A stipulation in a fire insurance policy for submission to arbitration of the amount of loss in case of a disagreement held not to impose an obligation on the insurer to de-

mand an appraisal; but in the event of a disagreement between the parties, an appraisal is required by the terms of the contract, and in a suit on the policy the burden lies upon the insured to show that he has, on his part, performed or offered to perform the condition as to appraisal. *Graham v. German American Ins. Co. (Ohio)*, 9-79.

Disagreement by arbitrators.—Where a dispute as to the insurer's liability under a policy of fire insurance has been submitted to arbitration pursuant to a provision in the policy requiring such submission in the event of a disagreement of the parties, but the arbitrators, without any fault on their part or on the part of either party to the submission, have disagreed and have failed to return an award, the absence of the award does not bar an action on the policy by the insured, if he has acted in good faith and endeavored to secure an award or a settlement, and the insurer has not acted in good faith in that respect. *Bernhard v. Rochester German Ins. Co. (Conn.)*, 8-298.

ARBITRARY.

Exercise of judicial discretion, see **SPECIFIC PERFORMANCE**, 2.

ARCHITECTS.

Approval of work done by contractor, see **CONTRACTS**, 5 b (3).

Certificate of architect as condition precedent to recovery on building contract, see **CONTRACTS**, 7 d.

Compensation of architect, see **MASTER AND SERVANT**, 1 d.

Right to lien, see **MECHANICS' LIENS**, 3.

ARGUMENTS OF COUNSEL.

In civil cases, see **TRIAL**, 4.

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ARMS.

See **WEAPONS**.

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Devise in restraint of entering military or naval service, see **WILLS**, 9 d.

Enlistment of principal in navy as exonerating bail, see **BAIL**, 8.

Forfeiture of citizenship by desertion, see **CITIZENSHIP**.

Judicial notice of military reservations, see **EVIDENCE**, 1 g.

Land grants in aid of construction of military roads, see **PUBLIC LANDS**.

Review of judgment of court-martial, see **HABEAS CORPUS**, 2.

State militia, see **MILITIA**.

Enlistment of minors.—Although a minor under eighteen years of age, who has been enlisted in the army or navy without the consent of his parents or guardian, is entitled to be discharged, he is, nevertheless, subject to the rules and regulations of the service until discharged by operation of law, and is liable to be tried and punished by a military or naval court for infractions of such rules and regulations prior to his discharge. *Dillingham v. Booker (U. S.)*, 16-127.

The civil courts should not interfere by habeas corpus to discharge a minor under eighteen years of age, who has been enlisted in either the military or naval service without the consent of his parents or guardian, if at the time of the presentation of the petition for the writ such minor is under arrest and held on any charge cognizable by either a military or naval court. *Dillingham v. Booker (U. S.)*, 16-127.

ARRAIGNMENT.

See **CRIMINAL LAW**, 6 h.

ARREARS.

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ARREST.

1. **EXECUTION OF PROCESS**, 335.

a. Killing to effect arrest, 335.
b. Breaking doors, 335.

2. **ARREST WITHOUT WARRANT**, 335.

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b. By peace officers, 335.
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Arrest in civil actions, see **IMPRISONMENT FOR DEBT AND IN CIVIL CASES**.

Arrest in extradition proceedings, see **EXTRADITION**, 4 e.

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Killing in resisting arrest, see **HOMICIDE**, 5 a.

Liability of carrier for wrongful arrest of passenger, see *CARRIERS*, 6 e (4) (3).
Principal's liability for acts of agent, see *AGENCY*, 3 c.

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Validity of warrant reciting offense under void amendatory statute, see *CRIMINAL LAW*, 3.

Wrongful arrest, see *FALSE IMPRISONMENT*.

1. EXECUTION OF PROCESS.

a. Killing to effect arrest.

Felon.—A peace officer has the right to kill a felon if it is necessary to do so to effect his arrest or prevent his escape, and also has the right to kill a person attempting to rescue the felon, if the rescue cannot be prevented in any other way, provided the killing is done solely for the honest and non-negligent purpose of effecting the arrest or preventing the escape. *State v. Smith (Iowa)*, 4-758.

Misdemeanant.—As a general rule an officer has no right, except in self-defense, to kill a mere misdemeanor in attempting to arrest him or to prevent his escape after arrest. *State v. Smith (Iowa)*, 4-758.

Person attempting to rescue misdemeanor.—A peace officer has the right to kill a person whom he is arresting for attempting to rescue a misdemeanor in his custody, where there is a statute making it a felony to attempt to rescue any person who is in the custody of any peace officer upon any criminal charge. *State v. Smith (Iowa)*, 4-758.

Plea of justification in action for killing.—In a civil action against a sheriff to recover damages for the killing of a human being, where the defendant interposes the defense that the person killed was a felon, and that he was shot and killed while fleeing from arrest, the plea of justification, in order to be sufficient as against a demurrer, must either allege in terms that the officer attempting to make the arrest gave information to the fugitive of his authority to make the same, or aver such a state of facts as exempted the officer from imparting such information. Where the averments of the plea are consistent with the idea that the officer had ample opportunity to impart the required information before the person escaping attempted to flee, but made no effort to do so, the plea is insufficient. *Richards v. Burgin (Ala.)*, 17-898.

In such a case the plea, in order to be sufficient as against a demurrer, must also set forth facts sufficient to show that the killing of the fugitive was necessary in order to prevent his escape. An averment that the killing of the deceased "reasonably appeared to be necessary" in order to prevent his escape is insufficient, being a mere conclusion on the part of the pleader. *Richards v. Burgin (Ala.)*, 17-898.

Question for jury.—The question whether a peace officer was justified in killing a felon who was resisting arrest is one

of fact for the jury, and not one of law for the court. *State v. Smith (Iowa)*, 4-758.

b. Breaking doors.

Private person attempting to recapture felon.—Under the Tennessee statutes, a private person seeking to make an arrest for a felony may break open an outer or inner door or window of a dwelling house of the person sought to be arrested, though he cannot break into the dwelling house of a stranger; but in order to retake a person who has escaped from his custody after he has arrested him for a felony, a private person may, upon immediate and fresh pursuit, break open the outer or inner door or window of any dwelling house in which the fleeing criminal has taken refuge, provided he has given notice of his intention and has been refused admittance. *McCaslin v. McCord (Tenn.)*, 8-245.

Sheriff acting as private person.—Where the sheriff of a county attempts to arrest in another county, without a warrant, a person who has escaped from the custody of officers in a third county, he and the person assisting him must be treated as private persons attempting to make an arrest without a warrant, and if they are not in fresh pursuit of the person sought to be arrested, they cannot break either an outer or an inner door or a window of the dwelling house of a stranger, in which they believe that the escaped prisoner has sought refuge. *McCaslin v. McCord (Tenn.)*, 8-245.

2. ARREST WITHOUT WARRANT.

a. In general.

Misdemeanant after commission of offense.—A person charged with a misdemeanor cannot legally be arrested therefor after the commission of the crime, without a proper warrant. *McCullough v. Greenfield (Mich.)*, 1-924.

Escaped prisoner.—The Tennessee statutes do not authorize either a private person or an officer to arrest without a warrant a person who has escaped from jail or from custody, when the pursuit is not immediate or fresh. *McCaslin v. McCord (Tenn.)*, 8-245.

Except where an escape itself is by law a felony, and with the further exception of an immediate pursuit for recapture, there is no authority conferred by the Tennessee statutes upon either an officer or a private person to make an arrest without a warrant for an escape. *McCaslin v. McCord (Tenn.)*, 8-245.

b. By peace officers.

General rule stated.—A police officer has no authority to make an arrest without a warrant except for a breach of the peace committed in his presence or when he has reasonable ground to believe that the person arrested is a felon or is about to commit a felony. *Cook v. Hastings (Mich.)*, 13-194.

For violation of town ordinance.—As a general rule, a municipal peace officer in whose presence a town ordinance has been violated has no lawful authority, without a

warrant, to arrest the offender, when he has had ample time and opportunity since the commission of the offense to procure a warrant. *Yates v. State* (Ga.), 9-620.

Policeman acting as special officer. — A regularly qualified and commissioned police officer, while acting as special officer for a railway company at one of its railroad stations, may lawfully arrest, without a warrant, a person found acting in a disorderly manner or in a state of intoxication on one of the company's trains while the same is standing at the station. Such arrest and detention does not constitute false arrest or false imprisonment. *Erie R. Co. v. Reigherd* (U. S.), 16-459.

Presumption as to official capacity. — A constable who, within his jurisdiction, arrests a person who has committed a felony, will, in making the arrest, be presumed and held to act in his official capacity, whether such arrest is made by him under or without warrant. And the law will not permit him to claim that an arrest made, pursuant to official duty, was made by him in his individual capacity as a private citizen. *Somerset Bank v. Edmund* (Ohio), 10-726.

c. By private persons.

Escaped prisoner. — The Tennessee statutes do not authorize any private person to make an arrest for an escape, except where the escape itself is by law a felony. *McCaslin v. McCord* (Tenn.), 8-245.

Under Tennessee statutes. — It is not within the contemplation of the Tennessee statutes that private citizens of one county shall take it upon themselves to go into another county without warrants in search of criminals, except in cases of fresh pursuit of a fleeing criminal endeavoring to avoid immediate capture in an original arrest, or in cases of immediate pursuit after arrest and escape. *McCaslin v. McCord* (Tenn.), 8-245.

3. CALL FOR ASSISTANCE BY OFFICER.

Right of private person to respond. — Any person who hears the call of a police officer for assistance in the arrest of a fleeing criminal may respond to that call and aid in the arrest, without waiting for information as to the offense which the criminal has committed. *State v. Bertchey* (N. J.), 18-931.

4. WAIVER OF ILLEGAL ARREST.

Pleading guilty. — Where a person who has been arrested on a charge of intoxication and disorderly conduct signs a stipulation in the police court, in a form prescribed by statute, waiving the reading of the affidavit in the case, and also waiving the right to be personally present on the trial, and pleading guilty to the charge of intoxication, he thereby waives any right which he might otherwise have to question the legality of his arrest or detention by action for false arrest. *Erie R. Co. v. Reigherd* (U. S.), 16-459.

ARREST OF JUDGMENT.

See JUDGMENTS, 7.

Effect of granting motion for new trial, see NEW TRIAL, 3 e.

Motion in arrest of judgment as prerequisite to writ of error, see APPEAL AND ERROR, 2 b.

ARSON.

1. WHAT CONSTITUTES, 336.
2. ATTEMPTS TO COMMIT ARSON, 337.
3. INDICTMENT OR INFORMATION, 337.
4. EVIDENCE, 337.

1. WHAT CONSTITUTES.

Burning unfinished dwelling house.

— Where it appears in a prosecution for arson that the structure which was burned was unfinished, and, though intended for a dwelling house, had never been occupied; that it consisted of "one main big room with a piazza in front and a shed room on the rear; that the piazza and about half way up the rafters on the front part of the big room was covered; that the balance of the main big room was not covered; that there were window openings and door openings to said building, but that the doors and windows had not been put in; that there was a chimney opening, but that the chimney had not been commenced; that they commenced to cover the house on the same Saturday evening that the house was burned," the defendant cannot be convicted, because such a structure is not a dwelling house within the meaning of the Alabama statute relating to arson. *Davis v. State* (Ala.), 15-547.

Burning own house. — In Wisconsin the statutory offense of burning the dwelling house of another is the same as the common-law offense of the felonious burning of the dwelling house of another, in that it relates to the security of the habitation, regardless of the location of the title to the property. One may be guilty of the offense by burning his own house where it is the habitation of another, but not where it is his own habitation. *Kopczynski v. State* (Wis.), 16-865.

Burning property of spouse. — Neither husband nor wife can be guilty of arson in burning the dwelling house which they jointly occupy as a home, regardless of the status of the title; but it is otherwise where the house is the habitation of but one, the other having left it to reside elsewhere, although the marital relation still exists. *Kopczynski v. State* (Wis.), 16-865.

In the case last suggested, the status of the title to the property is immaterial except as it may bear on the question of fact respecting joint occupancy of the property burned as a dwelling house. *Kopczynski v. State* (Wis.), 16-865.

Burning "shop." — A house used for the purpose of manufacturing woodwork is a "shop" within the meaning of the word as used in the North Carolina statute defining

the subject of arson. *State v. Arthur* (N. Car.), 19-505.

Under Ohio statute.—It is not essential to the crime of arson as defined by the Ohio statute, that the building be the sole property of the person who burns it, or that the value of his property in it be \$50, but it is sufficient that he has an estate in it and that the building is of the value of \$50. *Jones v. State* (Ohio), 1-618.

2. ATTEMPTS TO COMMIT ARSON.

Employing another to commit.—A person who employs others to commit the crime of arson, gives them materials with which to do it, shows them how to start a slow-burning fire, pays them compensation for their services, furnishes a horse for one of them to ride, and starts them on their way, is guilty of an attempt to commit the crime of arson, within the meaning of the Oregon statute prescribing the punishment for attempts to commit crimes. *State v. Taylor* (Oregon), 8-627.

3. INDICTMENT OR INFORMATION.

Description of property.—An information describing a house alleged to have been fraudulently burned by the defendant, "as the dwelling house of defendant," is not insufficient because the house was not actually used or occupied as a place of abode by the defendant. *People v. Mix* (Mich.), 12-393.

Ownership of property.—In charging the offense of burning the dwelling house of another, it is proper to allege the dwelling house to be that of him who occupies the structure as a habitation, though he may have no property rights therein. *Kopczynski v. State* (Wis.), 16-865.

Situs of property in county.—An information for arson, which alleges that the defendant, in a specified county and state, "then and there being, did then and there unlawfully, wilfully, and feloniously set fire to and burn a certain barn building" owned by a specified person, is not open to the objection that it does not alleged that the situs of the barn was in the county named. *State v. McLain* (Wash.), 10-321.

4. EVIDENCE.

Corpus delicti.—The *corpus delicti* of arson is sufficiently established to justify the admission in evidence of a confession of the defendant where the building described in the indictment is conceded to have been burned and there is evidence tending to show a criminal agency. *State v. Rogoway* (Oregon), 2-431.

To prove the *corpus delicti* of arson it must be shown not only that the building was burned but also that it was burned by the wilful act of some person criminally responsible, and not as the result of natural or accidental causes. *State v. Pienick* (Wash.), 13-800.

In a prosecution for arson, evidence examined and held insufficient to prove the *corpus*

delicti beyond a reasonable doubt, and consequently insufficient to sustain a conviction by the verdict of a jury. *State v. Pienick* (Wash.), 13-800.

Threats.—In a prosecution for arson, the defendant cannot introduce evidence to show that prior to the burning a third person had made certain threats against the owner of the building, and that after the burning the owner stated that he thought it had been done by such person, where no other evidence of any kind is offered tending to implicate the third person. *State v. McLain* (Wash.), 10-321.

Motive.—Upon the trial for arson of the owner of the property destroyed by fire shortly after being insured for a large sum, a statement made by the accused under oath prior to the fire, placing the value of the property at an amount much smaller than the amount of insurance, is admissible in evidence to show a motive for the burning. *Hooker v. State* (Md.), 1-644.

In a prosecution for burning a building with intent to defraud the insurance company in which the defendant had insured it for more than it was worth, the proof of loss as sworn to by the defendant, describing the building and its contents, is properly admitted in evidence as bearing upon the defendant's motive; and, as bearing upon the same question, evidence offered by the defendant that the fire destroyed certain other property not included in the proof of loss is improperly excluded. *People v. Mix* (Mich.), 12-393.

Contents of building burned.—Under the Washington statute defining arson as "the wilful setting fire to any structure," and defining the word structure as "any . . . barn . . . in which property is placed or stored," it is competent, in a prosecution for burning a barn wherein the evidence is purely circumstantial, to prove the contents of the building for the purpose of showing that it was a "structure" within the meaning of the statute; and the evidence is not incompetent as tending to inflame the minds of the jury against the defendant by showing that the fire destroyed or seriously endangered a large amount of valuable property. *State v. McLain* (Wash.), 10-321.

Experiments to ascertain cause of fire.—In a trial for arson the state will not be permitted to prove an experiment by a policeman to show that a candle placed about where the fire occurred produced a light of about the same sort as he had noticed on the night of the fire, where there is no evidence as to the presence of candles about the premises at the time of the fire. *Hooker v. State* (Md.), 1-644.

Sufficiency of circumstantial evidence.—Evidence reviewed, in a prosecution for arson, and held, though purely circumstantial, sufficient to justify the trial court in denying the defendant's motion for a directed verdict. *State v. McLain* (Wash.), (Wash.), 10-321.

In a prosecution for burning a building with intent to defraud the insurance com-

pany in which the defendant had insured it for more than it was worth, a conviction is supported by evidence of a purely circumstantial nature from which the jury might infer that the defendant endeavored unsuccessfully to procure others to burn the building, and then stated that he would burn it himself, and that he placed a jug containing kerosene or gasoline in the house in such a manner that it could be readily ignited, and after the building burned, endeavored to divert suspicion by procuring false testimony, notwithstanding the testimony of other witnesses that the defendant was four miles away when the fire occurred. *People v. Mix* (Mich.), 12-393.

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ployees on guests, see **INNS, BOARDING HOUSES AND APARTMENTS**, 6.

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Right of wife to sue husband for assault and battery, see **HUSBAND AND WIFE**, 2 f.

1. As A CRIME.

a. Assault with intent to kill or murder.

Intent.—A specific intent to kill is an essential element of the offense of assault with intent to murder. *State v. Bennett* (Iowa), 5-997.

To constitute the crime of assault "with intent to murder or kill" (Kirb. Dig. Ark., § 1588) a specific intent to take the life of the person assaulted is necessary, and therefore it is error to instruct the jury that to constitute the offense the circumstances must be such that if death had resulted the defendant would be guilty of murder either in the first or the second degree, and that a specific intent to kill is not an element of murder in the second degree. *Chowning v. State* (Ark.), 18-529.

Wounding one person in attempt to kill another.—Under the Missouri statute a person who, while shooting with intent to kill another, wounds a third person at whom he does not shoot and whom he has no intention of killing, is not guilty of an assault with intent to kill the third person. *State v. Mulhall* (Mo.), 8-781.

Actual infliction of injury.—In a prosecution for an assault with intent to kill, the wounding of the prosecuting witness is competent evidence for the jury to consider in determining the intent of the defendant, but such wounding is not an essential element of the offense, as the offense may be complete though the person assaulted is not wounded, and a wound inflicted on a person does not constitute an offense unless it is inflicted with the intent to kill him. *State v. Mulhall* (Mo.), 8-781.

b. Assault with dangerous or deadly weapon.

Pointing unloaded firearm.—A conviction for assault with a dangerous weapon cannot be sustained upon evidence that the accused, without justification, drew a revolver and pointed it at the prosecuting witness within shooting distance, thereby putting the witness in fear, where it is admitted that the revolver was unloaded. *Price v. United States* (U. S.), 13-483.

One who unlawfully points, in a threatening manner, an unloaded revolver at another who does not know the weapon is unloaded is guilty of a simple assault. *Price v. United States* (U. S.), 13-483.

c. Indecent assault.

Admissibility of the particulars of a complaint by the prosecutrix of an indecent as-

sault elicited by a question. *King v. Osborne* (Eng.), 2-830.

Admissibility of the complaint of an indecent assault by a prosecutrix under the age of consent. *King v. Osborne* (Eng.), 2-830.

d. Indictment or information.

Information for assault with intent to kill considered and held to charge every element of the offense under the Missouri statute. *State v. Temple* (Mo.), 5-954.

e. Defenses.

Self-defense.—A person who is assaulted with a deadly weapon on his own premises may, without retreating, use such force as is reasonably necessary to defend himself, although the assault does not occur within his dwelling. *State v. Bennett* (Iowa), 5-997.

Intoxication.—Intoxication to the extent of being incapable of forming an intent to take life is a defense to an indictment for an assault "with intent to murder or kill" (Kirb. Dig. Ark., § 1588), since a specific intent to take the life of the person assaulted is an essential ingredient of the offense. *Chowning v. State* (Ark.), 18-529.

Provocation.—Opprobrious epithets do not excuse an assault and battery. *Stockham v. Malcolm* (Md.), 19-759.

f. Evidence.

Reason for carrying arms.—In a prosecution for assault with intent to kill, it is not necessary for the prosecuting witness to explain why he was armed, but it is not prejudicial error to permit him to make such an explanation. *State v. Ruck* (Mo.), 5-976.

Description of weapon by witness.—In a prosecution for assault with intent to kill, where it appears that the assault was committed with a bottle, the fact that the state has been unable to procure the particular bottle does not preclude the prosecuting witness from describing it. *State v. Ruck* (Mo.), 5-976.

Other weapons in defendant's possession.—In a prosecution for assault with intent to kill, where there is evidence of a confession by the defendant admitting the assault and stating its purpose, testimony by the arresting officer that he found in the defendant's room certain weapons other than that with which the assault was made, which the defendant said would be found there, is competent as tending to establish the motive and intent with which the assault was made. *State v. Ruck* (Mo.), 5-976.

Nature of weapon used.—In a prosecution for assault with intent to kill, where it appears that the assault was made with a beer bottle, it is for the jury to determine whether a bottle is a deadly weapon within the meaning of the statute, and whether it was used with intent to kill. *State v. Ruck* (Mo.), 5-976.

Arrest of accomplices.—In a prosecution for assault with intent to kill, it is com-

petent to prove that the persons who assisted the defendant in making the assault, but who have not been indicted, were arrested shortly after the assault and had in their pockets weapons similar to that used by the defendant. *State v. Ruck* (Mo.), 5-976.

Production of accomplices for identification.—In a prosecution for assault with intent to kill, where only one of the assailants has been indicted and is on trial, it is competent to permit the defendant's accomplices to be brought into court in order that the prosecuting witness may identify them. *State v. Ruck* (Mo.), 5-976.

Identification of defendant.—In a prosecution for assault with intent to kill, it is competent to permit the state to have the prosecuting witness identify the defendant as his assailant, and for that purpose have the prisoner stand up. *State v. Ruck* (Mo.), 5-976.

Presumption of intent to kill.—In a prosecution for assault with intent to commit murder, where the defendant admits the act but seeks to justify it on the ground of self-defense, a specific intent to kill may be presumed from the act. Such presumption is not conclusive, however, but is to be considered with the other evidence in determining the defendant's guilt or innocence. *State v. Bennett* (Iowa), 5-997.

Sufficiency of evidence of intent.—Evidence reviewed in a prosecution for assault with intent to kill, and held sufficient to show that the assault was made with intent to kill. *State v. Ruck* (Mo.), 5-976.

Nature and extent of wound inflicted.—It is not error to permit the physician who attended the complaining witness, after he was stabbed by the defendant, to testify as to the nature and extent of the wound inflicted, together with his treatment of the same. *Stevens v. State* (Neb.), 19-121.

Collateral transactions.—It is proper in a prosecution for assault and battery to exclude evidence of collateral transactions which do not warrant or justify the defendant in making the assault. *Stevens v. State* (Neb.), 19-121.

Comparative size and strength of parties.—Where one charged with assault and stabbing with intent to wound pleads and attempts to prove self-defense as a justification, the state may prove the relative size and physical strength of the parties, together with the weakened physical condition of the complaining witness, as tending to show that the defendant had no reason to believe himself in imminent danger of death or great bodily harm at the time he committed the assault. *Stevens v. State* (Neb.), 19-121.

Character of prosecuting witness.—The defendant is entitled by way of justification to prove the general reputation of the prosecuting witness in the community where he resided as a violent, quarrelsome, and dangerous man; but he is not entitled to prove specific acts occurring more than ten years previous to the alleged assault, with which the defendant had no concern. *Stevens v. State* (Neb.), 19-121.

Character of defendant.—Where the defendant attacks the reputation of the prosecuting witness, and introduces evidence tending to show that his reputation, in the community where he resides, as a peaceable and law-abiding citizen is bad, the prosecution is entitled to contradict such testimony by the evidence of competent witnesses. *Stevens v. State* (Neb.), 19-121.

g. Instructions.

Accidental shooting.—In a prosecution for an assault with a pistol with intent to commit murder, where the defendant claims that the pistol was discharged accidentally, it is erroneous for the court to instruct the jury that they should disregard the evidence as to accident unless they find affirmatively that the pistol was discharged accidentally, if the jury are not also instructed that evidence of accidental shooting is to be considered in determining whether there is reasonable doubt of the defendant's guilt. *State v. Matheson* (Iowa), 8-430.

Intent and malice.—Instruction in a prosecution for assault with intent to kill considered and held not open to the objection that it eliminates the necessity of proof that the act was done "purposely" and "with malice aforethought." *State v. Temple* (Mo.), 5-954.

Intoxication of defendant.—In a prosecution for assault with intent to commit murder, where the evidence shows that the defendant was drunk at the time of the assault, the court should instruct the jury as to the effect of such evidence as tending to show lack of a specific intent to kill. *State v. Bennett* (Iowa), 5-997.

h. Verdict.

Conviction for assault with dangerous weapon under indictment for assault with intent to kill.—An information for shooting at a person with intent to kill includes the crime of assault with a dangerous weapon by shooting at a person with intent to injure, and will support a conviction thereof. *State v. Bednar* (N. D.), 20-458.

2. AS A CIVIL INJURY.

a. Elements of cause of action.

Intent to injure.—It is unnecessary to show in a civil action for assault and battery that the defendant intended by the act complained of to injure the plaintiff. It is sufficient if it appear that the act was unlawful. *Mohr v. Williams* (Minn.), 5-303.

Running bicycle against pedestrian.—Even when the use of sidewalks for bicycles is tolerated by the failure to attach a penalty to such use, a person riding a bicycle on a sidewalk is invading the part of the street set apart for pedestrians, and takes upon himself the risk of injuring them so as to make himself liable for injuring a pedestrian who is in the proper exercise of his rights in coming upon or walking upon

the sidewalk. *Fielder v. Tipton* (Ala.), 13-1012.

In an action against the rider of a bicycle for injuries received by a pedestrian on a sidewalk in being struck by the defendant's machine, testimony by the defendant that he was traveling at the rate of four or four and one-half miles an hour in front of a shop in which he knew persons were constantly going in and out, and that it was impossible for him to avoid striking the plaintiff after he saw the plaintiff step out of the shop, justifies a general charge in favor of the plaintiff. *Fielder v. Tipton* (Ala.), 13-1012.

b. Defense.

Trespass by plaintiff.—One may resist another trespassing upon his lands, whatever the motive for so resisting may be, it being not the design of the arrestor but the act of the trespasser which is wrongful. *Slingerland v. Gillespie* (N. J.), 1-886.

Voluntary agreement to fight.—Where two persons engage voluntarily in a fight either can maintain an action against the other to recover the actual damages for the injuries he may receive, and the fact that the combat was by agreement or mutual consent of the parties to it is no defense. *Morris v. Miller* (Neb.), 17-1047.

Right of recaption of property.—The right of recaption does not justify the owner of personal property in committing an assault on the person in possession thereof in order to retake the property, where the owner in possession has no knowledge of the ownership and has no intention of withholding the property from the true owner. *Stanley v. Payne* (Vt.), 6-501.

c. Pleading.

Sufficiency of petition.—In an action for assault or for trespass, the petition must allege facts constituting such assault or trespass. *Reed v. Maley* (Ky.), 2-453.

Special plea of justification.—In a civil action to recover damages for an assault and battery, the defense of justification cannot be proven under the general issue, but must be specially pleaded. *Morris v. McClellan* (Ala.), 16-305.

Plea of self-defense.—In a civil action to recover damages for an assault and battery, where the defendant pleads self-defense, the plea, to prevail against a demurrer, must aver every element or fact necessary under the law to constitute self-defense if the cause had been a criminal prosecution. *Morris v. McClellan* (Ala.), 16-305.

Plea of defense of another.—Where the defendant in a civil action to recover damages for an assault and battery interposes the defense that he struck in protection of another person, who was entitled to his protection under the law, his plea must show not only freedom from fault on the part of the person whom he sought to protect, but freedom from fault on his own part, as well as a necessity to commit the battery. *Morris v. McClellan* (Ala.), 16-305.

d. Evidence.

Acts and declarations of parties.—

In a civil action to recover damages for an assault and battery, although it is competent to show all that occurred at the time of the difficulty and was connected therewith, as forming a part of the *res gestæ*, evidence in the nature of hearsay, concerning acts and declarations of the parties several minutes after the difficulty was over, is not admissible. *Morris v. McClellan* (Ala.), 16-305.

In an action by husband and wife to recover damages for assaults alleged to have been committed on the wife by the defendant under circumstances which made them the criminal offense of an attempt to commit rape or an indecent assault, evidence by both husband and wife of complaints made by the latter to the former in the evening of each of the days on which the assaults were alleged to have been committed, of what had been done to her, including the particulars of the complaints, is properly admitted. *Hopkinson v. Perdue* (Ont.), 2-230.

Hat worn by person assaulted.— In a civil action to recover damages for an assault and battery, it is not error to receive in evidence the plaintiff's hat, showing a break or rent at a place which, when worn, would be over or near the point of injury upon the plaintiff's head, where such hat was picked up immediately after the encounter between the plaintiff and the defendant, near where the plaintiff fell, and where its identity, condition, and possession are shown by evidence preliminary to its introduction. *Morris v. Miller* (Neb.), 17-1047.

Evidence as to damages.— Upon the question of damages for assault upon a physician it is competent to prove by another physician, shown to have a sufficient acquaintance with the plaintiff's practice to answer the questions put to him, the professional standing and reputation of the plaintiff and the nature and extent of his practice before and after the injury. *Conklin v. Consolidated R. Co.* (Mass.), 13-857.

In an action to recover damages for an assault and battery, evidence of a report of the exact words constituting an insult by the plaintiff to the defendant's daughter, detailed to the defendant on the day after he had been informed of the insult and half an hour before he assaulted the plaintiff, is inadmissible in mitigation of punitive damages. *Lovelace v. Miller* (Ala.), 14-1139.

An instruction that the jury in an action for an assault and battery may consider the defendant's condition in life and pecuniary circumstances in estimating compensatory damages is inconsistent with a refusal to charge that the plaintiff is entitled to recover punitive damages. *Stockham v. Malcolm* (Md.), 19-759.

The use of offensive language by the plaintiff may be shown in mitigation of damages in an assault and battery case. *Stockham v. Malcolm* (Md.), 19-759.

Justification.— In an action for assault and battery, the defendant cannot testify as

to knowledge that it was the plaintiff's practice to carry a weapon, in order to sustain the theory of justification, where there is no evidence that the plaintiff had any weapon in his hand, or that he made any movement as if to draw a weapon from his person, or that he made any such demonstration as gave the defendant reasonable ground to suppose that he was in imminent danger. *Stockham v. Malcolm* (Md.), 19-759.

Burden of proving justification.— In a civil action to recover damages for an assault and battery, the burden of sustaining a plea of justification by legal and competent evidence sufficient reasonably to satisfy the jury, rests upon the defendant. *Morris v. McClellan* (Ala.), 16-305.

Burden of proving freedom from fault.— In a civil action to recover damages for an assault and battery, where the defense of self-defense is interposed, the rule of evidence does not place the burden of proving freedom from fault in bringing on the difficulty upon the defendant, and consequently an instruction by the court which places such burden upon him is erroneous. *Morris v. McClellan* (Ala.), 16-305.

Amount of evidence required.— A preponderance of the evidence is sufficient to prove an issue in a civil action for assault and battery. *Clasen v. Pruhs* (Neb.), 5-112.

e. Instructions.

Self-defense.— In an action for damages for an assault and battery, wherein it is claimed by each of the parties that the other was the aggressor, and by the defendant that what he did was in self-defense, it is not error for the court to instruct the jury among other things that the right of self-defense does not imply the right to attack, or voluntarily to enter into an affray, or to use more force than is necessary for defense, and that the question as to who provoked the difficulty or made the first assault is for the jury to decide under the evidence. *Morris v. Miller* (Neb.), 17-1047.

f. Measure of damages.

Exemplary damages.— Under the North Dakota statute exemplary damages may be awarded for an assault where it is committed with malice either actual or presumed, and malice authorizing such a recovery may be presumed from the wanton and reckless manner in which the wrongful act was committed. *Shoemaker v. Sonju* (N. Dak.), 11-1173.

Verdict for one cent.— In a civil action to recover damages for an assault and battery, where the evidence clearly shows that two separate unprovoked assaults, accompanied by grossly insulting language, were publicly made by the defendant upon the plaintiff, a verdict for one cent in favor of the plaintiff is manifestly inadequate, even though it is not shown that the plaintiff suffered any severe physical injury. *Leavitt v. Dow* (Me.), 17-1072.

In an action for assault and battery punitive damages cannot be found unless the act

is unjustifiable, wilful, wanton, and reckless, manifesting malice. *Fink v. Thomas* (W. Va.), 19-571.

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1. WHAT MAY BE ASSIGNED.

a. In general.

Ordinary business contracts.—As a general rule all ordinary business contracts are assignable unless expressly prohibited by statute or in contravention of some principle of public policy. *Atlantic, etc., R. Co. v. Atlantic, etc., Co.* (N. Car.), 15-363.

b. Executory contracts.

Contracts involving personal trust and confidence.—The general rule that all ordinary business contracts are assignable is

subject to the exceptions that executory contracts for personal services involving a personal relation of confidence between the parties, and executory contracts imposing liabilities or duties which in express terms or by fair intendment from the nature of the liabilities themselves import reliance on the character, skill, business standing, or capacity of the parties, are not assignable without the assent of the other party to the contract. *Atlantic, etc., R. Co. v. Atlantic, etc., Co.* (N. Car.), 15-363.

But such exceptions do not apply where the contract is entirely objective in its character and gives clear indication that the personality of the other contracting party was not considered. Accordingly an executory contract between a railroad company and an individual for the cutting of the company's timber lands and the delivery on its right of way of a definite quantity of cord wood, which is not to be performed by the contractor personally and which does not require or import any special reliance on his skill or business qualifications, is assignable so as to impose on the assignee the obligation to pay for the wood when delivered. *Atlantic, etc., R. Co. v. Atlantic, etc., Co.* (N. Car.), 15-363.

Contract for purchase of lands.—An agreement for the purchase of lands at the option of the purchaser, his heirs and assigns, the purchaser being the exclusive judge of the sufficiency of the title offered, is assignable if there be nothing in the nature of the transaction to justify the assumption that any particular trust or confidence is reposed in the purchaser alone, and the assignee has the right to pass upon the title; and where the vendor furnishes a certificate of title for the inspection of an assignee he will be estopped thereafter to deny the right of the assignee to pass upon the title. *Simmons v. Zimmerman* (Cal.), 1-850.

Unearned wages.—An assignment of wages to be earned in the future under an existing contract of employment is valid as an agreement, and takes effect as an assignment as the wages are earned; but an assignment of wages to be earned, without limit as to amount or time, is void, and cannot be enforced against a debtor after his discharge in bankruptcy, as to wages thereafter earned by him. *Leitch v. Northern Pacific R. Co.* (Minn.), 5-63.

An assignment of wages to be earned in the future under an existing employment is valid, though the contract of employment is not for a definite term. *Rodijkeit v. Andrews* (Ohio), 6-761.

An assignment of future earnings which may accrue under an existing employment is a valid contract and creates rights which may be enforced in an appropriate forum. *Citizens Loan Assoc. v. Boston, etc., R. Co.* (Mass.), 13-365.

Salary or fees of public officer.—An assignment of the salary or fees of a public officer to be earned in the future is contrary to public policy and void. *First Nat. Bank v. State* (Neb.), 4-423.

An assignment of the unearned part of his salary by a public officer is against public policy and void. *McGowan v. New Orleans* (La.), 10-633.

A voluntary assignment by an officer or employee of a municipal corporation, of salary or fees not yet earned by him, is void as against public policy. (See notes, 4 Ann. Cas. 423; 10 Ann. Cas. 636.) *Dunkley v. Marquette* (Mich.), 17-523.

c. Rights of action.

Personal injuries.—In the absence of a statutory provision to the contrary, the right of action for personal injuries resulting from negligence cannot be made the subject of assignment before judgment. *Weller v. Jersey City, etc., St. R. Co.* (N. J.), 6-442.

A right of action for personal injuries resulting from negligence is not rendered assignable to a third person during the lifetime of the person injured, by a statute preserving to the executor or administrator of a decedent a right of action for trespass committed on the person of the latter during his lifetime, as such statute does not transpose the right of action into a property right. *Weller v. Jersey City, etc., St. R. Co.* (N. J.), 6-442.

Injuries to property.—The rule that rights to damages for torts are not assignable applies to a right of action against a railway company for killing a horse. *McCormack v. Toronto R. Co.* (Ont.), 7-500.

Cause of action for conversion of personalty.—A cause of action in favor of the owner of personalty, against a party wrongfully taking and converting the same to his use, is assignable. *Kansas City, etc., R. Co. v. Shutt* (Okla.), 20-255.

Cause of action for destruction of personalty by fire.—A cause of action in favor of the owner of personalty, on account of the wrongful destruction of such property by fire, against the wrongdoer, is not assignable. *Kansas City, etc., R. Co. v. Shutt* (Okla.), 20-255.

2. CONSTRUCTION AND EFFECT OF ASSIGNMENT.

a. In general.

Assignment collateral to lease.—Where it appears from the parol evidence introduced for the purpose of showing the circumstances under which a railroad lease for ninety-one years was made and the objects which the parties had in view, that the locomotives used by the lessor were exclusively "wood burners," and that for the purpose of supplying such locomotives with wood the lessor had purchased timber lands and had made contracts for the cutting and delivery on its rights of way of a certain quantity of wood, which contracts, being the only ones made in connection with such timber lands, were at the time of the lease in the course of performance and were brought to the attention of the lessee, a provision in the lease that it shall include "all lands, interests in lands, timber, timber rights, and contracts now owned by the lessor," will, not-

withstanding the use of the words "demise" and "let," be held to amount to an assignment of such contracts. *Atlantic, etc., R. Co. v. Atlantic, etc., Co. (N. Car.)*, 15-363.

As between such lessor and lessee, the effect of such assignment is to establish a primary liability on the part of the latter for the performance of such contracts, and if the lessor is compelled to pay damages because of the nonperformance or breach thereof by the lessee, there is an implied promise by the latter to reimburse the former for the amount paid, notwithstanding a provision in the lease that the lessee shall not "be liable for any debts of the said lessor at said date." *Atlantic, etc., R. Co. v. Atlantic, etc., Co. (N. Car.)*, 15-363.

Such liability is, moreover, imposed by a stipulation in the lease that the lessee shall indemnify the lessor for the damages it may sustain by reason of the lessee's failure to perform its duties and obligations, and that the lessor shall notify the lessee of the institution of any suit against the lessor; and where the lessor has notified the lessee of the institution of a suit for the breach of such a contract, and the lessee has failed to defend such suit, the lessor is entitled to recover the reasonable expenses of making such defense. *Atlantic, etc., R. Co. v. Atlantic, etc., Co. (N. Car.)*, 15-363.

Instrument construed as assignment and not mortgage.—An instrument in form an assignment by a contractor of the balance due under the contract for the erection of a house, made to secure money advanced and to be advanced by the assignee to enable the contractor to proceed with the work, and containing a direction to the owner to make payments maturing under the contract to the assignee, is not a mortgage, but an ordinary assignment. *Spengler v. Stiles-Tull Lumber Co. (Miss.)*, 19-426.

b. Priority between assignments.

Notice to debtor.—Where several assignments of a single fund or chose in action are made, they take effect as among the assignees from the date when they are perfected by notice to the debtor, and not from the date of their execution. *Lambert v. Morgan (Md.)*, 17-439.

Notice to trustees.—Where the terms of a will are such that an equitable conversion of all of the testator's real estate is effected at the time of his death, a life tenant under the will takes no interest in the real property which is capable of being mortgaged as such, and a mortgage executed by him, transferring and assigning all his interest in the estate, is in effect a mere assignment of a fund or chose in action, which takes effect, as against other assignees, from the date when notice thereof is given to the trustees in whom the corpus of the fund is vested, and not from the date when it is executed or recorded. Such an instrument is not within the registry act, and its mere recordation does not create any lien, or operate as notice to the trustees. *Lambert v. Morgan (Md.)*, 17-439.

3. ACTIONS.

Joinder of assignor and assignee as plaintiffs.—The action was originally brought by the assignees of the persons who were tenants of the lower premises when the damage was done, but the assignors were added as plaintiffs: Held, that, both parties being before the court, a right of action was vested in either one or the other, and the effect of the assignment was immaterial. *Powley v. Mickleborough (Can.)*, 18-532.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Property passing by assignment—life insurance policies.—Where a policy of life insurance is assignable, every right given by it to the insured passes under a general assignment by him of all his "estate, property, and effects, . . . also all claims, debts, choses in action owing to him . . . and all evidences thereof . . . also any and all other property, real or personal, of all belonging to him . . . except such property as is exempt" from execution. *Blinn v. Dame (Mass.)*, 20-1184.

Dividends of secured creditors.—A secured creditor of an assignor for the benefit of creditors may not prove and receive the dividends upon the face of his entire claim, but must credit the value of his collaterals on the debt and prove only for the balance. *Union, etc., Bank v. Duncan (Miss.)*, 2-272.

Upon a general assignment for the benefit of creditors, without preference, a dividend for creditors is payable ratably on the debt of a secured creditor only after the reduction of the debt by the value of the securities held by him. *Kretschmar v. First National Bank (Miss.)*, 13-1085.

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ATTACHMENT.

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1. **IN WHAT CAUSES ATTACHMENT MAY BE HAD**.

Proceedings in equity.—Although a proceeding to enforce the statutory liability of the stockholders of an insolvent bank is in its nature equitable, the plaintiff is entitled to a writ of attachment in aid thereof. *Adams v. Clark* (Colo.), 10-774.

Action on contract for payment of money.—An undertaking whereby the surety is liable only upon default of the principal in the performance of his contract is not a contract for a "direct payment of money" within the statute authorizing the issuance of an attachment in an action upon such a contract. *A. O. H. Division No. 1 of Anaconda v. Sparrow* (Mont.), 1-144.

2. **NONRESIDENT DEFENDANTS.**

Constitutionality of statute.—A statute authorizing the enforcement of the contract obligation of a nonresident who dies owning real estate in Kansas, by attachment and sale thereof in an action brought against the nonresident executor, is constitutional. *Manley v. Mayer* (Kan.), 1-825.

Jurisdiction dependent on property.—Where a court obtains jurisdiction of a nonresident by virtue of an attachment of his property within the state, the jurisdiction and the validity of the attachment depend upon the defendant having property in the state, and if the title to the property attached has passed from the defendant to the plaintiff, the attachment will be dissolved. *Greenwood Grocery Co. v. Canadian County Mill, etc., Co.* (S. Car.), 5-261.

Deposit by plaintiff to defendant's credit.—A person indebted to a nonresident cannot, by a deposit of the amount of the debt in a bank in defiance of the creditor's wishes, confer jurisdiction in attachment on the court where the bank is located. *Saxony Mills v. Wagner* (Miss.), 19-199.

3. GROUNDS FOR ATTACHMENT.

Fraudulent conveyance by debtor.—If a debtor sells goods with the fraudulent intent of cheating, hindering, or delaying his creditors, the sale constitutes a ground for attachment by such creditors though it is made in the usual course of trade and business. *Farris v. Gross* (Ark.), 5-616.

4. WHAT MAY BE ATTACHED.

Equitable interest in personal property.—Under the South Carolina statute an equitable interest in personal property is subject to attachment. *Pelzer Mfg. Co. v. Pitts* (S. Car.), 11-665.

Partnership property.—In an action against two persons composing a partnership, an attachment running against one of the partners individually is efficient to take partnership property in the hands of a third party. *Pelzer Mfg. Co. v. Pitts* (S. Car.), 11-665.

Negotiable promissory note.—Under a statute providing that all property not exempt from execution shall be subject to attachment, and that personal property capable of manual delivery and not in possession of a third person shall be attached by the taking thereof into possession by the sheriff, a negotiable promissory note in the possession of the owner thereof, and free from any liens, is subject to attachment and sale under execution, such note being embraced in the term "property." *Fishburn v. Londershausen* (Ore.), 15-975.

Real property of decedent.—Under the Massachusetts statutes real property belonging to the estate of a deceased person may be attached under mesne process in any suit for a debt of the deceased properly brought against his executor or administrator. *Herthel v. McKim* (Mass.), 5-911.

Cars used in interstate commerce.—Cars of a nonresident railroad company in which goods have been transported from another state, and amounts due such company under traffic agreements with local companies, are not exempt from attachment and garnishment in the state courts on the ground of interference by the state with interstate commerce. *Davis v. Cleveland, etc., R. Co.* (U. S.), 18-907.

A freight car not only belonging to a foreign corporation but actually in use as an instrumentality of interstate commerce, being loaded with interstate freight not delivered to the consignee, is not subject to attachment. *Shore v. Baltimore, etc., R. Co.* (S. Car.), 11-909.

Property in custody of bankruptcy court.—A state court has no jurisdiction to attach property which is in the custody

of a federal court as part of a bankrupt's estate; and an attempted attachment of such property and all proceedings based thereon are void. *French v. White* (Vt.), 6-479.

Dividends in the hands of a trustee in bankruptcy are in the custody of the bankruptcy court and subject to its exclusive jurisdiction until they are actually distributed, and such dividends cannot be reached by attachment issuing from a state court, although checks therefor have been drawn by the trustee and countersigned by the referee and are ready for delivery. *Rockland Savings Bank v. Alden* (Me.), 13-806.

5. LIEN OF ATTACHMENT.

In general.—Under the Idaho statute (Rev. Codes, § 4302), an attachment duly and regularly issued and levied becomes a lien on the property "as security for the satisfaction of any judgment that may be recovered." The attachment, therefore, is such a provisional remedy as reaches out and lays hold upon the property by proceeding *in rem* and subjects it to the payment of the debt for the recovery of which the action was instituted. *Potlatch Lumber Co. v. Runkel* (Idaho), 18-591.

Waiver by enlarging original claim.—An attachment is waived by including in the judgment causes of action other than those secured by the attachment. *Beyer v. Dobeas* (Wis.), 18-1019.

6. PROCEDURE.

a. In general.

What defects jurisdictional.—An attachment proceeding, in which there is no service of process upon the defendant, no levy of the writ upon the property, and no service upon any garnishee indebted to him or having property or effects belonging to him, is void, as the court acquires no jurisdiction of either the person or property of the defendant so as to be able to render any judgment. *Pease v. Chicago Crayon Co.* (Ill.), 14-263.

Practice where principal judgment is reversed on appeal.—Where a judgment in favor of the plaintiff, in an action wherein an attachment has been granted, is reversed on appeal, and the case is remanded for a new trial, the ancillary proceeding of the attachment must also be remanded with it, even though the appellate court is of the opinion that the evidence warranted the granting of the attachment. In such a case the court below will be instructed to sustain the attachment in the event that the plaintiff is successful upon the new trial, and otherwise to dissolve it. *Hogg v. Thurman* (Ark.), 17-383.

b. Affidavit.

Allegation of grounds in alternative.—Under the Utah statute which specifies the grounds for an attachment, an affidavit for attachment which alleges that the defendant has disposed of or is about to dispose of his

property, with the intent to defraud his creditors, is not bad for the reason that two grounds for the attachment are stated in the alternative, as the party making the affidavit for the writ may know that the defendant has disposed of or is about to dispose of his property by one or more methods enumerated in the statute, but may be in doubt as to, or unable to state, the specific manner in which he has placed or is about to place his property beyond the reach of his creditors. *Johnson v. Emery* (Utah), 11-23.

Averment of indebtedness.—An affidavit in attachment that the defendant "is indebted to deponent" instead of that the defendant "is indebted to the plaintiff," as required by statute, is jurisdictionally defective and not subject to amendment. *Butcher v. Cappon, etc., Leather Co.* (Mich.), 12-169.

Statement of grounds.—An affidavit for an attachment, which states in the language of the statute, that the debtors "have sold, assigned, transferred, secreted, or otherwise disposed of, or are about to sell, assign, transfer, secrete, or otherwise dispose of their property with intent to cheat or defraud their creditors," states but one ground for attachment. *McCarthy Bros. Co. v. McLean County, etc., El. Co.* (N. D.), 20-575.

Use of disjunctives.—The use of the disjunctive conjunction "or" in subdivision 4, section 6938, Rev. Codes 1905, is not to connect two grounds for an attachment, but said subdivision states one ground only, consisting of different phases of facts or conditions intimately related, pertaining to that one ground. *McCarthy Bros. Co. v. McLean County, etc., El. Co.* (N. D.), 20-574.

Variance between affidavit and declaration.—Inconsistency between the claim stated in an affidavit for an attachment and the demand set up in the declaration constitutes a variance fatal to the attachment. *Simmons v. Simmons* (W. Va.), 3-184.

Upon a motion to quash the attachment for variance between the claim stated in an affidavit and the demand set up in the declaration, the declaration may be resorted to to establish the variance, and a plea in abatement is not necessary. *Simmons v. Simmons* (W. Va.), 3-184.

c. Dissolution.

Oral motion to quash.—A plea in abatement to an attachment which sets up only matter of variance appearing from the declaration and affidavit without the aid of the plea, accompanied by an oral motion to quash, may be treated as a motion to quash. *Simmons v. Simmons* (W. Va.), 3-184.

Renewal of motion to quash.—An order overruling a motion to quash an attachment is interlocutory and does not preclude a renewal of the motion. *Simmons v. Simmons* (W. Va.), 3-184.

Setting aside levy on exempt property.—A court has the power to set aside a levy of a writ of attachment upon exempt property. *Holmes v. Marshall* (Cal.), 2-88.

Bankruptcy of partner.—Where in an

action against two persons composing a partnership, an attachment is issued against one of the partners individually, the fact that one member of the partnership is adjudged a bankrupt, within four months after the attachment is issued, does not affect the right of creditors of the firm to hold the firm property under attachment. The contention that the attachment is annulled by the bankruptcy of a partner cannot be urged on appeal, in any event, where it appears that a motion to dissolve the attachment on that ground was refused by the trial court and no appeal was taken from the order refusing the notice. *Pelzer Mfg. Co. v. Pitts* (S. Car.), 11-665.

Effect of giving bond.—The dissolution of an attachment by giving the statutory bond to pay any judgment that may be recovered in the suit, operates as an appearance converting the suit from an action *in rem* into an action *in personam* and waives all defects in the affidavit for the attachment. *Butcher v. Cappon, etc., Leather Co.* (Mich.), 12-169.

d. Trial of title to property attached.

Who may claim title.—The South Carolina statute providing for the defense of attachment suits is designed not merely to allow an intervention by one in possession of the property claiming absolute ownership in his own right, but also by one in possession claiming a special property interest affected by the attachment. *Shore v. Baltimore, etc., R. Co.* (S. Car.), 11-909.

Under the provisions of the Idaho statute (Rev. Codes, § 4111) which authorize a third person to intervene who has "an interest in the matter in litigation, in the success of either of the parties, or an interest against both," the owner or claimant of property attached in an action for debt has such an interest against both parties to the main action as entitles him to intervene for the purpose of asserting his right and title to the attached property. *Potlatch Lumber Co. v. Runkel* (Idaho), 18-591.

Burden of proof.—Under the South Carolina statute providing that "an issue shall be made up under the direction of the judge to try the question," the trial judge has the discretion, where attached property is claimed by a third person, to require the attachment plaintiffs to take the position of actors and bear the burden of proving that the ownership of the property is in the defendant rather than in the claimant. *Pelzer Mfg. Co. v. Pitts* (S. Car.), 11-665.

Confusion of goods.—Where goods belonging to two or more persons are intermingled and confused, with the knowledge of the owners, so that they are incapable of being identified or distinguished, and part of the goods only are subject to attachment, the party claiming to be the owner of that part not subject to attachment must point them out and make demand for their return when seized under a writ of attachment; and if this is not done the officer serving the writ will not be liable for the seizure of the goods,

as in such case he is not deemed to be a trespasser. *Johnson v. Emery* (Utah), 11-23.

7. DAMAGES FOR WRONGFUL ATTACHMENT.

In general.—Where an attachment is sued out maliciously and without probable cause from a court which is without jurisdiction, and damage results to the defendant from the levy of the attachment, the malicious suing out and levy can be made the basis of an action by the defendant for damages. *Ailstock v. Moore Lime Co.* (Va.), 7-545.

Nominal damages.—While no recovery can be had in an action to recover for wrongful attachment, where no property rights of the plaintiff were interfered with by the issuance of the writ and no special injury resulted therefrom, yet if the writ was sued out maliciously and without probable cause, the law will presume some injury to have resulted from the wrong and will award nominal damages at least. *Dorr Cattle Co. v. Des Moines Nat. Bank* (Iowa), 4-519.

Punitive damages.—In an action for wrongful attachment of property, proof that the attachment was sued out by the defendant wantonly, recklessly, and wilfully, for the purpose of coercing the plaintiff to pay money not owing, is equivalent to a proof of malice and entitles the plaintiff to punitive damages. *Pittsburg, etc., R. Co. v. Wakefield Hardware Co.* (N. Car.), 3-720.

Damages for injury to credit and business.—As elements of damage for the wrongful suing out of an attachment on mining property, injury to the credit and business of the attachment defendant and the loss of property through sales under judgments secured by its employees for wages due at the time of the levy, are not proper elements of damage, where the defendant's possession and mining operations were not disturbed by the levy of the writ. *Plymouth Gold Mining Co. v. United States Fidelity, etc., Co.* (Mont.), 10-951.

Counsel fees.—Under the Montana statute providing in effect that where a court decides that the plaintiff in an attachment was not entitled to a writ, the plaintiff must pay all costs which may be awarded the defendant and all the damages the latter may have sustained by issuance of the writ, expenses for reasonable counsel fees incurred by the defendant in defending the attachment may be recovered on the attachment bond as an element of damages; and it is immaterial that the fees have not actually been paid. *Plymouth Gold Mining Co. v. United States Fidelity, etc., Co.* (Mont.), 10-951.

A contract between an attachment defendant and its counsel, as to the fee to be paid for the services rendered by the latter in resisting the attachment, is not conclusive as to the value of such services as an element of damages for wrongful attachment, but evidence of the contract is competent to go to the jury with other evidence tending to show what was in fact a reasonable compensation for services. *Plymouth Gold Mining Co. v. United States Fidelity, etc., Co.* (Mont.), 10-951.

8. ATTACHMENT AGAINST NATIONAL BANK.

Issuance before final judgment forbidden.—Section 5242 of the U. S. Revised Statutes relating to national banking associations forbids the issuing of an attachment against a national bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court whether the bank be solvent or insolvent. *Van Reed v. People's Nat. Bank* (U. S.), 3-1154.

Section 5242 of the U. S. Revised Statutes forbidding an attachment against national banks was not repealed by the Act of July 12, 1892, depriving national banks of the right to invoke the jurisdiction of the federal courts simply upon the ground that they were created by and exercise their powers under Acts of Congress. *Van Reed v. People's Nat. Bank* (U. S.), 3-1154.

Effect of invalid attachment.—In an action against a national bank where there has been no personal service in the court of original jurisdiction, no jurisdiction is obtained by the issuing of an attachment in violation of section 5242 of the U. S. Revised Statutes. *Van Reed v. People's Nat. Bank* (U. S.), 3-1154.

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1. ADMISSION OF ATTORNEYS.

Attorney as officer of court.—An attorney at law is an officer of the court, exercising a privilege or franchise, to the enjoyment of which he has been admitted not as a matter of right but upon proof of fitness through evidence of his possession of satisfactory legal attainments and a fair private character. *In re Durant* (Conn.), 10-140.

Power of legislature to prescribe qualifications.—The admission of an applicant to the practice of law is a judicial act, but the legislature by virtue of its police power has the right to prescribe the qualifications which a person must possess in order to become a practicing member of the bar. *In re Applicants for License* (N. Car.), 10-187.

Residence in state.—No one but a citizen of the United States and a resident of the state of Nebraska can be admitted to practice generally in the courts of said state. *In re Robinson* (Neb.), 17-878.

Constitutionality of statute regulating.—The North Carolina statute prescribing the qualifications for admission to practice law, which has been construed as not requiring applicants for licenses to show good moral character, is not unconstitutional, either as being an unwarranted exercise of judicial power by the legislature, or as being an unlawful attempt to deprive the judicial department of power which of right belongs to it. *In re Applicants for License* (N. Car.), 10-187.

Investigation of moral character.—Under the North Carolina statute an applicant for license to practice law who, on his examination, satisfies the court of his competent knowledge of the law, is entitled to receive a license, and an investigation into his general moral character is neither required nor permitted. *In re Applicants for License* (N. Car.), 10-187.

Right of court to reject applicant.—When the legislature of a state has by positive enactment prescribed the qualifications which a person must possess in order to enter the legal profession, and a citizen presents himself for examination and is shown to possess these qualifications, the courts must admit him to the practice of law. The courts exercise their judicial functions in determin-

ing whether an applicant possesses the required qualifications, and there their power ends. *In re Applicants for License* (N. Car.), 10-187.

2. DISBARMENT OF ATTORNEYS.

a. In general.

Nature of proceedings.—A proceeding for the disbarment of an attorney is in no sense a criminal prosecution, nor is it in aid of a criminal investigation, but its purpose is to ascertain whether the accused is worthy of confidence and is possessed of that good moral character which is a condition precedent to the privilege of practicing law and of continuing in the practice thereof. *In re Thresher* (Mont.), 8-845.

The action of the court in exercising its power to declare a forfeiture of the privilege or franchise of an attorney is judicial in its character, but the inquiry made is in the nature of an investigation by the court into the conduct of one of its own officers, and is not the trial of an action or suit; and the order entered is but an exercise of the disciplinary jurisdiction which the court has over its officers. *In re Durant* (Conn.), 10-539.

Conviction of crime as condition precedent.—Where the conduct charged as a ground for disbarring an attorney falls within the sphere of his official duty, the court may disbar him without awaiting the result of a criminal prosecution or being controlled thereby, even though the judgment of disbarment may be in effect a finding that the accused is guilty of a crime. *In re Thresher* (Mont.), 8-845.

Acquittal of crime as defense.—The acquittal of an attorney of the criminal charge upon which disbarment proceedings are based is no defense to such proceedings, *People ex rel. Colorado Bar Assoc. v. Thomas* (Colo.), 10-886.

b. Power of court.

Nature of power in general.—The power to declare the forfeiture of the privilege or franchise of an attorney for his misconduct is a summary one, inherent in the courts, and exists, not to mete out punishment to the offender, but that the administration of justice may be safeguarded and the courts and public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession. *In re Durant* (Conn.), 10-539.

Constitutional provisions as to eligibility.—The provisions of the Oklahoma constitution, that all attorneys at law, licensed to practice in any court of record of the territory of Oklahoma, or in any of the United States courts for the Indian Territory, or any court of record of any of the Five Civilized Tribes, shall be eligible to practice in any court of the state without examination, does not preclude the court from inquiring into the moral qualifications or from disbarring those who fall within its terms,

and who claim the rights conferred thereunder, when the contingency arises requiring the exercise of such power. *In re Mosher* (Okla.), 20-209.

Power of appellate court.—An appellate court has original jurisdiction to suspend or disbar an attorney who files therein a petition for rehearing containing insulting, contemptuous, and slanderous language. *In re Robinson* (Wash.), 15-415.

Power of district courts in Iowa.—Though the supreme court of Iowa has the exclusive authority to admit attorneys at law to practice in the courts of the state, the district courts have jurisdiction to entertain and determine disbarment proceedings. *State v. Mosher* (Iowa), 5-984.

c. Grounds for disbarment.

(1) In general.

Misconduct showing unfitness.—For the manner in which an attorney at law exercises his privilege or franchise he is continually accountable to the court, and the privilege may at any time be declared forfeited for such misconduct, professional or nonprofessional, as shows him to be an unfit or unsafe person to enjoy the privilege and to manage the business of the others in the capacity of attorney. *In re Durant* (Conn.), 10-539.

Moral delinquencies.—The license of an attorney at law may be revoked on the ground that he has ceased to be of good moral character, though the statute does not specify that ground as a cause for disbarment. The moral delinquencies must be such, however, as to unfit the accused for the proper discharge of the trust reposed in him, such as lack of common honesty and veracity in professional intercourse. *State v. Mosher* (Iowa), 5-984.

Suppression of fact of disbarment in another state.—An attorney at law who had been disbarred in a sister state for fraud and deceit, and who within a short time thereafter moved to the Indian Territory and was admitted to practice in the courts of that territory, and on such admission had himself enrolled in this court without disclosing such previous disbarment, is thereby guilty of practicing such fraud and deceit as to require his disbarment, when the same is properly brought to the notice of this court. *In re Mosher* (Okla.), 20-209.

Solicitation of employment.—The Washington statute (L. 1903, p. 68) which provides that any attorney who seeks or obtains employment to prosecute or defend in any suit or case at law or in equity by means of personal solicitation of such employment for him, or who, by himself or another, seeks or obtains such employment by giving to the person from whom the employment is sought money or any other thing of value, shall be deemed guilty of barratry, and shall be disbarred, in addition to the other penalties prescribed thereby, is valid, and does not contravene either the Fourteenth Amendment to the Federal Constitution or article 1 of the

state constitution. While the practice of law is a legal occupation in itself, it is not a natural right or a right guaranteed by the constitution, but rather a privilege granted by the state, which may be surrounded by whatever restrictions the legislature may in reason prescribe. *State v. Rossman* (Wash.), 17-625.

(2) Conviction of crime.

Conviction in another jurisdiction.—The North Carolina statute of 1907 (c. 941, § 1) relative to the disbarment of attorneys, does not impose upon the court the duty or confer the power to disbar an attorney because he has been convicted of a crime in the courts of another state of the United States. *Matter of Ebbs* (N. Car.), 17-592.

The language of section 211 of the revisal disables the court from disbarring an attorney because of his conviction of crime in another jurisdiction, in the exercise of its inherent power to deal with its attorneys. *Matter of Ebbs* (N. Car.), 17-592.

Determination of guilt in disbarment proceeding.—In a disbarment proceeding under the statute of 1907, no question as to the attorney's guilt or innocence of the crime of which he has been convicted can be presented or determined. The statute is mandatory, and makes it the imperative duty of the court to disbar an attorney upon the production of the record showing his conviction. *Matter of Ebbs* (N. Car.), 17-592.

(3) Wrongful retention of client's money.

In general.—An attorney who receives the purchase price of a tract of land, which he has sold for a client, and withholds therefrom a certain amount, representing to his client that such amount is to be applied to the payment of arrears of taxes on the property sold, when in fact he has already exacted a like amount from the purchaser for the same purpose, and who, in the same transaction, deceives his client with regard to a claim for damages made by the buyer of the property, and withholds from the purchase money, ostensibly on account of such claim, an amount larger than that which he afterwards pays in settlement thereof, is properly disbarred. *Matter of Wilson* (Kan.), 17-690.

Money not received in professional capacity.—In such a case it is no defense that the attorney was acting as a real estate agent and not as a lawyer. Whenever one who is in fact a lawyer accepts employment to act for some one else in a business transaction in the course of which he receives money belonging to his employer, his wrongful retention of the money is a sufficient ground for his disbarment, even though he may not have been called upon to give advice on legal questions or to take part in litigation. *Matter of Wilson* (Kan.), 17-690.

Conversion of client's money.—An attorney is guilty of misconduct justifying his removal under the Montana statute providing for the removal of any attorney "who is guilty of any deceit, malpractice, crime, or

misdeemeanor," where, without the knowledge of his client, he withdraws and appropriates to his own use money deposited in the court by the client as a tender in an action wherein he represents the client as attorney. *In re Thresher* (Mont.), 8-845.

Where a defendant against whom judgment has been rendered by a justice of the peace gives his attorney a check payable to the justice to be deposited in lieu of an undertaking on appeal, and the attorney, instead of taking the appeal, forges or causes to be forged the indorsement of the justice on the check, and appropriates the proceeds of the check to his own use, he is guilty of misconduct justifying his removal under the Montana statute authorizing the removal of any attorney "who is guilty of any deceit, malpractice, crime, or misdemeanor," and it is immaterial whether his conduct is properly to be designated as malpractice or as a crime. *In re Thresher* (Mont.), 8-845.

(4) **Insulting language or conduct toward court.**

Invective or scandalous innuendo. — Where an attorney indulges in invective or in scandalous innuendo that tends to degrade the court or to impair its respectability and usefulness, it is the duty of the court to take such steps as may appear to be necessary to preserve its dignity and good name, even to the expulsion of the offender from practicing before it. *Pittsburgh, etc., R. Co. v. Muncie, etc., Traction Co.* (Ind.), 9-165.

Criticism of judicial rulings. — An attorney has a right to comment upon and criticize the rulings of a judicial officer in an action which has been finally determined, and can be disbarred for such comment and criticism, if at all, only when it is so base and vile as to establish clearly his bad character and his unfitness to remain a member of an honorable profession. *State Board v. Hart* (Minn.), 15-197.

An attorney may not, however, insult the judicial officer by words written or spoken addressed to such officer personally because of the latter's official act, though in a matter finally ended; and if he does so, it may constitute a sufficient cause for his disbarment. *State Board v. Hart* (Minn.), 15-197.

Personal letter impugning intelligence and integrity. — An attorney who writes a personal letter to the chief justice of the supreme court of the state, impugning both the intelligence and the integrity of the chief justice and his associates in the decision of appeals in which the attorney represented the defeated litigants, is guilty of professional misconduct, and may be suspended from practicing in courts of the state. *State Board v. Hart* (Minn.), 15-197.

Offensive personalities. — In a proceeding to disbar an attorney for using insulting language in a petition for rehearing, language examined and held to show that the attorney did not maintain the respect due to the court, that he indulged in offensive personalities, and that he attempted to intimidate the court

into rendering a favorable decision. *In re Robinson* (Wash.), 15-415.

Apology for improper language. — An attorney who, upon being charged with using insulting, contemptuous, and scandalous language in a petition for rehearing, disavows any intentional disrespect to the court or any of its members and apologizes for his conduct, will not be disbarred but will be reprimanded or suspended. *In re Robinson* (Wash.), 15-415.

d. **The accusation.**

Statement of facts. — In disbarment proceedings under the Iowa statute the accusation need not state the facts upon which the prosecution shall be founded. *State v. Mosher* (Iowa), 5-984.

Requiring answer by counsel. — Though the Iowa statute concerning disbarment proceedings contemplates that the court shall examine the accusation and pass upon its sufficiency before ordering the accused to answer, the statute is directory merely, and an order which directs the drawing up of an accusation and requires the accused to answer is without prejudice, especially where the accused tests the sufficiency of the accusation by motion and demurrer and thereafter answers. *State v. Mosher* (Iowa), 5-984.

e. **The hearing.**

Right to hearing. — Where it is sought to declare the forfeiture of an attorney's privilege or franchise on the ground of his misconduct, he is entitled to a fair hearing or an opportunity to be heard, and to a fair determination of the question at issue, in the exercise of sound judicial discretion. *In re Durant* (Conn.), 10-539.

Trial by jury. — The proceeding for disbarment of an attorney, prescribed by the Washington statute (Bal. Code, §§ 4776-4777; P. C., §§ 3198, 3199), is in the nature of a civil action, and the accused is not entitled to a trial by jury therein. *State v. Rossman* (Wash.), 17-625.

Reduction of evidence to writing. — Where the evidence in disbarment proceedings is taken down in shorthand, certified by the judge and the reporter, filed with the clerk, and transcribed pursuant to an order duly entered, and the transcript is also filed with the clerk, there is a sufficient compliance with a statute requiring all the evidence to be reduced to writing, filed and preserved. *State v. Mosher* (Iowa), 5-984.

Right to be confronted by witnesses. — In disbarment proceedings deposition against the accused may be read, as the proceeding is civil and not criminal in its nature, and the accused has no constitutional right to be confronted by witnesses against him. *State v. Mosher* (Iowa), 5-984.

In disbarment proceedings, deposition against the accused are admissible in evidence, as the proceeding is not a criminal prosecution and does not fall within the class of cases wherein the accused has a constitutional right to be confronted by the witnesses.

nesses against him. *State ex rel. Kehoe v. McRae* (Fla.), 6-580.

Opportunity to cross-examine witnesses. — In a proceeding to disbar an attorney on the ground of his misconduct in inducing a woman to make a false statement to a client of his that she had been guilty of adultery with the client's husband, where it appears that such woman testified to that fact in a suit for support brought by the client against her husband, and that at the time of giving such testimony the attorney had full opportunity to cross-examine the witness in his own interest, and that he availed himself of such opportunity, and it further appears that the witness has died since testifying in the suit for support, a transcript of her testimony may be admitted in evidence in disbarment proceedings, though the issues and the parties in the two proceedings are different, and though the attorney claims that the cross-examination of the witness was not made in his behalf. *In re Durant* (Conn.), 10-539.

Impeachment of moral character of witness. — In a disbarment proceeding, where a deposition containing damaging statements against the attorney and given by a witness in another suit between different parties is admitted in evidence in connection with evidence of efforts on the part of the attorney to induce the deponent to retract or change his testimony, and the deposition is not offered or received as evidence of the truth of the facts therein stated, but solely for the purpose of showing the character of the evidence the attorney endeavored to suppress, it is not competent to ask the witnesses questions designed to cast discredit upon the deposition, or designed to show that the deponent was a burglar and that his moral character was bad. *In re Durant* (Conn.), 10-539.

Attempt to intimidate witness. — In a proceeding to disbar an attorney on the ground of his misconduct in inducing a detective to make false statements to a client of the attorney's, to the effect that her husband had been guilty of adultery, where it appears that in a suit by the client against her husband for support the detective gave a deposition testifying to the attorney's misconduct and his (the detective's) connection therewith, evidence that the attorney endeavored to intimidate or corrupt the detective into retracting the testimony he had given is admissible for the purpose of establishing conduct on the part of the attorney tending to show a consciousness of guilt, and such deposition of the detective, if not offered or received as evidence of the truth of the facts therein stated, is admissible for the purpose of showing the character of the evidence which the attorney endeavored to suppress. *In re Durant* (Conn.), 10-539.

Effect of sworn denial by counsel. — The fact that the accused in disbarment proceedings makes a sworn denial of the accusation does not entitle him to have the proceedings dismissed, leaving him to meet a prosecution for perjury, but merely raises an

issue for the determination of the court. *State v. Mosher* (Iowa), 5-984.

Sufficiency of evidence. — Evidence reviewed in proceedings to revoke the license of an attorney at law and held to justify a judgment of revocation. *State v. Mosher* (Iowa), 5-984.

f. Review of proceedings.

Right of appeal. — A disbarred attorney is entitled to have the proceedings which have resulted in his disbarment reviewed upon appeal, for some purpose at least; but his relation to the court and the character and purpose of the inquiry are such that unless it clearly appears that his rights have in some substantial way been denied him, the reviewing court will not set aside the action of the disbarring court. *In re Durant* (Conn.), 10-539.

Trial de novo. — Disbarment proceedings are triable *de novo* on appeal. *State v. Mosher* (Iowa), 5-984.

Conclusiveness of findings by trial court. — Where the evidence in a disbarment proceeding against an attorney is conflicting, but there is evidence which, if believed, amply supports the charges against the accused, a finding by the trial court sustaining such charges will not be disturbed on appeal. *Matter of Wilson* (Kan.), 17-690.

g. Practicing after disbarment.

What constitutes. — Any advice given to clients, or action taken for them, in matters connected with the law is practicing law; and therefore it is practicing law to give advice as to the rights of a person committed to the chain gang for failure to pay a fine, and to undertake to procure the acceptance of the fine and the release of such person. *In re Duncan* (S. C.), 18-657.

Punishment. — Where a disbarred attorney is found guilty of practicing law by giving advice to a client, the court, in fixing his punishment, will consider his disclaimer of any intended disobedience of the order of disbarment. *In re Duncan* (S. C.), 18-657.

3. RELATION OF ATTORNEY AND CLIENT.

a. Notice to attorney as notice to client.

Knowledge acquired by an attorney that the grantee in a deed of land executed by a trustee is the trustee's wife, is attributed as notice to his principal, a subsequent mortgagee of the same property. *Scottish-American Mortg. Co. v. Clowney* (S. Car.), 3-437.

b. Authority of attorney.

To prosecute proceedings for review. An attorney at law who is employed only to try a litigated issue in a trial court has no implied authority to appeal from or to sue out a writ of error to a judgment rendered against his client, and to bind his client to a contract to pay stenographer's fees for transcribing the testimony to be used in prosecuting such appeal or writ of error. *Tobler v. Nevitt* (Colo.), 16-925.

To employ associate counsel. — The mere fact of employment of an attorney by a client does not empower such attorney to contract with another attorney that the client shall pay the latter for his services as counsel. *Bentley v. Fidelity, etc., Co.* (N. J.), 15-1178.

c. Right to become surety for client.

Louisiana statute. — The Louisiana statute forbidding any judicial or ministerial officer of any of the courts of the state to go bail for any prisoner or other person in any prosecution or criminal proceeding in their respective courts, or to become surety for the appearance of any prisoner or other person before their respective courts to answer any criminal charge, has no application to attorneys. *State v. Babin* (La.), 18-837.

Effect of rule of court. — An attorney may go surety for his client in either a civil or a criminal case, notwithstanding a rule of court to the contrary. The qualification of sureties is a matter of statutory law, and a status cannot be changed by a rule of court. *State v. Babin* (La.), 18-837.

d. Conveyance by client to attorney.

Rebutting presumption of fraud. — The general rule that a party alleging and relying on the fraud of the other party as a ground of relief or defense takes on himself the burden of proof, and must clearly establish every necessary element thereof, does not apply to a case arising out of dealings between an attorney and his client; and therefore where it appears that an attorney, in the course of transactions with his client as such, took a mortgage to himself from the client as fraudulent, the attorney has the burden of showing not only that he used no undue influence in procuring the mortgage, but also that he gave his client all the information and advice that it would have been his duty to give if he had not been interested himself. *Phipps v. Willis* (Ore.), 18-119.

Sufficiency of evidence to rebut presumption of fraud. — In an action to cancel a mortgage on the ground that it was procured by the fraud and misrepresentation of the mortgagee, the plaintiff's attorney, evidence examined and held insufficient to show that the mortgage was for a valuable consideration and was not obtained by fraud. *Phipps v. Willis* (Ore.), 18-119.

e. Summary jurisdiction to compel attorney to pay over client's money.

Existence of relation. — Where suit is instituted to recover a money demand, and the fee of the attorney for the plaintiff is to be one-half of the recovery, which half is conveyed to him by his client, and such attorney employs another attorney to render services in obtaining a judgment in such suit and collecting the same, for which services the former agrees to pay the latter, who collects the judgment and refuses to pay the attorney employing him one-half of the collection, the attorney making the collection

is not subject to be ruled by the attorney employing him, for his refusal on demand to pay the latter his fee of one-half of such collection, less the fee due the former for the services he has rendered. *Haden v. Lovett* (Ga.), 18-114.

Where two persons employ an attorney to institute a suit for them for the collection of a debt due them, and the attorney brings the suit and makes the collection, and one of the plaintiffs in such suit files a petition alleging that one-half of the collection belongs to him, and asks for a rule against the attorney because of his failure on demand to pay the petitioner such half, less one-half of the fee due such attorney for his services, it is error to dismiss the petition on the ground "that plaintiff's remedy under the facts is not one by rule, but by action at law." *Haden v. Lovett* (Ga.), 18-114.

f. Termination of relation.

Right of client to discharge attorney.

— It is a good cause for terminating a contract by which an attorney was employed so long as his services should be satisfactory, that the relation between the attorney and the managing officer of the client (a corporation) has become strained, and that each entertains feelings of distrust and ill will towards the other. *Price v. Western Loan, etc., Co.* (Utah), 19-589.

4. LIABILITY OF ATTORNEY TO CLIENT.

Burden of proving negligence. —

Where, in an action by an attorney against his clients on a promissory note given for legal services, the defendants admit signing the note with knowledge of what they were signing, the burden is upon them to prove by a preponderance of the evidence their plea that the plaintiff negligently and carelessly managed the business. *Priest v. Dodsworth* (Ill.), 14-340.

Burden of proving damages. — In an action against an attorney for a wilful violation of duty in settling a claim without authority, the damages recoverable are those shown to exist, and the burden of showing the amount of the damages suffered rests upon the plaintiff. Hence if the latter fails to prove that the claim was valid or worth more than the amount collected, he is not entitled to recover damages beyond such sum. *Vooth v. McEachen* (N. Y.), 2-601.

5. COMPENSATION OF ATTORNEYS.

a. Right to compensation.

Necessity of employment. — The right of an attorney at law to demand payment for his services depends upon whether he was or was not employed. He cannot recover from one who did not employ him, however valuable the result of his services may have been to such person, and especially if the person was not even a party to the suit. *Forman v. Sewerage, etc., Board* (La.), 12-773.

Necessity of express contract. — In New Jersey the services of an attorney as an

advocate, when such services are either requested or accepted by a client, are presumed to be gratuitous, unless there is an express contract to pay a specific amount for such services. *Bentley v. Fidelity, etc., Co.* (N. J.), 15-1178.

Forfeiture for soliciting employment.

— An attorney who goes to the scene of a disaster and solicits persons having rights of action for injuries or death caused by such disaster to intrust him with the prosecution of their actions, is guilty of unprofessional conduct which bars his right to collect fees when such suits are compromised by the parties. *Ingersoll v. Coal Creek Coal Co.* (Tenn.), 10-829.

Compensation for services to receiver.

— Compensation paid for services rendered to a receiver after the latter has taken possession of the assets of the defendant does not cover the services rendered by an attorney to the defendant both before and after the receiver's appointment. *Trimble v. Kansas City, etc., R. Co.* (Mo.), 1-363.

Proof of value. — The fact that an attorney's services in foreclosing a mortgage are rendered in the presence of the court is evidence from which the court may find the value of such services, especially where the mortgage provided for an attorney's fee to the amount allowed. *Larscheid v. Kittell* (Wis.), 20-576.

b. Contingent agreements.

Validity in general. — If the doctrine of champerty was ever in force in Washington as a part of the common law, it was repealed by a statute leaving the mode and measure of compensation of attorneys to the agreement of the parties. *Smith v. Hogan* (Wash.), 1-297.

Contract for one-half of recovery. —

A contract between attorney and client for the prosecution of a claim will not be declared void on the mere ground that it gives the attorney one-half of the recovery, unless it appears that it was induced by fraud or that in view of the nature of the claim the compensation provided for is so excessive as to evince a purpose on the part of the attorney to obtain an improper or undue advantage over his client. *Morehouse v. Brooklyn Heights R. Co.* (N. Y.), 7-377.

Fairness a question of fact. — The question whether a contract between attorney and client which gives to the attorney for the prosecution of a claim one-half of the recovery is unconscionable, is one of fact depending upon the character of the claim and the amount of services to be rendered in prosecuting it to judgment. *Morehouse v. Brooklyn Heights R. Co.* (N. Y.), 7-377.

Agreement to pay disbursements. —

An agreement between attorney and client whereby the former is to pay the necessary court disbursements of the action and is to receive a percentage of the recovery as compensation, is legal. *Smits v. Hogan* (Wash.), 1-297.

Stipulation prohibiting settlement by client. — A stipulation in a contract be-

tween an attorney and his client prohibiting the client from making a settlement of his litigation in good faith without the consent of the attorney is void as against public policy. *Matter of Snyder* (N. Y.), 13-441.

Where a contract employing an attorney to prosecute a claim for damages for personal injuries resulting from negligence provides that the client shall not settle or compromise except with the consent of the attorney, the provision cannot deprive the tortfeasor of the right to compromise with his adversary, provided the compromise is made in good faith and without any attempt to defraud the attorney. *Weller v. Jersey City, etc., St. R. Co.* (N. J.), 6-442.

Effect of invalid stipulation. — Where in a contract between an attorney and his client a stipulation fixing the value of the services at a certain percentage of the recovery is connected with a stipulation that a settlement cannot be had without the consent of the attorneys, and the latter stipulation is invalid, both must fail, and in the event of a settlement by the client alone the attorney is not bound by the stipulated percentage of the settlement, but may recover on the *quantum meruit*. *Matter of Snyder* (N. Y.), 13-441.

Effect of compromise by parties. —

Where a case in which the plaintiff has agreed to pay her attorney "a fee equal to fifty per cent. of any sum collected or recovered by suit, compromise, or otherwise," is compromised by the defendant's paying the plaintiff a certain sum, and agreeing to pay "the fee agreed upon" between the plaintiff and her attorney, the attorney is not entitled to an amount equal to that paid to the plaintiff, but only to one-half of that amount. *Schmitz v. South Covington, etc., R. Co.* (Ky.), 18-1114.

c. Retaining fees.

Validity of promise to pay. — A retaining fee from a client to his solicitor is a mere gratuity, and therefore a promise to pay such a fee is without consideration, and the solicitor has no right to deduct the amount from funds of the client that may come into the solicitor's hands. *In re Solicitor* (Can.), 19-488.

d. Proof of value of services.

Necessity of expert evidence. — Expert evidence is admissible to prove the value of an attorney's services, but it is not necessary. The court or the jury may find the value from evidence showing the extent and nature of the services rendered. *Spencer v. Collins* (Cal.), 20-49.

6. LIEN OF ATTORNEYS.

a. Right to lien.

Constitutionality of statute creating.

— The Missouri statute giving an attorney a lien upon his client's cause of action was enacted for the benefit of the honorable practicing lawyers of the state, and it is not ren-

dered invalid by the fact that it may in some instances enable disreputable attorneys to commit unprofessional acts. *O'Connor v. St. Louis Transit Co. (Mo.)*, 8-703.

The Missouri statute giving an attorney a lien upon his client's cause of action is not unconstitutional as being class legislation. *O'Connor v. St. Louis Transit Co. (Mo.)*, 8-703.

The Missouri statute giving an attorney a lien upon his client's cause of action is not unconstitutional either as depriving the opposite party to the client's action of his rights without due process of law, or as restricting or destroying the opposite party's right to contract and to effect a settlement of the action. *O'Connor v. St. Louis Transit Co. (Mo.)*, 8-703.

Statute not retroactive. — The Minnesota statute giving an attorney a lien upon his client's cause of action from the time of the service of the summons in an action brought thereon, does not apply to actions brought prior to the time the statute went into effect. *Northrup v. Hayward (Minn.)*, 12-341.

Creation by contingent agreement. — A contract whereby a client agrees to pay and assign to his attorney a specified percentage of such amount as may be recovered as damages for personal injuries sustained by the client is executory merely and gives to the attorney neither a legal nor an equitable interest in a cause of action either by way of assignment or lien. *Weller v. Jersey City, etc., St. R. Co. (N. J.)*, 6-442.

b. On what lien exists.

Real property. — Under the Kansas statute, an attorney may acquire a lien for his compensation upon money due his client from the adverse party in any action or proceeding in which the attorney is employed, but such lien does not extend to the land which is the subject-matter of the litigation. *Holmes v. Waymire (Kan.)*, 9-624.

Money of executor or trustee. — An attorney has a lien for his compensation for professional services and for his disbursements, upon money received by him on his client's behalf in the course of his employment, and this right of lien is not affected by the fact that the client is an executor or trustee and the services were rendered and money received on behalf of the estate. *Burleigh v. Palmer (Neb.)*, 12-777.

Judgment. — The Minnesota statute gives an attorney a lien upon a judgment procured as a result of his services to the extent of his agreed compensation from the time notice thereof is given the judgment debtor. *Northrup v. Hayward (Minn.)*, 12-341.

c. Enforcement of lien.

Action at law. — Under the Missouri statute giving an attorney a lien upon his client's cause of action, an attorney may maintain an independent action at law to recover the amount of his lien upon the failure of the opposing party to recognize the lien in

making a settlement with the attorney's client; and such action may be brought before a justice of the peace where the amount in controversy is within the justice's jurisdiction. *O'Connor v. St. Louis Transit Co. (Mo.)*, 8-703.

Notice to judgment debtor. — Under the Minnesota statute giving an attorney a lien upon a judgment from the time notice thereof is given to the judgment debtor no special form of notice to the judgment debtor is required, and it is not necessary that the notice shall be given or served in any particular way. Actual notice of the claim of the attorney, whether verbal or in writing, answers every purpose of the statute, and is sufficient to protect the rights of the attorney. *Northrup v. Hayward (Minn.)*, 12-341.

Execution on judgment. — The payment by the judgment debtor to the judgment creditor of a judgment upon which the attorney has such a lien, with actual notice of the attorney's claim, is void as to the attorney to the extent of his lien, and the satisfaction of the judgment may be set aside and the judgment reinstated, to enable the attorney to proceed by execution to satisfy his claim. *Northrup v. Hayward (Minn.)*, 12-341.

Illegality of contract as defense. — In an action by an attorney to recover for services rendered his client in obtaining a verdict for damages against a railroad company, and to enforce the plaintiff's lien against the company, where it appears that the company has paid damages to the client with notice of the attorney's lien, but it is found as a fact that the payment has been made honestly, the company may set up a defense that the contract for the attorney's compensation is unconscionable, illegal and void. *Morehouse v. Brooklyn Heights R. Co. (N. Y.)*, 7-377.

Admissibility of evidence. — Where an attorney has filed a lien for professional services rendered in the case, and his client agrees to pay a certain amount in consideration of the release of the lien, and suit is brought upon such agreement, the question of the amount of services performed by the attorney or the terms of the original employment are immaterial, and evidence respecting these matters was properly rejected by the court. *Burleigh v. Palmer (Neb.)*, 12-777.

d. Settlement between parties.

Right of client to settle. — The party to an action may without knowledge or consent of his attorney stipulate with the opposing attorney to dismiss the action without costs, and the court will enforce such stipulation to the extent that no costs may be taxed on dismissal in favor of the stipulating party. *Paulson v. Lyson (N. Dak.)*, 1-245.

7. LAW PARTNERSHIPS.

a. Power of member to bind firm.

In general. — The act of one partner in a firm of lawyers is the act of all, if it is within the scope of the firm's business. *Alley v. Bowen-Merrill Co. (Ark.)*, 6-127.

Purchase of books. — A partnership of practicing lawyers is bound by the act of one of its members in buying such law books as may be reasonably necessary for carrying on the partnership business. *Alley v. Bowen-Merrill Co.* (Ark.), 6-127.

b. Death of member.

Effect on contract for services. — Where a contract is made with an attorney and he alone is to render the services or his skill exclusively is depended upon, his death terminates the contract whether he be alone or a member of a firm. *Clifton v. Clark* (Miss.), 1-396.

Where a contract is made with a firm of attorneys, and the consummation thereof does not depend upon the skill of either member, the death of one member does not terminate the contract, and the client may settle for services previously rendered and abrogate the contract; but if the client permits a surviving partner to complete the contract, he will be liable for the full amount of the compensation originally agreed upon, of which the estate of the deceased partner will be entitled to recover the proper proportion. *Clifton v. Clark* (Miss.), 1-396.

When one member of a firm of general practitioners dies, a surviving partner must hold himself in readiness to complete all the executory contracts of the firm, and he cannot enter into a new contract with a client for the performance of the same services and defeat the claim of the estate of the deceased partner for the compensation under the original contract. *Clifton v. Clark* (Miss.), 1-396.

8. CONTRACT TO PROCURE BUSINESS FOR ATTORNEY.

Public policy. — A contract between a layman and a lawyer, by which the former undertakes and agrees, in consideration of a division of the fees received by the latter, to hunt up and bring to the attorney persons having causes of action against railroad companies for personal injuries, is contrary to public policy and void. *Holland v. Sheehan* (Minn.), 17-687.

Parties in pari delicto. — Such a contract is unenforceable, the parties thereto being *in pari delicto*. *Holland v. Sheehan* (Minn.), 17-687.

9. DESIGNATION OF ATTORNEY TO DEFEND OR PROSECUTE.

Power to appoint attorney for injured defendant, see COURTS, 2 a.

Compensation for defense. — In Indiana the professional services of an attorney cannot be demanded without just compensation, and, consequently, an attorney cannot be compelled under penalty of disbarment or being in contempt, to render gratuitous services for a pauper defendant in a criminal case. *Board of Commissioners v. McGregor* (Ind.), 17-333.

Compensation for prosecution. — An attorney is in nowise bound to accept an as-

signment by the court to aid in the prosecution of a criminal case, but may, at his pleasure, accept or decline such assignment. If he accepts, he is bound to know the limitations on the power of the court to make the appointment and to allow compensation for his services, and if such authority is exceeded he cannot complain that his services have been required without compensation in violation of the constitution. *Board of Commissioners v. McGregor* (Ind.), 17-333.

AUCTIONS AND AUCTIONEERS.

Contracts to suppress bidding, see CONTRACTS, 4 f.

Loan of funds by auction, see BUILDING AND LOAN ASSOCIATIONS, 3.

Printed advertisement of sale as memorandum required by statute of frauds, see FRAUDS, STATUTE OF, 3 e (3).

Tax sales, see TAXATION, 10.

Effect of advertisement. — An announcement, by advertisement or otherwise, that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received. It is not an offer to sell which can be transferred into a contract binding upon the owner of the property by mere attendance and bidding at the sale. *Anderson v. Wisconsin Cent. R. Co.* (Minn.), 16-379.

Effect of bid before acceptance. — A bid at auction is an offer to purchase which is accepted when the hammer falls, and until the acceptance of the bid is signified in some manner neither party assumes any legal obligation to the other. *Anderson v. Wisconsin Cent. R. Co.* (Minn.), 16-379.

Withdrawal of bid or offer to sell. — At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase or the auctioneer his offer to sell. *Anderson v. Wisconsin Cent. R. Co.* (Minn.), 16-379.

AUDIT.

Claims against state, see STATES, 5.

AUSTRALIAN BALLOT.

See ELECTIONS.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, 5.

AUTOMATIC CAR COUPLERS.

Statutory requirement of, see MASTER AND SERVANT, 3 e (2).

AUTOMOBILES.

See **MOTOR VEHICLES.**

AUXILIARY COURTS.

Compelling production of evidence, see **DEPOSITIONS**, 4 e.

AVERAGE.

See **SHIPS AND SHIPPING**, 4.

AVOIDANCE.

Avoidance of contract, see **CONTRACTS**, 6.
Confession and avoidance, see **PLEADING**, 4 a (5).

AVULSION.

Change of channel of stream as affecting boundaries, see **WATERS AND WATERCOURSES**, 3 b (2).

AWARD.

See **ARBITRATION AND AWARD.**

Amount of award for salvage services, see **SALVAGE.**

Letting municipal contracts, see **MUNICIPAL CORPORATIONS**, 7 e.

Suppression of award at exposition, see **EQUITY**, 2 f.

AWAY-GOING CROPS.

See **CROPS**, 3.

AWNINGS.

See **STREETS AND HIGHWAYS.**

BAGGAGE.

Duties and liabilities of carrier in respect to baggage, see **CARRIERS**, 6 i.

Liability of innkeeper for baggage of guest, see **INNS, BOARDING HOUSES AND APARTMENTS**, 5.

BAIL.

1. **IN GENERAL**, 358.
2. **POWER TO TAKE BAIL**, 358.
3. **RIGHT TO GIVE BAIL**, 358.
4. **CONSIDERATIONS GOVERNING GRANTING OF BAIL**, 359.
5. **DEPOSIT IN LIEU OF BAIL**, 359.
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7. **RIGHTS AND LIABILITY OF BAIL**, 359.
8. **EXONERATION OF BAIL**, 359.
9. **FORFEITURE OF BAIL**, 359.
10. **CONTRACT TO INDEMNIFY BAIL**, 360.

Action on bail bond as civil proceeding, see **ACTIONS.**

Prohibition of requirement of excessive bail, see **CONSTITUTIONAL LAW**, 1.

Release on bail, see **HABEAS CORPUS**, 6 b.

Right of surety in bail bond to set aside fraudulent conveyance by principal, see **FRAUDULENT CONVEYANCES**, 4 a.

Right to bail in extradition proceedings, see **EXTRADITION**, 5.

1. IN GENERAL.

Federal statute construed. — As used in the provision of the federal statute that the proceedings for the admission of offenders to bail are to be agreeable to the "mode of process" in the state wherein the bond or recognizance is taken, the words "mode of process" mean "mode of proceedings;" and the provision discloses an intention on the part of Congress to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings had for similar purposes by the laws of the state wherein the federal proceedings are had. *United States v. Zarafonitis* (U. S.), 10-290.

2. POWER TO TAKE BAIL.

Who may take under Oklahoma statutes. — Under the provisions of the Oklahoma statutes bail is permitted to be taken only by the persons or courts authorized by law to arrest and imprison offenders. *Territory ex rel. Thacker v. Woodring* (Okla.), 6-950.

Judges of superior courts. — Judges of superior courts of criminal jurisdiction, including the superior court of Quebec, have power to admit to bail persons accused of any crime whatsoever. *King v. Fortier* (Quebec), 1-10.

Clerk of court. — In the absence of express statutory authorization, the clerk of a district court of Oklahoma is not authorized to take bail in a criminal case, and hence any bond taken by him in such case is void. *Territory ex rel. Thacker v. Woodring* (Okla.), 6-950.

3. RIGHT TO GIVE BAIL.

Distinction between felonies and misdemeanors. — As to indictable offenses which were formerly felonies, superior court judges may admit or refuse an application for bail within their discretion, while as to offenses which were formerly misdemeanors the accused is entitled to bail as a matter of right. *King v. Fortier* (Quebec), 1-10.

Pending proceedings for review. — Where a person who was indicted for the crime of rape was found guilty with a recommendation to mercy, and was sentenced to the penitentiary for twenty years, and thereupon, after a refusal of a new trial, filed a bill of exceptions bringing the case to the supreme court of Georgia, he was not entitled as a matter of right to demand that he should be admitted to bail; but whether bail should be allowed him or not was a matter within the

sound discretion of the presiding judge. *Vanderford v. Brand* (Ga.), 9-617.

4. CONSIDERATIONS GOVERNING GRANTING OF BAIL.

Doubt as to guilt of accused. — In exercising discretion as to admission to bail, an application should be granted where a serious doubt exists as to the guilt of the accused, otherwise the application should be refused. *King v. Fortier* (Quebec), 1-10.

Application not opposed. — In admitting the accused to bail, a court may consider the fact that neither the public prosecutor nor the private counsel opposes the application. *King v. Fortier* (Quebec), 1-10.

5. DEPOSIT IN LIEU OF BAIL.

Authority of justice to accept. — A justice of the peace has no authority to accept money in lieu of the bail required by the Nebraska statute, and in case he does so, his bondsmen are not liable for his failure properly to account for the same. *Snyder v. Gross* (Neb.), 5-152.

6. THE UNDERTAKING.

Effect of failure to comply with statute. — A bail bond which is void under a statute for want of authority to execute it, cannot be enforced as a common-law obligation. Territory *ex rel.* *Thacker v. Woodring* (Okla.), 6-950.

Description of offense. — Under the federal statute providing that proceedings for the admission of defendants to bail are to be agreeable to the usual mode of process in the state wherein the bond or recognizance is taken, and the Texas statute providing that if a defendant is charged with an offense that is a misdemeanor the bond must "state that he is charged with a misdemeanor," a bond taken by a federal court sitting in the state of Texas sufficiently describes the offense where it describes it as "the offense of concealing property from his trustee in bankruptcy belonging to his creditors in violation of the bankruptcy act of the Revised Statutes of the United States," though it does not expressly designate the offense as a misdemeanor and does not follow the exact language of the statute defining the offense. *United States v. Zarafonitis* (U. S.), 10-290.

The purpose of describing in a recognizance or bail bond the offense with which the principal is charged is to identify the case and to inform the principal and sureties of the obligations to be assumed. *United States v. Zarafonitis* (U. S.), 10-290.

7. RIGHTS AND LIABILITY OF BAIL.

Right to arrest and deliver principal.

— The rule stated as to the right of the sureties on a criminal bail bond to arrest and deliver the principal to the custody of the law after his discharge therefrom. *State v. Scheneck* (N. Car.), 3-928.

Liability under federal statute. —

Under the laws of the United States, a bail bond given in a criminal case is a contract between the sureties and the government that if the latter will release the principal from custody the sureties will undertake that he shall personally appear at a specified time and place to answer. If the condition of the bond is broken by the failure of the principal to appear, the sureties become absolute debtors of the United States for the amount of the penalty. *United States v. Zarafonitis* (U. S.), 10-290.

When liability terminates. — The sureties on a criminal bail bond held not to be exonerated by the appearance and conviction of the principal who fails to appear for the purpose of submitting to the judgment. *State v. Schenck* (N. Car.), 3-928.

A bail bond in a criminal case, requiring the principal to "appear and answer the information" and "not depart the court without leave," is not susceptible of the construction that it requires the principal to abide the judgment and sentence of the court, and the appearance of the principal before the court and his entering a plea of guilty to the offense charged in the information, thereby putting himself in the power and control of the court, satisfies the conditions of the bond and discharges the liability of the sureties. *State v. Charles* (Mo.), 13-565.

If the term at which a person accused of crime is recognized to appear adjourns without his default having been entered of record, recognizance cannot thereafter be forfeited, and the recognizers will be discharged from liability thereunder. *State v. Dorr* (W. Va.), 8-1016.

8. EXONERATION OF BAIL.

Enlistment of principal in navy. —

The sureties on a recognizance given in a criminal prosecution are not excused from surrendering their principal by the fact that he has enlisted in the United States navy without their consent. *Lamphire v. State* (N. H.), 6-615.

9. FORFEITURE OF BAIL.

Entry of default as condition precedent. —

A recognizance given in a criminal proceeding, conditioned that the accused will appear before a circuit court on the first day of a certain term thereof and that he will not depart thence without leave of the court, can be forfeited only by calling the accused upon the recognizance at some time during the term, and, if he fails to appear, by entering his default of record. *State v. Dorr* (W. Va.), 8-1016.

In a proceeding by *scire facias* upon a recognizance given in a criminal proceeding, over of the recognizance and of the record upon which it is founded may be demanded. *State v. Dorr* (W. Va.), 8-1016.

Remission of penalty. — An application for a remission of the penalty for which judgment is rendered on a forfeited recognizance made under the federal statute (Rev. St., § 1020, 1 Fed. St. Ann. 523), which gives the

court power to remit the whole or any part of such penalty "when it appears to the court that there was no wilful default of the party," is not a motion to vacate the judgment, within the rule of the federal courts that a motion to vacate a judgment must be made before the expiration of the term at which the judgment is entered. *U. S. v. Jenkins* (U. S.), 20-1255.

10. CONTRACT TO INDEMNIFY BAIL.

Validity. — A bond of indemnity given by a person under charge of felony to indemnify his bail in a recognizance for his appearance to answer the charge is not void as against public policy. *Carr v. Davis* (W. Va.), 16-1031.

BAILMENTS.

1. IN GENERAL.
2. LIABILITY OF BAILEE FOR LOSS.
3. LIABILITY OF BAILEE FOR CONVERSION.
4. ACTION BY BAILOR FOR INJURY TO PROPERTY.
5. ACTION BY BAILEE FOR INJURY TO PROPERTY.
6. ESTOPPEL TO DENY BAILOR'S TITLE.

See **LIVERY KEEPERS; WAREHOUSES**, 1;
PLEDGE AND COLLATERAL SECURITY.
 Right of bailee to sue for conversion, see
TROVER AND CONVERSION, 3.
 Injuries by animals to bailee thereof, see
ANIMALS, 2 f.
 Liability of innkeeper for effects of guest, see
INNS, BOARDING HOUSES AND APARTMENTS, 5.

1. IN GENERAL.

What constitutes bailment for hire. — A bailment is for hire, although no direct hire is paid therefor, where it is a necessary incident of a business in which the bailee makes a profit. *Sulpho-Saline Bath Co. v. Allen* (Neb.), 1-21.

Distinction between bailment and sale. — The distinction between a bailment and a sale is that in the former the thing delivered or the proceeds after sale must be returned, whereas in the latter there is no obligation to return, but there is an agreement, express or implied, to pay money or its equivalent for the thing delivered. *B. F. Sturtevant Co. v. Dugan* (Md.), 14-675.

Bailment for sale. — Where goods are consigned with the understanding that the consignees shall pay the freight on the consignment, shall not sell the goods for less than the invoice price, shall retain all amounts in excess of such price, and shall guarantee the payment of the purchase price by the purchasers, the consignees not being required to remit the amounts due within a specified time, the transaction is not a sale, but a bailment for sale. *B. F. Sturtevant Co. v. Dugan* (Md.), 14-675.

2. LIABILITY OF BAILEE FOR LOSS.

Presumption of negligence. — The burden of proof is upon the bailee for hire to show that property intrusted to his care was lost without his negligence. *Sulpho-Saline Bath Co. v. Allen* (Neb.), 1-21.

Loss by burglary. — The delivery of jewelry and coins to the cashier of a bank for deposit in the vault of the bank, no compensation being paid for the service or convenience, constitutes a case of gratuitous bailment and the bank is not liable for loss of the property by burglary. *Gerrish v. Muskegon Savings Bank* (Mich.), 4-1083.

Liability as insurer. — The bailee of a horse under a special contract to return the horse in good condition or to pay its value is an insurer, and if the horse dies in the bailee's possession without his fault he is liable for its value. *Grady v. Schweinler* (N. Dak.), 15-161.

In an action on such contract it is unnecessary to allege or prove negligence on the part of the bailee. It is sufficient if the contract and the bailee's refusal to comply therewith after demand are averred and proved. *Grady v. Schweinler* (N. Dak.), 15-161.

Parol evidence of agreement. — If a warehouse receipt given by a bailee for goods stored specifies no particular place of storage, evidence is admissible to show a prior parol agreement which does so specify. *McCurdy v. Wallblom Furniture, etc., Co.* (Minn.), 3-468.

3. LIABILITY OF BAILEE FOR CONVERSION.

Conversion followed by loss. — Where goods are stored in a warehouse specifically agreed upon and are removed therefrom to another place by the bailee without notice to or knowledge of the bailor and are destroyed by fire, the bailee is responsible to the bailor for the market value in an action of conversion or in the nature of a conversion. *McCurdy v. Wallblom Furniture, etc., Co.* (Minn.), 3-468.

Agreement to store in particular place. — The facts that the parties to an agreement contract with reference to storage at a particular place and that the goods are there delivered by the bailor and stored by the bailee, show an agreement to store at such place. *McCurdy v. Wallblom Furniture, etc., Co.* (Minn.), 3-468.

Conversion of horse and carriage. — A person who hires a horse and carriage for the stated purpose of driving to a certain place, but loans them to another to drive to a different place, is liable for an injury to the property while it is in the possession of the latter, although the latter is guilty of no negligence in handling it, and the one to whom the property is loaned is similarly liable although free from negligence, provided he knows the property is being used in violation of the contract of hiring. *Palmer v. Mayo* (Conn.), 12-691.

Unauthorized use of photographs. — A person to whom photographs are loaned

for a particular purpose has no right to use them for any other purpose, in the absence of authority, express or implied, given him by the lender. *Klug v. Sheriffs* (Wis.), 9-1013.

Measure of damages. — The measure of damages for the unauthorized use of the property of another by a bailee thereof is not the value that may be produced by the labor and investment of the bailee, combined with such use of the property, but is the value of the use itself and any damage that may be done to the property in so using it; or, if the use amounts to a conversion, then the measure of damages will be the value of the property. *State v. State Journal Co.* (Neb.), 13-254.

4. ACTION BY BAILOR FOR INJURY TO PROPERTY.

Negligence of bailee as defense. — The negligence of a bailee for hire is not imputable to the bailor, and therefore the right of a livery stable keeper to recover for injuries to a horse while it was being driven by a customer is not affected by the fact that the negligence of the customer contributed to the injury. *Gibson v. Bessemer, etc., R. Co.* (Pa.), 18-535.

5. ACTION BY BAILEE FOR INJURY TO PROPERTY.

Right to sue for value. — A bailee of property having an interest therein under express contract may maintain an action to recover the value thereof against one through whose negligence or failure of duty it is lost. *Union Pacific R. Co. v. Meyer* (Neb.), 14-634.

6. ESTOPPEL TO DENY BAILOR'S TITLE.

A bailee is estopped to deny the bailor's title by asserting title in himself to the subject of the bailment acquired by purchase from a third person. *Jensen v. Eagle Ore Co.* (Colo.), 19-519.

BAKERIES.

Statutory regulation of hours of labor in bakeries, see **LABOR LAWS**, 1 a.

BALANCE.

Conclusiveness of balance shown by bank pass book, see **BANKS AND BANKING**, 5 b (1).
Recovery of balance on account, see **ACCOUNTS AND ACCOUNTING**.

BALLOTS.

See **ELECTIONS**.

BANKRUPTCY.

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Appeal in bankruptcy proceedings, see **APPEAL AND ERROR**, 4 c.

Attachment of property in custody of bankruptcy court, see **ATTACHMENT**, 4.

Discharge of corporation as affecting liability of stockholders for corporate debts, see **CORPORATIONS**, 8 g (3).

Effect of bankruptcy of partner as ground for quashing attachment against firm property, see **ATTACHMENT**, 6 c.

Effect of bankruptcy of purchaser of good will, see **GOOD WILL**.

Effect of bankruptcy on lien of execution, see **SHERIFFS AND CONSTABLES**, 2.

Effect on garnishment of bankruptcy of principal defendant, see **GARNISHMENT**, 3 a.

Effect of mortgage given for antecedent debt, see **MORTGAGES**, 5.

Husband's bankruptcy as barring right to dower, see **DOWER**, 2 g.

Recovery by trustee of property fraudulently transferred, see **FRAUDULENT CONVEYANCES**, 4.

Title of trustee to shares of stock held by bankrupt, see **CORPORATIONS**, 8 b (11).

1. CONSTRUCTION OF BANKRUPTCY ACT.

Power of state courts to construe. — While the construction of the bankruptcy act finally rests with the federal courts, and at last with the supreme court of the United States, and the construction adopted by the latter court is binding upon the state courts, still, where a particular provision of the act does not appear to have been finally construed by the federal supreme court, it is the duty of a state court to adhere to the rule laid down in its own prior decisions on the subject, in accordance with the rule of *stare decisis*. *Stuart v. Farmers Bank* (Wis.), 16-821.

Requirement of uniformity. — The requirement that a bankruptcy law shall be uniform has no bearing on the right of dower. That is a matter definable exclusively by the law of the state where the land lies. *Thomas v. Woods* (U. S.), 19-1080.

2. WHO LIABLE TO BANKRUPTCY.

Persons engaged principally in farming. — A person who, for a number of years prior to the institution of involuntary bankruptcy proceedings against him, has occupied a large farm of his own, and at the same time leased farming lands belonging to other persons, the whole amounting to about 1,700 acres of improved land, and who has devoted such land to cultivation and grazing, having and using thereon about twenty horses and an equipment of farming tools, wagons and machinery in quantity corresponding to his operations, and who has employed from seven to fifteen men, and supervised and controlled all the operations of raising the ordinary crops of agriculture, and sold all of the crops so raised, excepting such portions thereof as were necessary for the maintenance of his live stock, of which he kept a large amount, and who has built silos on his farm and used them for storing and preserving forage raised thereon to be fed to his cows and other stock, and who has sometimes bought stock from others and fattened the same on produce of the farm and then sold it, is "a person engaged chiefly in farming or the tillage of the soil," within the meaning of the bankruptcy act, and, therefore, not liable to involuntary bankruptcy proceedings. *Gregg v. Mitchell* (U. S.), 16-510.

Such a person as above described is none the less a farmer, within the meaning of the bankruptcy act, because he also buys milk from other parties and sells the same. While a person whose principal business is that of buying and selling milk, or its products, may be regarded as a dairyman, and, as such, subject to involuntary bankruptcy proceedings, it is otherwise with regard to a person whose principal business is that of farming, and who carries on a dairy simply as one of the departments of his farm. *Gregg v. Mitchell* (U. S.), 16-510.

Manufacturing corporations. — A corporation which is principally engaged in building concrete arches and bridges and dressing stone is a manufacturing corporation, and may be adjudged a bankrupt under section 4b of the bankruptcy law. *In re First National Bank* (U. S.), 11-355.

The issue as to whether a corporation is subject to adjudication as a bankrupt is not jurisdictional, and is therefore concluded by the adjudication. *In re First National Bank* (U. S.), 11-355.

There is no abuse of discretion in a denial by a bankruptcy court of a motion by creditors to vacate the adjudication in bankruptcy of a corporation and to permit them to answer and litigate the question whether the corporation is principally engaged in such a pursuit that it is subject to be adjudicated a bankrupt where the motion is first made seven weeks after the petition was filed and receivers were appointed, and five weeks after the adjudication, where the creditors were aware of the filing of the petition within forty-eight hours thereafter, and the administration of the estate had proceeded

without objection meanwhile. *In re First National Bank* (U. S.), 11-355.

Petition against corporation. — A petition for adjudication of involuntary bankruptcy alleging that the bankrupt is a corporation "engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone and selling the same, and railroad and ditch contracting," though not containing a complete statement that the corporation is principally engaged in a manufacturing pursuit, and therefore demurrable and amendable before adjudication, states that fact substantially and is invulnerable after adjudication. *In re First National Bank* (U. S.), 11-355.

Wage earners. — A person who draws a salary of \$900 a year as officer of a corporation is not a wage-earner, within the bankruptcy act (Act July 1, 1898, c. 541, § 1, subd. 27, 30 St. L. 547; 1 Fed. St. Ann. 546) defining a wage-earner as an individual who works for wages, salary, or hire at a compensation not exceeding \$1,500 a year, where he owns two-thirds of the stock of the corporation and drew more than \$2,000 from the corporation during the year preceding the institution of the bankruptcy proceeding against him, and is also in the business of buying and selling real estate, owning \$90,000 worth of property outside the corporation. *Carpenter v. Cudd* (U. S.), 20-977.

3. WHAT CONSTITUTES INSOLVENCY.

General rule stated. — A person is deemed to be insolvent within the provisions of the national bankruptcy act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts. *Plymouth Cordage Co. v. Smith* (Okla.), 11-445.

Meaning of "fair valuation." — An instruction which charges the jury that "a fair valuation of the notes and accounts is the net sum that in your judgment, from all the evidence before you, could have been, with reasonable diligence, realized from the collection of such notes and accounts, within a reasonable time after Oct. 31, 1901, and not the amounts as shown by their face, unless their face value was in fact their fair value," is a correct rule by which to determine the fair valuation of this class of personal property. *Plymouth Cordage Co. v. Smith* (Okla.), 11-445.

What property included in determining solvency. — In a contested proceeding in involuntary bankruptcy, property exempt from execution should be included in determining the issue of the solvency of the respondent. *Plymouth Cordage Co. v. Smith* (Okla.), 11-445.

When partnership is insolvent. — Under the national bankruptcy act of 1898 a partnership is insolvent if the partnership property is insufficient to pay the partner-

ship debts, because it is defined as a person by that act [section 1, (19)], and because any person is insolvent under that act whose property is insufficient to pay his debts [section 1 (15)], and the only property a partnership has or can convey or apply to the payment of its debts is partnership property, and the only debts it owes are the partnership debts. *In re Bertenshaw* (U. S.), 13-986.

Under the bankruptcy act of 1867 and the Massachusetts insolvency law of 1838, a partnership was an aggregation of partners and the insolvency or bankruptcy of the partners conditioned the bankruptcy of the partnership. This is not so under the national bankruptcy act of 1898, and therefore many of the rules of law applicable under the former acts do not obtain under the latter. *In re Bertenshaw* (U. S.), 13-986.

When corporation is insolvent. — A corporation is to be deemed insolvent within the meaning of the New Jersey corporation act if it is unable to meet pecuniary liabilities as they mature, by means of either available assets or an honest use of credit. *Empire State Trust Co. v. Trustees, etc.* (N. J.), 3-393.

4. PROVABLE CLAIMS.

What section of statute controlling. — In determining what claims are provable against a bankrupt under the national bankruptcy act, the section of the statute devoted especially to the subject must control, though there is a want of harmony between that section and the section regarding the effect of a discharge, and the latter section contains an amendment passed after the passage of the section specifying the claims provable. *Brown v. United Button Co.* (U. S.), 9-445.

Unliquidated claim for tort. — Under the national bankruptcy act, a claim for unliquidated damages, resulting from an injury to the property of another and not connected with or growing out of any contractual relation, is not provable in bankruptcy. *Brown v. United Button Co.* (U. S.), 9-445.

5. JURISDICTION OF BANKRUPTCY COURT.

Property in another district. — The filing of a petition in bankruptcy gives the court jurisdiction of all the property of the bankrupt wherever situated, and on the adjudication the court may determine all liens and interests affecting real property whether in the district or elsewhere. *Thomas v. Woods* (U. S.), 19-1080.

6. EXAMINATION OF BANKRUPT.

Under section 21a of the bankruptcy act (1 Fed. St. Ann. 587) authorizing the court to order the examination of a bankrupt "whose estate is in process of administration," the court has no power to make such an order before an adjudication of bankruptcy. *Skubinsky v. Bodek* (U. S.), 19-1035.

7. MATTERS TRIABLE BY JURY.

Under the provisions of the bankruptcy act (Act July 1, 1898, c. 541, § 19, subd. a, 30

St. L. 551; 1 Fed. St. Ann. 586) that a person against whom an involuntary petition has been filed shall be entitled to a jury trial on the filing of the written application therefor at or before the time within which an answer may be filed, an alleged bankrupt has no right to a jury trial unless he makes seasonable application therefor. *Carpenter v. Cudd* (U. S.), 20-977.

The bankruptcy act (Act July 1, 1898, c. 541, § 18, subd. d. 30 St. L. 551; 1 Fed. St. Ann. 584) entitled an involuntary bankrupt to a jury trial as a matter of right only in respect to his insolvency and any act of bankruptcy alleged against him. As to any other issue of fact involved, such as whether the bankrupt is a wage-earner, the court may in its discretion submit it to a jury, but the finding of the jury thereon is only advisory. *Carpenter v. Cudd* (U. S.), 20-977.

8. CONTEMPT PROCEEDINGS AGAINST BANKRUPT.

Where a bankrupt has been adjudged, after repeated hearing, to have in his possession a sum of money received from a particular source, which he has not turned over to his trustee, and he is ordered to turn it over, which order he neither obeys nor seeks to have reviewed, a sufficient *prima facie* case is made to warrant his commitment for contempt, unless he gives an adequate explanation of what has become of the money. *In re Stavrahn* (U. S.), 20-888.

The petition of a trustee in bankruptcy, asking that the bankrupt be adjudged in contempt for failing to obey an order to pay over money or to turn over property, is not required to allege affirmatively that he was able to comply with the order; but when the record and moving papers show that the bankrupt has been adjudged, after a full hearing, to have concealed specific property, and has been ordered to turn it over, sufficient is charged to put him on his defense. *In re Stavrahn* (U. S.), 20-888.

9. DEBTS AFFECTED BY DISCHARGE.

In general. — Under the national bankruptcy act a discharge in bankruptcy releases the bankrupt from all debts and claims which are made provable against his estate and which existed on the day the petition was filed, except such debts as are excepted by the act from a discharge in bankruptcy. *Ruhl-Koblegard Co. v. Gillespie* (W. Va.), 11-929.

The effect of a discharge in bankruptcy is to extinguish a pre-existing debt and not merely to bar the remedy thereof. *Needham v. Matthewson* (Kan.), 19-146.

Debt not scheduled in time. — Under the national bankruptcy act, if a debt is not duly scheduled in time for proof and allowance, and the creditor has no notice or actual knowledge of the proceeding, he is not affected by the discharge. *Custard v. Wigder-son* (Wis.), 10-740.

Debt not sufficiently scheduled. — Under the strict rule which prevails respecting the scheduling of debts of a bankrupt as

required by the national bankruptcy act, a debt due to "A. Custard" is not sufficiently scheduled by the appearance of the name "A. Custard" in the schedule. *Custard v. Wigderson* (Wis.), 10-740.

Claims for alimony. — A claim for past due alimony, including an allowance for the support of minor children, is not a provable debt from which the husband is released by a discharge in bankruptcy. *Wetmore v. Markoe* (U. S.), 2-265.

A discharge in bankruptcy does not satisfy a money decree for alimony rendered in a proceeding for divorce and alimony. *Lemert v. Lemert* (Ohio), 2-914.

An amendment to the bankruptcy act adopted in 1903 excepting from the operation of a discharge a decree for alimony or for support of the wife and children is not a legislative recognition of the fact that prior to the amendment judgments for alimony would be discharged. *Wetmore v. Markoe* (U. S.), 2-265.

Liability of surety on bond. — A surety on an injunction bond, given in a suit brought to restrain the enforcement of a judgment, is not released from liability thereon by the discharge of his principal in bankruptcy. *Stull v. Beddeo* (Neb.), 15-950.

The discharge in bankruptcy of a surety on an administrator's bond is a bar to an action against him to recover for a breach of the bond where such breach was committed and the administrator died prior to the filing of a petition in bankruptcy. *Harmon v. McDonald* (Mass.), 3-64.

Assignment of unearned wages. — A duly recorded assignment of wages to be earned in the future in an existing employment, executed to secure a valid subsisting debt, may be enforced by the creditor notwithstanding the subsequent discharge of the assignor in bankruptcy, as a lien is preserved to the creditor by section 67d of the national bankruptcy act of July 1, 1898. *Citizens Loan Assoc. v. Boston, etc., R. Co.* (Mass.), 13-365.

Lien for rent. — The lien obtained by a landlord by distraining on the goods of his tenant is not a lien "obtained through legal proceedings" within the meaning of the national bankruptcy act, and such lien is therefore not divested by the adjudication of the tenant as a bankrupt within four months after the lien is obtained. *In re West Side Paper Co.* (U. S.), 15-384.

The above rule applies to the lien obtained by a landlord by distraining on goods belonging to one who occupies the leased premises by the tenant's permission, but without the landlord's consent, notwithstanding the fact that the owner of the goods is adjudicated a bankrupt on the following day, the right to distrain having been created by the lease more than four months before such adjudication. *In re West Side Paper Co.* (U. S.), 15-384.

Claim against agent for conversion. — Whether a debt due from an agent to his principal for rent collected and converted to his own use is one created by fraud, embezzle-

ment, misappropriation, or defalcation, while acting in a fiduciary capacity, within section 17 of the national bankruptcy act of 1898, *quære*. *Stull v. Beddeo* (Neb.), 15-950.

Right of action for false representation. — If a right of action for falsely representing land to be unencumbered and selling it as such is treated as brought upon the liability growing out of a subsequent promise to pay, the discharge of the defendant in bankruptcy is a complete bar to recovery. *Nelson v. Petterson* (Ill.), 11-178.

Judgment for slander. — A judgment for slander is not a liability from which a bankrupt is discharged under the bankruptcy act of 1898. *Sanderson v. Hun* (Ky.), 3-168.

Judgment for wilful and malicious injury. — Where a declaration in an action for tort contains three counts, one for assault and battery, one for false imprisonment, and one for malicious prosecution, and there is a general verdict for the plaintiff upon which verdict a judgment is entered, the judgment is not released by the defendant's subsequent discharge in bankruptcy, as each of the counts is for a "wilful and malicious injury," within the meaning of the national bankruptcy act. *McChristal v. Clisbee* (Mass.), 5-769.

A jail certificate in an action for injuries sustained while undergoing a surgical operation at the hands of the defendant, finding that the cause of action "arose from the wilful and malicious acts of the defendant, and for wilful injuries to the person of the plaintiff," brings the judgment within the provisions of the national bankruptcy act excepting from the operation of a discharge judgments in actions "for wilful and malicious injuries to the person or property of another," although the provision of the bankruptcy law means something more than malice in the broader sense of the term, so that a mere adjudication of malice would not bring a judgment within the exception relied on. *Flanders v. Mullin* (Vt.), 12-1010.

As used in the provision of the national bankruptcy act (Act of July 1, 1898, c. 541, § 17; 1 Fed. St. Ann. 578), that a discharge in bankruptcy shall not release judgments "for wilful and malicious injuries to the person or property of another," the word "wilful" means nothing more than intentional, and the word "malicious" means nothing more than that disregard of duty which is involved in the intentional doing of a wilful act to the injury of another. *McChristal v. Clisbee* (Mass.), 5-766.

Judgment in action for fraud. — Subdivision 2 of section 17 of the original bankruptcy act of 1898 (1 Fed. St. Ann. 758), providing "that judgments in actions for fraud or obtaining property by false pretenses or false representations" are not released by a discharge in bankruptcy, comprehends judgments rendered in actions the gist of which is the actual fraud of the defendants. In determining this question courts will look to the pleadings and judgment; and if the relief granted in the judgment is based upon actual, as distinguished from constructive, fraud of the bankrupt, the bankrupt shall not

be discharged from its obligations, notwithstanding the action may not be strictly *ex delicto* in form. *Moody v. Muscogee Mfg. Co.* (Ga.), 20-301.

Partnership debts. — Partnership creditors may pursue unadjudicated partners by actions at law and suits in equity before, during, and after proceedings in bankruptcy against the partnership. The discharge of the partnership where the partners are not adjudicated bankrupt does not discharge the partners from their liability for the partnership debts. *In re Bertenshaw* (U. S.), 13-986.

In bankruptcy proceedings by one partner for a personal discharge, an indebtedness on a judgment against the partnership held sufficiently scheduled. *Loomis v. Wallblom* (Minn.), 3-798.

The discharge of an individual partner in bankruptcy held to be a good defense in an action on a judgment against the partners. *Loomis v. Wallblom* (Minn.), 3-798.

Individual liability of partner. — A full discharge of individual liability of one partner on a firm debt may be had in bankruptcy proceedings concerning that partner only. *Loomis v. Wallblom* (Minn.), 3-798.

10. VOIDABLE TRANSFERS AND PREFERENCES BY BANKRUPT.

Distinction between fraudulent and preferential transfers. — There is a marked distinction between the provisions of the bankruptcy act regarding preferential transfers and its provision regarding conveyances made with intent to hinder, delay, or defraud creditors. In a preferential transfer the fraud is constructive or technical, while in a fraudulent conveyance it is actual. In order to set aside a preference under section 60b of the act, it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference, but to make a conveyance voidable under section 67e, on the ground that it was intended to hinder, delay, or defraud creditors, actual fraud must be shown. *Coder v. Arts* (U. S.), 16-1008.

Transfer prohibited by state statute. — Under the provisions of the national bankruptcy act authorizing a trustee in bankruptcy to avoid a transfer by the bankrupt which a creditor of the bankrupt might have avoided, the trustee in bankruptcy of a New Jersey corporation may avoid a transfer by the corporation prohibited by the New Jersey statute relating to transfers by insolvent corporations. *Empire State Trust Co. v. Trustees, etc.* (N. J.), 3-393.

Chattel mortgage recorded within four months. — A chattel mortgage executed and delivered more than four months prior to the bankruptcy of the mortgagor is not voidable because not recorded until a subsequent date within such period of four months. *First Nat. Bank v. Johnson* (Neb.), 4-485.

Transfer to secure or pay pre-existing debt. — Intentional transfers by in-

solvents to secure or pay pre-existing debts, made within four months before the filing of a petition in bankruptcy, which are not voidable as preferences under section 67c of the national bankruptcy act of 1898 or violative of other provisions of law, and which are made without intent to hinder, delay, or defraud creditors more than such securities or payments necessarily have that effect, do not evidence an intent to hinder, delay, or defraud creditors within the meaning of that section of the act. It is not every intent to hinder, delay, or prevent creditors from collecting, but an intent to do so unlawfully, only, that is denounced by that section. *Sargent v. Blake* (U. S.), 15-58.

Payment of fiduciary debt. — In an action on a promissory note given by a bankrupt, where there is no evidence on which to base a hypothesis that the debt for which the note was given was of a fiduciary character, it is error for the court to charge the jury that if they believe that the debt for which the note was given was *bona fide* claimed to be a fiduciary debt, that is, one against which a discharge in bankruptcy would not be a protection, and that the attorneys of the bankrupt, in view of that contention, advised him to pay the debt as a fiduciary one, and that thereupon he signed the note, and the fiduciary character of the debt was the moving consideration, then the note is valid. Especially is such an instruction erroneous where a question fairly presented by the evidence, as to whether the note in suit was not given in consummation of an agreement for a secret preference in order to induce the creditor to whom it was given to join in a composition with creditors, has not been submitted to the jury by any portion of the charge. *Dicks v. Andrews* (Ga.), 16-1070.

Paying individual debt from partnership property. — The application, within four months before the filing of a petition in bankruptcy, of the property of an insolvent partnership, with the consent of all the partners, to the payment of an individual debt, does not evidence an intent to hinder, delay, or defraud the partnership creditors within the meaning of section 67c of the national bankruptcy act of 1898; and where the creditor paid has no reasonable cause to believe that a preference is intended thereby, such payment is not void or voidable. *Sargent v. Blake* (U. S.), 15-58.

Where it appears that within four months before the adjudication of a firm and its members as bankrupts, one of the partners, with the consent of the other, took for himself a sum of money from the partnership funds; that in consideration thereof and of the other partner's covenant to assume and pay the partnership debts, he conveyed his interest in the remainder of the partnership property and the partnership business to the other partner; and that immediately thereafter the other partner paid to his mother, out of the funds which had been partnership property, a sum of money which he had borrowed from her to invest in the partnership business, the mother having no reasonable

cause to believe that any preference was intended by this payment or that it was made with intent to hinder, delay, or defraud creditors of the firm or of the partners, and the partners having no intent to hinder, delay, or defraud creditors to any greater extent than the payment to the mother would necessarily hinder or prevent them from collecting their debts, the trustee in bankruptcy cannot recover from the mother the amount paid to her. *Sargent v. Blake* (U. S.), 15-58.

What constitutes unlawful preference. — The reasonable ground of belief intended by section 60, subdivision b, of the bankruptcy act, which provides that a preference given by the bankrupt shall be voidable by the trustee if the person receiving it 'had reasonable cause to believe that it was intended thereby to give a preference,' is the present knowledge of the creditor; and it is only where the facts known to the latter are such as would induce a present belief in an ordinarily prudent and intelligent business man that his debtor is insolvent and intends a preference, that he is prohibited by the bankruptcy act from collecting or securing his debt or a part thereof. *Stuart v. Farmers Bank* (Wis.), 16-821.

In an action by a trustee in bankruptcy to recover alleged unlawful preferences, it is error for the court to instruct the jury that although the facts which the defendant knew at the time when he received payment from the debtor may not have been sufficient to induce the belief that the latter intended to give a preference, yet, if a reasonably prudent man would have been put upon inquiry thereby, and upon such inquiry might have learned other facts warranting such belief, then the defendant is chargeable with notice of the debtor's insolvency and intent to prefer. *Stuart v. Farmers Bank* (Wis.), 16-821.

Secret preference in composition with creditors. — If a bankrupt gives to one of his creditors a note for the balance of the debt due such creditor in excess of the amount which is to be accepted by creditors in a composition, in consideration that such creditor will join in the composition and not oppose it or its confirmation, and the transaction is withheld from the knowledge of the other creditors, such consideration is illegal, and the creditor receiving the note cannot enforce its payment by suit. *Dicks v. Andrews* (Ga.), 16-1070.

If such an agreement for a secret preference is made, and a note is given in consideration and consummation thereof, it is not rendered valid by being signed before the composition, but dated in advance and left with another person to be delivered after the composition is completed, and so delivered. *Dicks v. Andrews* (Ga.), 16-1070.

When mortgage constitutes a preference. — If a chattel mortgage is executed more than four months before bankruptcy which creates no lien on specific chattels, and afterwards within the four months, while the mortgagor is insolvent, he separates or identifies certain chattels and agrees that the mortgage shall apply to them, the lien is created

then for the first time and constitutes a preference within the meaning of the national bankruptcy act. *First Nat. Bank v. Johnson* (Neb.), 4-485.

Set-off of mutual debts. — A bank deposit and a note of the depositor held by the bank are mutual debts which are subject to be set off against each other under section 68 of the bankruptcy act. *Booth v. Prete* (Conn.), 15-306.

The setting off by such bank of the amount of the deposit against the amount due on the note is not a transfer of property by the bankrupt within section 1, subdivision 25, of the bankruptcy act, and such set-off, if made in good faith, does not give a preference within section 60, subdivision a of the act even if the set-off is made within four months before the filing of the petition in bankruptcy. *Booth v. Prete* (Conn.), 15-306.

The doctrine of set-off is not enlarged by the provision of the bankruptcy act (Act July 1, 1898, § 68a; 1 Fed. St. Ann. 696) that in "cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor . . . one debt shall be set off against the other;" and therefore a bank with which funds of a bankrupt have been deposited for a special purpose cannot set off against the deposit a debt due from the bankrupt. *Wagner v. Citizens' Bank, etc., Co.* (Tenn.), 19-483.

Payment of attorney's fees. — Legal services contemplated by the bankruptcy act for which an insolvent debtor contemplating bankruptcy proceedings may contract and pay. *In re Habegger* (U. S.), 3-276.

A transfer of property by an insolvent debtor, in contemplation of bankruptcy proceedings, to an attorney, in consideration of the latter agreeing to perform legal services in negotiating with the creditors of the debtor for a settlement of financial difficulties without resort to the bankruptcy court, is a voidable preference, and the property so transferred may be recovered by the trustee of the bankrupt estate. *In re Habegger* (U. S.), 3-276.

Who may sue to avoid transfer. — A creditor of one discharged in bankruptcy cannot maintain a suit to set aside an alleged fraudulent transfer of the property of the bankrupt, although such transfer may have been made more than four months prior to the filing of the petition in bankruptcy. The right to sue for and subject such property to the payment of the bankrupt's debts is vested alone in the trustee, and the failure of the trustee to bring such suit within the time prescribed by law does not transfer to the creditor the right to do so. *Ruhl-Koble-gard Co. v. Gillespie* (W. Va.), 11-929.

11. ASSETS OF BANKRUPT.

Decree for payment of money. — A bankrupt and his trustee may join in proceedings to enforce the payment of money due a bankrupt under a decree granting a divorce to his wife but requiring her to pay a certain fund to her husband. *Carnahan v. Carnahan* (Mich.), 8-53.

Membership in stock exchange. — A bankrupt's membership in a stock exchange is an asset in the custody and possession of the federal court in which the bankruptcy proceeding is pending, and therefore that court has jurisdiction of a petition by the bankrupt's trustee to determine the conflicting claims to such asset, though both the bankrupt and the adverse claimant are citizens of the state in which the proceeding is pending, though the membership is personal in its character, is not evidenced by any certificate, and is incapable of being transferred except with the approval of the exchange, and though at the time of the filing of the petition the membership has been sold and the proceeds are in the hands of the exchange for distribution in accordance with its rules. *O'Dell v. Boyden* (U. S.), 10-239.

Where a membership in a stock exchange is personal in its character and is not evidenced by any certificate, but the rules of the exchange provide that it may be transferred with the approval of the exchange's committee on admissions, and prescribe the manner in which the proceeds of the transfer may be disposed of, the membership is a pecuniary estate which passes to the member's trustee in bankruptcy; and this is so though prior to the filing of the petition in bankruptcy the member executed a paper which purported to transfer his membership to another person, but which was ineffectual for that purpose because of noncompliance with the rules of the exchange. *O'Dell v. Boyden* (U. S.), 10-239.

Right of action for personal injuries. — A right of action for damages for personal injuries does not pass to the person's trustee in bankruptcy by virtue of the provisions of the national bankruptcy act, that "the trustee . . . shall . . . be vested by operation of law with the title of the bankrupt . . . to all (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, . . . (6) rights of action arising upon contracts or from unlawful taking or detention of or injury to his property;" and the bankruptcy of a person having a right of action for tort for personal injuries is not a bar to an action by such person on his claim. *Sibley v. Nason* (Mass.), 12-938.

The right of the plaintiff in a personal injury action to recover, as an element of damage, wages which he would have earned except for disability caused by the accident, is not lost by his adjudication in bankruptcy subsequent to the accident, as the recovery in such a case is not, strictly speaking, for the wages, but for the loss of time. *Sibley v. Nason* (Mass.), 12-938.

The right of the plaintiff in a personal injury action to recover, as an element of damage, the amount of bills for medical attendance, is not lost by his adjudication in bankruptcy, although the adjudication may be pleaded in bar of any recovery against him for such medical attendance. *Sibley v. Nason* (Mass.), 12-938.

Individual property of unadjudicated partner. — Under the national bankruptcy act, 1898, a partnership is a distinct entity separate from the partners who compose it. It owns its property and owes its debts apart from the individual property of its members which it does not own, and apart from the individual debts of its members which it does not owe. It may be adjudged bankrupt, although the partners who compose it are not so adjudicated. Accordingly the trustee of the estate of a bankrupt partnership is not the trustee of the individual property of the unadjudicated partners and has no right to administer that property, nor is he the trustee or the assignee of the claims of the partnership creditors or their agent or attorney to collect those claims out of other than the partnership property, and, where no partner is adjudged bankrupt, he has no power to enforce such claims against any property except the partnership property, or against any unadjudicated partner or other person who has none of the partnership property. *In re Bertenshaw* (U. S.), 13-986.

Where a partnership is adjudicated bankrupt, but none of the partners is adjudged a bankrupt, and application is made to the court to order an unadjudicated partner to turn over his property to the trustee of the partnership estate for administration in bankruptcy, the court of bankruptcy is without jurisdiction summarily to take and administer, in the proceedings against the partnership, the individual estate of the solvent partner without his consent. *In re Bertenshaw* (U. S.), 13-986.

Administration of partnership and individual property. — The provisions of the national bankruptcy act of 1898 that "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and net proceeds of the individual estate of each partner to the payment of the individual debts," enunciates a rule of administration of partnership and individual property, and governs only such partnership and individual property as the bankrupts own at the filing of the petition and such as has been previously transferred fraudulently or in such a manner as to create a voidable preference. *Sergeant v. Blake* (U. S.), 15-58.

12. TITLE TO PROPERTY OF BANKRUPT.

When bankrupt's title is divested. — Under the national bankruptcy act, the appointment of a trustee is essential to divest a bankrupt of the title to his property, and therefore an adjudication in bankruptcy does not divest the bankrupt of the title to a chose in action, where the adjudication is had without the appointment of a trustee. *Rand v. Iowa Central R. Co.* (N. Y.), 9-542.

In an action to recover a debt, where it appears that the plaintiff was adjudicated a bankrupt after the accrual of the cause of action and before the beginning of the suit, and that the adjudication in bankruptcy was had without the appointment of a trustee, a judgment for the plaintiff will protect the de-

fendant from liability to any trustee in bankruptcy who may be subsequently appointed. *Rand v. Iowa Central R. Co.* (N. Y.), 9-542.

13. POWERS AND DUTIES OF TRUSTEES.

Power to sue for partition. — A trustee in bankruptcy having legal title with no beneficial interest in undivided property and no duties with reference to the undivided property requiring partition for the benefit of a *cestui que trust* is not in general such a tenant in common as authorizes him to sue for partition. *Hobbs v. Frazier* (Fla.), 16-558.

The federal bankruptcy statute contains no express authority to a trustee in bankruptcy to sue for partition of the property of the bankrupt, the title to which is by law vested in the trustee in bankruptcy for the purpose of paying the debts of the bankrupt, and the nature of the trustee's power and duties does not necessarily make the right to sue for partition exist by implication. A sale of the bankrupt's interest may be made without partition, and this may be sufficient for debt-paying purposes. *Hobbs v. Frazier* (Fla.), 16-558.

Where a trustee in bankruptcy sues for the partition of property and merely alleges that he "is desirous of obtaining a partition and division of the said premises," and it does not in any way appear that partition is essential to the statutory duties of such trustee, or that the bankruptcy court has authorized the proceeding, or that it is necessary fully to protect the rights of those interested in the estate of the bankrupt, the right of the trustee in bankruptcy to sue for partition is not apparent. *Hobbs v. Frazier* (Fla.), 46-558.

Duty to pay taxes. — Under the national bankruptcy act of 1898 it is the duty of a trustee to pay, in advance of dividends, all taxes due and owing by a bankrupt, including taxes assessed upon mortgaged property which the trustee has relinquished to the mortgagee creditors. *Chattanooga v. Hill* (U. S.), 3-237.

14. COMPOSITION.

Effect as discharge. — Where a bankrupt offers, under the bankruptcy act, a composition to his creditors which is accepted by the creditors, and confirmed by the bankruptcy court, so long as the order confirming the composition stands, it has the effect of a discharge and bars all remedies for the enforcement of claims by creditors, either against the debtor or his property. *Turner v. Hudson* (Me.), 18-600.

Jurisdiction of state court to annul. — When a debtor has been discharged from his debts on a composition in bankruptcy, a bill in equity by a creditor, charging that the debtor fraudulently concealed and omitted from his schedule of assets filed in the bankruptcy court money and property of his own which should have been included therein, and that the creditor relying upon the correctness of the schedules was induced thereby to accept the composition, does not lie, in the state court, at least, to reach the property

thus concealed and omitted, and apply it to the payment of the creditor's claim. *Turner v. Hudson* (Me.), 18-600.

15. DECREE OF DISCHARGE.

Collateral attack. — A decree of discharge in bankruptcy under the national bankruptcy act, in due form on its face, cannot be attacked collaterally. *Custard v. Wigderson* (Wis.), 10-740.

Annulment by state court. — A discharge in bankruptcy cannot be annulled or disregarded by a state court. It must be attacked for fraud in its procurement in the federal courts if anywhere. And the same rule applies to fraud in the proceedings for a bankruptcy composition. *Turner v. Hudson* (Me.), 18-600.

16. REVIVAL OF DEBTS.

Promise by debtor in general. — The effect of a discharge in bankruptcy is to extinguish the bankrupt's debt; and a promise by a debtor to revive a discharged debt must be clear, express, distinct, unequivocal, and without qualification or condition before it will be enforceable against him. *Moore v. Trounstone* (Ga.), 7-971.

In an action on notes given by a person afterwards discharged in bankruptcy under the national bankruptcy act, which is sought to be maintained on the ground that the bankrupt, subsequent to his discharge, promised to pay the notes, it is error to direct a verdict for the plaintiff, where the evidence as to whether the promise was made is conflicting. *Custard v. Wigderson* (Wis.), 10-740.

Letter to creditors. — A debt discharged in bankruptcy held to be revived by a letter from the discharged bankrupt to the creditors, the promise being sufficiently clear, certain, and explicit, and not conditional. *Sundling v. Willey* (S. Dak.), 9-644.

Promise before discharge. — A promise by a debtor to pay a previously existing debt to his creditor, made after the former's adjudication as a bankrupt, but before his discharge, will not be impaired by a subsequently acquired discharge. *Moore v. Trounstone* (Ga.), 7-971.

A promise to pay a pre-existing debt, made by a bankrupt after his adjudication as such, but before his discharge, will not be impaired by a subsequent discharge. *Dicks v. Andrews* (Ga.), 16-1070.

Part payment. — The moral obligation to pay the former indebtedness is a sufficient consideration for a new promise, but in order to revive a liability upon a claim discharged in bankruptcy there must be an express promise to pay the specific debt. A promise cannot be implied from the fact of part payment or other circumstances. *Needham v. Matthewson* (Kan.), 19-146.

17. ANCILLARY JURISDICTION OF BANKRUPTCY COURT.

Compelling surrender of property of trustee. — Where a corporation or an individual has been adjudicated a bankrupt in

a district court of the United States, a district court in another district has power to compel the delivery of property within its jurisdiction, belonging to the bankrupt, to the trustees in bankruptcy, and, consequently, the dismissal of a proceeding to compel such delivery, on the ground that the court is without jurisdiction, is erroneous. In any case where the original court of bankruptcy could act summarily, another court of bankruptcy, sitting in another district, can do so in aid of the court of original jurisdiction. *Babbitt v. Dutcher* (U. S.), 17-969.

18. APPEALS IN BANKRUPTCY.

Appellate jurisdiction. — Under paragraph *a* of section 24 of the bankruptcy act, the supreme court of the United States and the circuit court of appeals of the United States have appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases; under paragraph *b* of the same section the several circuit courts of appeals have jurisdiction to revise in matters of law, upon petition, the proceedings of the several inferior courts of bankruptcy within their jurisdiction; and under paragraphs *a* and *b* of section 25 the circuit courts of appeals and the supreme court, respectively, have jurisdiction of appeals in bankruptcy proceedings in certain specified cases. The proceeding by petition under section 24*b* is designed to enable the circuit court of appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings by section 24*a*, or the special appeal given in certain cases under section 25. *Coder v. Arts* (U. S.), 16-1008.

What constitutes proceeding in bankruptcy. — Where a creditor of a voluntary bankrupt files with the trustee in bankruptcy a claim upon certain promissory notes, and asks that such notes be allowed as a proper claim against the assets in the hands of the trustee to be administered, and states, in his claim, that he holds a mortgage as security for payment of the debt, which it is his purpose to maintain and upon which he is entitled to priority in the distribution of the assets, the presentation of the claim must be considered as the institution of a proceeding in bankruptcy, as distinguished from a controversy arising in the course of bankruptcy proceedings, and consequently the appropriate appellate jurisdiction in such a case is to be determined by the provisions of the bankruptcy act governing appeals in bankruptcy proceedings. *Coder v. Arts* (U. S.), 16-1008.

A proceeding instituted by petition and citation in a court of bankruptcy to determine adverse claims to property is a "controversy arising in a bankruptcy proceeding" (Bankruptcy Act 1898, § 24*a*; 1 Fed. St. Ann. 593) which may be reviewed on appeal, regardless of whether the petition is filed by the trustee in bankruptcy or by an adverse claim-

ant of the property. *Thomas v. Woods* (U. S.), 19-1080.

A proceeding instituted by a trustee in bankruptcy in the bankruptcy court to have certain liens on and claims to property of the estate declared void, and the property sold, is a "controversy arising in a bankruptcy proceeding" (Bankruptcy Act 1898, § 24*a*; 1 Fed. St. Ann. 593) and therefore is reviewable on appeal. *Thomas v. Woods* (U. S.), 19-1080.

Appeal or petition for review. — In such a case as that above considered, where the amount of the claim exceeds \$500, the proper remedy of the party aggrieved by a judgment of the district court allowing or rejecting the same is by appeal to the circuit court of appeals under section 25*a* of the bankruptcy act, and not by petition for review under section 24*b*. Such an appeal brings before the appellate court both the validity of the claim and the lien asserted securing the debt, the former directly and the latter incidentally. *Coder v. Arts* (U. S.), 16-1008.

Appeal to federal supreme court. — In such a case, where the amount of the claim exceeds \$2,000, a further appeal lies to the supreme court of the United States under subdivision 1 of section 25*b* of the bankruptcy act, without obtaining the certificate mentioned in subdivision 2 of that section, since the claim, together with the lien asserted thereon, presents a case for the construction of the bankruptcy act which might be brought to the federal supreme court under section 709 of the Revised Statutes, were the case decided by the highest court of a state. *Coder v. Arts* (U. S.), 16-1008.

Record on appeal. — Where an appeal has been taken to the supreme court of the United States from a judgment of the circuit court of appeals, under the bankruptcy act, the latter court has power to make its findings of fact and conclusions of law a part of the record by an order made within the time limited for taking an appeal, and to direct that the same be filed *nunc pro tunc* as of the date the judgment entertained. *Coder v. Arts* (U. S.), 16-1008.

Conclusiveness of findings by circuit court of appeals. — On an appeal to the supreme court of the United States by a trustee in bankruptcy from a judgment of the circuit court of appeals allowing a claim against the bankrupt estate and adjudging that a mortgage held by the claimant as security is valid, the findings of fact made by the circuit court of appeals are conclusive, and consequently, where that court has found, as facts, that neither the mortgagee nor any of his agents had reasonable cause to believe that the debtor intended to give a preference by making the mortgage, and that the debtor did not make the mortgage with any intent or purpose on his part to hinder, delay, or defraud his creditors, the judgment appealed from cannot be reversed on the ground that the mortgage in question was a fraudulent or preferential transfer. *Coder v. Arts* (U. S.), 16-1008.

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1. BANKING BUSINESS IN GENERAL.

What constitutes. — A corporation engaged in the general business of operating a department store, which receives moneys up to \$500 from any one desiring to deposit with it, issues passbooks evidencing such deposits, pays interest on the amounts deposited, and pays the principal sum deposited, with interest thereon, on demand, in money or goods at the election of the depositor, is within the terms of the Wisconsin statute which declares the soliciting, receiving, or accepting of money on deposit as a regular business by a person or corporation to be a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass-book, a note, a receipt, or other writing. *MacLaren v. State (Wis.)*, 18-826.

Right to engage in banking. — Banking is a lawful business, in which it is the inherent right of every citizen to engage. *Ex p. Pittman (Nev.)*, 20-1319.

2. REGULATION AND CONTROL.

Power to regulate. — The banking business may be regulated, but not prohibited, and it is not only within the power but it is the duty of the legislature to regulate the business so as to reduce failures to a minimum. *Ex p. Pittman (Nev.)*, 20-1319.

Regulations as to property. — The provisions of the Indiana statute regulating private banking which require that "the real estate, bank furniture, and fixtures" of a private bank "shall not constitute more than one-third in amount and value of the entire capital of such bank," and that a private banker shall make oath that "the responsibility and net worth of the individual members of such firm, partnership, or individual is equal to an amount at least double the amount of capital paid into such bank," are not, in their application to bankers already in business, unconstitutional as taking the property of such bankers by law without just compensation, or as depriving them of their property without due process of law, or as denying them the equal protection of the laws, or as granting special privileges and immunities. *State v. Richcreek (Ind.)*, 10-899.

Private banking. — The provision of the Indiana statute regulating private banking, which requires an individual, or one member of a firm, conducting a banking business under the act to be a resident of Indiana, is not unconstitutional. *State v. Richcreek (Ind.)*, 10-899.

Receipt of deposits by department store. — Independent of any constitutional authority, there is no doubt of the right of the legislature to regulate banking, nor can there be any doubt of its power to regulate a business carried on by a department store corporation of receiving moneys on deposit, paying interest thereon, and paying the principal sum deposited, with interest, on demand, in money or goods, at the election of the depositor, even though such business should be held not to constitute banking. *MacLaren v. State (Wis.)*, 18-826.

It is competent for the legislature to define such a business as that above described as banking, even though it is not such in fact, and to throw around it the general safeguards provided for the banking business proper. *MacLaren v. State (Wis.)*, 18-826.

3. OFFICERS AND AGENTS.

a. Powers, duties and liabilities in general.

Limitation of actions against directors for making unlawful loans, see **LIMITATION OF ACTIONS**, 4 a (2) (c).

President. — Under an Iowa statute providing that a state bank shall be managed

by its board of directors, a state bank is bound by an act done by its president without express authorization, where the president has for several years performed similar acts with the full acquiescence of the directors, irrespective of whether the act is one inherently pertaining to the office of president. *Griffin v. Erskine* (Iowa), 9-1193.

Cashier. — The indorser of a promissory note held by a bank is not released from liability by the action of the bank's cashier in receiving money for interest in advance on the note and agreeing to extend the time of payment, unless such action is expressly authorized or is ratified by the bank, as the cashier has no implied authority to release the bank's security. *Bank of Ravenswood v. Wetzel* (W. Va.), 6-48.

Directors. — The powers and duties of the directors of a bank and the liability for acts of the employees stated. *Mason v. Moore* (Ohio), 4-240.

Imputation of knowledge of bank's condition. — The directors of a bank are not held, as a matter of law, to know of its affairs, or what its books and papers would show, and such knowledge cannot be imputed to them for the purpose of charging them with liability. *Mason v. Moore* (Ohio), 4-240.

b. Liability for making false reports.

In a criminal prosecution against an officer of a bank for making a false report to the state bank examiner, preceding reports made by the defendant are admissible for the purpose of showing his intention in making the report in question. *State v. Jackson* (S. Dak.), 16-87.

In such a case a ruling of the trial judge fixing one year from the report in question as the period covering the dates of such other reports is a proper exercise of his discretion. *State v. Jackson* (S. Dak.), 16-87.

In such a case an instruction that "an overdraft arises when a customer of a bank draws from that bank more money than is standing to his credit in his account with the bank, and such a sum so appearing from the deposit account to be withdrawn in an overdraft, and would be so reported to the public examiner in such a report as the one involved in this case," is correct. *State v. Jackson* (S. Dak.), 16-87.

The report made by a bank officer to the state bank examiner must agree with the books of the bank in the statement of assets and liabilities and in the names by which such assets and liabilities are called. *State v. Jackson* (S. Dak.), 16-87.

4. STOCK AND STOCKHOLDERS.

A by-law of a national bank, enacted pursuant to an Act of Congress necessitating the production of an old certificate of stock before the issuance of a new certificate to take its place, will not impair the authority of the chancellor to order the bank to issue a new certificate of stock where the person who is in possession of the old certificate after

service of constructive process fails to appear. *Letcher v. German Nat. Bank* (Ky.), 20-815.

5. DEPOSITS.

a. Respective duties of bank and depositor.

Duty of bank to depositors. — A bank is the debtor of its depositors, and is under obligation to keep careful and faithful accounts with them, to scrutinize checks, and to exercise proper care and skill to prevent or discover fraud. *Brown v. Lynchburg National Bank* (Va.), 17-119.

Duties of depositor. — A bank depositor is under obligations to the bank to examine, within a reasonable time and with ordinary care, the account rendered in the pass book and vouchers returned by the bank to him, and to report any errors discovered without unreasonable delay. The examination need not be so minute as to exclude any possibility of error, but it should be made in good faith and with ordinary diligence, and such care should be used as is required by the circumstances of the particular case. *Brown v. Lynchburg National Bank* (Va.), 17-119.

b. Liability of bank.

(1) In general.

Unauthorized deposit of public funds.

— Where a county treasurer, acting in excess of his authority, sends tax receipts to a bank and authorizes it to receive the money thereon and deliver the receipts to the taxpayers, the deposit of the money in the bank, or its retention by the bank, is wrongful, and the bank holds the money charged with a trust in favor of the county. *Page County v. Rose* (Iowa), 8-114.

Where a county treasurer sends a bank specific tax receipts and authorizes it to collect the taxes and deliver the receipts to the taxpayers, the bank is chargeable as a trustee of the moneys thus collected, and the county may establish the trust against the insolvent estate of the bank in the hands of its receiver or assignee. *Page County v. Rose* (Iowa), 8-114.

Improper withdrawal of trust funds.

— If a bank has notice or knowledge that a breach of trust is being committed by the improper withdrawal of deposited funds, it becomes responsible for the wrong done, and may be made to replace the funds. Accordingly where funds of an insolvent corporation are deposited in a bank by the receiver of the corporation appointed by an order of court, of which the bank has knowledge, providing that the funds shall be paid out only on checks signed by the receiver and countersigned by the judge, and the bank pays out the funds on checks not countersigned as provided, the creditors of the corporation to whom the receiver sustains a fiduciary relation may hold the bank liable for loss sustained by reason of such unauthorized payment of the funds. *American Nat. Bank v. Fidelity, etc., Co.* (Ga.), 12-666.

Where in such a case the creditors or the

obligee in a bond given by the receiver for the faithful performance of his duties relating to the funds upon a breach of trust by the receiver, participated in by the bank, bring suit and recover judgment against the receiver and the surety on the bond, and the surety pays the judgment, such surety is subrogated to the rights of the creditors to enforce the liability incurred by the bank on account of its participation in the breach of trust by the fiduciary. *American Nat. Bank v. Fidelity, etc., Co. (Ga.)*, 12-666.

Refusal to pay check. — The liability of a bank for refusal to pay a check where the bank has set off a deposit against the debt. *Callahan v. Bank (S. Car.)*, 2-203.

Conclusiveness of balance shown by book. — A balance struck in a pass book is, in effect, an account stated between the bank and the depositor, which will operate as an estoppel against the bank unless impeached for fraud or error. *Greenhalgh Co. v. Farmers' Nat. Bank (Pa.)*, 18-330.

Individual dealings between depositor and cashier. — In an action to recover the amount of certain checks alleged to have been deposited by the plaintiff with the defendant bank in the usual course of banking business, and claimed by the defendant to have been loaned by the plaintiff to the defendant's cashier individually, it is proper for the court to refuse to charge that if the plaintiff's treasurer and the defendant's cashier made an arrangement whereby the amount of the checks was intended as an individual loan to the cashier and was received by him as such, there can be no recovery, because those officers of the parties might have made such an arrangement without authority. *Greenhalgh Co. v. Farmers' Nat. Bank (Pa.)*, 18-330.

(2) Embezzlement by employee.

Negligence as question for jury. — In an action against a bank to recover a balance alleged to be due to the plaintiff on a deposit account, where the evidence shows that the amount sought to be recovered was embezzled by an employee or employees of the bank, and charged by such employee or employees to the plaintiff's account; that the embezzlement covered a period of about three years, the money being taken from time to time in small sums; that during such period the bank rendered monthly statements to the plaintiff, consisting of his canceled checks for the month, a machine-made slip purporting to contain a list of such checks, and a statement showing the totals of debits and credits and the balance to the credit of the plaintiff; that the plaintiff examined such statements to a certain extent, but failed to discover the embezzlement until he was notified by the bank that he had overdrawn his account; and that upon such notification he made a further examination of the monthly statement and discovered, without difficulty, that the lists of checks returned therewith contained false entries aggregating the amount of the embezzlement, the question whether the plaintiff

has been guilty of such negligence as to preclude his recovery should be submitted to the jury, and it is error for the court to direct a verdict in favor of the defendant. *Brown v. Lynchburg National Bank (Va.)*, 17-119.

c. Recovery of money deposited.

Limitation of actions to recover deposits, see **LIMITATION OF ACTIONS**, 4 a (2) (a).

Set-off of unmatured notes against balance of depositor, see **BANKRUPTCY; GARNISHMENT**, 3 b.

Demand as condition precedent. —

A mere oral request for payment is not a sufficient demand to enable a depositor to maintain an action against a bank to recover money deposited. *Stapf v. First National Bank (Ind.)*, 6-631.

Set-off of claim against depositor. —

In an action by a depositor against a bank to recover money deposited, the defendant is entitled to set off a certificate of deposit, issued by another bank and deposited by the plaintiff, which it has been unable to collect by the exercise of due diligence in forwarding for collection and bringing suit for non-payment, especially where it appears that the bank issuing the certificate has had no property subject to execution at any time since the deposit of the certificate by the plaintiff with the defendant. *Stapf v. First National Bank (Ind.)*, 6-631.

The rule that a bank may set off a deposit against the depositor's indebtedness does not apply to a special deposit or a deposit for a specific purpose; and therefore where money is deposited with a bank to the credit of an insolvent corporation, to be distributed among all the creditors, pursuant to a meeting of creditors at which the bank was represented by its president who assented to the plan, the bank is estopped to assert the right of set-off in respect to such deposit. *Wagner v. Citizens' Bank, etc., Co. (Tenn.)*, 19-483.

6. COLLECTIONS.

Title to money collected. — The title to the proceeds of a check forwarded for collection under a general indorsement in blank. *Continental Nat. Bank v. First Nat. Bank (Miss.)*, 2-116.

Lien on money collected. — Where a bank has collected a sight draft sent to it by a correspondent bank with instructions to "return at once if not paid," it is not deprived of its lien on the proceeds of the collection by the fact that it held the draft for several days before collecting it, awaiting the arrival of the goods for which it was drawn, if in so doing it acted in accordance with the established course of dealing between it and the correspondent bank. *Garrison v. Union Trust Co. (Mich.)*, 5-813.

Where a bank receives for collection from a correspondent bank a draft bearing an unqualified general indorsement with no notice that the latter is not the real owner thereof, the collecting bank is entitled to a lien on the proceeds of the collection for the balance which it has on deposit with the correspond-

ent bank; and it is entitled to this lien as against the real owner of the draft. *Garrison v. Union Trust Co.* (Mich.), 5-813.

Where a bank sends to another bank for collection a draft bearing unqualified general indorsements, the fact that the draft has a "collection number" stamped upon it is not of itself sufficient to charge the collecting bank with notice that the forwarding bank does not own the paper, but holds it for collection merely. *Garrison v. Union Trust Co.* (Mich.), 5-813.

Mingling collections with general assets. — The right of a bank to which a paper is forwarded for collection to mingle the proceeds with the general assets. *State ex rel. North Carolina Corp. Commission v. Merchants', etc., Bank* (N. Car.), 2-537.

Sending instrument to payor. — It is negligence for a bank with which a note or certificate of deposit or other obligation is deposited for collection to send it directly to the payor for collection, unless it acts in obedience to the depositor's instructions. *First National Bank v. Bank of Whittier* (Ill.), 5-653.

Liability for acts of correspondent. — Where a bank to which a certificate of deposit is given for collection forwards it to another bank with instructions which amount to a direction to send the certificate directly to the payor, the forwarding bank is liable to its depositor for a loss resulting from the action of its correspondent in sending the certificate to the payor, though it does not instruct its correspondent in express terms to adopt such a course. *First National Bank v. Bank of Whittier* (Ill.), 5-653.

Validity and effect of custom. — A person intrusting a paper to a bank for collection may be bound by a custom which is reasonable and which is sufficiently general to justify the presumption that it is known. *Farley Nat. Bank v. Pollock and Bernheimer* (Ala.), 8-370.

A bank to which a check is intrusted for collection cannot send it to the bank upon which it is drawn, receive such bank's check on New York in payment, and, when the latter check is protested on account of the failure of the bank drawing it, escape liability on the ground of a custom to transact business in that way. *Farley Nat. Bank v. Pollock and Bernheimer* (Ala.), 8-370.

7. INSOLVENCY.

The legislature as an exercise of police power can impose a penalty for the conduct of business by an insolvent bank. *Ex parte Pittman* (Nev.), 20-1319.

The Nevada statute (St. 1907, c. 189) making it a crime to receive bank deposits knowing the bank to be insolvent, is not unconstitutional as being a special law for the punishment of offenses; nor is it objectionable as class legislation. *Ex parte Pittman* (Nev.), 20-1319.

Prior to the Nevada statute (St. 1907, c. 189) making it a crime to receive bank deposits when the bank is known to be insol-

vent, the general laws making it a crime for any one wrongfully to convert property of another to his own use applied to bank officers who embezzled bank funds, the same as to other embezzlers. *Ex parte Pittman* (Nev.), 20-1319.

The purpose of a statute making it a crime to receive deposits when a bank is known to be insolvent is not only to protect innocent depositors, but to deter bank officers from so conducting a bank as to endanger its solvency. *Ex parte Pittman* (Nev.), 20-1319.

8. SAVINGS BANKS.

a. Rules and by-laws.

Assent by depositor. — A depositor in a savings bank is bound by the reasonable rules to which he assents by an agreement in writing. *Langdale v. Citizens' Bank* (Ga.), 2-257.

A savings bank depositor accepting and using a deposit book containing printed by-laws assents to them and is bound thereby. *Chase v. Waterbury Sav. Bank* (Conn.), 1-96.

Presentation of pass book as condition of payment. — By-laws of a savings bank, which require the presentation of the deposit book, or due notice to the bank in case of the loss of the book, as conditions precedent to payment to the depositor or to another on his written order, are reasonable conditions and become a part of the contract between the bank and the depositor, when brought to the notice of the latter. *Hough Avenue Savings, etc., Co. v. Anderson* (Ohio), 14-479.

Payment to any person presenting pass book. — The rule as to the payment made to a person presenting a pass book, held reasonable and binding on the depositors. *Langdale v. Citizens' Bank* (Ga.), 2-257.

b. Liability for payment to wrong person.

Payment on forged check. — The liability of a savings bank under its rules for the payment of a forged check in good faith. *Langdale v. Citizens' Bank* (Ga.), 2-257.

The effect of the rule requiring a written order when a pass book is not presented personally, on the liability of a bank for the payment of a forged check made in good faith. *Langdale v. Citizens' Bank* (Ga.), 2-257.

Duty of bank to use ordinary care. — A stipulation by a savings bank against liability for fraud by means of forged signatures or the presentation of a bank book without the depositor's knowledge, to which stipulation the latter impliedly assents, will not relieve the bank from the duty to exercise ordinary care in payment. *Chase v. Waterbury Sav. Bank* (Conn.), 1-96.

The question whether a savings bank has failed to use reasonable care in paying money to the wrong person is for the jury. *Chase v. Waterbury Sav. Bank* (Conn.), 1-96.

Notwithstanding a by-law of a savings bank requiring the depositor to give notice that his pass book has been lost or stolen,

and that "in all cases a payment upon presentation of a deposit book shall be a discharge to the company for the amount so paid," the bank is at least bound to act in good faith and to exercise reasonable care to avoid payment to the wrong person, and for a failure to exercise reasonable care to avoid payment to a person not entitled thereto it will be liable to pay again to the rightful owner of the deposit. *Hough Avenue Savings, etc., Co. v. Anderson* (Ohio), 14-479.

Where a savings bank pays a deposit to a person other than the depositor on presentation of the deposit book and a forged order purporting to have been written by the depositor, evidence that the paying teller was not acquainted with the depositor or familiar with his signature, and paid out the money without comparing the signature to the order with the genuine signature of the depositor, is sufficient to raise a question for the jury on the question of good faith and reasonable care on the part of the bank, and supports a judgment for the plaintiff. *Hough Avenue Savings, etc., Co. v. Anderson* (Ohio), 14-479.

Contributory negligence of depositor. — A savings bank negligently paying money upon a forged order not excused from liability by the contributory negligence of the depositor. *Chase v. Waterbury Sav. Bank* (Conn.), 1-96.

c. Savings bank trusts.

Deposit in savings bank as gift, see GIFTS, 1 a.

A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by an unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. If the depositor dies before the beneficiary without revocation, the presumption arises that an absolute trust was created as to the balance on hand at his death. *Matter of Totten* (N. Y.), 1-900.

A mere savings bank deposit made by a person in her own name as trustee for another, who is a mere friend, over which deposit the depositor exercises complete control during her life, is insufficient to establish a gift *inter vivos* or to create a trust entitling the supposed beneficiary to the deposit as against the depositor's administrator. *Nicklas v. Parker* (N. J.), 14-921.

Where a person deposits money in a savings bank in her own name as trustee for certain persons who are dead at the time the accounts are opened, the deposits pass after her death intestate to her administrator. *Nicklas v. Parker* (N. J.), 14-921.

9. NATIONAL BANKS.

a. False entries in books.

Liability for false entries made by third person. — On a charge against an officer of a national bank of making false en-

tries in the books of the bank, it is immaterial whether the defendant made the entries in person or caused them to be made by a clerk or bookkeeper. *Morse v. U. S.* (U. S.), 20-938.

Evidence of fraudulent intent. — Entries in the books of a national bank showing loans to persons named, on the security of stocks deposited as collateral, when in fact the transactions were purchases of the stock by the bank, the supposed borrowers being merely dummies wholly irresponsible for the amount of the notes which they gave without any intention of paying the same or any knowledge of the actual transactions, are false entries, and when they are made by the direction of an officer of the bank who conducted the transactions, a jury is justified in finding that they were fraudulent and made with intent to deceive the bank examiner and his agents in violation of the federal statute (Rev. St. § 5209, 5 Fed. St. Ann. 145). *Morse v. U. S.* (U. S.), 20-938.

Instructions. — In the prosecution of a person under the federal statute (Rev. St., § 5209; 5 Fed. St. Ann. 145), charged as the officer of a bank with having made false entries in the books of the bank and in reports to the comptroller, with intent to injure and defraud the bank and deceive its officers and the examiner, it is not error to charge the jury that if they find that such false entries were made, they are authorized to presume therefrom, in the absence of any explanation, that the defendant knew them to be false, and that if the natural and probable consequence of such entries was to defraud or deceive, they may presume, in the absence of explanation, that such was the defendant's intention. *Morse v. U. S.* (U. S.), 20-938.

b. False reports to comptroller.

A report to the comptroller made by a national bank is false if it fails to include in the list of securities held by the bank shares of its own stock which it has purchased. Such purchase, though prohibited by statute (Rev. St. U. S., § 5201; 5 Fed. St. Ann. 140), is not a nullity, nor does it extinguish the stock. *Morse v. U. S.* (U. S.), 20-938.

A report made by a national bank to the comptroller accurately stating the facts as shown by the books does not prevent such statements from being false, where the books themselves do not correctly show the actual transactions or condition of the bank. *Morse v. U. S.* (U. S.) 20-938.

c. Misapplication of funds by officers.

In the prosecution of an officer of a national bank under the federal statute (Rev. St., § 5209; 5 Fed. St. Ann. 145) for misapplication of funds with intent to injure and defraud the association, general language used in the charge in explaining the statute, stating that a misapplication of funds, in order to constitute an offense, must be with intent to injure or defraud the bank "or to deceive any officer of the bank or any agent appointed

pursuant to law to examine the affairs of the bank," is not misleading, where the jury are subsequently charged specifically on the precise issue presented by the indictment and that an intent to defraud the bank must be shown. *Morse v. U. S. (U. S.)*, 20-938.

d. Civil liability for false reports.

The liability of the directors of a national bank to one purchasing bank stock in reliance on a false report of the condition of the bank. *Mason v. Moore (Ohio)*, 4-240.

e. Suits by and against receivers.

The federal law gives the receiver of a national bank the legal title to the assets thereof and he may maintain an action in his own name in a state court to recover such assets. *Fish v. Olin (Vt.)*, 1-295.

f. Rights and liabilities of stockholders.

Enforcement of liability of stockholders, see **LIMITATION OF ACTIONS**, 4 a (2) (c).

Limitation of actions to recover assessment on stock, see **LIMITATION OF ACTIONS**, 3.

Right of married woman to hold stock, see **CORPORATIONS**, 8 g (2) (c).

Right of stockholders to inspect books, see **CORPORATIONS**, 8 e (3).

Taxation of stock, see **TAXATION**, 2 c.

BAPTISMAL RECORDS.

Admissibility in evidence, see **EVIDENCE**, 9 a.

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1. **BASTARDY PROCEEDINGS**.

Right of mother to institute. — The right of the mother to institute bastardy proceeding is not affected by the fact that the child is born dead. No bond to indemnify the county against the expense of support and maintenance can be required, but it is proper to order an allowance to the mother to reimburse her for expenses for medical attention and medicine for herself, and the burial expenses of the child. *State v. Addington (N. Car.)*, 11-314.

Right of married woman to maintain proceeding. — Only an unmarried woman may maintain a bastardy proceeding under the Mississippi statute (Code 1906, § 268) which describes the person who may make complaint as "any unmarried woman." *Welch v. Cliburne (Miss.)*, 19-388.

Child born in another state. — A non-resident mother of a bastard child may maintain filiation proceedings against a resident of the state, though the child was begotten and born in another state. *Roy v. Poulin (Me.)*, 18-573.

Jurisdiction of mayor. — The mayor of a city is invested with the jurisdiction of a bastardy proceeding against a resident of the city by the Indiana statute providing that he "shall have, within the limits of said city, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of this state." *Evans v. State ex rel. Freeman (Ind.)*, 6-813.

Waiver of objection to jurisdiction. — The defendant in a bastardy proceeding brought before the mayor of a city waives his right to question the mayor's jurisdiction over his person if he fails to interpose a proper plea to the jurisdiction before pleading to the action. *Evans v. State ex rel. Freeman (Ind.)*, 6-813.

Venue. — Filiation proceedings by a non-resident mother are properly entered in the county where the defendant resides. *Roy v. Poulin (Me.)*, 18-573.

Competency of married woman to testify to nonaccess of husband. — In a prosecution for bastardy, where the relatrix is a married woman, she may testify to the

nonaccess of her husband. *Evans v. State ex rel. Freeman* (Ind.), 6-813.

Corroboration of testimony of relatrix. — Under the Indiana statute making the relatrix in a bastardy proceeding a competent witness against the defendant, her testimony may prevail though it is not corroborated by the other evidence. *Evans v. State ex rel. Freeman* (Ind.), 6-813.

Commitment of defendant. — Under the North Carolina statute, authorizing the court to commit the defendant in a bastardy proceeding to the house of correction until he has performed the order of the court, commitment can only be made to the county jail where there is no house of correction, and the court has no authority to require the defendant to work on the public roads. *State v. Addington* (N. Car.), 11-314.

Validity of contract to discontinue. — Where the defendant in bastardy proceedings instituted by a father on behalf of his minor daughter procures a third person to execute a mortgage to secure the support of the daughter and her unborn child in consideration of the discontinuance of the bastardy proceedings and the marriage of the parties, such contract of mortgage is founded upon a good consideration and is valid. *Jangraw v. Perkins* (Vt.), 2-492.

2. RECOGNITION OF BASTARD BY PUTATIVE FATHER.

Sufficiency of evidence to show. — Evidence reviewed in an action to construe a will and held insufficient to show a general or notorious recognition by the putative father of an illegitimate child alleged to be his. *Brisbin v. Huntington* (Iowa), 5-931.

3. LEGITIMATION OF CHILD.

Oklahoma statute. — Under the statutes of Oklahoma the father of an illegitimate minor child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts or legitimates such child, and it acquires the legal status of a legitimate child from birth. *Allison v. Bryan* (Okla.), 17-468.

Consent of mother. — Such father, desiring so to legitimate or adopt such child, may do so without the consent and against the will of the mother. *Allison v. Bryan* (Okla.), 17-468.

4. RIGHT TO CUSTODY OF CHILD.

Under Oklahoma statute. — Under the statutes of Oklahoma, the mother of an illegitimate unmarried minor is entitled to its custody, service, and earnings; but where an illegitimate child has been legitimated or adopted by its father in the manner prescribed by the statute, all the reciprocal responsibilities and duties between a father and a legitimate child obtain between him and such adopted or legitimated child, and he is charged with its support and education, and

is entitled to its custody, services, and earnings. *Allison v. Bryan* (Okla.), 17-468.

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1. POWERS OF ASSOCIATION.

Extent of power to insure. — A fraternal beneficiary society has no power to insure the lives of its members except to the extent that it is authorized by statute, either expressly or by necessary implication. *State ex rel. Supreme Lodge v. Vandiver* (Mo.), 15-283.

Power to issue paid-up policies. — The Missouri statute defining and regulating fraternal beneficiary societies, which provides that such societies shall make provision for the payment of death benefits, that the fund from which such payments shall be made shall be derived from "assessments or dues," and that they may create and disburse a "reserve or emergency" fund, does not authorize such societies to issue nonforfeitable and twenty-year paid-up policies or death benefit certificates. *State ex rel. Supreme Lodge v. Vandiver* (Mo.), 15-283.

2. PROPERTY OF ASSOCIATION.

Ownership as between councils. — A fund raised by the voluntary contributions of the members of a subordinate council or lodge of a fraternal benefit society for sick and funeral benefits, belongs to the subordinate association for distribution to the parties for

whose use and benefit it was contributed, and cannot be recovered by the superior upon the revocation of the charter of the subordinate body, especially where the fund has been paid out in good faith to the persons and for the purposes for which it was contributed, prior to a court decision sustaining the revocation of the charter of the subordinate body by the superior body. *State Council, etc., v. Emery* (Pa.), 12-870.

3. CONSTRUCTION OF CONTRACT.

Strict construction against insurer.

— A benefit society's contract of insurance must be construed strictly against the insurer and liberally in favor of the insured, and where two equally reasonable interpretations are possible, that one should be adopted which will enable the beneficiary to recover. *Grand Legion, etc., v. Beaty* (Ill.), 8-160.

Ambiguous stipulations in a benefit certificate will be construed in favor of the beneficiary and against the insurer. *Clemens v. Royal Neighbors* (N. Dak.), 8-1111.

Self-executing provision for forfeiture. — A condition in a fraternal benefit certificate that "if the member . . . shall . . . become so far intemperate in the use of alcoholic drinks or the use of drugs, to such an extent as to permanently impair his health, or to produce delirium tremens . . . then this certificate shall be null and void and of no effect, and all moneys which shall have been paid, and all rights and benefits which may have accrued on account of this certificate shall be absolutely forfeited," is self-executing. *Modern Woodmen v. Breckenridge* (Kan.), 12-636.

4. THE APPLICATION.

Answers to questions as warranties.

— Where an application for membership in a beneficial association contains certain questions as to the state of the applicant's health, which questions he answers and warrants to be true, the truth of the answers is a condition precedent to the validity of the benefit certificate, but in an action on the certificate the application is sufficient evidence to support the truth of the answers for the purpose of submission to the jury. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Answers incorrectly reported by examiner. — A benefit certificate will not be avoided on the ground that the member falsely represented in his application for membership that he had never suffered from a certain disease, where it appears that the member, when questioned by the medical examiner, answered truthfully that he had had a slight attack of the disease, but the examiner, who was writing down the answers, incorrectly inserted a negative answer, unless it also appears that the member when he signed the application had actual knowledge of the fact that the answer had been incorrectly written; and oral evidence is admissible to show that the member in fact answered truthfully. *Lyon v. United Moderns* (Cal.), 7-672.

Warranty as to other applications. —

A fraternal association which issues death benefit certificates is not a "company" within the meaning of a question in an application for membership in other fraternal associations as to whether any proposal or application to insure the life of the applicant has "ever been made to any company, or agent, or medical examiner, upon which a policy has not been issued." *Lyon v. United Moderns* (Cal.), 7-672.

Warranty as to qualification of beneficiary. —

Where a member of a beneficial association declares that a person whom he designates as a beneficiary in his benefit certificate comes within one of the clauses specified in the by-laws, the statement amounts to a warranty and is one upon the truth of which the validity of the contract depends. *Caldwell v. Grand Lodge* (Cal.), 7-356.

Warranty of sound bodily health. —

The signing by a pregnant married woman, who is a member of a fraternal association, of a certificate stating that she is in sound bodily health, such certificate being required for the purpose of making effective her death benefit certificate, is not a false representation if the certificate signed by her is otherwise true. *Merriman v. Grand Lodge, etc.* (Neb.), 15-124.

Duty to report subsequent illness. —

A married woman who is an applicant for a death benefit certificate in a fraternal association which issues such certificates on the lives of married women is not required to inform the association of evidence of pregnancy discovered subsequently to her application and physical examination. *Merriman v. Grand Lodge, etc.* (Neb.), 15-124.

5. CONSTITUTION AND BY-LAWS.

a. Validity.

Terms and conditions of membership. —

Fraternal beneficiary associations can impose such terms and conditions upon membership, not contrary to law, as they may choose, and members must comply with those terms and conditions in order to be entitled to the benefits of membership. *Gifford v. Workmen's Benefit Assoc. (Me.)*, 17-1173.

Suspension for non-payment of assessments. —

A rule of a fraternal beneficiary association that a member failing to pay an assessment on or before the last day of the month in which the call is dated "shall stand suspended from all rights, benefits, and privileges of this association without further notice," is a valid rule and self-executing. *Gifford v. Workmen's Benefit Assoc. (Me.)*, 17-1173.

Forbidding disposition of benefit by will. —

A benevolent association may provide by its constitution that no will shall be permitted to control the appointment or distribution of, or rights of any person to, any benefit payable by the association, and such provision is binding upon a member whose benefit certificate contains stipulations that he is bound by the laws, rules, and regula-

tions of the association. *Thomas v. Covert* (Wis.), 5-456.

Prohibiting resort to courts. —

A law of a fraternal benefit society prohibiting the members from resorting to the courts for redress of alleged injuries until they have exhausted remedies provided by the laws and rules of the order is valid and binding on the members, and compliance with such law by a member is a condition precedent to his right to sue in the courts for injunctive relief and for damages for his alleged suspension from the society. *McGuinness v. Court Elm City, No. 1, etc.* (Conn.), 3-209.

b. Construction.

By-law regarding prohibited occupations. —

The by-law of a benefit society prohibiting members from engaging in certain occupations or kinds of employment must be held to refer to a vocation or calling to which a member devotes himself with some degree of permanency for hire or profit, and not to acts which are simply incidentally connected with regular employment. *Stevens v. Modern Woodmen* (Wis.), 7-566.

Occasional acts of performing the duties of a bartender and of selling liquor to be used as a beverage, performed for his employer as a matter of accommodation by a person who is regularly employed to do work of a different nature, cannot be treated as being an employment as a bartender, or as being engaged in the sale of liquors within the meaning of a prohibition in the by-laws of a benefit society. *Stevens v. Modern Woodmen* (Wis.), 7-566.

By-law adopted without knowledge of member. —

Where an application for membership in a beneficial association enumerates the occupations classified as extra hazardous, and contains a promise by the applicant to respect the regulations of the association, such promise is deemed to be made with respect to the information thus given; and therefore there is no forfeiture of benefits because the applicant engages in an occupation not mentioned in such enumeration, but declared hazardous by a by-law adopted prior to the application, where the applicant does not know of the by-law. *Gienty v. Knights of Columbus* (N. Y.), 20-928.

c. Operation.

Whether retroactive or prospective. —

A by-law of a mutual benefit association which restricts the classes of persons who may be designated as beneficiaries will be presumed not to apply to beneficiaries designated prior to adoption. *Dolan v. Supreme Council* (Mich.), 15-232.

d. Penalties for violation.

Waiver of forfeiture. —

A subordinate lodge of a mutual benefit association which has the power to discipline and expel a member for violating the by-laws of the association, and possesses knowledge that a member has forfeited his benefit certificate by violating the by-laws of the association, waives the

right of the association to insist upon the forfeiture by continuing to receive his dues and in all other respects treating him as a member until his death. *Modern Woodmen v. Breckenridge* (Kan.), 12-636.

e. Amendments.

(1) In general.

Filing under Nebraska statute. —

The Nebraska statute, providing that before any amendment to or alteration in the constitution or by-laws of a beneficial association shall take effect, a copy of the amendment or alteration duly certified must be filed with the auditor of public accounts, applies to beneficial associations organized under the laws of other states as well as to those organized under the laws of Nebraska. *Knights of Maccabees v. Nitsch* (Neb.), 5-257.

(2) Validity as applied to existing members.

Implied condition of reasonableness.

—The general consent and agreement of a member of a mutual fraternal benefit society in his application and certificate to be bound by any changes in the constitution, by-laws, and rules that the society may enact in the future are subject to the implied condition that the changes must be reasonable. *Olson v. Court of Honor* (Minn.), 10-622.

Where a benefit certificate is conditioned upon compliance of the member with all the by-laws of the order thereafter to be enacted, the condition must be construed as referring only to reasonable by-laws and amendments adopted in furtherance of the contract and not to such as would overthrow it or materially alter its terms. *O'Neill v. Supreme Council American Legion of Honor* (N. J.), 1-422.

Regulating benefit in case of suicide.

—An amendment of a benefit society's by-laws limiting the benefit in case of suicide to five per cent. of the face of the certificate for each year the member "shall have been continuously a member of the society," is void as to an existing member who received his certificate at a time when the society's by-laws provided that it would not pay the benefit of a member who committed suicide, whether sane or insane, unless he was at the time under treatment for insanity. *Olson v. Court of Honor* (Minn.), 10-622.

Increasing assessments. — It is within the statutory and charter power of a fraternal beneficiary association, organized under the laws of Massachusetts, so to amend its by-laws as to increase the assessments made against members to provide for the payment of death benefits, where the amendments are necessary to insure the payments of the sums named in the association's benefit certificate; and it is no objection to such amendments that they classify the members according to age. *Reynolds v. Supreme Council* (Mass.), 7-776.

An amendment to the by-laws of a fraternal beneficiary association does not violate the contract rights of pre-existing members,

though it increases the amounts of the assessments which they are required to pay, where the amendment is necessary to enable the association to pay the sums named in its benefit certificates, and the members, at the time of joining the association, expressly agreed to be bound by the laws and rules of the association then in force or thereafter adopted. *Reynolds v. Supreme Council* (Mass.), 7-776.

Changing qualifications of beneficiaries.

—Where a member of a beneficial association who, upon joining the association, agreed specifically to abide by and conform to the by-laws then in force or subsequently to be adopted, voluntarily surrenders his benefit certificate and has a new one issued, he cannot designate in the new certificate a beneficiary not contemplated by a valid and reasonable subsisting by-law, though at the time he joined the association the by-laws then existing permitted the designation of "any person or persons selected by the member." *Caldwell v. Grand Lodge* (Cal.), 7-356.

Placing occupation in extra hazardous class. — The fact that an amendment to the by-laws placing the occupation of "switchmen" in the list of extra hazardous risks is not in terms retroactive does not indicate an intention of the society to exclude from its operation those who are members when it is passed and who have agreed to be bound by future amendments. *Gilmore v. Knights of Columbus* (Conn.), 1-175.

A member of a fraternal benefit society who agrees in his application for membership not to engage in any occupation deemed by the society at the time or thereafter to be extra hazardous, and also to be bound by the reasonable by-laws of the society then in force or thereafter adopted, will be bound by an amendment of the by-laws adopted after he becomes a member and adding certain occupations to extra hazardous risks. *Gilmore v. Knights of Columbus* (Conn.), 1-175.

An amendment to the by-laws of a fraternal benefit association placing the occupation of "switchmen" in the list of extra hazardous risks is reasonable. *Gilmore v. Knights of Columbus* (Conn.), 1-175.

6. ASSESSMENTS.

a. Notice of assessments.

Publication in newspaper. — Where the constitution of a benefit society provides that printed notices of assessments shall be sent to the members and that the official organ of the society shall be "an official notice of assessment to each member," the publication of the notice of assessment in a newspaper is not a notice to a member unless a copy of the paper is sent to him. *Grand Legion, etc., v. Beatty* (Ill.), 8-160.

b. Forfeiture of certificate for failure to pay.

General rule stated. — Where the by-laws of a beneficial society and a contract

between the society and a member so provide, the failure of a member to pay an assessment within the time stipulated operates to disconnect him from the society and to forfeit all claims of the member and the beneficiaries named in the certificate to the benefit fund of the society. *Supreme Commandery v. Bernard* (D. C.), 6-694.

Application of advance payment. — Until an advance payment exacted of a member of a mutual benefit association prior to his initiation has been duly applied to some assessment, the member cannot be held to be in arrears as to an assessment or subjected to a forfeiture for its nonpayment. *Trotter v. Grand Lodge* (Iowa), 11-533.

Wrongful refusal to accept payment. — Where a member of a beneficiary association offers to pay dues to an officer whose duty it is to receive them, and such officer refuses to accept the same, the association cannot base the forfeiture of the promised benefit on the nonpayment of dues. *Foresters of America v. Hollis* (Kan.), 3-535.

Survival of right to reinstatement. — The right of a disconnected member of a beneficial society to reinstatement upon the payment of overdue assessments is personal to him and does not survive his death. *Supreme Commandery v. Bernard* (D. C.), 6-694.

When the rules of a fraternal beneficiary association provide that a suspended member to be reinstated shall within thirty days from his suspension pay all arrears of assessments, such payment must be made during the life of the applicant for reinstatement. Payment of such arrears after his death, by some other person, will not effect the reinstatement, unless such payment is accepted by the association with knowledge of the death. *Gifford v. Workmen's Benefit Assoc.* (Me.), 17-1173.

Waiver of forfeiture in general. — Where the by-laws of a beneficial society provide that a member who fails to pay assessments "shall *ipso facto* stand disconnected from his commandery and from the order, without sentence by the commandery," the fact that the officers of the local commandery fail to give prompt notice to the supreme commandery of the disconnection of the member does not amount to a waiver of the condition of disconnection. *Supreme Commandery v. Bernard* (D. C.), 6-694.

Waiver by receiving overdue assessments. — Where the by-laws of a beneficial society and the benefit certificate issued thereunder provide that the failure of a member to pay an assessment shall operate to disconnect him from the society and to forfeit the benefit certificate, but the member has an absolute right to pay overdue assessments within a specified time after the disconnection, the society does not waive the conditions of disconnection and forfeiture by receiving the overdue assessments within such time. *Supreme Commandery v. Bernard* (D. C.), 6-694.

A beneficiary association will not be permitted to assert a forfeiture because assess-

ments were not paid at the times stated in the by-laws where, by the adoption of a custom, or a course of conduct, it has led the insured members to believe that the assessments may be paid and will be received at other times. *Foresters of America v. Hollis* (Kan.), 3-535.

A mutual fraternal benefit insurance association may waive a forfeiture of a certificate of insurance by the customary acceptance of overdue assessments, just as is the case with ordinary insurance companies. If there is any difference in the degree of strictness with which the insured shall be held to pay premiums and assessments promptly on time, it is in favor of members of mutual fraternal associations. *Trotter v. Grand Lodge* (Iowa), 11-533.

Notwithstanding a provision of the laws of a mutual benefit association that any member of a lodge "in arrears in the payment of assessments or dues on the 28th day of the month upon which the same has been called shall, from that date, stand suspended from all rights and benefits under his or her certificate of membership," a member does not become suspended by automatic operation of this provision, for failure to pay an assessment by the day specified; and if the association acting through its local agent has adopted a custom by which assessments are habitually received several days after the day on which the laws require payment to be made, without declaring a suspension or forfeiture, and the member is thus led to believe that literal compliance with the laws in this respect is not insisted on, a waiver of forfeiture may arise where the member dies on the 6th of the month without having paid an assessment for the previous month, the assessment being subsequently paid to the local secretary and duly forwarded by him to the grand secretary. *Trotter v. Grand Lodge* (Iowa), 11-533.

Power of subordinate officers to waive. — The secretary of a subordinate lodge of a mutual benefit association, charged with the duty of collecting and forwarding assessments of members, is the agent of the grand lodge, and may pursue a course of conduct in accepting the overdue assessments which will operate as a waiver of a forfeiture for the nonpayment of an assessment at the time required by the laws of the association. *Trotter v. Grand Lodge* (Iowa), 11-533.

Whether waiver will be found in any particular case depends, not on the intention of the party against whom it is asserted, but on the effect which his conduct or course of business has had upon the other party. *Trotter v. Grand Lodge* (Iowa), 11-533.

c. Personal liability for assessments.

Recovery by action. — A member of an unincorporated mutual insurance association is not personally liable for an assessment for the death benefit of another member at the suit of the latter's beneficiary where the only provision in the contract of membership as

to compelling payment of assessments is forfeiture of membership for nonpayment. *Cochran v. Boleman* (Ind.), 1-388.

Where a member of an incorporated beneficial association has been expelled for nonpayment of dues in accordance with the by-laws, the unpaid dues are not debts recoverable at law at the suit of the association. *L'Union St. Jean Baptiste de Pawtucket v. Ostiguy* (R. I.), 1-401.

7. SUICIDE OF MEMBER.

Effect where certificate is silent. — The action of a member of a fraternal benefit society in intentionally taking his own life while he is sane does not defeat the right of his wife, who is a beneficiary in his benefit certificate, to recover the benefit, where the contract of insurance is silent as to the effect of suicide on the rights of the parties. *Grand Legion, etc., v. Beaty* (Ill.), 8-160.

Although the insurance certificate of a fraternal beneficiary order contains no provision in regard to the death of the insured by suicide, a provision against suicide is implied, and no action can be maintained on the certificate by the legal representative of the insured if the death of the latter was intentionally caused by himself when of sound mind. *Davis v. Supreme Council* (Mass.), 11-777.

Suicide while insane. — Where the death of the insured is the result of his volition, he having the conscious purpose to end his life, and the intelligence to adopt means to that end, it is his own act, and avoids the certificate sued upon, even though he was so far insane as not to be morally responsible for his conduct. *Davis v. Supreme Council* (Mass.), 11-777.

Under a benefit certificate providing that it shall be void "if the member holding this certificate . . . shall die . . . by any means or act which if used or done by such member while in the possession of all natural faculties unimpaired would be deemed self-destruction," a death by suicide avoids the policy, whether the insured is sane or insane at the time of the act. *Clemens v. Royal Neighbors* (N. Dak.), 8-1111.

Legality of rule reducing benefit. — A provision in the certificate of a benefit insurance to the effect that the beneficiary shall be entitled to recover thereunder, in case of suicide of the assured, only one-third of the amount otherwise due, is legal and binding and in no wise affected by a subsequent incontestable clause in the certificate. *Childress v. Fraternal Union of America* (Tenn.), 3-236.

8. BENEFICIARIES.

a. In general.

Interest of member in benefit. — A member of a fraternal or beneficial association has no such interest or property in the proceeds of the certificate therein as will impress such proceeds with a trust in favor of his estate or his creditors. *Warner v.*

Modern Woodmen of America (Neb.), 2-660.

Right to benefit upon failure of beneficiaries. — Where a certificate in a beneficial association provides that payment thereof shall be made only to certain persons as beneficiaries, and the by-laws of the association and a state statute contain the same provision, the death of such member, without the existence of any one entitled to be made a beneficiary under his certificate, creates no interest in his estate to the fund mentioned therein, and his administrator cannot recover against the association on such certificate. *Warner v. Modern Woodmen of America* (Neb.), 2-660.

Where a certificate of a beneficial association, together with the by-laws and a state statute, provide that payment thereof shall be made to certain persons only as beneficiaries, and the certificate is payable to the legal heirs of the member, who dies leaving no heirs, and without designating any other beneficiary, and it appears that no one is in existence who could legally become such beneficiary, no equitable rights accrue to either creditors or to the estate of the deceased member, and the fund contemplated by the certificate will revert to the society. *Warner v. Modern Woodmen of America* (Neb.), 2-660.

Vested interest in certificate. — The designated beneficiary of a certificate of benefit insurance, where the beneficiary may be changed at any time by the insured, has no vested interest in the insurance, and no greater rights under the certificate as against the defense of suicide, than the legal representatives of the insured. *Davis v. Supreme Council* (Mass.), 11-777.

Estoppel of association to deny qualifications. — A mutual insurance association cannot resist payment of its insurance certificate on the ground that the member's sister-in-law, who is the designated beneficiary, is not a proper person to be so designated, where the relationship appears upon the face of the certificate issued by the association to her and the association has received the payment of dues thereon. *Stronge v. Supreme Lodge* (N. Y.), 12-941.

Where the name of a person who does not belong to the class of persons who may be designated as beneficiaries, under the rules of a beneficial association and the statute regulating such associations, is inserted in a benefit certificate, such person has no right to receive any part of the benefit fund, and the acceptance by the association of assessments paid after his name has been so inserted does not confer such right. *Modern Woodmen v. Comeaux* (Kan.), 17-865.

Necessity of insurable interest. — The rule of public policy which forbids one from insuring for his own benefit a life in which he has no insurable interest does not prevent a person who secures a death benefit certificate on his own life and pays the premium thereon from designating as beneficiary one who has no insurable interest. *Dolan v. Supreme Council* (Mich.), 15-232.

b. Meaning of terms descriptive of beneficiaries.

Legal heirs. — The term "legal heirs," when used to designate the beneficiaries in a benefit certificate issued by a benevolent association, means the persons designated as distributees by succession statutes, and therefore includes the widow of the insured if she is included among the distributees by the statute of the state where the certificate is issued and where the insured lives and dies. *Thomas v. Covert* (Wis.), 5-456.

Member of family. — The stepfather of a married woman, who is not a member of her household, is not a member of her family within the meaning of a statute designating and restricting the classes of persons who may be beneficiaries in a benefit certificate issued by benefit societies. *Supreme Lodge v. Dewey* (Mich.), 7-681.

Immediate family. — Where the charter of a mutual fraternal benefit association defines one class of persons to whom the death benefit of a member is payable as "such person or persons of the immediate family of said member as by him designated," the words "immediate family" should be interpreted as meaning a group of persons, of which the insured member is one, connected as one family, and including all persons bound together by ties of relationship, as parents and children living together as members of one household under one head. The words do not exclude from the class of designated beneficiaries every person whom the head of the family is not legally bound to support, such as an adult daughter who resides at her father's house, as her home, and has no other place of residence. *Dalton v. Knights of Columbus* (Conn.), 11-568.

In an action by the adult daughter of a member of a mutual benefit association to recover, as his designated beneficiary, his death benefit, a requested charge that the daughter was not her father's legally designated beneficiary, in view of the charter provision of the association limiting the beneficiaries to the member's "immediate family," if at the time of his death she had separated herself from his household, is properly refused as an incorrect statement of law and as an insufficient and improper statement on which to base a finding of fact, in view of the evidence, where the court in its charge has fairly stated the conflicting claims as to the facts proved upon which the jury must find whether the daughter remained, at her father's death, a member of his household. *Dalton v. Knights of Columbus* (Conn.), 11-568.

Dependent. — The term "dependent," as used to designate a beneficiary in a benefit certificate, defined. *Caldwell v. Grand Lodge* (Cal.), 7-356.

A married woman, whose husband is capable of supporting her, held not to be dependent upon another man within the meaning of the term as used to designate a beneficiary in a benefit certificate. *Caldwell v. Grand Lodge* (Cal.), 7-356.

Where D., who is an unmarried man without living relatives and a member in good standing of the order of Modern Woodmen of America, being sick and without a home, enters into an agreement with a neighbor, who is keeping a hotel, for the purpose of securing a place where he can live and be cared for, whereby it is agreed that the name of such hotel keeper shall be inserted in D's benefit certificate as beneficiary, and that he shall have all of the property which is owned by D., in return for which he shall furnish D. with a home at his hotel, as a member of his family, during D's lifetime, and, in pursuance of such agreement, the name of the hotel keeper is inserted in the benefit certificate, he being designated therein as a "dependent," and D. makes a will bequeathing his property to the hotel keeper's wife, and then goes to the hotel to live and remains there until his death, which occurs a few months afterwards, the hotel keeper has no valid claim against the order as a beneficiary, since he is not a dependent upon D. within the meaning of the law relating to fraternal associations. *Modern Woodmen v. Comeaux* (Kan.), 17-865.

c. Change of beneficiary.

When original beneficiary may prevent. — The designation of the beneficiary of a mutual benefit certificate of insurance in pursuance of a contract fully performed by the beneficiary, cannot be revoked and a new beneficiary named at the pleasure of the insured, even though the by-laws of the association provide that a change of beneficiary may be made at any time without the consent of the existing beneficiary. *Stronge v. Supreme Lodge* (N. Y.), 12-941.

9. ACTIONS TO RECOVER BENEFITS.

a. In general.

Rights of member on repudiation of certificate. — Where a beneficial organization issues to a member a certificate entitling the beneficiary to a stated sum on the death of the member in good standing, on condition of paying the periodical assessments and complying with the by-laws, the member has such an interest in the enforcement of the certificate as entitles him to maintain an action to recover damages for its repudiation. *O'Neill v. Supreme Council American Legion of Honor* (N. J.), 1-422.

Where a certificate issued by a beneficial organization is repudiated by it during the life of the member, the latter need not continue the payment of the assessments or further perform the conditions precedent in order to sue for damages. *O'Neill v. Supreme Council American Legion of Honor* (N. J.), 1-422.

Where a beneficial organization attempts by an unauthorized by-law to make a material modification of a certificate previously issued, a member must exercise his option to treat such by-law as a repudiation of the contract within a reasonable time, and ordi-

narily what is reasonable time is a question for the jury. *O'Neill v. Supreme Council American Legion of Honor* (N. J.), 1-422.

Necessity of pleading insurable interest. — In an action to recover insurance procured by a member of a beneficiary association on his own life for the benefit of another, it is not necessary for the beneficiary to allege that he had an insurable interest in the life of the insured, and if the association relies on the defense of no insurable interest it must plead and prove it. *Foresters of America v. Hollis* (Kan.), 3-535.

Sufficiency of proofs of death. — A provision in a benefit certificate that the benefit shall be paid within a specified time after "satisfactory proof of death of said member, and of the identity and right of claimant, and of the validity of the claim," does not require a claimant as a prerequisite to the bringing and maintenance of an action on the certificate to show that the beneficial association has no good defense against the claimant on the ground of misrepresentation by the member in his application for membership, and therefore a proof of death which is otherwise sufficient to make out a *prima facie* case for the claimant is not rendered insufficient by the fact that it shows material misrepresentations in the application. *Lyon v. United Moderns* (Cal.), 7-672.

Lack of insurable interest as defense.

— Where a benefit society files a bill of interpleader to determine the title to the proceeds of a benefit certificate issued subject to the provision that if the designated beneficiary proves to be an unlawful one, the benefit shall be payable to the husband of the member, the husband, inasmuch as he has a direct interest in the contract which he is entitled to enforce, may show a want of insurable interest in the designated beneficiary. *Supreme Lodge v. Dewey* (Mich.), 7-681.

b. Evidence.

Cause of disease. — In an action on a benefit certificate, where the witness has testified that the insured told him he thought that he had a certain disease, it is not erroneous to refuse to permit the witness to answer a further question as to the cause to which the insured attributed the disease. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Prior application to another company. — In an action on a benefit certificate where the defense is interposed that a false date of birth was given in the application for membership, a prior application for life insurance in another company made under circumstances of a nature to vouch for the truthfulness of the statements and representations therein contained, in which the date of birth is different from that given in the application involved in the action, is competent evidence tending to establish the true date. *Taylor v. Grand Lodge* (Minn.), 11-260.

Declarations and admissions of deceased. — Declarations and admissions of a person, since deceased, made *ante litem*

motam respecting the date of his birth, are admissible in evidence against his beneficiary in an action to recover upon a mutual benefit certificate issued to him in his lifetime, in which action the defense interposed is that a false date of birth was given in the application for membership, the basis for the insurance. *Taylor v. Grand Lodge* (Minn.), 11-72.

In an action on a benefit certificate, a written report made by the examining physician at the time of the examination of the insured upon his application for membership is the best evidence of the disclosures made at that time by the insured as to the state of his health, and therefore it is not erroneous to refuse to permit the examining physician to testify orally as to such disclosures. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Parol testimony regarding contents of books. — Where in an action on a certificate of a benefit society the defendant, in order to show that the insured took his own life to escape punishment for crime, introduces evidence tending to show that for a long period of time preceding his death the insured had been engaged in a series of embezzlements, it is error to permit witnesses to testify on the subject of these embezzlements as to what the books of account of the insured show, without producing the books themselves. *Davis v. Supreme Council* (Mass.), 11-777.

Burden of proof. — Where in the petition in a suit on a certificate issued by a benefit society, containing a contract of life insurance, the plaintiff alleges, in one paragraph that the insured was a member in good standing and the certificate was in full force at the time of the death of the insured, and in another paragraph, that the plaintiff had furnished the defendant with proof of the death and performed all the conditions of the contract, and in still another paragraph, that all assessments and dues were duly paid, and the answer of the defendant denies that the insured was a member in good standing at the date of his death, and that the certificate was in full force, and also denies, in a general way, the allegations in the other paragraphs, the denial of the defendant is in due form, and the effect of the same is to place upon the plaintiff the burden of proving the allegations as made, notwithstanding they are general in their nature. *Supreme Lodge v. Grenshaw* (Ga.), 12-307.

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Commitment of wayward children, see INFANTS, 4 c.

REQUESTS.

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BEST AND SECONDARY EVIDENCE.

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BETTERMENTS.

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BETTING.

See GAMING AND GAMING HOUSES.

BEVERAGES.

See INTOXICATING LIQUORS.

BIAS.

Disqualification of judge, see JUDGES, 4 c.
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 Ground for change of venue, see CHANGE OF VENUE, 1 d.
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 Impeachment of witness for bias, see WITNESSES, 5 b (2) (c).

BIBLE.

Reading Bible in public schools, see SCHOOLS, 6.

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Duty of municipality to make highways safe for bicycles, see STREETS AND HIGHWAYS, 7 d.
 Riding bicycle on railroad track as trespass, see INJUNCTIONS, 2 a.

BIDS.

See AUCTIONS AND AUCTIONEERS.
 Advertising for bids for public work, see MUNICIPAL CORPORATIONS, 7 d.
 Chilling or puffing bidding at judicial sales, see JUDICIAL SALES.
 Defective title as affecting liability of bidder at sheriff's sale, see EXECUTIONS, 8.

BIGAMY.

1. WHAT CONSTITUTES.
2. INDICTMENT.
3. DEFENSES.
4. EVIDENCE.

1. WHAT CONSTITUTES.

Place of second marriage. — The provision of the Canadian statute which defines bigamy as "the act of a person who, being married, goes through a form of marriage with another person in any part of the world," is *intra vires* of the Dominion Parliament, when it is read in connection with the limitation imposed by the provision of the statute that "no person shall be liable to be

convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage." *Rex v. Brinkley* (Ont.), 10-407.

The North Carolina statute (Revisal, 1905, § 3361) making it a crime for a person having a lawful husband or wife living to marry a second time, whether the second marriage is in "North Carolina or elsewhere," is unconstitutional in so far as it relates to second marriages outside the state. *State v. Ray* (N. Car.), 19-566.

Cohabitation under foreign bigamous marriage. — Where the wife of a domiciled Canadian obtains in one of the United States a divorce which is invalid in Canada, and thereafter the husband, acting under legal advice that the divorce is valid and that he is at liberty to marry again, goes through a form of marriage with another woman in such state, after having gone there for the purpose of contracting such marriage, he is guilty of bigamy under the Canadian statute. *Rex v. Brinkley* (Ont.), 10-407.

The Missouri statute making it a penal offense for persons to cohabit within the state who have contracted a bigamous marriage in another state is constitutional, though it denominates the offense as "bigamy" instead of as a "felony," as it is within the power of the legislature to make such cohabitation bigamy, and the statute is not directed against the act of contracting the void marriage. *State v. Stuart* (Mo.), 5-963.

Cohabiting under a foreign bigamous marriage is not within the purview of the North Carolina statute (Revisal, 1905, § 3361) making it a felony for a person having a lawful husband or wife living to marry a second time, and providing that an offender may be prosecuted in any county in which he may be apprehended. *State v. Ray* (N. Car.), 19-566.

2. INDICTMENT.

Sufficiency under Missouri statute. — An indictment held sufficient under the Missouri statute making it a penal offense for persons to cohabit within the state who have contracted a bigamous marriage in another state. *State v. Stuart* (Mo.), 5-963.

Averments as to former marriage. — An indictment for bigamy must distinctly aver a former marriage, and must allege the name of the former wife or husband. An indictment which merely alleges that the defendant did unlawfully marry a named woman, "he, the said defendant, then and there having a lawful former wife then living," is fatally defective. *Bryan v. State* (Tex.), 16-515.

3. DEFENSES.

Belief in death of former spouse. — It is bigamy for a married person, whose spouse is absent from the state or from the country, but is alive, to marry a third per-

son before the expiration of the time prescribed by the statute, even though the spouse contracting such second marriage does so under an honest belief, based upon reasonable grounds, that the absent spouse is dead. *State v. Ackerly* (Vt.), 8-1103.

Belief in validity of divorce. — It is no defense to a charge of bigamy that the defendant entered into the second marriage under an honest but mistaken belief that the first wife was dead or had obtained a divorce. *People v. Spoor* (Ill.), 14-638.

4. EVIDENCE.

Absence of criminal intent. — Under the Illinois bigamy statute providing that "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife . . . shall be guilty of bigamy," but providing that the act shall not extend to marriages entered into under the belief that the former spouse, who has been continually absent and unheard of for five years, is dead, or to marriages entered into after a lawful divorce, a divorce relied on as a defense to a prosecution for a second marriage must be shown to have been legally granted, and evidence that the defendant had no criminal intent in entering into a second marriage or believed in good faith that the former spouse had obtained a divorce is not admissible. *People v. Spoor* (Ill.), 14-638.

Validity of prior marriage. — To sustain a prosecution for bigamy the evidence must show beyond a reasonable doubt that the former marriage of the parties was a valid legal marriage. *McCombs v. State* (Tex.), 14-72.

Presumption as to validity of prior marriage. — In a prosecution for bigamy it is not necessary for the prosecution to show, in addition to the fact of the first marriage of the accused, that there were no impediments to such marriage, as a valid marriage is presumed and the burden of showing the illegality thereof is on the accused. *State v. Kniffen* (Wash.), 12-113.

Where a person, legally married, enters into a second marriage which in its inception is, bigamous and void, the fact that the parties to the second marriage continue to live together as husband and wife after the dissolution of the first marriage by divorce, without any new contract of marriage or knowledge by the innocent party of the fact of the former marriage or divorce, does not create any presumption of a valid marriage by cohabitation or render bigamous a third marriage contracted by the party to the first and second marriages after the dissolution of the first marriage. *McCombs v. State* (Tex.), 14-72.

Admissibility of marriage license and certificate. — In a prosecution for bigamy in the state of Washington a copy of a marriage license and certificate of marriage from another state is not a record of a court which under the Washington statute may be authenticated by the clerk "or other officer having charge of the records of such court,"

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but is a public record of a county, and to be admissible in evidence must be certified as required by section 906 of the revised statutes of the United States. *State v. Kniffen* (Wash.), 12-113.

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Verbal guarantee by transferrer, see FRAUDS, STATUTE OF, 6 d.

Warehouse receipts as negotiable instruments, see WAREHOUSES, 2.

1. FORM.

What constitutes negotiable bill of exchange. — A written order directing the payment of a certain amount of money "on account of contract" between the drawee and the drawer, although it states no specific time of payment, is a negotiable bill of exchange, payable absolutely on demand, and the words quoted are not a direction to charge a particular fund but merely to indicate the fund to which the drawee is to look for reimbursement. *First National Bank v. Lightner* (Kan.), 11-596.

Omission of amount from body of instrument. — Where the amount for which a promissory note is given is omitted from the body thereof, the marginal figures may be referred to to supply the omission. *Kimball v. Costa* (Vt.), 1-610.

Where the amount for which a promissory note is given is omitted from the body thereof, no recovery can be had upon the instrument until the blank is filled in, though the amount is stated in the margin of the

note in words as well as in figures. *Chestnut v. Chestnut* (Va.), 7-802.

Notes given for patent or patented rights. — Books and the right to sell books are not patents or patented rights within the meaning of the Arkansas statute (Kirby's Digest, §§ 513, 514), which requires notes given for patents or patented rights to be in a certain form and to contain certain statements on their face. *Hogg v. Thurman* (Ark.), 17-383.

Joint maker as indorser. — Where a note runs, "we jointly and severally promise to pay," and is signed by A and B on its face, and B prefixes to his signature the word "indorser," it is deemed to be the note of A indorsed by B. Hence, in default of protest for nonpayment and of notice thereof, B is discharged from liability on the note. *Tapley v. Paquet* (Can.), 19-560.

2. CONSIDERATION.

Effect of absence between nominal parties. — If a note is made and delivered to an attorney for his client, and delivered by him to the client, being payable on its face to the attorney or bearer, the absence of a consideration between the attorney personally and the maker of the note will not affect its statute, but the question will turn upon whether there is a valid consideration as between the client and the maker. *Dicks v. Andrews* (Ga.), 16-1070.

Effect of partial failure. — A partial failure of consideration may be shown in reduction of damages in an action upon a promissory note. *Hathorn v. Wheelwright* (Me.), 2-428.

The holder of a note given in consideration of services to be rendered by the payee, which services are never fully performed, is entitled to recover only such a proportion of the face of the note as the amount of services rendered bears to the amount of services required by the agreement. *Sullivan v. Sullivan* (Ky.), 13-163.

Failure of independent consideration. — When a promissory note is given for two or more independent considerations and there is a failure of any of such considerations, such failure is a defense *pro tanto* to such note in an action between the original parties or between others standing in no better position than the original parties. *Tuttle v. Tuttle Co.* (Me.), 8-260.

Restraint of marriage. — A promissory note given by a widower to his housekeeper in consideration of her foregoing a proposed marriage and continuing in his service is not invalid as founded upon an illegal consideration, the restraint of marriage being merely an incident to the contract and not being so unreasonable as to be contrary to the policy of the law. *Crowder-Jones v. Sullivan* (Ont.), 4-729.

3. CAPACITY OF PARTIES.

Validity of note indorsed by lunatic. — In an action against the maker of a promissory note by one to whom the payee has in-

dorsed and transferred the same, it is a good defense to the action seeking a recovery on the note that the payee was at the time of the indorsement and transfer insane. *Walker v. Winn* (Ala.), 4-537.

In an action against the maker of a promissory note by one to whom the payee has indorsed and transferred the same while insane, it is no defense that the consideration for the transfer of the note to the indorsee was grossly inadequate and that the transfer was a fraud on the payee. *Walker v. Winn* (Ala.), 4-537.

4. EXECUTION AND DELIVERY.

Extrinsic evidence of execution. — Where the execution of a note is denied by a plea of *non est factum*, the note will not be received in evidence until some extrinsic evidence of its execution has been submitted. Slight evidence is sufficient to lay the foundation for admission, but the sufficiency of the evidence is for determination by the court. *Patton v. Bank of La Fayette* (Ga.), 4-639.

Recitals in mortgage as proof of execution. — The recitals in a mortgage as to the date, amount, etc., of a note which the mortgage was given to secure, though sufficient evidence that there was such a note outstanding, do not identify any particular note as the one described, and therefore do not dispense with proof of execution in an action on a note corresponding to the one described in the mortgage. *Matter of Pirie* (N. Y.), 19-672.

Parol evidence of conditional delivery. — Parol evidence is admissible to show that a promissory note not under seal was delivered merely as security for the performance of a collateral oral agreement and that it has been discharged by the performance of such agreement. *Oakland Cemetery Assoc. v. Lakins* (Iowa), 3-559.

When delivery is not essential. — It seems that delivery of a negotiable instrument is not essential to its validity in the hands of an innocent holder for value, even though the maker has lost possession by theft. *Worsham v. State* (Tex.), 18-134.

5. ACCEPTANCE.

Neglect or failure to return instrument. — Under the Arkansas statute providing that "every person upon whom a bill of exchange is drawn, and to whom the same may be delivered for acceptance, who shall destroy such bill, or refuses within twenty-four hours after such delivery, or within such time as the holder may allow, to return the bill, accepted or nonaccepted, to the holder, shall be deemed to have accepted the same," the mere neglect or failure to return does not constitute an acceptance. *St. Louis Southwestern R. Co. v. James* (Ark.), 8-611.

Where there is a statute requiring that an acceptance of a bill of exchange shall be in writing, the mere failure of a drawee to return a bill delivered to him for acceptance does not, in the absence of any demand or request for return, bind him as acceptor. *St.*

Louis Southwestern R. Co. v. James (Ark.), 8-611.

6. NEGOTIABILITY AND TRANSFER.

a. Effect of various provisions upon negotiability.

Argument to pay exchange. — A promissory note is not rendered nonnegotiable by an agreement to pay the sum named with exchange on a point other than that at which it is payable. *Haslach v. Wolf* (Neb.), 1-384.

Argument to pay costs and expenses. — A note which provides, in case of collection through an attorney or by legal proceedings, for the payment of costs and expenses including a certain per cent. for attorney's fees, the expenses not being specified, is nonnegotiable. *Green v. Spiers* (S. Car.), 4-261.

Stipulation for attorney's fees. — Under the Utah statute (Comp. Laws 1907, § 1554), declaring that a provision in a note for an attorney's fee does not make the amount to be paid uncertain, a provision in a note by which the maker agrees to pay a reasonable sum as an attorney's fee does not render the note nonnegotiable. *McCormick v. Swem* (Utah), 20-1368.

Clause retaining title to property sold. — Under the Idaho negotiable instruments statute a promissory note containing a stipulation that the title to property for which the note is given shall, until payment, be retained by the payee, is non-negotiable, and, although transferred before maturity, is subject to all the equities between the maker and the payee. *Kimpton v. Studebaker Bros. Co.* (Idaho), 14-1126.

A note in the ordinary form of a negotiable instrument, which contains the provisions that it is given, subject to the approval of the payee, for a stock of merchandise received of the payee, and that the title thereto shall remain in him until the note is paid, is a nonnegotiable instrument. *Worden Grocer Co. v. Blanding* (Mich.), 20-1332.

Agreement for extension of time of payment. — The negotiable quality of a promissory note is not destroyed by a provision therein that the makers and indorsers thereof severally waive presentment of payment and notice of protest, and consent that the time of payment may be extended without notice, when by its terms it is made payable on or before a day named. *First Nat. Bank v. Buttery* (N. Dak.), 17-52.

b. Method of negotiation or transfer.

Instrument payable to officer of bank. — Under the Iowa negotiable instruments act, where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank, it is deemed *prima facie* to be payable to the bank of which such person is officer, and it may be negotiated either by the indorsement of the bank or by the indorsement of the officer. *Griffin v. Erskine* (Iowa), 9-1193.

Delivery of instrument payable to order. — Within the negotiable instruments

aw a mere delivery of a negotiable instrument payable to order vests title in the transferee and carries with it the right to compel the indorsement of the transferrer. *Swenson v. Stoltz* (Wash.), 2-504.

Effect of indorsement as assignment.

— The indorsement of a non-negotiable promissory note operates as an assignment thereof, which under the Massachusetts statute of 1897 enables the assignee to sue on the note in his own name. *MacKeown v. Lacey* (Mass.), 16-220.

Indorsement and delivery of non-negotiable note. — Where the payee of a nonnegotiable note indorses it, and then delivers it to the president of a corporation who purchases the note for the corporation, the note is sufficiently assigned to the corporation. *Worden Grocer Co. v. Blanding* (Mich.), 20-1332.

Payment by stranger as purchase. — The payment of a note by a stranger to the contract represented by the note, and the delivery thereof to him, will be held to be a purchase of the note until an intention to the contrary is shown. *Johnston v. Schnabaum* (Ark.), 15-876.

7. MATURITY.

Default in payment of interest. — Where a promissory note made payable two years after date provides that the interest thereon shall be paid annually, and default in the payment of the first instalment of interest is made, the note does not become overdue merely because the payment of the interest is in default. *Union Investment Co. v. Wells* (Can.), 11-33.

Where a promissory note, due five years from its date, with interest payable annually on a fixed day, contains a provision that if the interest is not paid when due, the payee may declare the entire debt due; and, after the failure of the debtor to pay an instalment of interest, the attorneys for the creditor give notice to the administrator of the deceased debtor of an intention to bring suit on the note at the next term of court, and on the return day of such term bring suit for the entire amount of the note, this is evidence of an election to declare the whole debt due for nonpayment of the interest. *Harris v. Powers* (Ga.), 12-475.

Such circumstances furnish evidence of an intention to declare the whole debt due for nonpayment of interest, although the maker of the note has died and an administrator has been appointed, and although the creditor does not bring a separate suit on the note, but joins with other creditors in an equitable petition praying to have his right enforced and also for the administration of the estate by a court of equity. *Harris v. Powers* (Ga.), 12-475.

8. PRESENTMENT AND DEMAND.

When unnecessary. — Where a promissory note is payable on demand at a particular place, no demand or presentation at the place named is necessary in order to entitle

the holder to maintain an action upon the note against the maker thereof. *Farmers National Bank v. Venner* (Mass.), 7-690.

9. PROTEST AND NOTICE.

a. Who may protest.

Notary indirectly interested in note.

— The indirect pecuniary interest of a notary in a note does not render him incompetent to protest it for nonpayment. *Patton v. Bank of Lafayette* (Ga.), 4-639.

Stockholder of bank. — A notice of protest to the indorser of a dishonored promissory note held by a bank is not rendered invalid by the fact that the note is protested and the notice given by a stockholder of the bank. *Bank v. Ravenswood v. Wetzel* (W. Va.), 6-48.

b. Right to notice.

Right of surety on note. — A surety on a promissory note is not entitled to notice of its dishonor, as he is not an indorser, but is primarily liable. *Rouse v. Wooten* (N. Car.), 6-280.

c. Sufficiency of notice.

In general. — A notice of protest is sufficient which by express terms or by necessary implication informs the indorser of the identity of the paper, of due demand, of its protest, and of its dishonor. Mistakes and omissions in such notice which obviously could not have misled or prejudiced the indorser are not fatal. *Derham v. Donohue* (U. S.), 12-372.

Where a certificate of deposit dated January 25, 1904, and due January 25, 1905, is duly presented for payment on the latter date, and payment is refused, a notice of the presentment, demand, and dishonor, sent to and received by the indorser, though erroneously dated January 25, 1904, instead of January 25, 1905, and omitting to recite the clause in the certificate "no interest after six months," nevertheless identifies the certificate and sufficiently notifies the indorser of the due presentment, demand, and dishonor, as he obviously could not be misled or prejudiced by the mistake and omission. *Derham v. Donohue* (U. S.), 12-372.

Notice delivered to administratrix of decedent. — A notice of the protest of a dishonored note is sufficient to charge the estate of a deceased indorser, where it is duly delivered to his administratrix, though it is addressed to the indorser as though he were living. *Bank of Ravenswood v. Wetzel* (W. Va.), 6-48.

Certificate as prima facie evidence. — A certificate of protest by a notary affords *prima facie* evidence of the fact therein recited. *Patton v. Bank of La Fayette* (Ga.), 4-639.

d. Waiver of protest or notice.

Waiver without consideration. — An accommodation indorser of a promissory note, who, eighteen months after its maturity, with

knowledge that there has been no demand of payment or notice of dishonor, indorses thereon the words, "I hereby waive protest or demand of payment," is liable on his indorsement, though there is no consideration for the waiver. *Burgettstown Nat. Bank v. Nill* (Pa.), 5-476.

Waiver by parol. — Subsequent to the indorsement of a negotiable instrument, demand, protest, and notice may be waived by parol. *Dewey v. Sibert* (S. Dak.), 16-151.

The provisions of the South Dakota Revised Civil Code, relating to notice of dishonor, do not change the above rule. *Dewey v. Sibert* (S. Dak.), 16-151.

10. DISCHARGE AND PAYMENT.

Discharge of surety. — The fact that a bank which is the owner of a note upon which there is a surety is, at its maturity, indebted, upon general deposit account, to the principal upon the note in a sum larger than that due upon the note, and fails to exercise its right to set off the amount of the note against this deposit indebtedness, and allows the deposit to be checked out by such depositor, does not discharge the surety on the note. *Davenport v. State Banking Co.* (Ga.), 7-1000.

Discharge of accommodation joint maker. — Under the negotiable instruments law providing in effect that all persons signing a negotiable instrument shall be liable, whether the execution is for a valuable consideration or as an accommodation maker, and then specifying that when the liability is secondary, it may be avoided by an agreement extending the time of payment, an accommodation joint maker of a note is not discharged by an extension of time to the co-maker. *Cellers v. Meachem* (Ore.), 13-997.

Discharge of joint maker by failure to make a claim against estate of other maker. — One of the makers of a joint note is not relieved from liability by the failure of the holder of the note to make claim against the estate of the other maker within the time limited by statute. *Newhall v. Field* (N. Mex.), 12-979.

Sufficiency of payment to bank. — The fact that a note is made payable at a particular bank does not of itself make the bank the agent of the payee or holder to receive payment; and payment to a bank of the amount due on a note made payable there, when the bank does not have possession of the note or authority to collect it, does not discharge the maker, as the bank will be treated as the agent of the maker and not of the holder. *State National Bank v. Hyatt* (Ark.), 5-296.

Presumption of authority to receive payment. — If the person to whom payment shall be made is not designated in a note, the designation therein of the place of payment does not raise a presumption of authority to receive payment in the person in charge of such place, unless he has possession of the note, properly indorsed. *Hoffmaster v. Black* (Ohio), 14-877.

The acceptance by the legal holder of a note of interest payments from a person unauthorized to collect such payments does not confer implied authority upon such person to receive payment. *Hoffmaster v. Black* (Ohio), 14-877.

Burden of proving payments. — In an action on a promissory note which is in the possession of the plaintiff, the burden of proving payments is on the defendant. *Olson v. Day* (S. D.), 20-516.

Burden of proving authority. — When payment has been made to a person who was not in possession of such note, properly indorsed, the burden of showing that such person was authorized to receive payment rests upon the party who makes the claim of payment. *Hoffmaster v. Black* (Ohio), 14-877.

Payment to unauthorized agent. — The rule that the maker of a negotiable promissory note can satisfy it only by payment to the present owner or to such owner's authorized agent, and that if the recipient of the money is not actually authorized to receive payment such payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note, applies to a note secured by a mortgage. *Marling v. Nommensen* (Wis.), 7-364.

Recovery back of amount paid. — The maker of a non-negotiable promissory note who, with full knowledge of the facts and without fraud, duress, or extortion, pays the amount of such note to the assignee thereof without deducting a credit to which he is entitled against the original payee, cannot recover such credit from such payee. *Kimp-ton v. Studebaker Bros. Co.* (Idaho), 14-1126.

11. RIGHTS AND LIABILITIES OF PARTIES.

a. In general.

Liability of accommodation maker. — The fact that one of two makers of a promissory note executed the note solely for the benefit of the other, and that this circumstance is known to the purchaser of the note, does not relieve the accommodation maker of his primary liability. *Cellers v. Meachem* (Ore.), 13-997.

Liability of maker signing as surety. — The word "surety," appended to the name of a maker of a note, cannot alter his liability as to the owner thereof, and only shows that, as between the promisors, one is a principal and the other a guarantor, and both are primarily liable. *Cellers v. Meachem* (Ore.), 13-997.

Liability of surety signing as joint maker. — Persons who, though sureties for the maker, appear on the face of a note as joint makers, are primarily liable to the holder of the note, notwithstanding any irregularity in the indorsement thereof. *Johnston v. Schnabaum* (Ark.), 15-876.

Liability of indorser as joint maker. — Where a person, for the purpose of giving the maker of a promissory note credit with the payee, writes his name on the back of the note before delivery and acceptance thereof,

he is to be considered a joint maker of the note and liable as such so far as the holder of the note is concerned, even though he states at the time that his signature is an indorsement. *Lake v. Little Rock Trust Co.* (Ark.), 7-394.

Liability of officer on corporate note. — Where the name of a corporation is attached to a promissory note as maker and is followed by the names of two of its officers, with the designation of their respective offices, neither of the officers is liable personally; and the officer whose name appears last is not rendered liable personally by the fact that the corporation's name appears but once. *English, etc., Mortgage, etc., Co. v. Globe Loan, etc., Co.* (Neb.), 6-999.

Liability of bank on special indorsement. — Where a promissory note indorsed and delivered to a bank is thereafter indorsed and delivered to the president of the bank for the special purpose of collection, and he subsequently redelivers the note to the bank, the bank by reissuing the note, without striking out its former indorsement to its president, but without accident or mistake, becomes liable to the transferee as indorser, whether the reissue is before or after maturity of the note. *Moore v. First National Bank* (Colo.), 12-268.

b. Assignee of legal title.

Right to sue. — The holder of the full legal title of a note by assignment may sue the maker thereon though he has no beneficial interest in the proceeds, the assignment having been made to enable him to realize on the claim in the interest of the original payee. *Manley v. Park* (Kan.), 1-832.

c. Bona fide purchasers.

(1) Who are.

Bank discounting note. — The transfer of a negotiable note to a bank in consideration of credit upon its books, which credit is not absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals, is not ordinarily a purchase of the note so as to constitute the bank an innocent holder in due course. *McNight v. Parsons* (Ia.), 15-665.

A bank, by purchasing or discounting a note for a depositor and giving him credit for the proceeds on his deposit account, does not, so long as no part of the deposit is drawn out or the balance of the account exceeds the amount of the proceeds of the discount, become a *bona fide* purchaser of the note for value, so as to be protected against infirmities in the paper. *Union National Bank v. Winsor* (Minn.), 11-204.

Purchaser for nominal or inadequate consideration. — In order that one may claim to be a *bona fide* holder of a negotiable instrument, it must appear that he has paid a valuable consideration for its transfer to him. Any substantial consideration is sufficient, but a purely nominal consideration is not; and even though not purely nominal, the consideration may still be so inadequate

as to make it a question for the jury whether the purchaser is a *bona fide* holder. *Hogg v. Thurman* (Ark.), 17-383.

Notice that consideration is executory. — Knowledge by an indorsee that the note was given in consideration of an executory agreement of the payee which has not been performed does not deprive the indorsee of his character as a *bona fide* holder, unless he has also notice of the breach of that agreement. *McNight v. Parsons* (Ia.), 15-665.

Constructive notice of default in interest. — Where a negotiable promissory note which provides for the periodical payment of interest thereon is transferred after a default in the payment of the first installment of interest, but before the principal is due, the transferee is not charged with constructive notice of the failure to pay the interest, as the doctrine of constructive notice is not applicable to current notes transferred for value. *Union Investment Co. v. Wells* (Can.), 11-33.

(2) What defenses available against.

Usury. — The New York banking law places state banks on an equality with national banks as regards the subject of usury, and, therefore, promissory notes, void for usury as between the original parties, are collectible in the hands of a state bank which has discounted them for value before maturity and in due course without notice of the usury. *Schlesinger v. Gilhooly* (N. Y.), 12-1138.

Absence of consideration. — A *bona fide* holder takes negotiable paper free from all equitable defenses, including the defense of absence of consideration between the original parties to the instrument. *Hogg v. Thurman* (Ark.), 17-383.

When accommodation makers may not set up the want of consideration in an action by the holder of the accommodation paper who has acquired the same in good faith after maturity. *Mersick v. Alderman* (Conn.), 2-254.

Payment to original payee. — An indorsee of a negotiable note taken as collateral security for a pre-existing debt without a new consideration is a holder for value and in due course of business and in the absence of notice is protected against a claim of payment made to the original payee. *Birket v. Edward* (Kan.), 1-272.

Violation of statute. — A negotiable promissory note, void between the parties because given in violation of statute, but having nothing on its face to indicate the consideration or that it was given in violation of the statute, is valid and enforceable in the hands of an innocent holder for value. *Arnd v. Sjoblom* (Wis.), 11-1179.

Though the making of a contract be prohibited and made a crime by statute, yet if the contract take the form of negotiable paper it will be valid in the hands of a *bona fide* holder for value. *Union Trust Co. v. Preston Nat. Bank* (Mich.), 4-347.

Negotiable paper in the hands of a *bona fide* holder for value is not subject to a defense

which would avoid it in the hands of the original holder, unless some statute, either expressly or by necessary implication, so declares; hence, a check certified in violation of the Michigan statute making it an offense to certify a check unless the amount stands to the credit of the drawer is enforceable by a *bona fide* holder. *Union Trust Co. v. Preston Nat. Bank* (Mich.), 4-347.

In Nebraska a statute will not be construed so as to make a negotiable instrument void in the hands of a *bona fide* purchaser unless the act specifically so declares. *Citizens' State Bank v. Nore* (Neb.), 2-604.

A note given for medical services rendered by an unlicensed practitioner may be recovered on by a *bona fide* purchaser notwithstanding the Nebraska statute prohibiting the practice of medicine without a license. *Citizens' State Bank v. Nore* (Neb.), 2-604.

Transfer procured by fraud. — Where the owner of an overdue negotiable paper, dated before the passage of the negotiable instruments act, transfers it under circumstances which enable the transferee to deal with it as if he were the true owner, no equity attaches to the paper in favor of the true owner as against an innocent purchaser for value and without notice from the transferee, though the original transfer is procured by the transferee by means of false and fraudulent representations. *Gardner v. Beacon Trust Co.* (Mass.), 5-581.

Where the guardian of the infant owner of an overdue note and mortgage, dated before the passage of the negotiable instruments act, transfers the instruments to one who fraudulently and falsely represents that the owner of the equity wishes to pay off the mortgage, and the assignee assigns the mortgage and note to a trust company as collateral security for money borrowed, and the trust company takes the assignment in good faith for value and without notice of the assignee's fraud or of any defect in his title, the trust company acquires a good title as against the true owner. *Gardner v. Beacon Trust Co.* (Mass.), 5-581.

Fraudulent delivery of notes signed in bank. — Where a person places his signature to blank forms of promissory notes and delivers them to another person as custodian with instructions to keep them until the signer shall by letter or telegram give instructions to the custodian to issue them as promissory notes for amounts to be named in the instructions, and the custodian without receiving any instructions, and in fraud of the signer of the notes, fills in the blanks for considerable sums and sells the notes to a purchaser for value, who takes them in good faith and without notice of the fraud, the signer of the notes is nevertheless not estopped from denying the validity of the notes as against the purchaser. *Smith v. Prosser* (Eng.), 11-191.

Notice of infirmities after acquisition. — In an action against the indorser of a note, the rights of the parties do not depend on the knowledge of the plaintiff at the time of the trial, but on what the latter

knew at the time of discounting the note. *Chemical National Bank v. Kellogg* (N. Y.), 5-158.

d. Purchasers with notice.

Not bona fide purchaser. — A purchaser of a note who is told before purchasing that the maker refuses to pay it is not a *bona fide* purchaser. *Old National Bank v. Marcy* (Ark.), 9-339.

Rights on repurchase. — If the payee of a promissory note, which he has procured by fraud, sells it to an innocent third person and then repurchases it, he does not thereby acquire any better right against the maker than he had in the first instance. *Aragon Coffee Co. v. Rogers* (Va.), 8-623.

Knowledge of infirmities in prior notes. — In an action by the purchaser to enforce payment of a series of promissory notes, evidence that the plaintiff, at the time he purchased the last notes of the series, knew that they were part of a series and that the payment of the first notes had been refused, and that he had knowledge of facts which were sufficient to justify the conclusion that all of the notes were given for a single consideration, is sufficient to sustain a verdict that the plaintiff was not an innocent purchaser. *Old National Bank v. Marcy* (Ark.), 9-339.

Rights of indorsee after maturity. — An indorsee of promissory notes who takes them after maturity, and is charged with notice of a decree rendered upon them, succeeds only to the rights of his indorser. *Bank of Fayetteville v. Lorwein* (Ark.), 6-202.

Failure of consideration. — Where the sole consideration for a promissory note and mortgage, given by the owner of real property to a building contractor, is the promise of the contractor to erect and complete a building upon the real property, and it is understood between the parties, when the note is given, that the maker shall not be liable to pay the same unless and until the house is completed, the failure of the contractor to complete the house, and his abandonment of his contract for its erection, render the note and mortgage void in the hands of a third person who has purchased the same with notice of the agreement between the parties. *Tice v. Moore* (Conn.), 17-113.

e. Transfer in violation of contract.

Remedy of maker. — The remedy of the maker of promissory notes which have been sold by the payee to an innocent purchaser for value, in direct violation of the contract of the parties, derived from a construction of the terms of the notes and a contemporaneous written agreement, is an action for damages for the amount of the notes with interest. *Myrick v. Purcell* (Minn.), 5-148.

f. Forged instruments.

Rule where part of signatures are genuine. — Where a joint note purporting to have been signed by a number of persons

is put afloat before maturity and passes into the hands of a *bona fide* holder, the actual signers of the note are liable, although it turns out that some of the signatures are forged. *First Nat. Bank v. Shaw* (Mich.), 12-437.

Liability in case of negligent execution. — A person who indorses and delivers a promissory note that is obviously incomplete because of its failure to specify any amount whatever will be held liable to a *bona fide* holder for the amount subsequently filled in, even though such amount is in excess of the amount agreed upon at the time of the indorsement; but this rule has no application where the instrument is apparently complete as to amount at the time when it is indorsed and delivered. *National Exchange Bank v. Lester* (N. Y.), 16-770.

Liability in absence of negligence. — Where a promissory note apparently complete at the time of its indorsement is subsequently raised in amount by means of a forgery, the indorser cannot be held liable thereon, even to a *bona fide* holder, for the increased amount, merely because there were spaces left in the instrument which made the forgery easy or possible. There is no presumption that those into whose hands such a note may come will commit a forgery, and consequently the failure of the indorser to provide against the contingency by completely filling up spaces in the instrument does not constitute negligence. *National Exchange Bank v. Lester* (N. Y.), 16-770.

When bank paying forged check may recover. — The rule that he who accepts a negotiable instrument to which the drawer's name is forged is bound by the act and can neither repudiate the acceptance nor recover the money paid, has no application in behalf of one who has acquired the paper in the absence of any consideration whatever therefor either present or past, and consequently, where a trust company has paid a forged check, purporting to be signed by a depositor, in the belief that the signature was genuine, and it appears that neither the depositor whose name was forged nor the forger was indebted to the person in whose favor the check was drawn, there is nothing in the law of commercial paper which prevents the trust company from recovering the amount of the check. *Title Guarantee, etc., Co. v. Haven* (N. Y.), 17-1131.

g. Stolen instruments.

Rights of bona fide purchaser. — The rule that one who steals personal property cannot convey to a purchaser, however innocent, any title to the property as against the true owner, does not apply to a stolen negotiable instrument which, when acquired by a purchaser in good faith before maturity and without notice, may be held by the purchaser against the world. *Ehrlich v. Jennings* (S. Car.), 13-1166.

h. Conflict of laws.

Validity of accommodation indorsement. — A married woman who is an accommodation indorser of a note in a state

where such a contract is unenforceable, the note being dated and made payable in the state where such a contract is authorized, is estopped to deny that the indorsement is a contract of the latter state in an action by a *bona fide* holder without notice. *Chemical National Bank v. Kellogg* (N. Y.), 5-158.

Presumption as to place of indorsement. — The place where the note was dated and made payable is presumed, in the absence of notice to the contrary, to be the place where it was indorsed. *Chemical National Bank v. Kellogg* (N. Y.), 5-158.

Where a note is presented for discount, a bank has the right, under the provision of the negotiable instruments law that "except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated," to presume that such note was indorsed at the place where it was dated. *Chemical National Bank v. Kellogg* (N. Y.), 5-158.

Law of place where bill is drawn. — The rights and obligations of the drawer of a bill of exchange are fixed by the law of the place where he draws it, and he is discharged by failure to protest the same in accordance with the laws of that place, although such failure is due to different laws or customs prevailing in the country where the bill is payable. *Amsinck v. Rogers* (N. Y.), 12-450.

A written order drawn by a business house in New York upon a business house in Vienna, Austria, requiring the latter to pay on demand to the order of the former a stated amount of money and charge the same to freight being shipped to the drawee in a designated steamship, is a foreign bill of exchange within the New York negotiable instruments law. *Amsinck v. Rogers* (N. Y.), 12-450.

The failure of the collecting agent in Vienna to demand payment of such bill of exchange, to protest the same, and to give notice of dishonor as required by the laws of New York, discharges the drawer, although in Austria, where the bill is payable, it is only a "commercial order," requiring no protest or notice of dishonor. *Amsinck v. Rogers* (N. Y.), 12-450.

12. ACTIONS.

a. Who may sue on note.

Owner. — The owner of a promissory note in which a third person by mistake or inadvertence is named as payee, may sue on it without indorsement on proof of such ownership by evidence other than the note. *Spreng v. Juni* (Minn.), 18-222.

b. Jurisdiction.

Magistrates' courts. — Under the South Carolina code providing that magistrates shall have civil jurisdiction in actions arising on contracts for the recovery of money only, if the sum claimed does not exceed \$100, a magistrate has jurisdiction of an action on a promissory note wherein the amount claimed is \$100, though the amount of the note with

interest exceeds \$100, as it is the amount claimed and not the amount due which determines his jurisdiction. *Brunson v. Furtick* (S. Car.), 5-307.

c. Plaintiff's pleadings.

Complaint on note held as security.

— In an action upon a note held as security, the complaint may be in the ordinary form of one on behalf of an indorsee of a negotiable note against the maker, though the judgment can be only for the amount secured by the note. *Mersick v. Alderman* (Conn.), 2-254.

Complaint in action for cancellation.

— In an action to have a note and mortgage surrendered for cancellation on account of fraud, the complaint does not state facts entitling the plaintiff to the relief demanded when there is no allegation of the insolvency of the defendant, or that the plaintiff has not an adequate remedy at law, or that the defendant has threatened to dispose of the note before maturity to a *bona fide* purchaser. The most that could be said of such allegations is that the plaintiff claims and alleges failure of the consideration of the note. *Handley v. Sprinkle* (Mont.), 3-531.

Complaint in magistrate's court.

— A complaint in an action in a magistrate's court upon a promissory note held sufficient to withstand a demurrer. *Brunson v. Furtick* (S. Car.), 5-307.

Replication containing repugnant defenses. — Where in an action on a promissory note given for legal services the defendant files a plea of failure of consideration and avers that the note was given in consideration of the plaintiff's agreement to defend successfully the title to certain of defendant's property and to return the note if he failed to do this, and that by reason of the negligence of the plaintiff the consideration of the note has wholly failed, a replication by the plaintiff denying that the consideration for the note has failed, but also alleging a compromise by mutual consent of the parties of the controversy in which the plaintiff was employed, is both a traverse and a confession and avoidance and is demurrable as embracing two repugnant defenses. *Priest v. Dodsworth* (Ill.), 14-340.

d. Defendant's pleading.

Affidavit of defense. — Where the defendant in an action on a promissory note has not filed the affidavit required by the Virginia statute, it is proper for the trial court to refuse to permit him to prove that he did not make the note declared on. *Chestnut v. Chestnut* (Va.), 7-802.

If an accommodation indorser, when sued on his indorsement, desires to invalidate his waiver of protest on the ground that it was procured by fraud, he must aver such fact clearly and explicitly in his affidavit of defense, and not leave it to be inferred from the statements therein contained. *Burgettstown National Bank v. Nill* (Pa.), 5-476.

Denial of protest and notice. — In an

action against the indorser on a promissory note where the declaration alleges protest and notice, the plaintiff is not required to prove these facts unless they are put in issue by a proper plea. *Bank of Ravenswood v. Wetzel* (W. Va.), 6-48.

Denial of plaintiff's title. — Under a sworn plea to the complaint in an action on a promissory note by one to whom the payee has indorsed and transferred the same, denying that the plaintiff is really interested in the note sued on, evidence that the payee of the note was insane when he transferred it to the plaintiff is competent. *Walker v. Winn* (Ala.), 4-537.

Admission of plaintiff's title. — In an action on a promissory note, brought by a person claiming as indorsee thereof, the answer admits the plaintiff's ownership of the note where it avers that the defendant tendered the amount due to one M. who was in possession of the note, and that M., for himself and the plaintiff herein for whom he was acting as agent at that time, refused, etc. *Hornstein v. Cifuno* (Neb.), 20-1267.

Denial of execution. — An affidavit filed by one of twenty defendants in an action on their joint promissory note, denying the execution of the note, is sufficient to justify a requirement that the plaintiff must show the execution of the note before placing it in evidence, and to admit the defense of forgery as to some of the signatures. *First Nat. Bank v. Shaw* (Mich.), 12-437.

e. Evidence.

Parol evidence to vary terms. — In an action at law on a promissory note parol evidence is inadmissible to show that the rate of interest agreed upon was different from that specified in the note. *Cochran v. Zachery* (Ia.), 15-297.

Parol evidence varying indorsement. — As against a person who purchased a note with notice that it was indorsed for collection only, parol evidence is admissible to show that an unrestricted indorsement on the note was intended merely for the purpose of collection. *Johnston v. Schnabaum* (Ark.), 15-876.

Parol evidence of conditional delivery. — As between the original parties to a promissory note, or as between the maker and one who is not a *bona fide* holder, parol evidence is admissible to show that the note was delivered upon condition that it should not be negotiated until a chattel for which the note was given should be ascertained to be as represented. The negotiation of such note in violation of the condition is a fraud upon the maker, which casts upon the indorsee the burden of showing that he or some one through whom he claims acquired the note for value in good faith and before maturity. *McNight v. Parsons* (Ia.), 15-665.

In such a case the testimony of the maker as to the conditional delivery of the note is sufficient to require the submission of the question to the jury, and to cast such burden of proof upon the indorsee. In order to warrant the direction of a verdict for such in-

indorsee, it must appear that he has established the good faith of the transfer either to himself or to a prior indorsee by evidence of such clear and undisputed character that no question of fact is left for the finding of the jury. *McNight v. Parsons* (Ia.), 15-665.

In such a case the testimony of the cashier of a bank that he or the bank purchased the note for value before maturity, even though such testimony is not disputed by other witnesses to the transaction, is not sufficient to warrant the court in saying as a matter of law that he received the note in good faith, and in directing a verdict for the indorsee. *McNight v. Parsons* (Ia.), 15-665.

Where the evidence in such a case tends to show that a prior indorsee, for the purpose of avoiding the defense of the maker, of which such indorsee had notice, made a colorable transfer to the holder, such holder has not sustained the burden of proof as to his want of notice so as to warrant the court in directing a verdict in his favor, the credibility and the weight of his testimony being for the jury. *McNight v. Parsons* (Ia.), 15-665.

Amount paid by plaintiff for note. — In an action on a promissory note, brought by a person who claims to be a *bona fide* purchaser thereof against the maker, it is error for the trial court to exclude evidence as to the amount of the consideration paid by the plaintiff for the note. In such a case the defendant is entitled to show, if he can, that the amount paid was either purely nominal or inadequate, and, upon making such proof, he is further entitled to show fraud or absence of consideration between the original parties to the instrument. *Hogg v. Thurman* (Ark.), 17-383.

Burden of proving want of consideration. — Where in a suit upon a promissory note the defense is that the note was given or obtained without a valuable consideration, the plaintiff has the affirmative of the issue and the burden of proof rests upon him, at every stage of the case, to show a consideration for the note, by a preponderance of the whole of the evidence adduced on the trial. (*Klunk v. Hocking Valley R. Co.*, 74 Ohio St. 125, approved and followed; *Dalrymple v. Wyker*, 60 Ohio St. 108, distinguished.) *Ginn v. Dolan* (Ohio), 18-204.

f. Instructions.

Characterizing protest as ministerial act. — A charge of the court stating correctly the principles of law in reference to the validity and force of a certificate of protest is not rendered erroneous by the court's characterization of the protest as a ministerial act. *Patton v. Bank of La Fayette* (Ga.), 4-639.

g. Recovery of attorney's fees.

Action against administrator. — Where a provision for the payment of attorney's fees is included in a note, the death of the debtor insolvent does not destroy the right to recover such fees as against his ad-

ministrator, upon compliance with the statute in respect to giving notice. *Harris v. Powers* (Ga.), 12-475.

Where the statutory notice is duly given to an administrator of an intention to bring suit on certain promissory notes of the decedent containing a provision for the payment of attorney's fees, and it becomes necessary, by reason of the insolvency of the estate and certain complications, to place the assets in the hands of a receiver and to have an accounting as to assets and debts; and the creditors holding the notes and other persons accordingly file, on the last day for bringing suit at the next term of the superior court (called the return day), an equitable petition under which a receiver is appointed and an administrator of the assets of the estate is had, and the auditor, to whom the case is referred, finds that the administrator has no money to pay the notes and cannot pay them, the holders of the notes are not prevented from recovering attorney's fees on the notes on the theory that the administrator had until the very end of the return day to pay the debt and avoid a judgment for attorney's fees, and that the filing of the equitable suit before the expiration of that day prevented the administrator from making payment. *Harris v. Powers* (Ga.), 12-475.

In an action on a note, where the issue is whether a stipulation in the note provides for the payment of an attorney's fee, the testimony of the maker that, before or at the time of the signing of the note, it was understood that it should not provide for an attorney's fee, is properly disregarded. *McCormick v. Swem* (Utah), 20-1368.

In an action on a note brought by an indorsee, where the statutory presumption created by the Utah statute (Comp. Laws 1907, §§ 1573, 1608, 1609, 1611) that the plaintiff is an indorsee before maturity for value and in good faith is not overcome, the defense of partial failure of consideration is properly rejected. *McCormick v. Swem* (Utah), 20-1368.

In an action on a note stipulating for a reasonable attorney's fee, the plaintiff, having employed an attorney who conducted the case, may recover an attorney's fee without proving an express agreement with the attorney as to fees, or that he paid the attorney a specified sum before suit was commenced. *McCormick v. Swem* (Utah), 20-1368.

The amount of the attorney's fee stipulated for in a note should be allowed, unless it is unjust, oppressive, or unreasonable in view of the circumstances. *McCormick v. Swem* (Utah), 20-1368.

In an action on a note for \$1,167 on which \$791.22 has been paid, where the note stipulated for a reasonable attorney's fee, and the action is defended on the ground that the plaintiff is not a *bona fide* holder but holds the note subject to defenses, the court may, on the plaintiff's proving that \$75 is a reasonable attorney's fee, allow such sum as an attorney's fee. *McCormick v. Swem* (Utah), 20-1368.

A provision in a note for an attorney's fee, but leaving blank the amount thereof, amounts to a promise to pay a reasonable sum as an attorney's fee. *McCormick v. Swem* (Utah), 20-1368.

BILLS IN EQUITY.

See EQUITY, 3.

BILLS OF DISCOVERY.

See DISCOVERY.

BILLS OF EXCEPTIONS.

See APPEAL AND ERROR, 10.
Proof of former evidence by bill of exceptions, see EVIDENCE, 3 b.

BILLS OF EXCHANGE.

See BILLS AND NOTES.

BILLS OF LADING.

See CARRIERS, 4 c.
Effect of attaching bill of lading to draft for price of goods sold, see SALES, 3.

BILLS OF PARTICULARS.

In civil cases, see PLEADING, 7.
In criminal cases, see ABORTION; INDICTMENTS AND INFORMATIONS, 3, 5.
Failure to furnish bill of particulars, see ground for new trial, see NEW TRIAL, 2 a (3).
Refusal to require statement of defense in ejectment, see APPEAL AND ERROR, 15 b (2).

BILLS OF REVIEW.

See EQUITY, 4.

BIRTH.

Admissibility of evidence of birth of child in prosecution for incest, see INCEST, 4 b.
Evidence of sexual intercourse, see RAPE, 2 d (2).
Revocation of will by birth of children, see WILLS, 6 b (7).

BLACKLISTING.

See LABOR COMBINATIONS.
Blacklisting employers, see CONSPIRACY, 1 a.
Liability for blacklisting discharged employees, see MASTER AND SERVANT, 3 l.

BLANKS.

Effect of filling blanks in instrument, see ALTERATION OF INSTRUMENTS, 3.

BLASTING.

See EXPLOSIONS AND EXPLOSIVES, 4.

BLIND PERSONS.

Contributory negligence of blind persons, see NEGLIGENCE, 7 a.

BLOCKING FROGS.

Application of statute requiring blocking of frogs, see RAILROADS, 3 b.
Duty of railroad company, see MASTER AND SERVANT, 3 c (1).

BLOOD HOUNDS.

Evidence as to trailing by blood hounds, see CRIMINAL LAW, 6 n (10).

BLOOD POISONING.

See INSURANCE, 8 a.

BLOOD STAINS.

Identification of accused by blood stains, see CRIMINAL LAW, 6 n (2).

BLOW-POST LAW.

Application limited to grade crossings, see RAILROADS, 3 b.

BOARDERS.

Guest of inn distinguished from boarder, see INNS, BOARDING HOUSES AND APARTMENTS, 2.
Liability of innkeeper for baggage of boarder, see INNS, BOARDING HOUSES AND APARTMENTS, 5.

BOARDING HOUSES.

See INNS, BOARDING HOUSES AND APARTMENTS.

BOARDS.

Agency for exercise of police power by municipalities, see MUNICIPAL CORPORATIONS, 4 d (2).
Appointment of county boards by circuit judge, see JUDGES, 3 b.

Board of county commissioners, see **COUNTIES**, 5.
 Board of health, see **HEALTH**, 1.
 Board of pardons, see **PARDON, REPRIEVE, AND AMNESTY**.
 Control of public boards by mandamus, see **MANDAMUS**, 2 b.
 Liability of municipality for acts of board of health, see **MUNICIPAL CORPORATIONS**, 9 a.
 Power of board to determine particular facts as delegation of judicial power, see **PHYSICIANS AND SURGEONS**, 1 b.
 Power of state board to hold title to property, see **STATES**, 7.
 Regulations made by board as exercise of legislative power, see **PHYSICIANS AND SURGEONS**, 1 b.
 School boards, see **SCHOOLS**, 5.

BODY.

See **DEAD BODY**.

BONA FIDE PURCHASERS.

See **BILLS AND NOTES**, 11 c; **VENDOR AND PURCHASER**, 4.
 Holders of municipal bonds, see **MUNICIPAL CORPORATIONS**, 8 e (4).
 Right of bona fide purchaser of note given for medical services by unlicensed practitioner, see **BILLS AND NOTES**, 11 c (2).

BONDS.

1. **CONSTRUCTION OF BOND.**
2. **VALIDITY OF BOND.**
3. **CONDITIONS OF BONDS.**
4. **ACTIONS ON BONDS.**

Administration bonds, see **EXECUTORS AND ADMINISTRATORS**, 4.
 Alteration of bond, see **ALTERATION OF INSTRUMENTS**.
 Appeal bond, see **APPEAL AND ERROR**, 18.
 Authority to issue municipal bonds as extending period of corporate existence, see **MUNICIPAL CORPORATIONS**, 2.
 Bail bonds, see **BAIL**, 6.
 Building contractor's bond as contract of guaranty, see **GUARANTY**, 1.
 Construction of bond and mortgage as parts of one transaction, see **MORTGAGES**, 7.
 Defective statutory bond good as common law obligation, see **SURETYSHIP**, 2.
 Effect of giving bond in attachment suit, see **ATTACHMENTS**, 6 c.
 Enforcement against municipality of state tax on municipal bonds, see **TAXATION**, 7.
 Executors' bonds, see **EXECUTORS AND ADMINISTRATORS**, 4.
 Exemption of state bonds from taxation, see **TAXATION**, 12 c (3).
 Indemnifying bonds, see **BAIL**, 10; **SHERIFFS AND CONSTABLES**, 2.

Injunction bonds, see **INJUNCTIONS**, 5.
 Issuance by consolidated corporation, see **CORPORATIONS**, 2 f.
 Liability of sureties, see **SURETYSHIP**, 2.
 Liquor dealers' bonds, see **INTOXICATING LIQUORS**, 4 i.
 Municipal bonds, see **MUNICIPAL CORPORATIONS**, 8.
 Official bonds of particular officers, see **JUSTICES OF THE PEACE**, 1 a; **POST-OFFICE; SCHOOLS**, 2; **SHERIFFS AND CONSTABLES**, 2.
 Official bonds of public officers generally, see **PUBLIC OFFICERS**, 4; 9 b.
 Qualification of judges by giving bonds, see **JUDGES**, 1.
 Replevin bonds, see **REPLEVIN**, 9.
 Security for fines, see **FINES**, 1 b.
 State bond, see **STATES**, 6.
 Succession taxes on United States bonds, see **TAXATION**, 13 b (2) (a).
 Taxation of state bonds, see **TAXATION**, 2 a.
 Validity of temporary injunction granted without bond, see **INJUNCTIONS**, 4 c.

1. **CONSTRUCTION OF BOND.**

In general.—In an action against a surety company to recover on the bond of a defaulting bank president, the bond must be construed as a whole, and the plaintiff's right to recover must depend upon such construction. *Willoughby v. Fidelity, etc., Co.* (Okla.), 8-603.

Application on part of contract.—Where the bond of a bank president is issued by a surety company and accepted by the bank, upon the faith of certain statements and representations in writing, made by the assistant cashier of the bank, relative to the conduct, duties, employment, and accounts of the bank president, who later defaults, and the statements so made by the assistant cashier are, by the terms of the bond, made a part of the bond itself, the bond and statements together form the contract, and they must be construed together, and upon their joint construction, or upon their construction as a whole, must depend the rights and liabilities of the parties thereto. *Willoughby v. Fidelity, etc., Co.* (Okla.), 8-603.

2. **VALIDITY OF BOND.**

Effect of false representations in procuring bond.—Where the bond of a bank president is issued by a surety company and accepted by the bank upon the faith of statements and representations made by the assistant cashier, the receiver of the bank, later appointed, in an action on the bond, cannot be heard to repudiate or question the authority of the assistant cashier to bind the bank by his statements and representations concerning the conduct, duties, employment, and accounts of the defaulting bank president, and at the same time be allowed to recover on the bond procured on the strength of the statements and representations so made by the assistant cashier. *Willoughby v. Fidelity, etc., Co.* (Okla.), 8-603.

Failure to disclose delinquency of employee. — The failure of the general agent of an insurance company, who requires a subordinate agent to furnish a bond for the prompt payment of moneys collected by him, to disclose to the sureties on the bond the fact that the subagent is behind with his accounts and is indebted to the company, if he is so indebted merely through a lack of punctuality or diligence and not through dishonesty, does not relieve the sureties of liability on the bond, where there is no inquiry on the part of the sureties. *Hebert v. Lee* (Tenn.), 11-1029.

But where the general agent of an insurance company requires a subordinate agent to furnish a bond for the prompt payment of moneys collected by him, and the subagent is, with the knowledge of the general agent, largely in default by reason of his embezzlement of his principal's funds, the failure of the general agent to disclose that fact to the persons who became sureties on the bond, although they make no inquiry or investigation, relieves them of liability. *Hebert v. Lee* (Tenn.), 11-1029.

The fact that such bond provides that the sureties shall be responsible for debts of the subagent incurred prior to as well as subsequent to the date of the bond does not prevent the sureties from avoiding liability on the bond, where the subagent's indebtedness grew out of embezzlement of which the sureties were not informed. *Hebert v. Lee* (Tenn.), 11-1029.

3. CONDITIONS OF BONDS.

Effect of unnecessary or illegal condition. — In the absence of an express statutory provision to the contrary, unnecessary or illegal conditions in a statutory bond which is given voluntarily have no effect upon good conditions in the bond, provided the good conditions can be separated from the illegal or surplus clauses. *Probate Court v. Adams* (R. I.), 8-1028.

What constitutes breach. — Where a condition of a bond is an undertaking to do a particular thing, a failure to do that thing is a breach upon the happening of which a cause of action arises. *Equitable Trust Co. v. National Surety Co.* (Pa.), 6-465.

Breach of one or several conditions. — Where a building contractor's bond contains separate and distinct covenants of indemnity and of guaranty that the work shall be completed, an action may be maintained against the surety for breach of the covenant of guaranty though the covenant of indemnity has not been broken. *Equitable Trust Co. v. National Surety Co.* (Pa.), 6-465.

Extrinsic evidence of additional conditions. — A bond which in terms secures the obligee against loss through the dishonesty of an agent cannot be construed as covering the failure of the agent to pay for goods sold and delivered to him because it appears from preliminary writings passing between the parties that the obligee understood the security to be of the latter charac-

ter. *Orion Knitting Mills v. United States Fidelity, etc., Co.* (N. Car.), 2-888.

4. ACTIONS ON BONDS.

Joinder of obligees as plaintiffs. — A provision in a bond for the payment of such damages as may be awarded to the obligees, jointly or severally, does not make the legal interest of the obligees several. Consequently all of them must join in an action on the bond. *International Hotel Co. v. Flynn* (Ill.), 15-1059.

Where the joint interest of such obligees appears from the face of the declaration, the fact that the action is brought by one of the obligees may, even where the judgment is by default, be availed of on writ of error. *International Hotel Co. v. Flynn* (Ill.), 15-1059.

Action by town on bond running to county. — Under the New York code providing that an official bond to the people shall be actionable by a person who has sustained injury by a breach thereof, a bond of a county treasurer running to the county and not to the people according to the statute is nevertheless within the scope and general policy of the statute and is actionable by a town situated in the county to recover school moneys apportioned to the town which have come into the hands of the county treasurer and which he has never paid over. *Ulysses v. Ingersoll* (N. Y.), 3-455.

Avowment of breach of condition. — The right to recover on a bond depends on a breach of the condition, and a petition that fails to allege such breach is fatally defective. *Lancaster County v. Fitzgerald* (Neb.), 13-88.

BOOKMAKING.

See GAMING AND GAMING HOUSES.

BOOKS.

Admissibility of book entries to corroborate witness, see CRIMINAL LAW, 6 n (1).
Admissibility of medical books in evidence, see EVIDENCE, 9 b.
Books as necessities for married women, see HUSBAND AND WIFE, 4 b.
Compelling production of books by accused, see CRIMINAL LAW, 6 n (1).
Entries in account books as hearsay, see EVIDENCE, 3 a.
Pledge of book accounts, see PLEDGE AND COLLATERAL SECURITY, 1.
Quotations from law books in instructions, see CRIMINAL LAW, 6 q (1).

BOOM COMPANIES.

Liability for obstructing flow of stream, see WATERS AND WATERCOURSES, 3 b (4).

BOOTH.

ovable booth as gaming house, see **GAMING AND GAMING HOUSES**, 2.

BORROWING.

orrowing servants, see **MASTER AND SERVANT**, 1 a.

ower of municipality to borrow money, see **MUNICIPAL CORPORATIONS**, 8 a.

BOTTLES.

egulation as to capacity of milk bottles, see **FOOD**, 5 b.

BOUNDARIES.

1. IN GENERAL.

2. AGREEMENTS AS TO BOUNDARIES.

3. EVIDENCE.

4. LOCATION OF LINE BETWEEN COUNTIES.

5. ACTIONS TO DETERMINE BOUNDARIES.

hange of school district boundaries as affecting title to school property, see **SCHOOLS**, 1.

Decree establishing boundaries as adjudication of title to land, see **JUDGMENTS**, 6 d (3).

Division fences, see **FENCES**, 2.

Extending possession to fixed boundaries, see **ADVERSE POSSESSION**.

Ferries on state boundaries, see **FERRIES**, 2.

Ownership *ad flum fluminis*, see **WATERS AND WATERCOURSES**, 3 b (2).

State boundaries, see **STATES**, 1.

Verbal agreement fixing boundary lines, see **FRAUDS, STATUTE OF**, 4 a.

1. IN GENERAL.

Natural monuments. — In a controversy between the owners of lots in a city addition over a boundary line between the lots, a stone in the centre of a government section, which is referred to in the original plat as one of the corners of the addition, must, if sufficiently identified, control over a monument set to fix the boundary of one of the lots, unless there are monuments fixing the corners and lines of the respective properties of the adjoining owners. *Kitchen v. Chantland* (Iowa), 8-81.

Conflict between monuments and courses and distances. — In locating a boundary line, calls for monuments prevail over courses and distances. *Stewart v. May* (Md.), 18-856.

Conclusions of survey. — One who joins in an application for survey for the establishment of the boundaries of his land under the Kansas statutes, who is present when the land is surveyed and who omits to appeal from the report of the survey, is concluded

by it, notwithstanding notice of the survey is not served upon him. *Shanline v. Wiltsie* (Kan.), 3-140.

Construction of grant. — In determining whether an island is within a certain grant executed between 1620 and 1635 including islands within three miles of the mainland, the three-mile limit should be measured by the marine mile, and not by the statute mile. *Lazell v. Boardman* (Me.), 13-673.

Effect of boundary on private way. — A deed describing the premises conveyed as bounded on a private way theretofore laid out over the land of the grantor does not pass the fee to the middle of the way. *Seery v. Waterbury* (Conn.), 18-73.

2. AGREEMENTS AS TO BOUNDARIES.

Long continued acquiescence. — Where adjoining owners or their grantors have acquiesced in a certain boundary line as the true one for ten years or more, the law will treat that line as the correct one. *Kitchen v. Chantland* (Iowa), 8-81.

Relief in equity on ground of mistake. — Evidence reviewed, in a controversy over a boundary line, and held to show that one of the adjoining owners was not entitled to be relieved in equity, on the ground of mistake, from an agreement fixing the line. *Kitchen v. Chantland* (Iowa), 8-81.

3. EVIDENCE.

Declaration of deceased persons generally. — Boundaries may be proved by the declarations of a deceased person, where it appears that the declarant had competent knowledge of the facts, and that the declarations were made at a time when he had no interest in the subject and before any controversy about the land had arisen. *Cadwalader v. Price* (Md.), 19-547.

Declarations of deceased vendor. — The declarations of a deceased vendor who had conveyed a plantation by a deed excepting from the grant a certain "landing," and had afterwards conveyed the landing to another person, are admissible, as against the vendee of the plantation, to show that the "landing" was a definite parcel of land, and to locate the boundaries thereof. Such evidence does not violate the rule that a vendor shall not impair the rights of his vendee. *Cadwalader v. Price* (Md.), 19-547.

4. LOCATION OF LINE BETWEEN COUNTIES.

Exercise of jurisdiction over disputed territory. — On an issue as to whether a certain tract of land is situated in one county or in another, where it is impossible to determine from the statutes creating the two counties exactly where the boundary line between them lies, evidence that one of the counties has assumed and exercised jurisdiction over the tract in question for many years, that deeds and other conveyances of land included in the tract have been recorded in that county, that the land has been assessed by that county for taxation, and like

facts tending to show the assumption and exercise of jurisdiction, and acquiescence therein by the residents of the tract, are admissible to determine the boundary line. *Puget Sound Nat. Bank v. Fisher* (Wash.), 17-526.

5. ACTIONS TO DETERMINE BOUNDARIES.

Equity jurisdiction in general. — To warrant an application to a court of chancery for the appointment of commissioners to ascertain a boundary, there must be some equity superinduced by the act of the defendant, or the danger of a multiplicity of suits. A controversy between independent proprietors or a confusion of boundaries is not sufficient to authorize equitable interference. *Watkins v. Childs* (Vt.), 11-1123.

The established foundations of the equity jurisdiction to determine confused boundaries are fraud or misconduct on the part of the defendant, resulting in a confusion of the boundary in question, a relation between the parties that makes it the duty of one of them to preserve and protect the boundary together with misconduct or neglect on his part resulting in the confusion of the boundary, and the necessity of a resort to equity to prevent a multiplicity of suits. *Watkins v. Childs* (Vt.), 11-1123.

Parties. — Although it is a prerequisite to the action of a court of equity in ascertaining a confused boundary that all persons interested, through either present or future estates, should be made parties, yet a demurrer, on the ground of lack of parties, not limited to the part of the bill which seeks the establishment of a certain line as to which interested parties are not joined, but made to the whole bill, which also asks for the establishment of another line as to which the parties are complete, must fail. *Watkins v. Childs* (Vt.), 11-1123.

Pleading. — In an application to a court of chancery to ascertain a confused boundary, an allegation, on information and belief, of the fact that defendant has removed the stakes marking the boundary line, is admitted as a fact by a demurrer, the rule being different in that regard between a mere allegation of information and belief and an allegation of a fact on information and belief. Furthermore the allegation of such fact on information and belief is sufficient, as the fact is peculiarly within the knowledge of the defendant, and by the demurrer admitting it a proper case for equitable relief is, in this respect, made out. *Watkins v. Childs* (Vt.), 11-1123.

It is a necessary prerequisite to equitable relief in ascertaining a disputed boundary that the plaintiff should allege that some of the lands in respect to which the relief is sought are in the possession of the defendant, and this requirement is not met by an allegation of successive trespasses. *Watkins v. Childs* (Vt.), 11-1123.

Evidence as to priority of location. — Where the priority of the location of one of two adjoining tracts claimed under original

warrants is established, and it appears that there are some marks upon the ground answering to some of the calls of the survey and that the other marks answering to the other calls have become obliterated, such marks making it possible to fix the true location of the tract, recourse cannot be had to the lines of the block or of any tract therein or of any other block. *Collins v. Clough* (Pa.), 15-871.

Admissibility of declaration of deceased surveyor. — Declarations of a deceased surveyor with respect to boundaries are admissible only when they were made on the ground surveyed, such declarations being admissible solely because they are part of the *res gestæ*. *Collins v. Clough* (Pa.), 15-871.

Under the above rule, the field notes of a deceased surveyor are admissible as declarations made contemporaneously with the work done on the ground, if such notes are authenticated in some way other than by the mere subsequent declarations of the surveyor himself; but later verbal statements of the surveyor to his son as to what he found on the ground while engaged in making the survey are inadmissible. *Collins v. Clough* (Pa.), 15-871.

Secondary evidence of survey. — Error in excluding a certified copy of the record of a government survey in a disputed boundary case is not cured by permitting a surveyor to testify as to a survey made by him of the line in question, and that his survey agreed with the field notes of the government surveyor. *Kellogg v. Finn* (S. Dak.), 18-363.

Question for court. — Where the true division line between two or more adjoining tracts which are claimed under original warrants is the subject of dispute, the question as to which of the tracts was first located is, where the evidence warrants a legal conclusion with respect to it, a preliminary question for the court to determine, and in such case it is error to submit the question to the jury together with the other evidence. *Collins v. Clough* (Pa.), 15-871.

Finding as to priority of location. — A finding by the jury in favor of the priority of the location of one of two adjoining tracts, claimed under original warrants, which is based on the bare presumption that the surveyor located his warrants in the order in which they were issued cannot be sustained as against positive and unchallenged declarations which appear on the face of the returns that he disregarded such order. *Collins v. Clough* (Pa.), 15-871.

Relief. — The scope of the equity jurisdiction to ascertain confused boundaries is not alone to locate the boundary but to require the defendant to make good to the plaintiff his proper quantity of land. *Watkins v. Childs* (Vt.), 11-1123.

BOUNTIES.

Pay of disabled postal clerks, see **POST-OFFICE**.

BOYCOTTS.

See LABOR COMBINATIONS, 9.

BRANDS.

Branding animals, see ANIMALS, 1 b; *LARCENY*, 6 a (4).
Branding articles of food, see *FOOD*.
Expression in title of subject of statute relating to branding trees, see *STATUTES*, 3 b.

BREACH.

See *BREACH OF PROMISE OF MARRIAGE*.
Conditions in insurance policy, see *INSURANCE*, 3 c (3).
Contract of employment, see *MASTER AND SERVANT*, 1 e.
Covenants, see *COVENANTS*, 5.
Liability of decedent's estate for breach of warranty, see *EXECUTORS AND ADMINISTRATORS*, 9.
Restraining breach of contract, see *INJUNCTIONS*, 2 c.

BREACH OF PROMISE OF MARRIAGE.

1. IN GENERAL.

2. ACTIONS.

- a. In general.
- b. Pleading.
- c. Evidence.
- d. Arguments of counsel.
- e. Instructions.
- f. Damages.
- g. New trial.
- h. Abatement and revival.
- i. Appeal and error.

1. IN GENERAL.

What constitutes.—What constitutes a breach of promise to marry indefinite as to time. *Anderson v. Kirby* (Ga.), 5-103.

Validity of promise.—A promise of marriage by a man who, to the knowledge of the promisor, is married at the time of the making of the promise, is void as against public policy, and cannot be enforced by action after the death of the promisor's wife. *Wilson v. Carnley* (Eng.), 14-157.

Existence of contract of marriage.—Where the evidence, in an action for the breach of a promise of marriage, is conflicting, the existence of a contract of marriage is a question for the jury. *Fisher v. Kenyon* (Wash.), 20-1264.

Consideration for promise.—Though a promise of marriage, made in consideration of the allowance of illicit sexual intercourse, is void for illegality and immorality of the consideration, what the consideration was is a question for the jury, when the evidence concerning it is inconclusive, but tends to prove mutual promises to marry, as well

as immoral conduct at or about the same time. *Connolly v. Bollinger* (W. Va.), 20-1350.

2. ACTIONS.

a. In general.

Demand of performance as condition precedent.—Where an alleged promise of marriage is denied by the defendant, or his conduct amounts to a repudiation thereof, a demand that he perform is not necessary before suit. *Hill v. Jones* (Minn.), 18-359.

Disease as defense.—An agreement of marriage between a woman who is an incurable consumptive and a man having a taint of consumption in his family is not binding and may be repudiated by the man without incurring any liability for breach of contract, although the facts were known to the parties prior to the agreement. *Grover v. Zook* (Wash.), 12-192.

Immoral consideration as defense.—Proof of indulgence, by the parties to a contract of marriage, in illicit sexual intercourse at the time and place of the making of the promise, does not, as matter of law, preclude a verdict in an action for breach of the contract. *Connolly v. Bollinger* (W. Va.), 20-1350.

Offer of marriage as defense.—The right of the plaintiff to recover in an action for breach of promise of marriage is not barred by an offer to marry made by the defendant after the institution of the action. *Connolly v. Bollinger* (W. Va.), 20-1350.

Accrual of cause of action.—Renunciation of a contract of marriage alters the status of the parties *ipso facto*, and a right of action accrues at once. *Connolly v. Bollinger* (W. Va.), 20-1350.

b. Pleading.

Alleging dates of promise to marry and request for performance.—In a count on a promise to marry generally in a declaration in assumpsit for breach of the contract, the dates of the promise and request for performance need not be so stated as to show the lapse of a reasonable time between them for performance. Being immaterial and merely formal, the dates may be laid under a *videlicet*, and the proof may vary therefrom. *Connolly v. Bollinger* (W. Va.), 20-1350.

c. Evidence.

Seduction.—Evidence of seduction is not admissible in aggravation of damages in an action for a breach of promise of marriage. *Wrynn v. Downey* (R. I.), 8-912.

In an action for a breach of promise to marry, evidence of seduction is not admissible to prove either a contract to marry or a breach of that contract. *Wrynn v. Downey* (R. I.), 8-912.

Attempt to compromise.—In an action for a breach of promise to marry, it is not competent to introduce evidence showing an attempt by the defendant to compromise the

plaintiff's claim. *Wrynn v. Downey* (R. I.), 8-912.

Circumstances antecedent to promise.

—In an action for a breach of promise of marriage, allegations and proof of circumstances antecedent to the promise, which tend to show the relations of the parties and the state of feeling between them at the time of the alleged promise, are permissible. *Anderson v. Kirby* (Ga.), 5-103.

Wealth of defendant. — Where the breach of a marriage contract occurred but a few months before the action therefor was begun, evidence is admissible as to the defendant's financial ability at the time of trial. *Fisher v. Kenyon* (Wash.), 20-1264.

Wealth of defendant's parents.

—In an action for the breach of a promise of marriage, evidence as to the financial condition of the defendant's father is inadmissible. *Spencer v. Simmons* (Mich.), 19-1126.

Proof of promise to marry. — Indefinite and indirect conversation between the plaintiff and the defendant in an action for the breach of a promise of marriage, capable of being interpreted as relating to marriage and aided by a course of conduct indicative of betrothal, is sufficient to sustain a finding of the marriage contract, without proof of an express or formal engagement. *Connelly v. Bollinger* (W. Va.), 20-1350.

d. Arguments of counsel.

Inflaming prejudices of jury. — A judgment for the plaintiff in an action for breach of promise of marriage will be reversed, where the plaintiff's counsel persists in the use of extravagant language calculated to inflame the prejudices of the jury against the defendant. *Spencer v. Simmons* (Mich.), 19-1126.

e. Instructions.

Attack on plaintiff's character. — In an action for breach of promise of marriage in which lewdness on the part of the plaintiff is set up as a defense, it is error for the court to charge without qualification that in assessing damages the jury may consider the nature of the defense set up. Such a defense may be considered as showing malice and wantonness, but the plaintiff in such an action is not entitled to recover independent damages for the defamatory charges. *Spencer v. Simmons* (Mich.), 19-1126.

f. Damages.

Seduction as element of aggravation.

—Seduction of the plaintiff by the defendant under a promise of marriage may be alleged and proved in aggravation of the damages sustained by the breach of the contract to marry. *Anderson v. Kirby* (Ga.), 5-103.

In an action for damages for the breach of a promise of marriage the fact that the plaintiff was seduced under promise of marriage, and that such seduction was followed by pregnancy, is admissible in evidence in aggravation of damages. *Johnson v. Levy* (La.), 16-978.

In action against decedent's estate.

—Compensatory damages may be recovered against the heirs of a decedent for his breach of a promise of marriage, where the obligor has been put in default as provided by law. But exemplary damages are not allowable in such a case. *Johnson v. Levy* (La.), 16-978.

Excessive damages. — A verdict for \$20,000 in favor of the plaintiff in an action for damages for the breach of a promise of marriage instituted against the heirs of the other party held to be excessive under the facts and circumstances of the case. *Johnson v. Levy* (La.), 16-978.

A judgment for \$6,000, for breach of a marriage promise, held not excessive under the evidence. *Fisher v. Kenyon* (Wash.), 20-1264.

g. New trial.

Improbable evidence as ground.

—Evidence in support of plaintiff's action for breach of promise of marriage examined and held so doubtful of merit, and in many respects so improbable, that a new trial should have been granted. *Hill v. Jones* (Minn.), 18-359.

h. Abatement and revival.

Death of defendant. — The obligation to fulfil a marriage engagement is personal, and the obligation to respond in damages, in the event of its nonfulfilment, is incidental thereto, from which it follows that, if the obligor dies before fulfilling the engagement, and without being put in default, the right of action to recover damages for the nonfulfilment perishes with him, and cannot be exercised against his heirs. But, where the obligor is put in default, as provided by law, his right to fulfil his engagement is thereby forfeited, and his obligation in premises is merged in his obligation to respond in damages, which latter obligation thereby acquires an independent status, becomes heritable, and may be enforced against the heirs of the obligor. *Johnson v. Levy* (La.), 10-722.

In an action for damages for the breach of a promise of marriage the fact that the plaintiff's father, after the discovery of her pregnancy, killed the other party to the promise of marriage on the occasion of his refusal to marry the plaintiff, does not bar her claim for damages against the estate of the decedent. *Johnson v. Levy* (La.), 16-978.

i. Appeal and error.

Sufficiency to support verdict.

—Where, in an action for damages for the breach of a promise of marriage, the evidence is conflicting, a verdict in favor of the plaintiff on the question of contract *vel non* will not be disturbed, except where it is clearly erroneous. *Johnson v. Levy* (La.), 16-978.

The finding of the jury as to the existence of a contract of marriage is conclusive on review. *Fisher v. Kenyon* (Wash.), 20-1264.

BREAD.

See **FOOD**, 5 a.

Confining on bread and water diet, see **CRIMINAL LAW**, 7 a (1).

BREAKING.

As element of burglary, see **BURGLARY**, 1.
Right to break door in making arrest, see **ARREST**, 1 b.

BRIBERY.

1. WHAT CONSTITUTES.

2. PROSECUTION.

Bribing government officers, see **CONSPIRACY**, 1 b.

Bribing witness not to testify, see **EMBRACERY**.
Effect of payment of benefits to members of labor unions during strikes, see **LABOR COMBINATIONS**, 3.

1. WHAT CONSTITUTES.

Payment to induce ultra vires contract.—A person who, as a member of the common council of a city, corruptly accepts a sum of money to vote in favor of the city's entering into a certain contract, is guilty of accepting a bribe, though the contract is one which the city has no authority to make, if the measure is one which may come before the common council for official action. *People v. Mol* (Mich.), 4-960.

A member of a board which is charged with the care and custody of school buildings, who has accepted money as a bribe to influence his opinion, judgment, and action in favor of letting or causing to be let a contract for cleaning the school buildings, is guilty of bribery, under the Kansas statute, notwithstanding the fact that the board had by a resolution referred the matter of cleaning such buildings to the superintendent of the buildings, who was an employee but not a member of the board, if it appears that the member charged with the offense let the contract with the approval of the superintendent of the buildings. *State v. Campbell* (Kan.), 9-1203.

Officers acting without jurisdiction.—An officer *de jure* acting with apparent, but without actual, jurisdiction is punishable for accepting a bribe just as if he had complete jurisdiction, provided the action to be taken corruptly is in form appropriate to the office held by him. *People v. Jackson* (N. Y.), 14-243.

Under the New York statute providing that "a judicial officer . . . who asks, receives, or agrees to receive a bribe . . . upon any agreement or understanding that his vote, opinion, judgment, action, decision, or other official proceeding shall be influenced thereby" shall be guilty of a felony, a coroner is a judicial officer and is guilty of the crime of bribery denounced by the statute

where he agrees in consideration of a bribe to discharge a defendant in a case of death by violence of which he officially takes jurisdiction, and of which he would have actual jurisdiction except for the fact that the death did not occur in the state in which the act causing the death was committed; and a conviction for such bribery may be had under an indictment which negatives actual jurisdiction of the case before the defendant as coroner in which the bribe is alleged to have been accepted, by charging that the death then under investigation took place in another state. *People v. Jackson* (N. Y.), 14-243.

Promise by candidate for public office.—A promise by the candidate for the office of county judge that he will "draw all papers necessary in the settlement of estates and give the necessary advice free of charge," although not to be commended; does not show that he "induced or procured" such electors "to vote for him for such office by bribery," within the statute forfeiting the office for such cause, and does not warrant the rejection of votes cast for such candidate or the ousting him from office. *State ex rel. Dithmar v. Bunnell* (Wis.), 11-560.

Repeal of statutes.—The provision of *Crim. Code Ill.*, § 34, enacted in 1874, making it an offense for a municipal officer to receive a bribe, and prescribing the punishment therefor, repeals by implication the provision on the same subject in the *Cities and Villages Act*, enacted in 1872. *People v. McCann* (Ill.), 20-496.

2. PROSECUTION.

Evidence of intent.—In a prosecution for accepting a bribe, where the gravamen of the charge is receiving money as a bribe to influence the opinion, judgment, and action of the defendant as a member of the board of education in causing a contract to be let, testimony showing that the contractor who paid the defendant the bribe soon afterward took a similar contract with an individual at a much lower price is material and competent evidence of the intent with which the money was received. *State v. Campbell* (Kan.), 9-1208.

Checks as evidence of receipt of money.—In a prosecution for accepting a bribe, where the defendant is shown to have cashed a check payable to his order for the amount he is charged with receiving, drawn by the person from whom it is charged he received the bribe, the check itself is competent evidence against him to establish the receipt of the money. *State v. Campbell* (Kan.), 9-1203.

Evidence of other offenses.—Under an indictment which charges the defendant with being an accessory to the bribery of himself, evidence of other briberies is admissible if such evidence would be admissible under an indictment directly charging the defendant with bribery; and the sufficiency of the indictment is not open to attack in an appeal taken by the state. *State v. Du Laney* (Ark.), 15-192.

In a criminal prosecution against the chairman of a legislative committee for accepting a bribe for voting against a certain telephone bill, the testimony of a witness that at the beginning of the legislative session he had made an agreement with the defendant that in consideration of sums of money to be paid to the defendant all bills affecting corporations in which the witness was interested which might be referred to such committee should be looked after by the defendant in the interest of the witness, that sums of money had been paid to the defendant pursuant to such agreement, and that the witness was interested in the telephone bill, is, notwithstanding the fact that there is no evidence to show that the defendant knew that the witness was interested in such bill, admissible for the purpose of showing a scheme by the defendant to commit bribery. *State v. Du Laney* (Ark.), 15-192.

Proof of immaterial averments. — Where an indictment charges that the defendant corruptly received a bribe of "fifteen dollars, lawful money of the United States," a conviction can be sustained only by proof that the money so received was "lawful money of the United States," although the allegation as to the kind of money received might be omitted from the indictment without affecting its sufficiency. *Value v. State* (Ark.), 13-308.

Sufficiency of evidence. — Evidence examined and held sufficient to sustain the conviction of a police officer for taking a bribe. *People v. McCann* (Ill.), 20-496.

Availing pendency of cause. — No error is made to appear in overruling a motion to quash certain counts in an information, based upon section 3476 of the general statutes of 1906, charging the defendant with the crime of bribery of a judicial officer, when such information substantially complied with the requirements of such statute. Such information is not fatally defective when it distinctly alleges that the defendant offered the bribe to the judge of a designated court for the purpose of and in order to influence him "to modify and reduce the sentence" imposed upon a certain named defendant on a prior day of the same term of court, because it does not affirmatively allege that the prosecution against such convicted defendant was still pending in such court at the time such bribe was offered. *Tillman v. State* (Fla.), 19-91.

BRIDGES.

Bridge over highway as nuisance, see *STREETS AND HIGHWAYS*, 5 c.

Compelling removal of bridge as taking thereof, see *EMINENT DOMAIN*, 6.

Construction of bridge as infringement of ferry franchise, see *FERRIES*, 1.

Duty of canal company to maintain bridge, see *CANALS*, 1.

Expression in title of subject of statute incorporating bridge company, see *STATUTES*, 3 b.

Liability of defective bridges in streets, see *STREETS AND HIGHWAYS*, 7 c (4).

Liability for obstructing stream by bridge, see *WATERS AND WATERCOURSES*, 3 b (4).

Liability of municipality for injuries in operation of lift bridge, see *MUNICIPAL CORPORATIONS*, 9 b (1).

Right of railroad to reimbursement of cost of bridge made necessary by the highway, see *RAILROADS*, 3 a (2).

Duty to keep toll bridge in repair.

The proprietor of a toll bridge is not a common carrier and is liable only for negligence in failing to keep the bridge in a reasonably safe condition for travel. *Gibler v. Terminal R. Assoc.* (Mo.), 11-1194.

An instruction defining the degree of care required by the operator of a toll bridge as to keeping the bridge safe for travel, as "such care as a prudent operator of a toll bridge would exercise" instead of "such care as a person of ordinary prudence would exercise," although unhappily worded, is not misleading or ground for reversal. *Gibler v. Terminal R. Assoc.* (Mo.), 11-1194.

In an action against a toll-bridge company for negligence in allowing snow, ice, and slush to accumulate on its bridge whereby the plaintiff was caused to fall and was injured, a part of an instruction given for the plaintiff which, without qualification, might be construed as allowing the plaintiff to recover if he stepped on the ice and slush on the sidewalk of the bridge, without requiring the jury to find first that such ice and slush formed a dangerous obstruction to pedestrians in passing over said sidewalk, is not objectionable where the instruction goes further and makes the liability of the defendant depend on a finding "that the defendant did not exercise ordinary care in so maintaining said sidewalk with said ice and slush thereon, and in so permitting said ice and slush to be on said sidewalk," especially where the conditions of the defendant's liability are fully stated in an instruction given at the instance of the defendant. *Gibler v. Terminal R. Assoc.* (Mo.), 11-1194.

In an action against a toll-bridge company for negligence in allowing snow, ice, and slush to accumulate on its bridge whereby the plaintiff was caused to fall and was injured, evidence examined and held to require submission to the jury of the issues of negligence and contributory negligence. *Gibler v. Terminal R. Assoc.* (Mo.), 11-1194.

BRIEFS OF COUNSEL.

Improper language in brief. — A brief can in no case be used as a vehicle for expressing hatred, contempt, insults, disrespect, or professional discourtesy of any nature for or to the court of review, trial judge, or opposing counsel, and a brief which is so used will be stricken from the files of the court. *Pittsburgh, etc., R. Co. v. Muncie, etc., Traction Co.* (Ind.), 9-165.

BROKAGE.

See **BROKERS**.

Marriage brokerage contracts, see **CONTRACTS**, 4 a.

BROKERS.1. **REAL ESTATE BROKERS**, 404.

- a. Employment, 404.
- b. Authority, 404.
- c. Right to compensation, 404.
- d. Failure to secure license, 405.
- e. Actions for commissions, 405.

2. **MERCHANDISE BROKERS**, 406.3. **STOCK BROKERS**, 406.

See **FACTORS**.

Employment of broker to purchase or sell as within statute of frauds, see **FRAUDS**, **STATUTE OF**, 4 c; 10.

Marriage brokerage contracts, see **CONTRACTS**, 4 a.

Stockbroker as pledgee of stock purchased for customer, see **PLEDGE AND COLLATERAL SECURITY**, 1.

Ticket brokers, see **CARRIERS**, 6 c (2); **THEATRES AND PUBLIC RESORTS**, 2 a.

Ticket brokers, regulation of, see **CONSTITUTIONAL LAW**, 5 c; **MUNICIPAL CORPORATIONS**, 5 f (2).

1. **REAL ESTATE BROKERS.**a. **Employment.**

Consideration of contract. — Where one employs another as agent to sell land for remuneration on performance, the contract is based on a consideration and is mutually binding. *Rowan v. Hull* (W. Va.), 2-884.

Necessity of signature by agent. — A written proposition to employ one as agent to sell land, signed by the proposer and accepted by the agent, though not signed by the latter, makes a binding contract of agency enforceable against both parties. *Rowan v. Hull* (W. Va.), 2-884.

b. **Authority.**

Authority to make agreement of sale. — A real estate broker who has lands listed with him for sale is only authorized to find a purchaser and submit a proposition, and cannot make an agreement of sale unless authorized in writing. *Halsell v. Renfrew* (Okla.), 2-286.

A real estate broker who is employed to find a purchaser for land, or with whom land is listed for sale at a specified price, has no implied authority to execute a contract of sale. *Larson v. O'Hara* (Minn.), 8-849.

A broker employed to sell real estate is not entitled to his agreed commission, unless he procures a purchaser on the terms specified in his contract of employment. *Stoutenburgh v. Evans* (Iowa), 19-1048.

Authority to give option. — A power

to sell land does not include the power to give an option unless so expressed. *Tibbs v. Zirkle* (W. Va.), 2-421.

An option, not authorized by written power to sell, is not binding on the landowner or a co-agent under such power to sell without express ratification. *Tibbs v. Zirkle* (W. Va.), 2-421.

A co-agent under a power to sell is not bound by an unauthorized option not given or ratified by himself, and if he purchase the land for himself he cannot be held as a trustee for the claimant under such option. *Tibbs v. Zirkle* (W. Va.), 2-421.

Agent to find buyer. — An agent employed to sell real estate, and not authorized to execute a contract of sale or to execute an instrument of conveyance, is only an agent to find a buyer. *Manker v. Tough* (Kan.), 17-208.

Exclusive authority to sell. — A provision in a contract for the sale of property between the owner thereof and a real estate agent that the contract is to "continue in force until ten days' notice is given in writing withdrawing the same from market," does not confer upon such agent the exclusive right to sell the property, especially where the construction placed upon such contract by the correspondence of the parties shows that such exclusive right is not contemplated, and if such agent procures a purchaser for the property, after a sale thereof has been consummated by another agent, the former is not entitled to recover commissions from the owner. *Henning v. Parsons* (Va.), 15-765.

Revocation of authority. — Where the owner of real estate confers authority upon an agent to sell the real estate at a certain price, an agency for that particular purpose is established which is presumed to continue until the sale is effected, and upon suit by the agent for his commission for making the sale, the burden is upon the principal to show that the agency had been terminated by revocation or otherwise, and this burden is not sustained by proof of the lapse of ten years between the beginning of the agency and the accomplishment of its purpose. *Hartford v. McGillicuddy* (Me.), 12-1083.

Agency coupled with interest. — Mere commission or reward to be earned by an agent in executing an agency to sell land does not alone make the agency one coupled with an interest. *Rowan v. Hull* (W. Va.), 2-884.

c. **Right to compensation.**

In general. — To entitle a real estate broker to his commissions for making a sale of property, not only is it necessary for him to produce a purchaser who enters into a valid and binding contract for the purchase of the property, but such purchaser must be ready, willing, and able to perform his contract. *Riggs v. Turnbull* (Md.), 11-783.

A real estate broker must find a purchaser able, ready, and willing to complete the purchase on the terms agreed, before he is entitled to his commissions. *Notkins v. Pashalinski* (Conn.), 20-1023.

Broker to find purchaser merely.

A broker whose undertaking merely is to find a purchaser for property at a price fixed by the vendor or at a price which shall be satisfactory to the vendor when he and the purchaser meet, is in reality only a middleman whose duty is performed when the buyer and seller are brought together. *Johnson v. Hayward* (Neb.), 12-800.

Sale not consummated.—When a real estate broker is entitled to commissions for a sale not actually consummated. *Colburn v. Seymour* (Colo.), 2-182.

Sale prevented by fault of owner.

Where a real estate broker procures and produces a purchaser, ready, willing, and able to complete the purchase on the authorized terms, and through the fault of the owner the sale is not consummated, the broker is entitled to his commission. *Hartford v. McGillicuddy* (Me.), 12-1083.

Refusal of seller to complete sale.

Where a real estate broker has found a purchaser able, ready, and willing to buy on the terms agreed, the capricious refusal of the seller to consummate the sale will not deprive the broker of his commissions. *Notkins v. Pashalinski* (Conn.), 20-1023.

Purchaser unable to perform contract.—A real estate broker who has undertaken the sale of property is not entitled to recover his commissions where the person procured as a purchaser, after signing a written contract of purchase and paying a part of the consideration in cash, declares his total inability to perform the contract, which is thereupon canceled. *Riggs v. Turnbull* (Md.), 11-783.

Sale made by owner.—Where the owner of real property who has listed property with an agent for sale at a definite price, but who has not given the agent exclusive agency, sells the property to a person who has been induced to purchase by the efforts of the agent, but the sale is made in good faith and in ignorance of those efforts, and is made for a price less than that named to the agent as the selling price, the owner is not liable for the commission which he agreed to pay the agent for the production of a purchaser who was ready, able, and willing to buy. *Quist v. Goodfellow* (Minn.), 9-431.

Secret contract with vendee's agent.

—A contract between a real estate agent acting for the vendor and similar agents acting for the vendee to share between them the difference between the price paid by the vendee and the price received by the vendor, such contract being unknown to the vendee, is not enforceable. *Howard v. Murphy* (N. J.), 1-571.

Sale under option in lease.—Where a real estate broker, employed to make a sale of land, effects a lease of land under a contract whereby the lessee is given an option to purchase, and the lessor agrees to pay commissions as for a sale in the event the option is exercised, the broker is entitled to his commission upon a sale of the land to the lessee. *Coates v. Locust Point Co.* (Md.), 5-895.

Right as between different brokers.

—As a general rule, where an owner puts his property in the hands of several real estate agents to sell, the agent who first procures a purchaser is entitled to his commissions to the exclusion of the other agents. *Henning v. Parsons* (Va.), 15-765.

d. Failure to secure license.

Effect on validity of contract.

Where, under a statute which authorizes cities of the third class to impose a license-tax upon "real estate agents," the council of such city enacts an ordinance imposing a license-tax on the business of "real estate," and a real estate agent thereafter continues to conduct his business within such city without a license and in such business makes a contract to find a buyer of real estate for a compensation, such ordinance does not render the contract illegal and void. *Manker v. Tough* (Kan.), 17-208.

Effect on right to commissions.

—A real estate broker is not prevented from recovering his commissions on sales by the fact that he has not taken out the license required by the Maryland statute, as the purpose of that statute is to raise revenue, and not to invalidate contracts. *Coates v. Locust Point Co.* (Md.), 5-895.

d. Actions for commissions.

Statute of limitations.—Where a real estate broker, employed to sell land, leases it under a contract giving the lessee the option to purchase, and the lessor agrees to pay commissions as for a sale in the event the option is exercised, the statute of limitations does not begin to run against the right to recover the commissions until the option is exercised. *Coates v. Locust Point Co.* (Md.), 5-895.

Action against purchaser.—Where a real estate broker enters into a contract with a prospective purchaser of land to go with him to see the land and the owner, and it is agreed that the broker is to look to the owner of the land for his commission in case a purchase is made, and a contract for the purchase of the land is accordingly entered into, the vendor agreeing in the presence of the purchaser to pay the agent a certain commission when the purchaser fully pays for the land, the agent may maintain an action against the purchaser for breach of his contract and recover damages in the sum of the commission he was to have received from the vendor. *Eells v. Parsons* (Iowa), 11-475.

Burden of proof.—The burden of proof as to the financial ability of a purchaser produced by a real estate broker when the principal has refused to consummate the sale. *Colburn v. Seymour* (Colo.), 2-182.

Sufficiency of evidence to sanction recovery.—In an action by a real estate broker for a commission for effecting a sale of property, evidence examined and held to support special findings of the jury that the plaintiff was authorized to sell the land in question for the price obtained and that he

had procured a purchaser at such price. *Hartford v. McGillieuddy* (Me.), 12-1083.

Measure of recovery.—In an action by a real estate broker to recover commissions for the sale of land brought about by him, he is entitled to recover commissions on the portion of the purchase price which was paid before the commencement of the action, whether or not he is entitled to recover on the portion which was not due and payable and was not paid at that time. *Coates v. Locust Point Co.* (Md.), 5-895.

2. MERCHANDISE BROKERS.

Who are merchandise brokers.—A person who negotiates the sale of merchandise of which he has not actual or constructive possession is a merchandise broker and not a factor. *J. M. Robinson, etc., Co. v. Corsicana Cotton Factory* (Ky.), 14-802.

Where a particular transaction constitutes a person a merchandise broker his relation to such transaction is not affected by the fact that on his letter heads he styles himself "commission merchant." *J. M. Robinson, etc., Co. v. Corsicana Cotton Factory* (Ky.), 14-802.

Authority to receive payment.—In the absence of express or implied authority to receive payment for merchandise sold by a merchandise broker for his principal, payment by the purchaser to such broker does not discharge the purchaser from liability to the principal. *J. M. Robinson, etc., Co. v. Corsicana Cotton Factory* (Ky.), 14-802.

3. STOCK BROKERS.

Ownership of stock purchased on margin.—A stockbroker who purchases and carries stock for his customer on margin is essentially a pledgee and not the owner of such stock. *Richardson v. Shaw* (U. S.), 14-981.

An agreement between a stockbroker and his customer that all stock purchased for the latter on margin may be pledged by the broker for his own benefit and may be sold for his protection does not convert the broker into an owner of the stock. *Richardson v. Shaw* (U. S.), 14-981.

The redemption by the stockbroker, while insolvent, of stock pledged by him pursuant to such an agreement, and the delivery of such stock to his customer upon demand, does not have the effect of making the customer a preferred creditor within the meaning of the bankruptcy law. *Richardson v. Shaw* (U. S.), 14-981.

BROTHER.

Meaning of word brother in statute, see STATUTES, 4 d.

Right of illegitimates to inherit, see DESCENT AND DISTRIBUTION, 5 b.

BUCKET SHOPS.

See GAMING AND GAMING HOUSES.

BUILDER.

Insurable interest in building, see INSURANCE, 5 d (1).

BUILDING AND LOAN ASSOCIATIONS.

1. DUES.
2. WITHDRAWALS.
3. LOANS.
4. USURY.
5. INSOLVENCY AND DISSOLUTION.

1. DUES.

Waiver of by-law regarding payment.

—A building and loan association may, by a course of dealing within the power of its directors to authorize and known to and acquiesced in by them, depart from a by-law adopted by it requiring the payment of dues to be made to a specified committee at a stated time and place. *Louchheim v. Somerset B. & L. Assoc.* (Pa.), 3-728.

Burden of proving waiver of by-law.

The burden of proof is upon a person asserting that a by-law requirement as to the payment of dues has been waived by a building and loan association to show such circumstances covering a long period of time and known to and sanctioned by the directors as will justify the presumption that the requirement as to the time and place of the payment and the person to whom the dues shall be paid has been waived. *Louchheim v. Somerset B. & L. Assoc.* (Pa.), 3-728.

Sufficiency of evidence to show waiver.—Evidence held sufficient to show a waiver of a building and loan association of a by-law requiring the payment of dues to be made to a specified committee at a specified time and place. *Louchheim v. Somerset B. & L. Assoc.* (Pa.), 3-728.

2. WITHDRAWALS.

Right of withdrawal after insolvency.

—Though the charter and by-laws of a building and loan association authorize the stockholders to withdraw from the association, the association's insolvency suspends the right of the withdrawal, in the absence of an express provision to the contrary. *Aldrich v. Gray* (U. S.), 8-832.

Where the charter and by-laws of a building and loan association do not permit the withdrawal of the stockholders after the association has become insolvent, a withdrawal after the insolvency is not validated by its subsequent ratification by the association's board of directors. *Aldrich v. Gray* (U. S.), 8-832.

Action against withdrawing stockholders.—It cannot be objected that a receiver of a building and loan association is not a proper party to bring suit against the stockholders of an association who have withdrawn since the association has become insolvent, where it appears that the court ap-

pointing the receiver directed him to take possession of the association's assets, including its choses in action, and to bring such suits as were necessary for their recovery, and that the court further directed the receiver "to file this bill, and prosecute the suit thereon in his own name." *Aldrich v. Gray* (U. S.), 8-832.

3. LOANS.

By-law regulating auction of funds.

— The by-law of a building and loan association, providing for making loans by auctioning its funds, on a certain night in each month, to the bidder of the highest premium, and that no loan shall be made to a second bidder on the same evening for a premium lower than the successful bid, does not prevent a second auction of funds on the same evening. *Spithover v. Jefferson Bldg, etc., Assoc. (Mo.),* 20-1248.

4. USURY.

Constitutionality of exempting statute.

— The Ohio statute exempting building and loan associations from usury laws is constitutional. *Cramer v. Southern Ohio Loan, etc., Co. (Ohio),* 2-990.

The Missouri statute (Rev. St. 1889, § 2814) providing that no premiums, fines, or interest on such premiums that may accrue to a building and loan association on its loans shall be deemed usurious does not contravene a constitutional provision (Const., art. 4, § 59) prohibiting local or special laws fixing the rate of interest; and therefore a contract for a premium does not violate the general statute against usury. *Spithover v. Jefferson Bldg., etc., Assoc. (Mo.),* 20-1248.

Construction of exempting statute.

— Under the provisions of the Ohio statute exempting building and loan associations from usury laws, the premium for a loan if reasonable need not be ascertained by competitive bidding but may be fixed at a uniform rate by the constitution and by-laws of the association. *Cramer v. Southern Ohio Loan, etc., Co. (Ohio),* 2-990.

Where the statute under which a building and loan association is incorporated expressly excepts from the operation of the usury laws fines, monthly payments, and premiums, exacted from borrowing members, it cannot be contended that a bond and mortgage requiring such payments are infected with usury. *Preston v. Rockey (N. Y.),* 7-315.

What contracts subject to usury laws.— Where there are absence of competitive bidding for the loan, a level rate of interest, premiums payable in gross instalments, and circumstances indicating that the borrower did not become a member of the building and loan association, such facts show that the transaction was not a building and loan contract but simply a loan subject to the usury laws. *Royal Loan Assoc. v. Porter (Kan.),* 1-794.

Recovery back of usurious exactions.

— Where a borrower from a building and loan association has been induced to pay ex-

cessive interest by the fraudulent representations of an officer of the association, his remedy is a suit in equity for an accounting and not an action at law to recover the sums paid as usurious exactions. *Beach v. Guaranty Sav., etc., Assoc. (Oregon),* 1-418.

A building and loan association contract requiring the payment of a fixed monthly premium on a loan for an indefinite period of time is usurious, and the borrower may recover an excess paid by him over the amount of the debt and legal interest. *Harper v. Middle States Loan, etc., Co. (W. Va.),* 2-42.

A borrower from a building and loan association who knowingly pays excessive interest is precluded from recovering the same thereafter. *Beach v. Guaranty Sav., etc., Assoc. (Oregon),* 1-418.

5. INSOLVENCY AND DISSOLUTION.

Settlement with borrowing members

— "earned premium."—On foreclosure by the receiver of an insolvent building and loan association against a borrowing member who has paid dues and assessments promptly until the association was dissolved by the appointment of a receiver, through no fault of such member, the receiver is not entitled to charge the member with the so-called "earned premium" where such premium is in the form of a deduction from the sum loaned. *Ottensoser v. Scott (Fla.),* 4-1076.

Attorney's fees on foreclosure of mortgage.—On foreclosure by the receiver of an insolvent building and loan association, attorney's fees are properly allowed, the mortgage providing that the borrowing member "promises and agrees to pay a reasonable sum of money for solicitor's fees that may be incurred by the association in the event that foreclosure of this mortgage becomes necessary." *Ottensoser v. Scott (Fla.),* 4-1076.

Credits for value of stock.—On a settlement with an insolvent building and loan association borrowing members are not entitled to be credited with the full face or book value of their stock, but only for such *pro rata* amount thereof as the actual conditions may warrant, based on the net assets in the hands of the receiver. *Ottensoser v. Scott (Fla.),* 4-1076.

Estoppel to contest scheme of settlement.

— Borrowing members of an insolvent building and loan association are not estopped from contesting a scheme of settlement agreed on by a majority of the stockholders and adopted by the court on bill filed by certain other members, borrowers, and nonborrowers, on behalf of themselves and others similarly situated against the association, as sole defendant, none of the complainants being in exactly the same class as such borrowing members. Nor do the facts that such borrowing members filed protest against the proposed scheme, and were represented by counsel who argued in support of the protest, constitute *res judicata*, it not appearing that they intervened or were in position to control the cause or to appeal therefrom or that

any action was taken by the court upon the protest. *Ottensoser v. Scott* (Fla.), 4-1076.

Termination of contracts. — Where a building and loan association becomes insolvent and unable to continue in business, borrowing shareholders should be relieved from their contracts with the association as of date of the appointment of a receiver, and equitable adjustment should then be made. *Preston v. Rockey* (N. Y.), 7-315.

Credits for interest and premiums. — In a settlement by an insolvent building and loan association with a borrowing member, sums paid by the member and charged to him for dues and interest on account of premium before insolvency, and sums paid by him as interest on account of an underlying mortgage in excess of the rate paid by the association, cannot be credited on his bond and mortgage, but he can only get relief therefor as a shareholder with other shareholders. *Preston v. Rockey* (N. Y.), 7-315.

In a settlement between an insolvent building and loan association and a borrowing member, the member is entitled to credit on the mortgage debt for all payments of interest, premiums, and dues which have been made by him under the mortgage. *Preston v. Woodland* (Md.), 10-389.

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BURGLARY.

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1. WHAT CONSTITUTES.

Entry effected by force. — If any force at all is necessary to effect an entrance into a building through any usual or unusual place of ingress, whether open, partly open or closed, such entrance is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present. *People v. White* (Mich.), 15-927.

Pushing up partly opened window. — An entrance into a building effected by pushing up, far enough to admit the body, a window found raised a couple of inches from the bottom, constitutes burglary within the above rule. *People v. White* (Mich.), 15-927.

Opening screen door. — In a prosecution for burglary, an instruction in the following terms is properly given: "The court instructs the jury that if they find from the evidence that the screen door mentioned in the evidence was kept closed by means of hinges and springs attached to the same in such manner that some force was necessary to open said

door and that the defendants opened said door by using such force, then the jury can find that there was a breaking of the dwelling-house mentioned in the evidence." *State v. Henderson* (Mo.), 15-930.

Rolling back door of freight house. — Rolling back the door of a freight house, which is closed, and entering the opening so made, for the purpose of committing larceny, constitutes breaking and entering within the meaning of the statute relative to that offense. *State v. Richmond* (Iowa), 16-457.

Entry obtained by fraud. — Where a person whose clothes are in another's house, but who has no right, except with the latter's consent, to enter such house to remove them, obtains the key of the house under the pretense of desiring to remove his clothes, but in reality for the purpose of stealing from the house, the entry of the house thus fraudulently effected and the larceny of goods therefrom renders such person guilty of house-breaking. *Young v. Commonwealth* (Ky.), 15-1022.

2. INDICTMENT OR INFORMATION.

Ownership of building entered. — An information charging burglary in the second degree and larceny, which fails to allege the ownership of the building broken and entered, is fatally defective in so far as the charge of burglary is concerned. *State v. James* (Mo.), 5-1007.

Corporate character of owner of property. — An information charging burglary of the depot of a named railroad company and larceny of the goods of a named express company is fatally defective where it does not allege whether the said railroad company was a corporation or a copartnership or whether the said express company was a corporation or a firm of individuals. *State v. Kelley* (Mo.), 12-681.

Specification of felony intended to be committed. — An indictment framed under section 6835, revised statutes, as amended and passed April 9, 1908, which, in all other respects, sufficiently describes and charges an attempt to break and enter an inhabited dwelling house with intent to commit a felony, will not be held bad for omission to designate and define the particular felony intended to be committed. *State v. Groves* (Ohio St.), 17-361.

3. VENUE.

County into which stolen goods are brought. — The Washington statute (Bal. Code, § 6791) authorizing a prosecution for burglary to be maintained in any county into which the stolen goods have been brought violates the constitutional guaranty (Const. Wash., art. 1, § 22) of trial by a "jury of the county in which the offense is alleged to have been committed." *State v. Carroll* (Wash.), 19-1234.

4. EVIDENCE.

Possession of stolen goods. — In a prosecution for burglary, evidence of possession of the stolen goods by the defendant

soon after the burglary was committed, when supplemented with other facts inconsistent with the idea that the possession was honest, is sufficient to sustain a conviction. *State v. Sparks* (Mont.), 19-1279.

Identity of property. — In a prosecution for burglary and larceny where the prosecuting witness identifies as his property goods found in the defendant's possession, and his testimony is not contradicted, there is sufficient evidence to enable the jury to determine whether or not the goods found in the possession of the defendant were in fact the goods stolen from the prosecuting witness. *State v. James* (Mo.), 5-1007.

Possession of similar property by accused. — In a prosecution for burglary, hearsay evidence to the effect that the accused had in his possession prior to the date of the burglary property of the same kind as that stolen is incompetent and properly rejected. *State v. Boyce* (Wash.), 3-351.

Pawn ticket for stolen property. — In a prosecution for burglary, a pawn ticket taken from the person of the accused while in custody and before being charged with the crime is competent evidence, even though the taking may have been illegal. *State v. Royce* (Wash.), 3-351.

Foot-prints near scene of crime. — In a prosecution for burglary, evidence that there were tracks near the scene of the crime which were of the same length and width as shoes taken from the defendant's house and which the defendant admitted were his, is competent. *Hargrove v. State* (Ala.), 10-126.

Other burglaries. — On the trial of an indictment for burglary, where the accused offers no evidence explanatory of his possession of the stolen property, it is reversible error to admit evidence on behalf of the prosecution concerning other burglaries, the fruits of which are also found in the possession of the accused. *Saldiver v. State* (Tex.), 16-669.

Sufficiency to warrant conviction. — Evidence reviewed in a prosecution for burglary and held to justify the trial court in refusing to rule that the lapse of two months between the time of the burglary and the time of the defendant's arrest with the stolen articles upon his person was so great as absolutely to repel any presumption that the prisoner was concerned in the burglary, and to warrant the jury in drawing an inference of guilt. *Rex v. Burdell* (Ont.), 6-454.

In a prosecution for burglary, evidence tending to show that the defendants were present in the front yard of the house wherein the burglary is alleged to have been committed, that shortly thereafter they were seen going together from such house in the direction of a nearby town, and that the stolen goods were found upon their persons when they were overtaken by the owner of the house, there being no satisfactory explanation of the manner in which they came into possession thereof consistent with their innocence, is sufficient to sustain a conviction for burglary. *State v. Henderson* (Mo.), 15-930.

Evidence given in a prosecution for burglary examined and held sufficient to justify the court in submitting to the jury the question of the guilt or innocence of the accused. *State v. Royce* (Wash.), 3-351.

5. INSTRUCTIONS.

Possession of stolen property by accused. — In a prosecution for burglary and larceny it is proper to instruct the jury as to the presumption arising from the defendant's recent possession of the stolen property, where there is sufficient testimony upon which to predicate such an instruction. *State v. James* (Mo.), 5-1007.

In a prosecution for burglary where the defendant has not testified, an instruction as to the unexplained possession of the stolen property by the defendant held not open to the objection that the prisoner might have given evidence in his own behalf or that an inference unfavorable to him may be drawn from the fact that he has not done so. *Rex v. Burdell* (Ont.), 6-454.

6. SENTENCE AND PUNISHMENT.

Excessive punishment. — A sentence of three years and nine months imprisonment for the crime of breaking and entering cannot be deemed excessive, where the maximum punishment imposed by statute for the offense is ten years imprisonment, and where the defendant offers no excuse for his crime and there are no palliating circumstances, save that he has offered to replace the stolen property. *State v. Richmond* (Iowa), 16-457.

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Retroactive by-laws, see BENEVOLENT OR BENEFICIAL ASSOCIATIONS, 5 c.

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CANALS.

1. CANAL COMPANIES.

2. CANALS AS NAVIGABLE WATERS.

Construction of irrigation canals, see EMINENT DOMAIN, 4 b.

Rights acquired by canal company in condemnation proceedings, see EMINENT DOMAIN, 8.

1. CANAL COMPANIES.

Powers. — An agreement by a canal company, as part of the consideration for a strip of land purchased by it for canal purposes, to construct a basin on such land, is not *ultra vires*. *Dawson v. Western Maryland R. Co.* (Md.), 15-678.

Duty to maintain bridges. — A canal company required by a charter to make good and sufficient bridges across a canal and keep the same in repair cannot relieve itself of such duty by leasing the canal, property, and franchises to a railroad company. *Ryerson v. Morris Canal, etc., Co.* (N. J.), 2-859.

Injury to adjoining land. — It is an actionable wrong for the owner of a canal to damage adjoining real property by throwing sand and mud thereon; and when the damage is of a permanent character recovery for the entire wrong may be had in one action. *Cherry v. Lake Drummond Canal, etc., Co.* (N. Car.), 6-143.

2. CANALS AS NAVIGABLE WATERS.

Canal connecting navigable streams.

— In view of the various statutes of the state of South Carolina relative thereto, which show that the Columbia canal was constructed by the state and used for many years as an improvement of the navigation of two navigable streams, the Broad and Congaree rivers, it must be held that such canal is a navigable body of water. Conceding that a stream not naturally navigable but made so by artificial means is not navigable in a legal sense, the rule, nevertheless, is that a canal constructed to improve the navigation of navigable streams is navigable water, although artificial in its construction. *State v. Columbia Water Power Co.* (S. Car.), 17-343.

Estoppel to deny navigability. — The contractual obligations assumed from time to time by the various lessees and transferees of the canal above mentioned, to keep the same open for navigation, estop them, and all parties claiming under them, from denying the navigable character of the canal and from claiming the right to obstruct the same. *State v. Columbia Water Power Co.* (S. Car.), 17-343.

Effect of cessation of user. — The fact that such canal has not been used for navigation for a number of years does not affect its character as a navigable body of water. The navigability of water does not depend upon its actual use for navigation, but upon its capacity for such use. *State v. Columbia Water Power Co.* (S. Car.), 17-343.

Effect of charging tolls. — The character of such canal as navigable water is not affected by the fact that at one time tolls were charged for its use. *State v. Columbia Water Power Co.* (S. Car.), 17-343.

Enjoining obstruction. — In a proceeding by the state, on the relation of the attorney general, to enjoin the obstruction of such canal, it is no defense that the canal is unfinished, or that there is no navigation thereon except by pleasure boats and that no commercial use is to be anticipated. *State v. Columbia Water Power Co.* (S. Car.), 17-343.

In such a proceeding, it is no defense that the obstruction of the canal will be nothing more than a public nuisance, and that the state has an adequate remedy therefor by indictment. The remedy by indictment, while always available for the abatement of a public nuisance, is not exclusive, nor is it, in general, an adequate remedy. Moreover, the obstruction of such a canal is not merely a nuisance, but constitutes an invasion of a property right of the state, namely, the right of unobstructed navigation of its navigable waters, which it holds in trust for the people of the state and of the United States, and where an invasion of such right is clearly shown, a court of equity will not hesitate to grant an injunction. *State v. Columbia Water Power Co.* (S. Car.), 17-343.

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1. GROUNDS OF REMEDY.

Breach of contract. — A deed conveying land in consideration of marriage will be canceled and a reconveyance directed, by the court of equity, where the grantee has refused to consummate the marriage. *Lambert v. Lambert* (W. Va.), 19-537.

Innocent misrepresentation. — Rescission of an executed contract for the sale of a chattel or chose in action will not be granted on the ground of innocent misrepresentation, actual fraud not being shown. *Seddon v. Northeastern Salt Co.* (Eng.), 1-514.

2. RIGHTS TO RELIEF.

Plaintiff in default. — Money paid on a contract induced by fraud cannot be recovered unless the contract may be rescinded, and a rescission will not be decreed to one who was himself in default at the time of the dereliction of which he complains. *Provident Loan Trust Co. v. McIntosh* (Kan.), 1-906.

Adequate remedy at law. — The principle that equity only supplements legal remedies, making up for their infirmities, precludes a person, who has an adequate defense at law to an obligation in writing against him which is ostensibly valid but in fact void, from maintaining a suit in equity to quiet the controversy and obtain a cancellation of the instrument, except where some special circumstances exist which necessitate a resort to equity to prevent irreparable injury; and fraud does not of itself necessarily satisfy the call for special circumstances. *Johnson v. Swanke* (Wis.), 8-544.

It cannot be said, either that the element of fraud entitles the injured party to a written instrument, as a matter of right, to the use of equity jurisdiction to cancel the instrument, where his defense at law would be full and adequate, or that under such circumstances the granting or denial of permission to use equity jurisdiction is a matter within mere judicial discretion. It is a matter to be determined by judgment as regards whether there are special circumstances rendering the legal remedy not wholly adequate to the case; and the determination reached by the trial court in the exercise of its discretion should not be reversed unless clearly wrong, but where the special circumstances are found to exist, the use of equity jurisdiction should be regarded as a matter of right. *Johnson v. Swanke* (Wis.), 8-544.

Where the purchaser of a horse has a good defense to any action at law that may be brought against him on a note given by him for the purchase price, he cannot invoke the jurisdiction of equity to cancel the note on the ground that the horse is a useless animal and will continue to be a source of expense to him, as, after he has offered to return the animal, and the offer has been refused by the seller, he may sell it for the best price fairly obtainable, reimburse himself out of the proceeds, and hold the balance for the use of the seller. *Johnson v. Swanke* (Wis.), 8-544.

Restoration of benefits. — A party seeking to rescind a contract is not relieved of the obligation to restore the benefits received by him merely because of his inability to do so, and it is not sufficient, under such circumstances, to offer to set off the amount against what is claimed from the other party. *Babcock v. Farwell* (Ill.), 19-74.

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1. WHO ARE COMMON CARRIERS.

Corporation furnishing messenger as carrier of money. — There is no presumption that a common carrier engaged in the business of transporting parcels within a city by means of messengers assumes to act as a common carrier in the transportation of money, and one alleging the assumption of that status must affirmatively prove it. *White v. Postal Tel., etc., Co.* (D. C.), 4-767.

If a common carrier engaged in the business of transporting parcels within a city by means of messengers does not customarily transport money, it will not be liable, in the absence of notice, for the loss of money contained in an envelope delivered to a messenger in its employ; and the acceptance by the carrier of a fee for the service of its messenger is not such a ratification of the messenger's act in undertaking to transport the money safely as will make it liable. *White v. Postal Tel., etc., Co.* (D. C.), 4-767.

A corporation engaged in the business of furnishing messengers in a city for hire, but which does not assume any control of the work in which the messengers are to be employed, is not a common carrier, and is not, in the absence of a special contract, liable to a person to whom it furnishes a messenger for the latter's failure to return money which he is sent to collect, unless the corporation fails to exercise due care in the selection of the messenger. *Haskell v. Boston District Messenger Co.* (Mass.), 5-796.

Transportation of live stock. — The common carrier of goods which transports live stock is as to the latter property also a common carrier. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

Railroad company carrying express matter. — A railroad company does not sustain the relation of common carrier to an express company, but the right of the latter company to the transportation furnished it depends solely on the contract between the two, and a messenger of the express company, by accepting his employment with knowledge of the provisions of a contract between the express company and the railroad company whereby the latter is released from liability for injuries to the employees of the former, assents to such contract, though he does not by that act alone waive his right to assert a liability against the railroad company. *Robinson v. St. Johnsbury, etc., R. Co.* (Vt.), 12-1060.

Passenger elevator in private building. — A landlord who maintains a passenger elevator in his private building is not a common carrier, and is not an insurer of the

safety of persons using the elevator. *Edwards v. Manufacturers' Bldg. Co.* (R. I.), 8-974.

2. REGULATION AND CONTROL OF COMMON CARRIERS.

a. In general.

Constitutional regulation. — The provision of the Utah constitution that "all railroad and other transportation companies are declared to be common carriers, and subject to legislative control; and [that] such companies shall receive and transport each other's passengers and freight without discrimination or unnecessary delay," requires merely that transportation companies shall not show favoritism to their own passengers or shippers over the passengers and freight coming from other lines, and does not prohibit a carrier from protecting its passengers from annoyance and interference by others who may desire to solicit the business and patronage of such passengers, or prevent the carrier from providing means by which a passenger may make arrangements for the transportation of himself or his property beyond the end of the carrier's railroad. *Oregon Short Line R. Co. v. Davidson* (Utah), 14-489.

Duty to public. — While a discretion is allowed a common carrier corporation in the means and manner of the discharge of the duties it owes to the public, such discretion must be exercised in good faith and with reasonable regard for the requirements of the public service. When all the necessary facilities are furnished and operated so as to reasonably meet the just requirements of the public service the law in that regard is satisfied. *State ex rel. Ellis v. Atlantic Coast Line R. Co.* (Fla.), 12-359.

The power and duty of a state to require the property of a common carrier corporation devoted to the public service within its borders to be maintained in a reasonably safe and adequate condition, and to be properly operated for rendering the public service to which the property is devoted by its corporate owner, are inherent and reserved in the state for the necessary protection and benefit of the lives and property within its territory. *State ex rel. Ellis v. Atlantic Coast Line R. Co.* (Fla.), 12-359.

Separate classification of railroads.

— The legal duties of persons, firms, or corporations operating railroads may be of a peculiar nature and essentially different from the duties of other common carriers, and as to such matters they may be separately classified for purposes of legislative regulation. *Seaboard Air Line R. v. Simon* (Fla.), 16-1234.

Where the subject of legislative regulation, as in the Florida statute, is payment for goods lost in transit by a common carrier, a subject as to which the legal duties of all common carriers are similar, and there appears to be no reasonable basis for imposing the burden of the regulation upon railroads only, the statute provides for an unreasonable classification that in effect denies to

those operating railroads due process of law and the equal protection of the laws in violation of constitutional rights, and is inoperative. *Seaboard Air Line R. v. Simon* (Fla.), 16-1234.

Prohibiting crowding of cars. — A statute making it an offense for a street railway company to fail to supply a sufficient number of cars to accommodate all persons desirous of using the cars "without crowding said cars," but which does not define "crowding" (Act Cong. May 23, 1908, § 16) is too indefinite and uncertain to be enforced, since an indictment under it would not comply with the constitutional requirement (Const. U. S., Amendment 6) that the accused shall "be informed of the nature and cause of the accusation." *United States v. Capital Traction Co.* (D. C.), 19-68.

Prohibiting solicitation of business on trains, etc. — The Arkansas statute (Acts 1907, p. 553) which prohibits the solicitation of business of certain kinds on the cars, etc., and at the stations of common carriers of passengers, is not in derogation of the right of personal liberty, but is a valid exercise of the police power. *Williams v. Arkansas* (U. S.), 18-865.

Such statute, in forbidding the soliciting of business for any "hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner," being applicable alike to all persons similarly situated, is not subject to the objection that it denies the equal protection of the law to persons engaged in the occupations mentioned. *Williams v. Arkansas* (U. S.), 18-865.

Statutory penalty for refusal to receive goods. — The North Carolina statute (Revisal 1905, § 2361) imposing a penalty on a common carrier which refuses to accept freight tendered for shipment, is not invalid as unlawfully regulating, or imposing a burden on interstate commerce, but is a valid regulation in direct and reasonable enforcement of the duties incumbent on common carriers. *Reid v. Southern R. Co.* (N. Car.), 17-247.

It seems that a statute imposing a penalty upon common carriers for refusal to receive freight tendered for shipment, and permitting no defense and no excuse however just and reasonable, would be invalid as authorizing a taking of the property of the carrier without due process of law. *Murphy Hardware Co. v. Southern R. Co.* (N. Car.), 17-481.

Penalty for failure to pay claims. — The Florida statute (Acts 1907, c. 5618) imposing a penalty on "all common carriers" in the state for failing to pay certain claims within a specified time after presentation is valid as making a classification in accordance with the constitutional requirements as to due process of law and equal protection of the laws. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

The constitutional provision for equal protection of the laws (Bill of Rights Fla., § 1; Const. U. S., Amendm. 14) is not violated by the Florida statute (Acts 1907, c. 5618)

which makes common carriers liable for interest and attorneys' fees in any case where a shipper has recovered a judgment for loss of or injury to goods shipped after refusal by the carrier to pay the claim therefor, but which gives no such right to the carrier if it prevails in the action. There is a dissimilarity in the situations of carrier and shipper respectively in that the shipper assumes no duty to the public. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

The court cannot say beyond a reasonable doubt that the penalty of fifty per cent. per annum interest on the principal sum of a claim for freight or express lost or damaged by a common carrier, imposed by the Florida statute (Laws 1907, c. 5618) for failure to pay the claim within sixty days from its filing with or presentation to the common carrier, is so exorbitant and unreasonable as to render the statute unconstitutional. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

Liability dependent on amount of recovery. — Under a statute imposing a penalty on a common carrier for refusing to pay a claim for injury to goods, with a provision that unless the consignee recovers judgment for the "full amount claimed," no penalty shall be recovered, but only the actual amount of damages with interest from the date of the filing of the claim, the carrier is liable for the penalty, if the total amount of the recovery, including interest, equals the amount of the claim filed. *B. & M. White Laundry Co. v. Charleston, etc., R. Co.* (S. C.), 18-690.

Under a statute making a common carrier liable to a penalty for refusing to pay a claim within a certain time, if the claimant sues for and recovers the "full amount claimed," a carrier is liable for the penalty, though the recovery is for half a cent less than the amount of the claim, the maxim *de minimus non curat lex* being applicable to such a case. *B. & M. White Laundry Co. v. Charleston, etc., R. Co.* (S. C.), 18-690.

Attorneys' fees in action for penalty. — The maximum sum allowed by the statute as a reasonable attorney's fee in a suit against a carrier on a claim for freight or express lost or damaged where the carrier has failed to pay said claim in sixty days after its presentation is fifteen per cent. on any amount recovered greater than the sum of one hundred dollars. The amount recovered means the amount of the claim recovered and not that amount plus the fifty per cent. per annum interest also allowed by the statute. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

In a suit against a railroad company for injuries to live stock, the question whether one of the animals was thrown down in the car and injured by the negligent moving of the car, is one of fact for the referee acting as the jury. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

b. Regulation of rates.

Carriage of pupils of public schools.

— A statute requiring street railway companies to carry school children at less than regular fare is not unconstitutional because not applying to all street railway companies in the state, nor because discriminating between the pupils of public schools and other persons. *Com. v. Interstate Consol. St. R. Co.* (Mass.), 2-419.

Discriminating regulations. — The provision of the New Jersey general railroad law limiting the rates of fare for passengers to three cents per mile, in the case of railroad companies organized under that statute, and to three and one-half cents per mile in the case of railroads operated under special charters, must be construed as fixing the maximum charge which may be made by a railroad operating under a prior special charter authorizing it to charge a higher rate of fare; and as so construed the statute is not unconstitutional, as the legislature may alter the charters of railroad companies, and a discrimination between railroad companies organized under the general law and those operated under special charters is one which it is within the power of the legislature to make. *Shelton v. Erie R. Co.* (N. J.), 9-883.

Special rates for particular classes of individuals. — While a state may prescribe the maximum scale of rates for the carriage of passengers, it cannot compel a railroad company to contract with any individual or class of individuals for carriage at a charge less than the established or regular scale of fares. *Commonwealth v. Atlantic Coast Line R. Co.* (Va.), 9-1124.

Mileage books. — The Virginia statute requiring railroad companies to keep on sale at each and every station mileage books of five hundred miles and over, which shall be sold for no greater sum than two cents per mile, is a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. *Commonwealth v. Atlantic Coast Line R. Co.* (Va.), 9-1124.

Prohibition of free passes. — A contract between a railroad company and a physician, by the terms of which he is to receive for his professional services to be rendered by him for the company, at its request, the sum of twenty-five dollars a month and an annual pass over its lines of road, where the physician does not spend a major portion of his time in the employment of the company, is prohibited by the Nebraska statute (Ann. St. 1907, §§ 10664, 10665) commonly called the anti-pass law, and the acceptance and use of such a pass by the physician renders him guilty of a violation of those sections. *State v. Martyn* (Neb.), 17-659.

The provisions of said "anti-pass law," prohibiting the issuance, acceptance, and use of free transportation, are a proper and reasonable exercise of the police power of the state, and the power of the legislature to regulate the business of common carriers by preventing unjust discrimination, and are not

unconstitutional. *State v. Martyn* (Neb.), 17-659.

Powers of state corporation commission. — Under the provision of the Virginia constitution that in all matters pertaining to the public visitation, regulation, or control of corporations which are within the jurisdiction of the state corporation commission the commission shall have the powers and authority of a court of record, the commission, in a proceeding instituted by the commonwealth to compel a railway company to obey a statute fixing the maximum rate to be charged for passenger tickets, must pass judicially on any questions properly raised, including questions as to the constitutionality of the statute. *Commonwealth v. Atlantic Coast Line R. Co.* (Va.), 9-1124.

Excessive fines and penalties. — The Minnesota statutes fixing the freight and passenger rates of railroad companies and making each violation by a railroad company of the freight rate act a misdemeanor for which the officers, directors, agent, and employees of the company are subject to imprisonment in the county jail for a period not exceeding ninety days, and making the sale of each ticket in violation of the passenger rate act a felony for which the offending agent is subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment, and also rendering the company itself liable to large fines, deny the company the equal protection of the laws and operate as a taking of its property without due process of law, since the statutes allow a hearing upon the constitutionality of the rate regulations only upon a violation thereof, in which case the company and its agents would incur the risk of being subjected to the severe fines and penalties provided by the statutes in case the regulations should be sustained. *Ex p. Young* (U. S.), 14-764.

Presumption of validity of statute. — An act of a state legislature fixing freight and passenger rates for railroads is to be regarded as *prima facie* valid, and the burden rests upon a railroad to prove the contrary. *In re Young* (U. S.), 14-764.

c. Interstate commerce act.

Prohibition of preferences. — The interstate commerce act does not prohibit the giving of all preferences and advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable. *Gamble-Robinson Commission Co. v. Chicago, etc., R. Co.* (U. S.), 16-613.

Prejudice not undue or unreasonable. — The fact that a carrier, for the purpose of injuring the business of a consignee, or harassing it, subjects it to a prejudice or disadvantage which is neither undue nor unreasonable, does not change the nature of the prejudice or disadvantage or create any cause of action therefor. *Gamble-Robinson Commission Co. v. Chicago, etc., R. Co.* (U. S.), 16-613.

Demand for prepayment of freight.

— A common carrier has the right under the common law to demand the prepayment of charges for freight of one, and to give credit for them to another similarly situated; and an interstate common carrier is free to exercise all his rights under the common law to the full extent to which such exercise has not been made unlawful by the interstate commerce act. *Gamble-Robinson Commission Co. v. Chicago, etc., R. Co.* (U. S.), 16-613.

An interstate carrier does not subject a consignee to an undue or unreasonable prejudice or disadvantage under section 3 of the interstate commerce act by exacting, after due notice to such consignee, the prepayment of charges for transportation of all property consigned to it, while it does not require charges to be paid in advance on freight consigned to others similarly situated. *Gamble-Robinson Commission Co. v. Chicago, etc., R. Co.* (U. S.), 16-613.

A complaint alleging that the plaintiff is a corporation engaged in buying, selling, and dealing for commissions in fruit, vegetables, and dairy products at Minneapolis, and having offices at St. Paul, Rochester, and Mankato in Minnesota, and Aberdeen in South Dakota; that the defendant is a common carrier having railroad stations at those towns, and lines of railroad through those states and adjoining states; that it is the custom and usage of such carriers, and of the defendant, for the terminal carrier to advance the charges of connecting lines upon freight consigned to parties at those stations, to transport the freight and deliver it to the consignees, to receive freight at its stations and to transport and deliver it to the consignees, to hold the bills until the questions regarding the correctness of the charges on its lines and on the connecting lines have been adjusted, and then to collect the bills of the consignees; and that from a bad motive the defendant, after notice, refused to advance charges to connecting lines, and to receive and transport freight consigned to the plaintiff, unless the charges upon it for transportation were prepaid, while it continued to give credit to other consignees similarly situated, according to the usage and custom, does not show that the plaintiff has been subjected to undue or unreasonable prejudice within the meaning of the interstate commerce act. *Ramble-Robinson Commission Co. v. Chicago, etc., R. Co.* (U. S.), 16-613.

3. DUTY TO FURNISH TRANSPORTATION AND SHIPPING FACILITIES.

Accommodations for steerage passengers on vessels. — Steerage passengers are entitled to recover damages from the owner of the vessel where they are not furnished with sleeping accommodations or proper food, and are compelled to occupy the steerage with a large number of drunk and disorderly persons who keep the place in a filthy condition, which the officers of the vessel make no effective effort to remedy,

Northwestern Steamship Co. v. Ransom (U. S.), 20-1015.

Contract to furnish cars. — A conversation between a shipper and the agent of a carrier amounting to an agreement that the carrier will furnish the shipper a cattle car at a certain time and place to be used for the transportation of the former's live stock, is not merged in or superseded by the written live stock contract of the carrier, the subject-matter of which is the extent of the obligations of the carrier after the delivery of the animals to it for conveyance to their destination, and which is designed solely to limit the liability of the carrier after the business of transportation has begun. *Clark v. Ulster, etc., R. Co.* (N. Y.), 12-883.

Mutuality of obligation. — The request of a shipper to the agent of a carrier that the carrier will furnish him a live-stock car at a certain time and place and the promise of the agent to comply with such request is a contract which is not void for want of mutuality, on the theory that such request imposes no legal obligation on the shipper to furnish the stock for shipment or compensate the carrier for its trouble and expense in furnishing the car in case he fails to make use of it. *Clark v. Ulster, etc., R. Co.* (N. Y.), 12-883.

Freight congestion as excuse for failure to furnish cars. — It is a question for the jury whether in a given case a freight company made it impossible for a railroad company to furnish a shipper with cars under the Minnesota statute (Laws 1907, c. 23, § 11) making railroad companies liable in damages for failure to furnish cars unless the failure results from a cause "not within the power of the railroad company to prevent." *Hardwick Farmers' El. Co. v. Chicago, etc., R. Co.* (Minn.), 19-1088.

Reciprocal demurrage. — The Minnesota statute (Laws 1907, c. 23, § 11) providing for reciprocal demurrage for failure to furnish railroad cars is a valid exercise of the police power, and is not an unlawful attempt to regulate interstate commerce in the absence of legislation by Congress on the subject. *Hardwick Farmers' El. Co. v. Chicago, etc., R. Co.* (Minn.), 19-1088.

Under the Mississippi statute providing that the railroad commission "may fix all charges and shall supervise and regulate all . . . car service associations or other associations governing or controlling cars or rolling stock of railroads," the commission has power to make rules originating charges for demurrage and reciprocal demurrage, with a view to the interest of the public at large in facilitating the handling of freight, independent of any support in the common-law doctrine of demurrage. *Yazoo, etc., R. Co. v. Keystone Lumber Co.* (Miss.), 13-960.

The rule of the Mississippi railroad commission that "when cars are properly loaded, and shipping instructions given, the railroad agent must immediately issue bills of lading therefor; and if said car or cars are detained or held, and not carried forward within twenty-four hours thereafter, said railroad

company shall be liable to said shipper for the payment of one dollar per car for each day, or fraction of a day, that said car or cars thus detained or held," was adopted with reference to car associations operating in the state of Mississippi, and not elsewhere, and raises no question of interference with interstate commerce. *Yazoo, etc., R. Co. v. Keystone Lumber Co.* (Miss.), 13-960.

Attorneys' fees in action for demurrage. — The provision of a statute for reciprocal demurrage for failure to furnish railroad cars, and that railroad companies shall be liable for attorney's fees in actions by shippers under the statute, is not invalid because it imposes a charge on carriers and not on debtors generally, the statute being a proper exercise of the police power of the state, and not a denial of equal protection of the laws. *Hardwick Farmers' El. Co. v. Chicago, etc., R. Co.* (Minn.), 19-1088.

4. CARRIERS OF GOODS.

a. Delivery of goods to carrier.

Duty of carrier to receive goods. — The common-law obligation of a carrier by sea is to receive goods which it is able and accustomed to carry, in the order of their tender, without preference to any shipper. *Ocean Steamship Co. v. Savannah Locomotive, etc., Co.* (Ga.), 15-1044.

A common carrier by sea cannot lawfully reject some goods which it professes to carry, and afterwards receive and transport other goods, where at the time of the tender there is room in the vessel for the rejected goods, and the safety of the vessel will in no wise be imperiled. *Ocean Steamship Co. v. Savannah Locomotive, etc., Co.* (Ga.), 15-1044.

Goods in excess of capacity. — At common law a carrier's duty to carry is limited to its facilities for transportation. A navigation company, whose charter confers no power of eminent domain, and imposes no public duties, is not to be classed as a public or quasi-public institution, and is not bound to provide sufficient facilities to carry all goods which may be offered to it. It may decline to receive goods for transportation in excess of its carriage capacity. *Ocean Steamship Co. v. Savannah Locomotive, etc., Co.* (Ga.), 15-1044.

Booking of freight in advance. — The carrier's common-law obligation of serving the public impartially in the receipt and transportation of goods does not inhibit a carrier by sea from making "bookings" of freight—that is, from making specific arrangements for the transportation of goods by a particular vessel, in advance of its sailing day—provided this privilege is extended impartially to all patrons, or if the grant of this privilege to shippers of one commodity does not interfere with the carrier's discharge of duty to the shippers of other commodities with respect to the receipt and transportation of their goods. The same rules which govern a carrier by sea in the reception of goods for transportation apply to the carrier's engagements to transport by a particu-

lar vessel, or within a specified limit of time. *Ocean Steamship Co. v. Savannah Locomotive, etc., Co. (Ga.)*, 15-1044.

Right to select character of goods. — A carrier which is not a public institution may select the character of the goods it proposes to carry, or discontinue to carry a particular commodity. *Ocean Steamship Co. v. Savannah Locomotive, etc., Co. (Ga.)*, 15-1044.

Right of carrier as against owner. — If a person not the owner of property or entitled to its possession takes it and delivers it to a railroad for shipment, the true owner, who is no party to the contract, may, before delivery by the carrier, demand and reclaim his property; and as against an action of trover brought for that purpose against the carrier by the true owner, it furnishes no defense that the carrier refused to recognize his title or right and carried and delivered the property in accordance with the shipment. *Georgia R., etc., Co. v. Haas (Ga.)*, 9-667.

b. Transportation and delivery to consignee.

(1) What constitutes delivery.

When merchandise has been brought to the place of its destination by a common carrier, and the consignee or his agent presents the bill of lading to the carrier and receipts for all the merchandise, there is a delivery to the consignee of all the merchandise, though a part of it is left on the premises of the carrier. *State v. Intoxicating Liquors, (Me.)*, 20-668.

(2) Delay in transportation.

Duty to transport promptly. — It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly and without unreasonable delay to their destination. *Bibb Broom Corn Co. v. Atchison, etc., R. Co. (Minn.)*, 3-450.

At times of extraordinary demand. — A railroad company, as a common carrier, must furnish such facilities for the transportation of freight as will meet the ordinary demands of the public, but it is not bound to anticipate or provide in advance for an unusual influx of freight such as arises from an excessive crop of cotton greater than the estimates made either by the railroad or by experts most familiar with crop conditions; and in an action for damages against a carrier for failing promptly to transport cotton accepted for shipment, the exclusion of evidence showing the extraordinary demands made upon the defendant's facilities and the defendant's efforts to meet them is erroneous. *Yazoo, etc., R. Co. v. Blum (Miss.)*, 11-272.

Notice of probable injury. — Common carriers are supposed to take notice of such natural events as are familiar to ordinary people. They will be held to a knowledge of seed-time and harvest, and of the general customs relating thereto in the territory where they do business. Hence, in an action against a carrier for delay in the delivery

of threshing machines received by it from the manufacturer thereof for shipment to the implement dealer, the carrier will be deemed to have had notice that such machines, if not already sold, were intended for immediate sale by the consignee, and that a delay in delivery until the entire threshing season had passed would defeat the purpose of the shipment. *Missouri Pacific R. Co. v. Peru-Van Zandt Implement Co. (Kan.)*, 9-790.

Right of consignee to sue. — When property has been consigned by a general owner to an agent who has a special interest therein as factor or commission agent, and the goods so consigned are negligently delayed in transit and converted by the carrier, so that sales thereof previously made by the consignee are canceled and lost, such consignee may maintain an action in its own name against the carrier for the recovery of damages on account of such lost commission, and also for the value of the property converted. *Missouri Pacific R. Co. v. Peru-Van Zandt Implement Co. (Kan.)*, 9-790.

(3) Delivery to wrong person.

Fraud or mistake as defense. — A carrier acts at its peril in making a delivery of goods, and no circumstances of fraud, or mistake, or imposition will excuse a delivery to a person other than the consignee. *Southern R. Co. v. Webb (Ala.)*, 5-97.

Instructions by unauthorized agent of shipper. — The liability of a common carrier for delivery of goods to a person other than the consignee as affected by instructions of an unauthorized agent of the shipper. *Southern R. Co. v. Webb (Ala.)*, 5-97.

c. Bills of lading.

Negotiability. — The Washington statute making a bill of lading negotiable by indorsement does not make the instrument negotiable in the same sense as promissory notes, bills of exchange, or other commercial paper, but simply makes an indorsement effective for the purpose of transferring the property represented by the bill of lading. *Roy and Roy v. Northern Pacific R. Co. (Wash.)*, 7-728.

Issuance without receipt of goods. — An agent of a carrier of goods has no authority to issue bills of lading without actually receiving the goods, and a bill of lading so issued through fraud or mistake cannot bind the carrier, even as to an innocent transferee or pledgee or *bona fide* purchaser of the bill, as the receipt of the goods lies at the foundation of the contract to carry and deliver, and there can be no such contract unless the goods are actually received. *Roy and Roy v. Northern Pac. R. Co. (Wash.)* 7-728.

d. Loss of or injury to goods.

(1) In general.

Act of God. — The negligent delay of a carrier in moving goods intrusted to it for transportation, not so unreasonable as to

amount to a conversion, will not render it liable for the loss of such goods after they have been carried to their destination if they are there destroyed by an act of God before delivery. *Rodgers v. Missouri Pacific R. Co.* (Kan.), 12-441.

Tort committed by the insane agent of a carrier held not to be an act of God so as to excuse the carrier. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

In Georgia it is the general rule that in order to avail himself of the act of God as an excuse, the burden is on the common carrier to establish not only that the act of God ultimately occasioned the loss but that his own negligence did not contribute thereto. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

A carrier of goods is liable for their loss or injury in the course of transportation by reason of an extraordinary flood which in itself constitutes an act of God, where the damage would not have occurred but for the negligent delay of the carrier in the transportation of the goods. *Green-Wheeler Shoe Co. v. Chicago, etc., R. Co.* (Iowa), 8-45.

Where a carrier delays unreasonably in forwarding goods delivered to it for shipment, and the goods are destroyed during this delay, the carrier is liable for the loss, notwithstanding the fact that the goods are destroyed by an act of God, such as a cyclone. *Alabama Great Southern R. Co. v. Quarles* (Ala.), 8-308.

Misrepresentation as to character of value of goods. — Liability of a carrier of goods for the loss of a package, the contents of which have been misrepresented. *Bottom v. Charleston, etc., R. Co.* (S. Car.), 5-118.

Goods seized under police regulations. — Where a carrier, from whose possession goods are taken by judicial process under police regulations, notifies the shipper of the seizure in time for the latter to contest the right to destroy the goods, and the shipper informs the carrier of his intention to make such contest, the carrier is relieved from further responsibility, and is not liable if a judgment ordering the destruction of the goods is subsequently rendered. An answer stating these facts does not indicate such consent, connivance, or fraud on the part of the carrier as would render it liable to the shipper. *American Express Co. v. Mullins* (U. S.), 15-536.

In reviewing a decision of a lower court in an action against a carrier for permitting the seizure and destruction of the goods by judicial process, the federal supreme court will determine for itself whether there is anything in the record which shows such consent, connivance, or fraud on the part of the carrier as would render it liable to the shipper. *American Express Co. v. Mullins* (U. S.), 15-536.

Delivery prevented by quarantine regulation. — Where a carrier of goods is sued by the consignor for failure to deliver the goods, and interposes the defense that delivery was prevented by the enforcement of a quarantine regulation by the municipal au-

thorities, it must show, in order to escape liability, not only that it was ordered by the authorities not to deliver the goods, and acted on such order alone, but, further, that the authorities were prepared to enforce the order by force, if necessary, and that it yielded obedience to the order because of that fact. In such a case the carrier need not go to the extent of actual collision with force marshaled by the authorities to enforce the regulation, but it must show that its action in failing or refusing to deliver the goods was due to such force existing and capable of controlling its actions. When that is shown, the carrier cannot be held liable. *Alabama, etc., R. Co. v. Tirelli* (Miss.), 17-879.

Liability as between charter and owner of vessel. — The charterer of a vessel, and not the owner, is liable to a consignee for loss resulting from the failure to exercise reasonable care in selecting a suitable place upon which to deposit the cargo upon its discharge, where the charter-party gives the charterer the absolute right to select the place for the discharge of the cargo and provides that the charterer shall indemnify the owner against all liabilities that may arise from the signing of bills of lading, notwithstanding the fact that it also provides that the vessel shall always lie safely afloat at any tide. *Rosenstein v. Vogemann* (N. Y.), 6-13.

Loss due to prior delay. — If a carrier negligently and carelessly delays a shipment of goods delivered to it for transportation and the goods are overtaken in transit and damaged by an act of God, which would not have caused damage had there been no delay, the carrier is liable even though the act of God could not reasonably have been anticipated. Neglect and unreasonable delay is such a proximate or concurring cause as renders a carrier liable. This rule applies whether the goods in their nature are perishable or nonperishable. *Bibb Broom Corn Co. v. Atchison* (Minn.), 3-450.

Corporations and persons liable. — If a lessee of the property and franchises of a railroad company, in the operation of its cars and the exercise of its franchise as a common carrier, commits a conversion of property, the lessor may be held liable therefor, in the absence of legislative provision to the contrary. *Georgia R., etc., Co. v. Haas* (Ga.), 9-677.

(2) Perishable goods.

Failure to ice cars. — A carrier of goods is required to use proper care for the protection and preservation of perishable property which it accepts for transportation, and is bound to ice the cars in which such property is shipped when icing is necessary to enable it to take proper care of the property. *Brennison v. Pennsylvania R. Co.* (Minn.), 10-169.

Weight and sufficiency of evidence. — Evidence reviewed, in an action against a carrier to recover damages for depreciation in value of a car of fruit, and held not to

justify the appellate court in setting aside the finding of the trial court that the injury was due to the negligence of the carrier. *Brennison v. Pennsylvania R. Co.* (Minn.), 10-169.

Evidence that a carrier in transporting a car of perishable freight in warm weather took double the time which should have been taken is sufficient to show negligence. *Bibb Broom Corn Co. v. Atchison, etc., R. Co.* (Minn.), 3-450.

(3) Failure to furnish suitable cars.

Duty of carrier. — It is the duty of a carrier to furnish cars suitable for the shipment of a particular commodity undertaken to be conveyed, and if injury results to such commodity from the unsuitableness of the cars for the shipment thereof, the carrier is liable. *F. D. Forrester & Co. v. Southern R. Co.* (N. Car.), 15-143.

Ventilated cars. — Where it appears that a ventilated car is the only safe means of transporting dried apples, a carrier which, having undertaken to transport such apples, carries them in an ordinary box car, is liable for the damage resulting from the unsuitableness of such car for such shipment. *F. D. Forrester & Co. v. Southern R. Co.* (N. Car.), 15-143.

The mere fact that the shipper knows that such apples are shipped in a box car does not relieve the carrier from liability. *F. D. Forrester & Co. v. Southern R. Co.* (N. Car.), 15-143.

Shipper selecting unsuitable car. — An agreement between a consignor and a carrier that the former may select from among the cars delivered to it on its side track such cars as it shall deem suitable for its shipments is not contrary to public policy; and where a shipper under such an agreement selects a car which is unsuitable for the transportation of its goods, the carrier is not liable to the consignee for injury caused thereby to the goods, as the only remedy of the consignee is against the consignor, the contract of the consignor being binding on the consignee. *Frolich v. Pennsylvania Co.* (Mich.), 4-1140.

(4) Loss by fire.

While common carriers of goods are not considered under the Louisiana statute insurers against loss or damage by fire, they are liable unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events. *Lehman, Stern & Co. v. Morgan's Louisiana, etc., Co.* (La.), 5-818.

Where cotton on a railroad platform in course of delivery has been damaged by fire, the cause of which is not shown or explained, proof of the usual and ordinary diligence in such cases to safeguard cotton will not avail the carrier as a defense. The carrier must prove that the fire was purely accidental and impossible to prevent. *Lehman, Stern & Co. v. Morgan's Louisiana, etc., Co.* (La.), 5-818.

(5) Termination of liability.

Carrier by water. — At common law, a common carrier of goods by water from port to port is liable as an insurer until the goods are delivered to the consignee, either actually or constructively; and in order to constitute a constructive delivery entitling the carrier to relieve itself from further liability by storing the goods in a place of safety, the carrier must give the consignee notice of the arrival of the vessel at the place of docking and must give him reasonable time after arrival for the removal of the goods. *Rosenstein v. Vogemann* (N. Y.), 6-13.

Notice of arrival of vessel. — The common-law ability of a common carrier of goods by water as an insurer until the goods are delivered to the consignee is not limited by a provision in the bill of lading that the goods are to be taken from the ship by the consignee directly they come to hand in the discharging ship, where the bill of lading is silent upon the question of notice to the consignee of the vessel's arrival and place of docking. *Rosenstein v. Vogemann* (N. Y.), 6-13.

Where a common carrier of goods by water from port to port unloads goods on a pier at the port of delivery without having given the consignee sufficient notice of the arrival of the vessel and reasonable time to appear and take charge of the goods, it is liable as a common carrier for the loss of the goods, resulting from the collapse of the pier, irrespective of the question of negligence in failing to select a safe place to unload. *Rosenstein v. Vogemann* (N. Y.), 6-13.

e. Liability as warehouseman.

After reasonable time to remove goods. — The consignee of goods is entitled to a reasonable time after being notified of the arrival of the goods at their destination within which to call for and remove them, and during such time the carrier holds the goods in its capacity as a carrier, but after the expiration of such time the carrier's liability is that of a warehouseman merely. *United Fruit Co. v. New York, etc., Transportation Co.* (Md.), 10-437.

What constitutes reasonable time for removal. — Where a shipment of goods arrives at its destination early one morning, and notice of the arrival is given the consignee before noon of the same day, the period between the giving of the notice and the close of business hours on the succeeding day constitutes a reasonable time for the removal of the goods by the consignee, and on the expiration of such period the carrier's liability becomes that of a warehouseman merely. *United Fruit Co. v. New York, etc., Transportation Co.* (Md.), 10-437.

Goods held at request of consignee. — A carrier of goods is liable only as a warehouseman during the time it holds goods at their destination at the request and for the convenience of the consignee. *United Fruit Co. v. New York, etc., Transportation Co.* (Md.), 10-437.

Evidence reviewed, in an action by the consignee of goods against the carrier to recover damages for their destruction in a fire not due to the carrier's negligence, and held sufficient to show that at the time of their destruction the goods were being held at the request and for the convenience of the assignee, and under an agreement that they were at the risk of the owner, and that therefore the carrier is not liable. *United Fruit Co. v. New York, etc., Transportation Co. (Md.)*, 10-437.

f. Limitation of liability.

(1) In general.

Right to limit liability. — A carrier may limit by special contract his common-law liability and may thereby exempt himself from liability for a loss resulting otherwise than by the negligence or misfeasance of himself or his servants. *Russell v. Erie R. Co. (N. J.)*, 1-672.

The right of a common carrier to limit by contract its common-law liability as insurer and its liability for negligence. *Central of Georgia R. Co. v. Hall (Ga.)*, 4-128.

Negligence on own line. — A carrier of goods cannot exempt itself from liability for its own negligence on its own line. *Allen, etc., Co. v. Canadian Pacific R. Co. (Wash.)*, 7-468.

Negligence of connecting carrier. — When a carrier undertakes to carry goods marked to a destination beyond its own line, it cannot stipulate in its contract that it shall be liable only for its own negligence. *Allen, etc., Co. v. Canadian Pacific R. Co. (Wash.)*, 7-468.

A printed stipulation contained in a bill of lading for goods shipped to a destination on the line of a connecting carrier, limiting the liability of the initial carrier to loss or damage occurring on its own line, does not constitute a contract and therefore is not binding on the shipper. *Allen, etc., Co. v. Canadian Pacific R. Co. (Wash.)*, 7-468.

Consideration for limitation. — A railroad company as a common carrier of milk is under a public duty to provide reasonable facilities for the transportation of this kind of freight, including care during transportation, and it is a question of fact whether a railroad company in furnishing special cars with icing facilities for the transportation of milk is rendering a service not required of it as a common carrier so that such service can be made the basis of a contract limiting its liability. *Baker v. Boston, etc., R. R. (N. H.)*, 12-1072.

A contract between a shipper of milk and the carrier whereby the shipper, in consideration of the furnishing of special milk refrigerator cars by the carrier agrees to employ men to handle the milk in said cars and to indemnify the carrier against liability for injuries to such employees, is unreasonable and void, unless the shipper is afforded, in the absence of special contract, the opportunity of having the carrier perform its full duty as a common carrier or some reduction

of rates is made as a consideration for the limitation of liability. *Baker v. Boston, etc., R. R. (N. H.)*, 12-1072.

Construction of limitation. — The provisions of a shipping receipt or bill of lading limiting the carrier's liability and prescribing the time within which claims for damages must be presented, being in derogation of the common law, are to be strictly construed, and are not to be considered as conditions precedent to the enforcement of the liability of the carrier unless it clearly appears that such was the intent or it is so specifically stated. *Hoye v. Pennsylvania R. Co. (N. Y.)*, 14-414.

Failure by shipper to read contract. — A shipper of goods cannot be allowed to testify that he did not read the contract of shipment, which was at a reduced rate and contained restrictions upon the liability of the carrier, nor can he avoid the restrictions of the contract unless the carrier's agent refused upon demand to accept the shipment at another rate under a contract for unrestricted liability. *St Louis, etc., R. Co. v. Pearce (Ark.)*, 12-125.

Conflict of laws. — A contract entered into in Illinois exempting a common carrier from liability for loss or injury not resulting from negligence, in the case of a through shipment from Illinois to Kentucky, may be set up as a defense to an action in the courts of Kentucky for loss and injury to the property while in transit, when the contract is valid in Illinois and the loss and injury occurred in that state, in spite of a provision of the Kentucky constitution that "no common carrier shall be permitted to contract for relief from its common-law liability." *Cleveland, etc., R. Co. v. Druen (Ky.)*, 4-1102.

(2) Validity of particular limitations.

Agreement as to value of goods. — A railway company has the right in its capacity as a common carrier to make with a shipper a contract of affreightment embracing an agreement as to the value of the property to be transported, and in such case the shipper will be bound in the case of loss by the agreed valuation; but a mere general limitation as to the value expressed in a bill of lading will not exempt a negligent carrier from liability for the true value. *Central of Georgia R. Co. v. Hall (Ga.)*, 4-128.

A carrier of goods cannot limit the extent of its liability for negligence by an agreed valuation, in consideration of a reduced charge for carrying a package, when the agreed valuation is greatly less than the real value of the package, though the contents of the package or the value of the contents are not disclosed to the carrier. *Southern Express Co. v. Owens (Ala.)*, 9-1143.

Where a shipper of valuable race horses enters into a special contract for the shipment of the horses at an extremely low valuation which he voluntarily elects to place on them in order to obtain a reduced rate of freight, and knowingly signs a stipulation

that the liability of the carrier shall be limited to the valuation named, although he has the opportunity of shipping the horses under an ordinary bill of lading at regular freight rates and without limitation of the carriers' liability, or of shipping under the special contract at a higher valuation by paying a proportionate freight rate, the contract is not one limiting the liability of the carrier in violation of a statute prohibiting an anticipatory contract by a carrier exonerating itself from liability for gross negligence, but is merely one in which the valuation of the property is agreed upon for the purpose of fixing transportation charges and measuring the responsibility of the carrier, and the contract is valid and effectual to protect the carrier from liability in excess of the valuation fixed, even for gross negligence. *Donlon v. Southern Pacific Co.* (Cal.), 12-1118.

A stipulation in an express receipt that the value of the property shipped "is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein," does not exempt the express company from liability for negligence, but merely fixes a basis for computing the amount of its liability, and therefore is not within the prohibition of the Carmack amendment to the Hepburn Act (34 St. L., c. 3591, § 7, Fed. St. Ann. 1909 Supp., p. 273) providing that "no contract, receipt, rule, or regulation shall exempt" any common carrier from liability "for any loss, damage, or injury," to property received for transportation to another state. *Bernard v. Adams Express Co.* (Mass.), 18-351.

Limitation of time for presentment of claim. — A common carrier and a shipper may, in the absence of fraud, imposition, or deception, enter into a valid and enforceable special agreement requiring the shipper, in case of loss or damage, to make a verified claim for damages in writing, within a specified time, and providing that, in default thereof, the carrier shall not be liable, provided the period of time within which such claim shall be made is, under all the circumstances of each case, a reasonable one. *Pennsylvania Co. v. Shearer* (Ohio), 9-15.

A provision in a contract for the shipment of live stock, that no recovery be had for any damages for delay, loss, or injury to the live stock covered by the contract unless the shipper shall give notice of the claim therefor within one day after the delivery of the stock at the place of destination, to the end that the claim may be investigated, is reasonable and binding, and the burden is upon the claimant to show that the notice has been given. *St. Louis, etc., R. Co. v. Pearce* (Ark.), 12-125.

A provision of a shipping receipt or bill of lading that "claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty

days after the delivery of the property or after the time for the delivery thereof, no carrier shall be liable in any event," is not a condition precedent, compliance with which must be established by the plaintiff in an action to enforce the carrier's liability, but is a limitation on the owner's right of recovery which must be treated as a matter of defense, the burden of pleading and proving which is on the defendant. *Hoye v. Pennsylvania R. Co.* (N. Y.), 14-414.

Restriction of liability to goods properly packed. — In an action against a carrier to recover damages for injury done to goods in courts of transit, the proof showed that the plaintiff had for many years consigned to the defendants for carriage wooden cisterns lined with lead, which were fitted with a crossbar, and had attached a lever which projected above the edge of the cistern; they were carried by the defendants unpacked at the ordinary rate of carriage and at company's risk. Many of the crossbars and levers having been broken in transit, owing, as the defendants alleged, to their brittle nature and to their not being protected by packing, the defendants gave notice in 1907 that they were not, and would not be, carriers of certain specified damageable goods (including cisterns) except when they were properly protected by packing.

After the notice the plaintiff continued to consign cisterns for carriage by the defendants, but the defendants required him to sign, at the time of sending, a special consignment note, headed "Consignment note for damageable goods when not protected by packing." The consignment note contained in substance a notice that the defendants would not carry the specified damageable goods (a list of which was given) at company's risk except when properly protected by packing, but that the sender might consign them not so protected if he agreed to relieve the defendants from liability for loss or injury, except on proof that it arose from wilful misconduct on the part of their servants. Then followed a form of agreement by which the sender agreed to the above terms and also to the conditions on the back of the consignment note, one of which conditions was: "The company will not be liable for any loss of, or damage to, or delay of goods resulting from their not being properly protected by packing." There was no alternative rate of carriage. Such being the proof, it was held by Buckley, L. J., and Kennedy, L. J. (Vaughan Williams, L. J., dissenting), that the goods were carried by the defendants by virtue of their statutory obligation under section 2 of the railway and canal traffic act, 1854, to afford reasonable facilities for the carriage of traffic; that the requirement of packing was not a refusal of reasonable facilities; and that the condition imposed on the carriage of unpacked articles in the signed consignment note was a just and reasonable condition within the meaning of section 7 of that act. *Sutcliffe v. Great Western R. Co.* (Eng.), 18-244.

Waiving damage for delay. — A contract between a shipper and a carrier pro-

viding that the former waives all claim for damages by reason of delay in furnishing cars, prior to the signing of the contract, is unreasonable and unenforceable where the contract, although based upon a reduced rate, is one offered to all shippers alike, regardless of whether they assert any claim to prior damages. *St. Louis, etc., R. Co. v. Pearce* (Ark.), 12-125.

(3) Estoppel to enforce limitation.

Deviation by vessel. — A deviation of a vessel from her voyage precludes her owners from setting up, as a defense to an action for damage to goods shipped, a stipulation in the bill of lading exempting them from liability for loss arising from the negligence of stevedores employed by them to discharge the vessel's cargo. *Joseph Thorley v. Orchis Steamship Co.* (Eng.), 7-281.

Effect of deviation. — Where merchandise is delivered to a railroad company under a shipping order directing its delivery to a steamship company for transportation by a specified route, but the steamship company issues a bill of lading designating a different route and delivers the merchandise to a connecting carrier which transports it by the route specified in the shipping order and receipt, instead of by the route specified in the bill of lading, and delivers it to its ultimate destination without requiring the surrender of the bill of lading, as required by a provision in the contract, and the draft for the price is not honored, the steamship company becomes liable to the consignor for the value of the merchandise, notwithstanding a provision in the bill of lading that the property was to be delivered to the connecting carrier at the owner's risk. When there has been a deviation from the journey prescribed by the contract, the carrier cannot avail itself of such a provision in its bill of lading to escape liability for the loss of the goods, but becomes an insurer. *Waltham Mfg. Co. v. New York, etc., Steamship Co.* (Mass.), 17-837.

g. Lien for charges.

Goods wrongfully delivered to carrier. — A carrier acquires no right, by virtue of its employment as such, to hold goods delivered to it by a wrongdoer to whom they do not belong, until the charges are paid, against the claim of the true owner, nor has the carrier any lien on the goods for the transportation charges. *Savannah, etc., R. Co. v. Talbot* (Ga.), 3-1092.

Lien to secure payment of demurrage. — The right of a railroad company to charge demurrage for the failure of the assignee of goods to unload the same from the car within a specified time, and a lien of the company to secure the payment of demurrage charges. *Southern R. Co. v. Lockwood Mfg. Co.* (Ala.), 4-12.

In the absence of a stipulation in the contract to the contrary, a carrier by water, even if a common carrier, has no lien for demurrage on goods which have been carried by it to their destination and have not been re-

ceived by the shipper or consignee after reasonable notice has been given to receive them; and if the carrier refuses to give up such goods on the ground that it has such a lien, they may be recovered from it in an action of replevin. *Nicolette Lumber Co. v. People's Coal Co.* (Pa.), 5-387.

Written contract as waiver. — A written contract for the transportation of goods by a common carrier will not be deemed to waive a lien upon them for the charges therefor unless it contains provisions inconsistent with the assertion of such lien or unless an intention to make such waiver is indicated expressly or by clear implication. *Atchison, etc., R. Co. v. Hinsdell* (Kan.), 13-981.

Such a waiver is not shown by recitals in such a contract that all prior agreements concerning the facilities for such shipment or concerning the transportation of such goods or such shipment are merged in the written contract, and that the written contract contains all the terms, agreements, and provisions relating in any manner to the transportation of such goods. *Atchison, etc., R. Co. v. Hinsdell* (Kan.), 13-981.

Extinguishment by injury to goods. — Where a common carrier becomes liable to a consignee of goods for injury to property while in transit, and the amount of damages occasioned by such injury equals or exceeds the freight bill on the damaged goods, the lien of the carrier is thereby extinguished, and the consignee is entitled to the possession of such goods without payment of freight; and in such a case the refusal of the carrier to deliver the goods to the consignee upon demand constitutes a conversion. *Missouri Pacific R. Co. v. Peru-Van Zandt Implement Co.* (Kan.), 9-790.

Extinguishment by delay. — When a common carrier negligently delays the delivery of goods, so that the damages occasioned by such delay exceed the amount of the freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods without payment of the freight, and a refusal by the carrier to surrender possession upon such demand is wrongful, and amounts to a conversion. *Missouri Pacific R. Co. v. Peru-Van Zandt Implement Co.* (Kan.), 7-790.

Termination by delivery of goods. — Where freight charges are due from a consignor to a carrier of goods, the carrier's lien for charges is terminated by its delivery of the goods to the consignee as the agent of the consignor, notwithstanding the consignee promises to do everything in his power to retain the goods until the charges are paid. *Lembeck v. Jarvis Terminal Cold Storage Co.* (N. J.), 7-960.

Where a carrier delivers goods to a consignee upon his promise to retain possession of them until the freight charges are paid by the consignor, if the delivery and promise are to be considered as making the consignee the agent of the carrier, so far as the possession of the goods is concerned, then the lien for freight charges is terminated upon their

payment by the consignor to the consignee, as payment to the agent is payment to the principal. *Lembeck v. Jarvis Terminal Cold Storage Co.* (N. J.), 7-960.

h. Discrimination.

Discrimination as to shipping facilities. — In an action by a shipper of lumber to enjoin a carrier by sea from discriminating against shipments of lumber in favor of shipments of cotton, held that there was evidence authorizing a finding that the defendant discriminated against the plaintiff in the reception and transportation of lumber tendered for shipment, and that the trial court did not abuse its discretion in granting an *ad interim* injunction. *Ocean Steamship Co. v. Savannah Locomotive, etc., Co.* (Ga.), 15-1044.

Discrimination as to rates. — A common carrier cannot discriminate between shippers of freight over its lines by charging lower rates of carriage to the shippers agreeing to reship the manufactured product of the freight by the same line. *Hilton Lumber Co. v. Atlantic Coast Line R. Co.* (N. Car.), 1-52.

Under the Nebraska statute forbidding discrimination in freight rates, which provides that no railroad company within the state shall "directly or indirectly charge to or receive from any person or persons, or association or corporation, any greater or less sum, compensation, or reward than is charged to or received from any other person or persons, association or corporation, for like and contemporaneous service in the receiving, transporting, storing, delivering, or handling of freight," and which also provides penalties for the violation of any of its provisions, and makes the offending railroad company liable to the party injured for all damages sustained, a contract between a railroad company and a shipper to transport merchandise for less than the usual and regular freight rates is void, even though it is entered into by mistake on the part of the railroad company and without any intention of discriminating against other shippers; and when a railroad company which has entered into such a contract discovers its mistake and exacts and is paid the regular rate, the shipper cannot recover back the difference between that rate and the contract rate. *Haurigan v. Chicago, etc., R. Co.* (Neb.), 16-450.

i. Connecting carriers.

(1) Duties and liabilities in general.

Statutes regulating liability between carriers. — A statute providing, in the case of several connecting railroads under different companies, where goods are to be transported over more than one railroad, that each company shall be responsible to its own terminus only, and until delivery to the connecting road, that the last company receiving the goods in good order shall be liable for damage thereto, and that such companies shall settle among themselves the question of ultimate liability, is not, as applied to ship-

ments from beyond the state, repugnant to the interstate commerce clause of the federal constitution. *Kavanaugh v. Southern R. Co.* (Ga.), 1-705.

The South Carolina statute providing that in the case of a through shipment of goods over the lines of connecting carriers each carrier shall be deemed to be the agent of the other carriers, and further providing that in any court of the state "any through bill of lading, waybill, receipt, check, or other instrument, issued by either of such carriers, or other proof showing that either of them has received" such goods for through shipment or transportation, shall be *prima facie* evidence of the liability of the carrier issuing it, for the loss or damage to the goods in course of transportation, is not, as applied to interstate shipments, violative of the commerce clause of the federal constitution. *Skipper v. Seaboard Air Line Ry.* (S. Car.), 9-808.

The South Carolina statute providing that "in case of the loss of or damage to any article or articles delivered to any railroad corporation for transportation over its own and connecting roads, the initial corporation . . . shall, in every case, be liable for such loss or damage, but may discharge itself from such liability by the production of a receipt in writing, for the said article or articles from the corporation to whom it was its duty to deliver such article or articles in the regular course of transportation," and further providing that in such an event "the said connecting road or roads shall be severally so liable, but may in succession and in like manner discharge themselves respectively therefrom," is not, as to interstate shipments, violative of the commerce clause of the federal constitution. *Skipper v. Seaboard Air Line Ry.* (S. Car.), 9-808.

Statutes requiring tracing of freight.

— The Georgia statute imposing upon an initial or connecting carrier the duty of tracing freight and informing the shipper as to the facts connected with the loss thereof is, in its application to shipments of freight to points outside of the state, violative of the interstate commerce clause of the federal constitution. *Central of Georgia R. Co. v. Murphy* (U. S.), 2-514.

The South Carolina statute making an initial, delivering, or terminal carrier liable for the loss or destruction of goods on the line of a connecting carrier if it fails to trace the goods and inform the shipper or consignee, within a specified time after receiving notice of the loss or damage, when, where, and by which carrier the goods were lost, but further providing that the initial, terminal, or delivering carrier shall be excused from liability upon proof that by the exercise of due diligence it has been unable to trace the line upon which the loss or damage occurred, is not, as to interstate shipments, violative of the commerce clause of the federal constitution. *Skipper v. Seaboard Air Line Ry.* (S. Car.), 9-808.

Duty to transport beyond own line.

— A carrier is under no common-law obligation to transport goods beyond its own line.

Allen, etc., Co. v. Canadian Pacific R. Co. (Wash.), 7-468.

Conflict between shipping receipt and bill of lading. — Where merchandise is delivered to a railroad company under a shipping order directing its delivery to a steamship company for transportation to its final destination by a specified route, and a shipping receipt is delivered to the consignor accordingly, and the consignor forwards the receipt to the steamship company specified therein, and the steamship company prepares a bill of lading designating a different route of transportation from that specified in the receipt, and transmits it to the consignor, who, without noticing the route mentioned therein, annexes it to a draft for the price of the merchandise and deposits it in a bank, the bill of lading and not the shipping order or shipping receipt constitutes the contract between the consignor and the steamship company. In such a case the rule that when a binding contract for the shipment of goods has been made between a consignor and a common carrier, and the execution of it has begun, delivery by the carrier to the consignor of a bill of lading different from the original contract in its provisions will not supersede the original contract, has no application, since the shipping order given to the railroad company and the shipping receipt delivered by it do not constitute a contract between the consignor and the steamship company. *Waltham Mfg. Co. v. New York, etc., Steamship Co. (Mass.)*, 17-837.

Which carrier liable. — Upon a presumption of actionable negligence for delay in the transportation of goods handled by connecting carriers, a *prima facie* right of action exists against any one of the connecting carriers in whose possession the goods are proven to have been. *Harper Furniture Co. v. Southern Express Co. (N. Car.)*, 12-924.

Waiver of statutory remedy. — The remedy afforded by statute providing for the liability of connecting railroads for shipments made thereby may be waived by a special contract between the consignor and the initial railroad, and in such case the consignee's remedy is upon the common-law liability of the carriers over whose lines the shipment is made. *Kavanaugh v. Southern R. Co. (Ga.)*, 1-705.

Burden of proof. — In an action against the initial carrier of two or more connecting carriers the burden of proof is on the plaintiff to show that the damage occurred on that line, whereas, if the suit is against the last or delivering carrier the burden is upon it to show that the damage was not done on its line; but in an action against the initial carrier there is no presumption that the damage occurred on the line of the last carrier. *St. Louis, etc., R. Co. v. Pearce (Ark.)*, 12-125.

(2) Presumption in locating negligence.

Receipt in good order. — When goods for shipment over several connecting lines are

received in good order by the initial carrier, the law presumes that each successive carrier between the initial and the last carrier received them in good order and, in the absence of evidence locating injury to goods, that the last carrier is the negligent one. This presumption may be overcome by evidence showing that one of the preceding carriers is the negligent one. *St. Louis, etc., R. Co. v. Coolidge (Ark.)*, 3-582.

(3) Concurrent negligence.

Liability of initial carrier. — Where in an action against the initial carrier for injury to freight by delay it appears that its negligence was the efficient and proximate cause of the injury, the fact that the last carrier is shown to have been equally guilty of negligence does not relieve the initial carrier from liability. *St. Louis, etc., R. Co. v. Coolidge (Ark.)*, 3-582.

(4) Liability for refusal to deliver goods.

Non-payment of freight as defense. — The rule stated as to the liability of the last of the connecting carriers for a refusal to deliver goods to the consignee except upon the payment of freight charges greater in amount than those fixed by the bill of lading issued by the initial carrier. *Goodin v. Southern R. Co. (Ga.)*, 5-573.

j. Actions against carriers.

(1) Actions for loss, injury or delay.

(a) Defenses.

Insanity of agent. — A common carrier, having a limited liability for goods shipped by contract so as to be liable only for fraud or gross negligence, held to have the right to plead, in defense of an action for the loss of goods carried, that the agent suddenly became insane and caused the loss; and held to be for the jury to say whether the carrier exercised due diligence. *Central of Georgia R. Co. v. Hall (Ga.)*, 4-128.

(b) Evidence.

Messengers intrusted with money. — In an action against a corporation engaged in the business of furnishing messengers for hire, to recover money collected but not returned by the messenger supplied by it, it is proper to exclude evidence that the defendant knew that its messengers were sometimes intrusted with money by the persons to whom they were supplied, as such evidence does not tend to establish the liability of the defendant as a common carrier. *Haskell v. Boston District Messenger Co. (Mass.)*, 5-796.

Loss by fire — burden of proof. — On the trial, based on a declaration which alleges only the common-law liability of defendant as a common carrier, by reason of the loss of plaintiff's goods by fire; and where it appeared as part of plaintiff's case that the liability was qualified by the introduction of a bill of lading, by the terms of which loss "by fire or by flood" excused the carrier from performance — held, that it was

incumbent on the plaintiff to show as a basis for recovery, not only a loss by fire, but also that the fire was attributable to some act of negligence on defendant's part. *Johnson v. West Jersey, etc., R. Co.* (N. J.), 20-228.

(c) Questions of law and fact.

Good faith of valuation. — Where there is an issue of fact as to whether there was an actual *bona fide* valuation of the goods shipped or a mere arbitrary effort to limit the liability of the carrier, the question is one for the jury, but where the written contract shows that it falls within the latter description and there is no issue of fact on the subject, it is proper for the court to construe the evidence. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

(d) Measure of damages.

Price of goods at destination. — A stipulation in a bill of lading that the value of the goods at the point of shipment shall determine the measure of damages in the event of a loss is void when based upon no consideration, and in an action to recover for an injury to the goods, the measure of damages is governed by the price thereof at the destination at the time they were due there. *St. Louis, etc., R. Co. v. Coolidge* (Ark.), 3-582.

In an action for the conversion of agricultural machinery, brought against a carrier of goods by the consignee, where it appears that the plaintiff had sold the machinery as agent for the consignor, and that he was entitled to receive out of the proceeds of the sale a commission on the selling price, and it further appears that the carrier negligently delayed the delivery of the goods until the sales were for that reason canceled and the commission thereby lost, and it further appears that the carrier has converted the machines to its own use, the price for which the machines were sold at the place of delivery is the proper measure of damages. *Missouri Pacific R. Co. v. Peru-Van Zandt Implement Co.* (Kan.), 9-790.

Profits lost by delay. — In an action against a carrier of goods for negligent delay in the transportation of scenery and other theatrical properties, where it appears that the carrier had full knowledge that the property had been widely advertised to be used in an exhibition at the place of destination and that the owner of the property was under heavy expenses in the use of it, the measure of damages is the ordinary gross earnings of the property for the time that the owner was deprived of its use for exhibition purposes, less such expenses, if any, as the deprivation of the use of the property saved him. *Weston v. Boston, etc., R. R.* (Mass.), 5-825.

Allegations of loss of profits which would have accrued to the plaintiffs upon the fulfillment of a collateral contract, in consequence of the delay on the part of a common carrier in the delivery of freight, are properly stricken upon demurrer, where it does not appear that the contract, from the fulfillment of which

profits would have accrued, was in the contemplation of the parties at the time the carrier received the freight for transportation. *Goodin v. Southern R. Co.* (Ga.), 5-573.

(2) Actions for breach of contract of affreightment.

Allegations and proof. — In an action to recover damages for the alleged breach of a contract of affreightment, in which the complaint is in the form prescribed by the Alabama code in general terms for suits on a bill of lading of a common carrier, damages resulting from a breach of the contract may be recovered, though the evidence shows a special contract. *Southern R. Co. v. Webb* (Ala.), 5-97.

(3) Actions for penalty for refusal to receive goods.

(a) In general.

Existence of strike as defense. — In an action against a railroad company to recover penalties for its refusal to receive a drove of cattle tendered to it for shipment, under the North Carolina statute (Revisal of 1905, § 2631) which imposes a penalty upon common carriers for such a refusal, it is a valid defense that the defendant was prevented from furnishing cattle cars to the plaintiff by a strike of the machinists on its road, numbering several thousand men, which strike it could not control, and in consequence of which a large part of its motive power got out of order and could not be used. To hold that a carrier must receive freight for shipment under such circumstances, and thus render itself liable to the further penalty, prescribed by section 2632 of the same statute, for delay in shipping, would be unreasonable. *Murphy Hardware Co. v. Southern R. Co.* (N. Car.), 17-481.

Pecuniary injury to shipper. — In an action against a carrier of goods to recover a statutory penalty for refusal to receive goods tendered for shipment, it is no defense that no pecuniary injury resulted to the shipper from the wrongful act of the carrier. The penalty is given not solely for the purpose of making pecuniary compensation to the person injured, but for the more important purpose of enforcing the performance by the carrier of its duties. *Reid v. Southern R. Co.* (N. Car.), 17-247.

(b) Evidence.

Goods billed to point on independent line. — In an action against a railroad company to recover a statutory penalty for refusal to receive goods tendered for shipment, evidence on behalf of the defendant company that the point designated as the destination of the goods was located on an independent line of railroad, is not sufficient to prevent a verdict for the plaintiff, where the evidence also shows that the line in question is operated by the defendant company, all the money being sent to its treasurer, the reports being made to its auditor, and all salaries of employees being paid by it. Under such cir-

circumstances the defendant's agents should know the location of the siding and the rate thereto, or should be able to ascertain the same in the exercise of reasonable care. *Reid v. Southern R. Co.* (N. Car.), 17-247.

Tender of goods. — In such a case, a tender of the goods from day to day until the shipment is made may be inferred from the placing of the goods in the car with the permission of the agent, the demand for shipment, and the continuous offer of prepayment of freight. *Reid v. Southern R. Co.* (N. Car.), 17-247.

Sufficiency to support recovery. — In an action against a railroad company to recover the penalty imposed by the above statute, where the evidence shows that the plaintiff applied to the agent of the defendant at a certain station in North Carolina for a freight car, which was furnished to him and which he loaded with goods; that a few days later he directed the agent to ship the goods to a certain person at a designated point in Tennessee, and tendered prepayment of the freight and demanded a bill of lading; that the agent thereupon refused to give the bill of lading or ship the goods, giving as his reason for such refusal that he did not know where the place designated by the plaintiff as the destination of the goods was located, or the rates thereto; that the plaintiff thereupon repeated his demand that the goods be shipped, and told the agent that he would prepay any additional amount found to be due, and asked to be notified over the telephone when the agent was ready to ship the goods so that he could pay the freight; that the agent failed to ship the goods for a period of fifteen days, at the end of which time he was replaced by another agent; that the latter agent, within two days after his arrival, shipped the goods to the point designated by the plaintiff, where they arrived in safety; and that the point so designated was not a regular station on the defendant's road, but a siding to which freight was rebilled from a regular station some two miles distant, the jury is justified in finding a verdict in favor of the plaintiff. *Reid v. Southern R. Co.* (N. Car.), 17-247.

(4) Actions to recover overcharges.

A shipper cannot maintain an action in a state court against a carrier of goods to recover damages on account of the exaction of unreasonable freight charges from him on interstate shipments, where the rate charged has been filed and promulgated by the carrier under the interstate commerce act and has not been found by the interstate commerce commission to be unreasonable. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.* (U. S.), 9-1075.

5. CARRIERS OF LIVE STOCK.

a. Transportation and delivery.

(1) Delay in transportation.

Delay caused by sickness of animal.

— A delay of twelve hours in the transportation of live stock on account of the sickness

of one is not negligence, where the remaining animals are sent forward by the next train. *Lewis v. Pennsylvania R. Co.* (N. J.), 1-156.

Burden of proof. — In order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose. *Cleve v. Chicago, etc., R. Co.* (Neb.), 15-33.

Sufficiency of evidence. — In an action against a carrier for injuries to live stock resulting from the alleged negligent delay of the carrier in the transportation thereof, evidence examined and held to be insufficient to show that the carrier was negligent. *Cleve v. Chicago, etc., R. Co.* (Neb.), 15-33.

Penalty for delay. — The plaintiff in an action against a carrier for delay in the transportation of live stock need not negative the exception in a statute which requires railroads to run their trains at a certain speed, provided, however, that on certain branch lines "the time consumed in picking up and setting out, loading or unloading stock at stations, shall not be included in the time required." Such exception is a matter of defense. *Cram v. Chicago, etc., R. Co.* (Neb.), 19-170.

(2) Deviation from direct route.

Necessary deviation. — A carrier of live stock who, in case of necessity, deviates from the direct route, and is not negligent in the selection of the other route, is not liable simply by reason of the deviation for injuries to the live stock caused by a flood. *Empire State Cattle Co. v. Atchison, etc., R. Co.* (U. S.), 15-70.

(3) Delivery to wrong person.

A contract of affreightment of stock, containing a stipulation that the owner or his agent shall ride upon the freight train on which the stock is transported, does not put upon the shipper the obligation of seeing that the stock is delivered to the consignee and not to a stranger, and the carrier is liable for the misdelivery. *Southern R. Co. v. Webb* (Ala.), 5-97.

Measure of damages. — Damages recoverable from a common carrier for misdelivery of stock. *Southern R. Co. v. Webb* (Ala.), 5-97.

b. Stoppage in transitu.

A carrier of a shipment of live stock accepted under a contract to carry the stock to a certain point is not liable for refusal to stop the property *in transitu* on the demand of a third person not a party to the contract, and who notifies the carrier that the consignor had obtained the property by a fraudulent sale which was rescinded, especially where the carrier gives the claimant notice and opportunity to protect his rights by legal proceedings. *Switzler v. Northern Pacific R. Co.* (Wash.), 13-357.

c. Loss of or injury to live stock.

Injuries caused by natural propensities of animals. — A carrier of live stock is not liable for injuries caused by the natural propensities of the animals. *Lewis v. Pennsylvania R. Co.* (N. J.), 1-156.

Failure to feed and water. — A contract between a carrier of live stock and a shipper that the latter will feed and water the stock, whether delayed in transit or not, is valid, and the carrier is not liable for injuries arising from failure to feed and water the stock. *Lewis v. Pennsylvania R. Co.* (N. J.), 1-156.

Burden of proving negligence. — In an action to recover damages from a carrier for injuries sustained in transit by live stock which were accompanied by the owner or his agents, the burden is on the owner to prove that the loss was occasioned by the carrier's negligence. *Cleve v. Burlington, etc., R. Co.* (Neb.), 15-33.

Presumption as to cause of injury. — Where injuries received by animals in transit may have been caused by the nature of the animals or by the negligence of the carrier, there is no presumption that the injuries were due to the latter cause. *Lewis v. Pennsylvania R. Co.* (N. J.), 1-156.

Fraudulent representations as to value. — Evidence held not sufficient to show a perpetration of fraud by a shipper on the carrier as to special value of horses shipped. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

Sufficiency of evidence. — In an action against a carrier to recover for injuries to a shipment of live stock caused by a flood, evidence examined and held that the carrier was not negligent in delaying the shipment, in deviating from the direct route, in sending the live stock to the place where the flood occurred, or in failing to move them from such place before the arrival of the flood. *Empire State Cattle Co. v. Atchison, etc., Cattle Co.* (U. S.), 15-70.

Recovery of interest. — A shipper whose property is injured by the negligence of the carrier is entitled to recover interest at the legal rate from the time the loss is sustained, on the amount of damages found in his favor. *Fell v. Union Pacific R. Co.* (Utah), 13-1137.

Damage suffered on connecting line. — In an action against a railroad for damages for injuries to live stock, it is not error to permit an amendment to the complaint changing the alleged place of destination of the shipment from Omaha, at which the defendant's road ended, to Chicago, which was the actual destination of the shipment, where the court confines the damages strictly to the loss occasioned by the neglect of the defendant on its own line of road. *Fell v. Union Pacific R. Co.* (Utah), 13-1137.

Allegations put in issue by plea of not guilty. — In an action against a carrier for injuries to live stock in transportation a plea of not guilty does not put in issue an allegation in the declaration that the con-

signee was the plaintiff's agent, and therefore the court will not consider an objection that such allegation is not supported by the evidence. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

d. Limitation of liability.

Right to limit. — A carrier of live stock may by a special contract so limit its liability for loss or damage that it will be liable only for gross negligence. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

Matter of contract. — In the absence of evidence to the contrary, it is to be assumed that property accepted by a carrier for transportation is taken under the responsibility cast on it by the common law, except as modified by statute; and, if lost under circumstances rendering the carrier liable by the general rule of law, it must respond, unless it can show a contract, or a special acceptance equivalent to a contract, which exempts it from the ordinary liability of common carriers. The transaction must amount to a contract on the subject, wherein the minds of the parties meet as in the making of other contracts. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

Limitation not favored. — Contracts limiting the common-law liability of carriers are not favored by the courts. Exemptions from liability will not be presumed, but must be found clearly expressed in the contract. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

Limiting time for presentation of claim. — A clause in a contract of affreightment for transportation of stock, that a notice in writing of a claim for loss or injury must be given before the stock is removed from the place of destination, does not apply to a claim for damages for delivering property to persons other than the consignee. *Southern R. Co. v. Webb* (Ala.), 5-97.

Valuation of property and corresponding freight rates. — Under the rules and regulations of the Railroad Commission of Florida prescribing the maximum valuation in the shipment of horses and mules at seventy-five dollars each for a certain released rate, and that for every increase of one hundred per cent. or fraction thereof in valuation there shall be an increase of fifty per cent. in rate, the shipper has the option to ship at his own or the carrier's risk, and he will not be bound, in the limit of his recovery, by the payment of the released rate unless he knows the rate paid is a released rate and there is a fair meeting of the minds of the shipper and the carrier that, by payment of the released rate, the recovery of the shipper will be limited to a certain maximum sum clearly agreed on. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

If by a rule of a carrier of live stock carried or a published schedule of tariff rates its liability is fixed by the rate of freight paid, and for the purpose of obtaining a certain rate of freight the shipper reports to the carrier a valuation on live stock shipped,

having notice or actual knowledge of these terms at the time or before the delivery of the stock by him to the carrier to be transported and assenting thereto, the liability of the carrier is fixed by such agreement. If, however, the shipper has no notice of the rule or tariff rates of the carrier and does not assent thereto, the rule is different. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

Where the evidence is not so clear as to forbid any other inference than that a shipper consented to a specified valuation, the question must be left to the referee's determination acting as a jury in a trial of the case. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

Where a shipper and a carrier fairly enter into a contract whereby the parties agree on a valuation of the property, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, such contract will be upheld as simply fixing the rate of freight and liquidating the damages, a proper and lawful mode of securing a true proportion between the amount for which the carrier may be responsible and the freight it receives, and also of protecting itself against extravagant and fanciful valuations. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

6. CARRIERS OF PASSENGERS.

a. Duty to receive for carriage.

(1) In general.

Regard for safety and convenience of other passengers. — The general rule that a common carrier of passengers is bound to accept anybody and everybody who presents himself for transportation and pays the regular fare, has its limitations. Where the carrier has reasonable cause to believe, and does believe, that the safety or convenience of its other passengers will be endangered by a person who presents himself for transportation, it has the right to refuse to accept such person as a passenger, and is not bound to wait until events have justified its belief in that regard, provided reasonable grounds for such belief exist. Nor is the right to refuse to accept a person as a passenger confined to cases where the safety or convenience of other passengers would be endangered. Such right may arise from other circumstances. *Connors v. Cunard Steamship Co.* (Mass.), 17-1051.

(2) Persons with contagious or infectious diseases.

Duty arising out of contract. — Where, by a contract made between a county court and a railroad company, for the mutual advantage of the parties thereto in preventing the spread of a contagious disease, the carrier agrees, in consideration that the county court shall provide and maintain a pesthouse for the care and treatment of persons in-

fectured with such disease, to furnish and equip properly a car therefor and transport such persons to the pesthouse, one of the class of persons therein designated in whose interest the contract is made may maintain in his own name an action against such carrier, either in assumpsit upon contract or in tort, for damages resulting from a breach of its duty to him under the contract, or arising out of the relation of carrier and passenger after he has been accepted as a passenger. *Jenkins v. Chesapeake, etc., R. Co.* (W. Va.), 11-967.

(3) Feeble or infirm persons.

Person requiring medical attendance during ocean voyage. — Subject to the general qualification that the safety or convenience of other passengers shall not be endangered, a common carrier of passengers is bound to take as passengers all who offer themselves, ill or well, provided it can furnish the necessary accommodations and the passenger is willing to pay for what he demands. Where, however, a person who presents himself to a steamship company as a passenger for an ocean voyage is so ill as to require medical attendance during the voyage it is his duty to state that fact to the carrier, and to make special arrangements for his transportation as a passenger in need of medical attention, and if he fails to do so he has no cause of action in tort against the steamship company for refusing to transport him as a passenger and removing him from the vessel, upon discovery of his condition by the ship's surgeon, before the vessel sails. Nor does it alter the case that the proposed passenger is accompanied by another person, where there is nothing to show that such other person is possessed of any medical knowledge or skill. *Connors v. Cunard Steamship Co.* (Mass.), 17-1051.

Ship carrying surgeon. — The fact that a steamship carries a ship's surgeon in compliance with statute does not affect the right of the steamship company to refuse to receive as an ordinary passenger a person whose condition is such as to require medical attendance during the voyage. *Connors v. Cunard Steamship Co.* (Mass.), 17-1051.

Helpless persons. — The law does not impose upon a carrier of passengers the duty to accept as a passenger a helpless person. If such person is received the carrier assumes the additional care and responsibility commensurate with the misfortune and needs of the passenger. *Illinois Central R. Co. v. Allen* (Ky.), 11-970.

Blind man. — A carrier incurs no liability in refusing to sell a ticket to a blind man, seventy-seven years of age and having no attendant, who desires to be carried about one hundred and fifty miles involving two or three changes of cars, one of such changes being to a steamboat, although such person is accustomed to take occasional short trips without an attendant. *Illinois Central R. Co. v. Allen* (Ky.), 11-970.

(4) Carrier's right to designate car or train.

Street railway company. — Where a street railway company has several cars standing at a given point, and all the cars afford equal and sufficient accommodations, the conductor of one of the cars may tell a prospective passenger that he cannot ride on such car and may direct him to take passage on another one, provided his action is not arbitrary, capricious, unreasonable, or discriminatory. *Dobbins v. Little Rock R., etc., Co.* (Ark.), 9-84.

Excluding passengers from freight train. — A railroad company has the right to classify its trains and assign them to such service as is reasonable. In the exercise of this right it may operate trains exclusively for the carriage of freight, and when it has designated a train for operation for that purpose, no person has a right to demand that he shall be carried upon such train as a passenger. *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 9-535.

(5) Duty to stop train to receive passenger.

Flag station. — A railroad company failing through mere inattention of the engineer to stop its train on proper signal to take up passengers at a flag station must respond in damages for the wrong done, although the action is brought for tort and not for breach of contract. *Williams v. Carolina, etc., R. Co.* (N. Car.), 12-1000.

A railroad company is bound to stop its trains in response to proper signals at a flag station at which it is in the habit of stopping trains of the kind so signaled. *Southern R. Co. v. Wallis* (Ga.), 18-67.

b. Statutes requiring separation of white and colored passengers.

Statute exempting particular class.

— The Florida statute requiring street car companies to provide separate compartments in their cars for white and colored passengers, and prohibiting passengers of either race from occupying a compartment set apart for the other race, but excepting from its provisions "colored nurses having the care of white children or sick white persons," violates the first section of the fourteenth amendment to the federal constitution. *State v. Patterson*, (Fla.), 7-272.

Statutory requirement of equal accommodations. — Railroads doing business in Georgia are required by its statutes to furnish "equal accommodations, in separate cars, or compartments of cars, for white and colored passengers;" and it is also declared by the statute that "the officers or employees having charge of such railroad cars shall not permit white or colored passengers to occupy the same car or compartment." *Hillman v. Georgia R., etc., Co.* (Ga.), 8-222.

Power of state as to interstate passengers. — Congressional inaction is equivalent to a declaration that a carrier may, by its regulations, separate white and negro interstate passengers. *Chiles v. Chesapeake, etc., R. Co.* (U. S.), 20-980.

c. Tickets and fares.

(1) Payment of fare.

Rule as to making change. — A rule of a street railway company requiring all conductors of cars to change bills or coins of the denomination of five dollars or less when tendered in payment of car fare, and further requiring them to put off the cars passengers who fail to tender bills or coins of that denomination or less, is reasonable and enforceable; and the conductor has the right to refuse to change a bill of a larger denomination tendered by a passenger, and upon the passenger's failure otherwise to pay his fare to require him to leave the car, though the rule is unknown to the passenger. *Knoxville Traction Co. v. Wilkerson* (Tenn.), 10-641.

(2) Sale of tickets.

Ticket brokerage. — The Oregon statute, making it an offense for any person to sell railroad tickets unless he has a certificate of authority from the railroad company, prohibits the ticket brokerage business, whether it is done by an agent holding a certificate or by a person not having a certificate, as it only permits an agent with a certificate to sell, issue, or deal in the tickets issued by the particular railroad company appointing him. *State v. Thompson* (Oregon), 8-646.

Ticket brokers and scalpers engaged in buying and selling the unused portions of return-trip railroad tickets issued by the carrier at a reduced rate and on condition that the tickets shall not be used by another than the original purchaser, commit a legal wrong against the carrier, although no actual malice is present. *Bitterman v. Louisville, etc., R. Co.* (U. S.), 12-693.

(3) Validity and effect of tickets in general.

Intrinsic effect of ticket. — In the determination of a passenger's right to travel under a railroad ticket tendered by him to the conductor in payment of his fare, conclusive force is to be given to the intrinsic effect of the ticket to pay such fare as expressed on its face. *Shelton v. Erie R. Co.* (N. J.), 9-883.

Presumption as to validity. — When a passenger is riding on a regular passenger train, has paid the usual fare, and holds a ticket which he has a right to suppose is in the common form of a ticket, a mere token that he is entitled to be carried, he may not unreasonably act on the presumption that the ticket is what the circumstances require it to be, if nothing appears which is likely to repel the presumption, even if on closer inspection a condition may be found in it. *Harmon v. Jensen* (U. S.), 20-1224.

Ticket "good until used." — The provision of the New Jersey statute prescribing the rates of passenger fare which may be charged by railroad companies that "tickets for passengers, except excursion tickets or tickets sold at reduced rates, shall be good until used," means that the tickets shall be

good "for passage." *Shelton v. Erie R. Co.* (N. J.), 9-883.

Mutilation of ticket. — A railroad ticket is not mutilated so as not to be good for passage unless it is deprived of some essential or material part. *Young v. Central of Georgia R. Co.* (Ga.), 1-24.

(4) Terms and conditions of tickets.

Acceptance of passenger. — The acceptance and use of a railroad passage ticket constitute assent by the purchaser to all the terms and conditions printed on the ticket. It is not necessary that he should sign the ticket in order to be bound by it. *Brian v. Oregon Short Line R. Co.* (Mont.), 20-311.

The purchaser of a railroad ticket will be presumed to consent to a reasonable limitation as to the time of its use which is plainly expressed on the ticket, though he does not sign the contract. *Freeman v. Atchison, etc., R. Co.* (Kan.), 6-118.

"Continuous passage." — A passenger by accepting a ticket over connecting lines, "good for one continuous passage," only binds himself that once on any of the lines of road over which he is routed he will pursue his journey over that road continuously; that is, he agrees that he is not entitled to stop-over privileges from any one of the lines of road. *Brian v. Oregon Short Line R. Co.* (Mont.), 20-311.

Where a railroad ticket provides on its face that it is given for "one continuous passage, commencing within one day from the date on back hereof," the purchaser is bound by the time limitation, if it is reasonable, though the date on the back is expressed in an abbreviated form by numerals, and though the railroad company has no rule providing for such limitation. *Freeman v. Atchison, etc., R. Co.* (Kan.), 6-118.

Limitation as to time of use. — It is competent for a carrier of passengers to limit the time within which tickets of any class may be used, subject to the qualification that the limitation must be reasonable. *Freeman v. Atchison, etc., R. Co.* (Kan.), 6-118.

A ticket which contains no limitation as to time, either on its face or by reason of a regulation of the railroad company, may ordinarily be used at any time within the period fixed by the statute of limitations. *Freeman v. Atchison, etc., R. Co.* (Kan.), 6-118.

Reasonableness of limitation. — It cannot be said that a condition limiting the time within which a railroad ticket may be used to one day from the date of the sale is unreasonable where there is a daily passenger train service between the points named in the ticket and such points are only a few miles distant from each other. *Freeman v. Atchison, etc., R. Co.* (Kan.), 6-118.

Coupons "void if detached." — A condition expressed on the face of a railroad ticket coupon that it shall be "void if detached," must be reasonably construed; and such a coupon cannot be refused for passage, where it is detached by accident or inadvertence and is presented with the balance of the

ticket of which it forms a part. *Fairfield v. Louisville, etc., R. Co.* (Miss.), 19-456.

(5) Connecting carriers.

Agency to issue ticket. — The agency of a railroad company to issue a ticket over the line of a connecting road is established by evidence that similar tickets issued by the same company over the same line had been accepted on the connecting road, and that the ticket in question was refused by the conductor on the sole ground that the time for which it was limited had expired. *Brian v. Oregon Short Line R. Co.* (Mont.), 20-311.

Separate contract with each carrier. — A railroad ticket over connecting lines constitutes a separate contract with each road where the ticket consists of a passage coupon for each road, with a provision that the company issuing it acts only as agent in respect to the connecting roads. *Brian v. Oregon Short Line R. Co.* (Mont.), 20-311.

Limitation as to time of using ticket. — A provision in a railroad ticket over connecting lines, that it will not be accepted for passage unless used to destination before a certain time, does not mean that the passenger must reach his destination before the time limited expires, but that the ticket must be presented for passage on the final road within such time. *Brian v. Oregon Short Line R. Co.* (Mont.), 20-311.

(6) Discrimination.

Favoring particular localities. — Where a railway company operating a tramway through several municipalities is charged with unjust discrimination in granting special rates to one of the municipalities, it is error for the board of railway commissioners on the hearing of the complaint to refuse to consider a contract between the railway company and the favored municipality whereby special privileges were conceded in regard to the use of the streets by the railway company, which contract was offered in evidence to justify the granting of the special rates. *Montreal Park, etc., Co. v. Montreal (Can.)*, 18-143.

Favoring particular class of passengers. — A carrier of passengers has the right to establish a reduced rate for the carriage of students under a prescribed age. *Fitzmaurice v. New York, etc., R. Co.* (Mass.), 7-586.

Nontransferable tickets at reduced rates. — A carrier of passengers has the lawful right to sell at a reduced rate tickets which are nontransferable, and is under the duty to use due diligence to enforce as against all who acquire such tickets the conditions of nontransferability and forfeiture for use by others than the original purchasers. *Bitterman v. Louisville, etc., R. Co.* (U. S.), 12-693.

d. Who are passengers.

(1) In general.

Errand boy as passenger. — A person riding on an elevator on his way to the office

of a tenant of the building to see if the latter wants him for an errand, is ordinarily a passenger for hire on the elevator. *Ferguson v. Truax* (Wis.), 13-1092.

Liability to person using contrary to orders. — If a person is guilty of misconduct furnishing reasonable ground for excluding him from an elevator, and in consequence thereof is permanently prohibited from riding in the elevator thereafter, and in violation of the prohibition is using the elevator when an accident occurs, he does not have the rights of a passenger against the proprietor, even though at that time he is on his way to the office of a tenant of the building served by the elevator; and an instruction in an action for the injuries received that ignores the prohibited use of the elevator is erroneous. *Ferguson v. Truax* (Wis.), 13-1092.

(2) Person intending to ride.

Signaling street car to stop. — A foot traveler on the highway who is approaching a street car which has stopped at his signal to receive him as a passenger has not, before actually reaching the car, the rights of a passenger, and the railway company owes him no other duty than that which it owes to any person on the highway. *Duchemin v. Boston El. R. Co.* (Mass.), 1-603.

Indication of intention. — In order to bring a person in a station house or upon the platform of a railroad station within the protection of the legal duties owing by a common carrier to its passengers, a person intending to become a passenger must go in a proper manner to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage, and must there, either by purchase of a ticket or in some other manner, indicate to the carrier his intention to take passage, and thus place himself in the carrier's charge. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 9-1096.

Nebraska statute construed. — The question whether a passenger is "a passenger being transported," within the meaning of the Nebraska statute providing that "every railroad company . . . shall be liable for all damages inflicted upon the person of passengers while being transported over its road," depends upon the circumstances of each particular case. After a person has become a passenger by indicating in the proper manner his intention to take passage, the carrier is held to its common-law liability alone until the time when the passenger is in the act of journeying, and from the time that the act begins until its termination, and during the necessary incidents of transportation, the passenger is "being transported," within the meaning of the statute. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 9-1096.

(3) Person impliedly invited upon station platform.

Degree of care required. — A railroad company owes only ordinary care to persons impliedly invited upon its station platform,

who are not passengers. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 9-1096.

(4) Person attending or visiting passenger.

Person boarding steamship at intermediate port. — Where a person goes aboard a steamer at an intermediate port of call, on the implied invitation of the owners, for the purpose of visiting a passenger thereon, the owners are bound to exercise ordinary care to avoid injuring him, and in determining what constitutes ordinary care under such circumstances, the magnitude of the threatened injury is a factor. *City of Seattle* (U. S.), 10-159.

Where a steamship carrying passengers from a port in Alaska to a port in the state of Washington makes a stop at an intermediate port in Alaska, and a person boards her for the purpose of visiting a passenger thereon, and the visitor upon hearing the whistle giving warning of the impending departure of the vessel immediately attempts to alight but is prevented from doing so by the fact that the gang plank has been removed, and the visitor thereupon requests to be put ashore, it is the duty of the master of the vessel, when he learns that the visitor is on board and demands to be put ashore, to bring the vessel back to the dock for the purpose of permitting him to leave, in view of the long voyage which the vessel is about to take, and the very considerable injury it would inflict upon the visitor to carry him in his unprepared state away from his family and his occupation for so long a time. *City of Seattle* (U. S.), 10-159.

Time to alight. — A railroad company is not liable to a person who enters a car in attending a passenger and is injured by the starting of the train before she has time to alight, where it does not appear that the trainmen know or ought to know that she is not a passenger. *Wickert v. Wisconsin Central R. Co.* (Wis.), 20-452.

(5) Public officer on train in discharge of duty.

Constable searching for suspected person. — In an action against a carrier of passengers to recover damages for the death of the plaintiff's intestate, where the declaration alleges that the deceased was a constable, and that, having been informed that criminals were escaping on one of the defendant's trains, he went aboard the train for the purpose of "apprehending said criminals" and "examining certain persons aboard whom he had reason to suspect of an unlawful design," but does not allege that the deceased entered the train for the purpose of serving a warrant for the arrest of any person whom he believed to be there, or that he had any reasonable ground to believe there was being committed upon the train any breach of the peace or other crime which required him to enter for the purpose of preserving public order, or that there were on the train persons who had committed a felony or any of the misdemeanors for which the state statutes

authorized a constable to arrest without a warrant, it must be held that the deceased was at most a mere licensee. *Creeden v. Boston, etc., Railroad (Mass.)*, 9-1121.

A person who has become a passenger upon a steam railroad train, and has placed himself in the carriage of the common carrier, cannot be said to be "abroad," within the meaning of the Massachusetts statute providing that an officer of the watch may during the nighttime examine all persons abroad whom he has reason to suspect of an unlawful design; and therefore an officer who goes on a railroad train for the ostensible purpose of performing the duties imposed upon him by this statute is at most a mere licensee. *Creeden v. Boston, etc., Railroad (Mass.)*, 9-1121.

Policeman riding on free pass. — A street railway pass issued without charge to a member of the police force is not based on a valuable consideration on the theory that the issuance of passes to peace officers induces them to ride upon the cars and thus tends to preserve good order on the cars and to protect the interests of the road. *Marshall v. Nashville R., etc., Co. (Tenn.)*, 12-675.

(6) Termination of relation of carrier and passenger.

In general. — The relation of carrier and passenger, when established, does not terminate until the passenger has reached his destination, has alighted from the train upon which he had been riding, and has had reasonable time within which to leave the place where passengers are discharged. *Glenn v. Lake Erie, etc., R. Co. (Ind.)*, 6-1032.

From the time a passenger places himself under the charge of the carrier as he begins his journey, until he is afforded the opportunity to leave the premises of the carrier at the termination of the journey, he is "a passenger being transported," within the meaning of the Nebraska statute providing that "every railroad company . . . shall be liable for all damages inflicted upon the person of passengers while being transported over its road," unless by some act not attributable to the carrier the relation ceases. *Fremont, etc., R. Co. v. Hagblad (Neb.)*, 9-1096.

The relation of carrier and passenger ceases when the car has reached its final station and been placed on a side track after notice to the passengers. *Schley v. Susquehanna, etc., R. Co. (Pa. St.)*, 19-1013.

Relation terminated by act of passenger. — A person cannot hold a railroad company liable as a carrier of passengers for personal injuries which he sustains on its premises after he has by his own act voluntarily terminated the relation of carrier and passenger. *Glenn v. Lake Erie, etc., R. Co. (Ind.)*, 6-1032.

Where a passenger, after alighting from a train upon which he has been riding, voluntarily loiters about the station for ten or fifteen minutes for the sole purpose of amusing himself, he thereby, as a matter of law, breaks the continuity of the journey and terminates the relation of carrier and passen-

ger. *Glenn v. Lake Erie, etc., R. Co. (Ind.)*, 6-1032.

Person awaiting connecting train. — Where a railroad company, whose train has arrived at the junction of its line with the line of another railroad, permits a passenger who is destined to a point of the connecting line to remain on the train to await the arrival of the connecting train, it owes him a duty in the nature of the duty owing to a passenger, notwithstanding the fact that it has safely carried him the entire distance agreed upon. *Abbott v. Oregon R., etc., Co. (Oregon)*, 7-961.

Passenger temporarily leaving train. — A passenger on a car or boat may, before reaching his destination, leave the vehicle to transact his own private business at any intermediate station or landing where a stop is made for any reasonable time to receive or discharge passengers; and if, without his fault, he is injured in consequence of the carrier's negligence on any part of the premises set apart by it for the use of the public or so used with his consent, he may recover damages for an injury sustained. *Abbott v. Oregon R., etc., Co. (Oregon)*, 7-961.

(7) Person riding gratuitously, in general.

Invitee of carrier. — A passenger who is carried gratuitously by a common carrier is as much a passenger as if he were paying full fare, and the fact that he is carried gratuitously will not of itself deprive him of his right of action for injury by the negligence of the carrier. *Indianapolis Traction, etc., Co. v. Klentschy (Ind.)*, 10-869.

The relation of carrier and passenger exists between a street railway company and a person who is taking a gratuitous trolley ride upon the invitation of the company. *Indianapolis Traction, etc., Co. v. Klentschy (Ind.)*, 10-869.

The relation of common carrier and passenger exists between a street railway company and persons who accept its invitation to take a free ride on its cars, where the cars are in the charge of and operated by the company's regular servants; and at the very least the carrier is bound to exercise ordinary diligence to avoid injuring such passengers and is liable for any want of ordinary care. *Indianapolis Traction, etc., Co. v. Lawson (U. S.)*, 6-666.

(8) Employees.

Employee riding on coupons. — A street railway employee whose home is at a distance from his assigned place of work is a passenger while riding on a regular street car of the company from his home to his place of work, if he so rides by his own volition and not by the direction of the company, and pays his fare in coupons issued to him by the company as a part of his wages. *Hebert v. Portland R. Co. (Me.)*, 13-886.

Employee of another. — Under the Pennsylvania statute of April 4, 1868, one not in the employment of a railroad company but using its facilities under a contract between the railroad company and his employer which

simply permits his carriage for and in connection with the business of his employer conducted upon the railroad is not a passenger. *Lewis v. Pennsylvania R. Co. (Pa.)*, 13-1142.

(9) Children riding free with parents.

Relationship established by custom.

— Where a child under four years of age rides on a street car without payment of fare, but is accompanied by his mother who has paid her fare, and there is a general custom on the part of the street railway company not to charge fare for the carriage of a child of that age, the relationship of passenger and carrier exists between the child and the street railway company. *Ball v. Mobile Light, etc., Co. (Ala.)*, 9-962.

(10) Person riding on free pass.

Pass exempting carrier from liability.

— A street railway company occupies the position of a mandatory and not a common carrier to a person riding on a free pass stipulating that such person uses the pass entirely at his own risk of injury or damage, and the company is not liable to such person except for negligence so gross as to amount to recklessness or wantonness. *Marshall v. Nashville R., etc., Co. (Tenn.)*, 12-675.

Drover's pass. — A person riding on a drover's pass properly issued to him by a railroad company is a passenger for hire, and his release of liability for damages resulting from the carrier's negligence is invalid. *Weaver v. Ann Arbor R. Co. (Mich.)*, 5-764.

A person actually put in charge of a shipment of live stock by a shipper, with the understanding that in consideration of the transportation furnished him he shall render such services as shall become necessary, is a "bona fide employee" of the shipper within the meaning of a drover's pass issued by the railroad company, though he has not been employed previously by the shipper. *Weaver v. Ann Arbor R. Co. (Mich.)*, 5-764.

(11) Express messengers.

Messenger riding in special car.

— An express messenger, carried by a railroad company in a special car under a contract with the express company for the transportation of express matter, is neither a trespasser, licensee, nor employee of the railroad company, but is a passenger for hire. *Davis v. Chesapeake, etc., R. Co. (Ky.)*, 12-723.

(12) Newsboy or news agent.

Pennsylvania statute. — A railway news agent riding on a train in the usual course of his employment held not to be a passenger of the carrier within the Pennsylvania statutes. *Smallwood v. Baltimore, etc., R. Co. (Pa.)*, 7-525.

(13) Railway mail agents or clerks.

In general. — In the carriage of the route agents or postal clerks of the United States

who are charged with duties respecting the mails carried under contracts made in accordance with law, a carrier of passengers is under the same obligation as regards suitable and safe carriage as it is to its ordinary passengers. *Lindsay v. Pennsylvania R. Co. (D. C.)*, 6-862.

A railway postal clerk in the discharge of his duties on a railway train occupies the relation of a passenger, and his rights are to be determined by the rules of law applicable to that relation. *Illinois Central R. Co. v. Porter (Tenn.)*, 10-789.

Railroads owe the same degree of care to postal clerks and mail agents riding in the postal cars in charge of mail as they do to passengers. *Malott v. Central Trust Co. (Ind.)*, 11-879.

Pennsylvania statute. — The Pennsylvania statute providing that any person sustaining injury or loss of life while lawfully engaged or employed on or about a railroad, though not employed by the railroad, may recover against the railroad only as if he were its employee, but providing that the statute shall not apply to passengers, precludes a railway postal clerk, in the employ of the federal government, from being considered a passenger, so far as the right to recover for personal injuries is concerned. *Martin v. Pittsburg, etc., R. Co. (U. S.)*, 8-87.

Such statute is not repugnant to the federal constitution by the fact that it lessens instead of augments the carrier's liability. *Martin v. Pittsburg, etc., R. Co. (U. S.)*, 8-87.

Such statute is not unconstitutional because it prevents a person traveling from or to another state from maintaining an action for an accident occurring in the domestic state, though such person could maintain an action in the foreign state for a similar accident occurring there. *Martin v. Pittsburg, etc., R. Co. (U. S.)*, 8-87.

(14) Person riding on ticket or pass fraudulently procured.

Where a railroad employee procures, in the name of a member of his family, a free non-transferable ticket for passage on an excursion train run for the benefit of the employees of the railroad, and gives the ticket to a person not a member of his family, who uses it, such person is not a passenger, and therefore cannot recover against the railroad company for any injury which is not wanton or wilful, though he does not look at the ticket or know its contents. *Harmon v. Jensen (U. S.)*, 20-1224.

Previous acquiescence by carrier.

— A person riding on a season railroad ticket, sold at a reduced rate, which he has procured by wilfully false representations as to his right to obtain the ticket, is in no better position than a mere trespasser; and this is so though the railroad company's conductors have previously accepted coupons of the ticket and permitted him to ride thereon. *Fitzmaurice v. New York, etc., R. Co. (Mass.)*, 7-586.

- (15) Person riding on locomotive, freight or special train.

Persons on locomotive with acquiescence of conductor. — One who with the mere silent acquiescence of the conductor rides upon the engine of a railroad train or in any place unsuitable or exposed, or not designated for carrying passengers, is not a passenger though he may have gone to the railroad station for the purpose of taking passage on the train. *Radley v. Columbia Southern R. Co.* (Oregon), 1-447.

Person on freight train, in general. — Before a person can enter upon and acquire the rights of a passenger on a train which the railroad company has designated for operation for the carriage of freight exclusively, he must show some contract made with some servant or agent of the company authorized to make such contract. This authority may be shown either by express grant or by necessary implication growing out of the nature or character of the employment. *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 9-535.

In an action against a railroad company to recover damages for personal injuries sustained by the plaintiff while riding on one of the defendant's freight trains, it is for the court, and not for the jury, to determine whether the conductor of the train had authority to bind the defendant by his agreement to carry the plaintiff as a passenger or as an employee. *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 9-535.

Unauthorized agreement with conductor. — The conductor of a train which a railroad company has designated for operation for the carriage of freight exclusively has no authority to contract for the carriage of passengers, or, except in case of emergency, to employ servants to assist him in operating the train; and a person who is injured while riding on a freight train under an unauthorized agreement with the conductor cannot hold the company liable for personal injuries sustained by him, where the injuries have not been inflicted wantonly or wilfully. *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 9-535.

Where the conductor of a freight train makes an unauthorized agreement to carry another person on the freight train in consideration of an undertaking of such person to assist in the operation of the train, and during the course of transportation such person is injured, the fact that the railroad company subsequently issues to him a pass wherein he is described as an "injured employee" does not tend to show any ratification of the attempted employment. *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 9-535.

Street car chartered for special purpose. — When a person enters a street car chartered for a special purpose after the regular schedule hours, tenders the amount of his passage and keeps a seat in the car with the knowledge and consent of the conductor, the street railway assumes towards that person all the duties incumbent on a

carrier of passengers. *McCarter v. Greenville Traction Co.* (S. Car.), 5-42.

e. Duty in carriage of passengers.

(1) Duties and liabilities in general.

Degree of care required. — A carrier is not an insurer of the safety of a passenger and is not liable for injuries received by the latter through unavoidable accident. *Taillon v. Mears* (Mont.), 1-613.

A carrier of passengers is bound to exercise the utmost practicable care and diligence to secure the safety of a passenger, but a duty of reasonable care for his own safety as well rests upon the passenger himself. *Interurban R., etc., Co. v. Hancock* (Ohio), 8-1036.

A carrier owes the duty to its passengers to provide for them a safe place to ride, to see that they are treated with respect by its servants, and not to expose them to unnecessary peril. *Carleton v. Central of Georgia R. Co.* (Ala.), 16-445.

A common carrier of passengers is bound to provide for the safety of its passengers so far as human skill, care, and foresight are capable of securing that end, and is liable for injuries received by them, in the course of their transportation, which might have been avoided or guarded against by the exercise upon its part of extraordinary vigilance, aided by the highest skill. *Morgan v. Chesapeake, etc., R. Co.* (Ky.), 16-608.

A common carrier of persons for hire or reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of care and skill. It is the duty of a railway company, among other things, to announce the approach to a station where passengers are to disembark; to afford passengers reasonable time and opportunity, under the circumstances, to embark and disembark; to provide reasonable platform facilities for persons to disembark with safety; to keep the station and platforms, at night, lighted in a reasonable manner, and to keep the depot and platforms free from dangerous obstructions. *Atchison, etc., R. Co. v. Calhoun* (Okla.), 11-681.

For the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business. *Colorado, etc., R. Co. v. McGeorge* (Colo.), 17-880.

A carrier of passengers for hire is bound to exercise the highest degree of care for the protection and safety of his passengers, and is responsible for the negligent acts of his servants though such acts are not within the scope of employment. *Taillon v. Mears* (Mont.), 1-613.

Scenic railways. — The proprietor of a scenic railway, operated for amusement purposes, is a common carrier of passengers

within the rule making it incumbent upon such a carrier to exercise the highest degree of care and caution for the safety of its passengers and to do all that human foresight and vigilance can reasonably do, consistent with the mode of conveyance and the practical operation of its railway, to prevent accidents to passengers while riding on its cars. *O'Callaghan v. Dellwood Park Co.* (Ill.), 17-407.

Street car companies. — Street car companies, as carriers of passengers, are held to the same degree of care and vigilance in preventing injuries to their passengers as is required of other railroads carrying passengers for hire, that is, the highest care and skill that prudent men would exercise in a like business and under like circumstances. *O'Gara v. St. Louis Transit Co.* (Mo.), 11-850.

Freight trains. — As a rule a railroad company is not negligent because of an occasional jar or jolt in the operation of a freight train, but a jar of great, unusual, and unnecessary violence is evidence of negligence. *Pasley v. St. Louis, etc., R. Co.* (Ark.), 13-121.

Trains run on Sunday. — A railroad company which runs a regular passenger train on Sunday cannot escape liability for failure to perform its legal duties incidental thereto on the ground that the running of trains on Sunday is unlawful. *Southern R. Co. v. Wallis* (Ga.), 18-67.

Keeping aisles of cars unobstructed. — It is not negligence as a matter of law for the conductor of a street car of ordinary type, with a seat running lengthwise of the car on each side, to suffer the bag or satchel of a passenger to remain on the floor of the car in the aisles where it is not so placed as to obstruct free passage out of and into the car, for in such case the street car company is not bound to exercise toward a passenger the utmost diligence in providing against those injuries that can be averted by human foresight, but is bound only to exercise the highest degree of care consistent with the carrying on of its business. *Pitcher v. Old Colony St. R. Co.* (Mass.), 12-886.

Discovery of obstacle on track. — Where in an action against a street car company for damages for personal injuries to a passenger, the defendant relies for a defense upon the fact that the derailment of the car was caused by a brick placed on the track by a small boy, the defendant, while not liable for the tortious act of the boy, is liable if the motorman on the car, by the exercise of the high degree of care which an employee in such circumstances is required to exercise, could have discovered the brick upon the track in time to have stopped the car and averted the derailment. *O'Gara v. St. Louis Transit Co.* (Mo.), 11-850.

Where in such an action the evidence is that the day of the accident was bright and clear, that the track was straight, and that the brick was placed on the track fifty feet in advance of the car, and there is evidence from which the jury is authorized to find

that the motorman saw the brick, and there is no affirmative proof on the part of the defendant that the car could not have been stopped within fifty feet, or at least brought to such a slow rate of speed that it would not have been derailed, a case is presented of the joint tort of the boy and the negligence of the motorman combining to produce the injury, and the trial court commits no error in refusing a peremptory instruction for the defendant at the close of the evidence. *O'Gara v. St. Louis Transit Co.* (Mo.), 11-850.

Train running into landslide. — In an action by a passenger against a railroad company to recover for injuries received in an accident, caused by the train running into a landslide on the track, it is reversible error for the trial court to instruct the jury that common carriers of passengers are bound to exercise all the care and skill which human foresight and diligence can suggest. For all practical purposes such an instruction makes the carrier an insurer of the safety of its passengers, which is not the law. *Colorado, etc., R. Co. v. McGeorge* (Colo.), 17-880.

Requiring passenger to change cars on moving train. — Whether it is negligence for a railroad company to require a passenger on one of its trains to pass from one car to another while the train is in motion, depends upon the conditions prevailing at the time, such as the manner in which the cars are coupled, the speed at which the train is moving, the condition of the track, and whether it is straight or curved, and also upon the condition of the passenger as to strength and sobriety. *Carleton v. Central of Georgia R. Co.* (Ala.), 16-445.

Corporations or persons liable. — A railroad company which has leased its road-bed, track, and rolling stock to another corporation is liable for the torts of the lessee; and this liability extends to an injury sustained by a passenger in consequence of the negligence of the lessee's servants. *Carleton v. Yaddin R. Co.* (N. Car.), 10-348.

(2) To transport promptly.

Liability for negligent delay. — A common carrier of passengers is not an insurer as to the time when passengers will arrive at their destination, in the absence of an express contract on the subject. If a railroad negligently fails to keep the time it promises, it will be liable in damages for injury thereby accruing to a passenger; but to entitle the passenger to recover there must be proof of negligence. *Cormack v. New York, etc., R. Co.* (N. Y.), 17-949.

Delay preventing passenger from voting at general election. — In an action against a carrier for failing to carry the plaintiff to a certain place and return him in time to transact certain business and to vote at a general election, the loss of the plaintiff's vote cannot be included as an element of damages, where his right to vote was not questioned and no humiliation or indignity was offered him, and the defendant purely through accidental happening failed

to return the plaintiff in time. *Morris v. Colorado Midland R. Co.* (Colo.), 20-1006.

Act of God as excuse for delay. — The publication of a time table imposes upon a railroad company the obligation to exercise all reasonable care and diligence to make the movements of its trains correspond thereto; but the obligation is not absolute and unconditional. The carrier may be relieved therefrom, if without any negligence on its part the observance of punctuality is prevented by the act of God or inevitable accident. It is the duty of the carrier to exercise reasonable foresight in the anticipation of obstructions to travel, to use all available means for the removal of such obstructions, and to proceed with the transportation as soon as practicable after such removal. Where all this has been done, the intervention of an act of God or *vis major* exonerates the carrier from legal liability for the delay. *Cormack v. New York, etc., R. Co.* (N. Y.), 17-949.

Blizzard as excuse for delay. — A snow storm of such severity as to constitute a blizzard in the common acceptance of that term, is an act of God, relieving a carrier of passengers from liability for delay in transportation. *Cormack v. New York, etc., R. Co.* (N. Y.), 17-949.

Weight of train and condition of track as excuse for delay. — The *prima facie* case of negligence made by showing that the defendant's passenger train failed to make its schedule and connections and that the plaintiff, a passenger, was thereby injured, is not conclusively rebutted, so as to justify a nonsuit, by evidence that the train was heavier than usual, and that the delay was caused partly by a trestle being on fire, and partly by the fact that the coal used in the locomotive was bad. It is for the jury to say whether such conditions were the result of negligence. *Taber v. Seaboard Air Line Ry.* (S. C.), 19-1132.

- (3) To provide safe cars and premises generally.

Cars owned by other companies. — A common carrier of passengers is answerable in the same degree for the safety of cars of other companies used by it as for the safety of its own cars. *Morgan v. Chesapeake, etc., R. Co.* (Ky.), 16-608.

Mixed trains. — The duty of a carrier of passengers to provide safe cars is the same with regard to mixed trains, intended for the carriage of both freight and passengers, as with regard to trains intended for the carriage of passengers only, and consequently an instruction which might lead the jury to believe that a passenger assumes additional risks by riding on a mixed train is erroneous. *Morgan v. Chesapeake, etc., R. Co.* (Ky.), 16-608.

Car door closing on passenger's hand. — The mere fact that while a car is standing at a station to discharge and receive passengers, the car door unexpectedly closes, and injures a passenger who is about to

alight, does not establish negligence on the part of the carrier. *Christensen v. Oregon Shore Line R. Co.* (Utah), 18-1159.

Safe exit from station. — A street railway company owes to its passengers the duty to use reasonable care in constructing and maintaining a safe turnstile which affords a means of egress from its terminal station to the street. *Gascoigne v. Metropolitan West Side El. R. Co.* (Ill.), 16-115.

- (4) To protect passengers.

- (a) From carrier's servants.

Insults or mistreatment. — A passenger is entitled to punitive damages from a carrier for insults or mistreatment suffered by him at the hands of any employee of the carrier. *Hutchinson v. Southern R. Co.* (N. Car.), 6-22.

Assault by conductor. — In an action against a street railway company to recover damages for an assault committed by the conductor of one of its cars, an instruction asserts a correct proposition of law which states that even though it was the duty of the conductor to keep the plaintiff out of the part of the car reserved for white people, it was also his duty not to use any more force than was necessary for that purpose. *Birmingham R., etc., Co. v. Mason* (Ala.), 6-929.

In an action by a widow to recover for the death of her husband who, while a passenger on a street railway car, was shot by the conductor thereof during an altercation between him and the plaintiff's husband, an instruction that if the jury should find that the plaintiff's husband brought on the difficulty the plaintiff can under no circumstances recover, is properly refused. *O'Brien v. St. Louis Transit Co.* (Mo.), 15-86.

Assault provoked by passenger. — Insulting language provoking an assault on a passenger by the conductor of the car is not a defense to an action by the passenger against the carrier, but it may be shown in mitigation of damages. *Jackson v. Old Colony St. R. Co.* (Mass.), 19-615.

Existence of relation of carrier and passenger. — A carrier is liable for assault not justified by the principles of self-defense, made by a servant of the carrier on a passenger while the relation of carrier and passenger exists; but after that relation has terminated, such an act of the servant is not within the scope of his employment, and the carrier is not liable. *Jackson v. Old Colony St. R. Co.* (Mass.), 19-615.

- (b) From fellow passengers or third persons.

Third persons, in general. — A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence, injury, or outrage and humiliation by third persons. This protection must be afforded by the conductor to the extent of all the power with which he is clothed by the company or by law, and his failure to afford it, when he

has knowledge that there is occasion for his interference, will subject the company to liability in damages. *Hillman v. Georgia R., etc., Co. (Ga.)*, 8-222.

Liability of a carrier of passengers for an assault on a passenger by a third person. *Brown v. Chicago, etc., R. Co. (U. S.)*, 3-51.

Injury not reasonably to be anticipated. — While a common carrier of passengers is perhaps not bound to protect its passengers from injuries by third persons to the same extent and degree as from like injuries by its own agents or employees, still it must use a high degree of care to prevent such injuries by strangers. It is under a duty to protect its passengers from all dangers which are known, or which by the exercise of a high degree of care ought to be known, whether occasioned by its own servants or by strangers; and if an injury offered by a passenger is the result of the occurring negligence of a stranger and its own, the carrier is liable. Where, however, the carrier has no knowledge of the condition of danger to which the passenger is subjected, and could not reasonably anticipate the injury, or provide against it, it is not liable for an injury suffered by a passenger at the hands of a stranger. *Irwin v. Louisville, etc., R. Co. (Ala.)*, 18-772.

Intoxicated persons. — In an action by a passenger against a carrier to recover damages for injury by an intoxicated person, the charge of the court held not to have been submitted accurately to the jury the law applicable to the case made by the pleadings and evidence. *Hillman v. Georgia R., etc., Co. (Ga.)*, 8-222.

Missile hurled through car window. — A railroad company cannot be held liable for injuries suffered by a passenger in one of its cars by being struck by a missile hurled through the car window by a stranger, where there is nothing to show that such an assault or injury could have been reasonably anticipated by the company at the time and place at which it occurred. *Irwin v. Louisville, etc., R. Co. (Ala.)*, 18-772.

A street railway company is not liable to a passenger for injury inflicted by a missile thrown by a stranger standing in the street, or the purpose of injuring the motorman of one of its cars as a punishment for the motorman's refusal to stop the car at a place where it was not required by law or custom to stop. *Woas v. St. Louis Transit Co. (Mo.)*, 8-584.

In an action against a street railway company to recover damages for personal injuries sustained by a passenger, where it appears that the injuries were inflicted by a missile thrown by a stranger on account of the failure of the motorman of one of the defendant's cars to stop the car, it is not erroneous to exclude evidence that prior to the injury in question certain persons had thrown missiles at the defendant's cars on account of their failure to stop and allow passengers to get aboard. *Woas v. St. Louis Transit Co. (Mo.)*, 8-584.

Mob violence. — A street railway held not liable for injury to a passenger resulting from mob violence occasioned by a strike against the company. *Bosworth v. Union R. Co. (R. I.)*, 3-1080.

(c) From arrest.

Arrest by known officer of the law. — A railroad company is not liable for failing to protect a passenger where the alleged neglect of duty consists only in the failure of the conductor of the train to resist known officers of the law in carrying out their purpose to arrest the passenger, and in delaying the train at a station a few minutes longer than usual while the arrest is being effected. *Bowden v. Atlantic Coast Line R. Co. (N. Car.)*, 12-783.

Prosecution instituted by conductor. — A conductor employed by a street railway company acts without the scope of his employment when he prosecutes a disorderly passenger for a breach of the peace, and therefore the company is not liable for his action unless it authorizes or ratifies it. *Dobbins v. Little Rock R., etc., Co. (Ark.)*, 9-84.

(5) To supply drinking water.

Georgia statute. — The Georgia statute requiring railroad companies to supply drinking water to passengers, and providing for indictment and fine for neglect of such duty, held to be valid except in so far as it undertakes to inflict punishment other than fine. *Southern R. Co. v. State (Ga.)*, 5-411.

(6) To heat cars.

Postal cars. — A route agent or postal clerk of the United States may maintain an action against a carrier of passengers for personal injuries sustained by him in consequence of the carrier's failure to comply with the federal statute requiring that postal cars shall be properly warmed for the accommodation of the route agents who accompany and distribute the mails. *Lindsey v. Pennsylvania R. Co. (D. C.)*, 6-862.

Train stalled during blizzard. — In an action by a passenger against a railroad company for failure to transport the plaintiff to his destination promptly, where the complaint also alleges that the car in which the plaintiff was compelled to spend the night, because of the delay, was cold and uncomfortable, and that the defendant did nothing to mitigate its uncomfortable condition, and there is evidence tending to support that allegation, but no evidence sufficient to support the allegation that the delay in transportation was due to the defendant's fault, it is error for the trial court to submit the case to the jury in a charge which leaves them at liberty to find against the defendant on the issue as to delay in transportation. In such a case, the question whether the defendant failed to perform its duty in mitigating the uncomfortable condition of the car should be submitted to the jury separately. *Cormack v. New York, etc., R. Co. (N. Y.)*, 17-949.

- (7) To carry to point indicated by sign on car.

In general. — A street railway company held not liable in damages for failure to carry a passenger to the point indicated by the signs on the car. *O'Connor v. Halifax Tramway Co.* (Can.), 3-1074.

- (8) To announce station and awaken passenger.

Failure to announce station. — The right of a sleeping passenger to damages for failure of the railroad company to announce the station. *Seaboard Air Line Ry. v. Rainey* (Ga.), 2-675.

Failure to awaken passenger. — The failure of a sleeping passenger to leave the train upon which he is riding immediately upon its arrival at his destination does not terminate the relation of carrier and passenger, where the servants in charge of the train, with the knowledge that the station is the passenger's destination, have failed to awaken him and acquaint him with the fact that he should alight. *Bass v. Cleveland, etc., R. Co.* (Mich.), 7-718.

It is not the duty of a railway company to awaken a sleeping passenger in order to advise him that his destination is reached and enable him to leave the train. *Seaboard Air-line Ry. v. Rainey* (Ga.), 2-675.

- (9) To stop at passenger's destination.

In general. — The duty of a carrier of passengers to stop trains at stations. *Gulf, etc., R. Co. v. Moore* (Tex.), 4-770.

Station where train is not scheduled to stop. — Where a passenger boards a train in ignorance of the fact that it is not scheduled to stop at the place to which he has a ticket, and he is received without objection or warning, it is the duty of the railroad company to stop the train for him at his destination. *Hutchinson v. Southern R. Co.* (N. Car.), 6-22.

Damages for failure to stop. — A passenger on a railroad train who is carried past his destination is entitled to recover damages from the railroad company, though he sustains neither bodily harm nor actual damages; and if he is carried by recklessly or wilfully, he is entitled to punitive damages. *Hutchinson v. Southern R. Co.* (N. Car.), 6-22.

- (10) To provide waiting room.

Common-law duty. — Even in the absence of statutory requirements, it is the duty of a railroad company to provide and maintain waiting rooms to shelter from inclement weather persons waiting at its stations to take its trains; and a company is liable for an injury which is the proximate result of its breach of this duty. *Draper v. Evansville, etc., R. Co.* (Ind.), 6-569.

At junction. — A petition alleged, in substance, the following facts: The plaintiff, a woman, purchased a through ticket between two points on connecting lines of two rail-

way companies. She was transported by the first railroad to a junction point on the two lines. At that place passengers had to wait for a transfer to connecting trains, and there was no place at such point where they could obtain accommodations. In view of these facts the two companies jointly provided and used a waiting room for such passengers; and upon her arrival there plaintiff was told by the agents and employees of both companies to enter the waiting room, which she did accordingly. It was necessary to wait several hours for the connecting train. While so waiting, the employee in charge of the waiting room refused to allow her to remain until the connecting train arrived, ordered and forced her to leave the waiting room at night and in the dark, with her husband and two children who accompanied her, and closed and locked the room. She was thereby exposed to a rainstorm and made sick, and was caused pain and suffering. Held, that, as against a general demurrer, the petition set out a cause of action in tort against the two defendants. *Riley v. Wrightsville, etc., R. Co.* (Ga.), 18-208.

An allegation that the plaintiff had to wait "several hours" for a train was subject to special demurrer, where no reason appeared why the plaintiff could not allege more definitely the time. *Riley v. Wrightsville, etc., R. Co.* (Ga.), 18-208.

The description of the person who forced the plaintiff to leave the waiting room as "the employee in charge of said waiting room" was subject to special demurrer for not alleging whether he was claimed to be the employee of the one or the other defendant, or of both. *Riley v. Wrightsville, etc., R. Co.* (Ga.), 18-208.

- (11) To light stations and platforms of cars.

Duty to light station, in general. — Duty of a carrier of passengers to light stations. *Abbot v. Oregon R., etc., Co.* (Ore.), 7-961.

A passenger who has completed his journey on a railroad train and alighted therefrom at a station provided for the accommodation of the general public is allowed a reasonable time to leave the premises; and a person who lawfully intends to secure passage on the cars has a right to occupy the waiting room at the station a reasonable time immediately preceding the arrival of the train which he expects to take; and in either case a person so occupying a waiting room sustains towards the carrier a relation analogous to that of a passenger, and the carrier owes such a person a duty commensurate with the degree of danger to which he may be exposed. *Abbot v. Oregon R., etc., Co.* (Oregon), 7-961.

In an action by a passenger against a railroad company to recover damages for personal injuries sustained by him at a defectively lighted station, it is for the jury to determine what was the reasonable period of time prior to the arrival of the train during which the company should have kept its

depot platform lighted. *Abbot v. Oregon R., etc., Co. (Oregon)*, 7-961.

Depot platform. — A train dispatcher's promise to stop at a certain station a train not scheduled to stop there, and his knowledge that some passengers will be at the station intending to take the train, do not, in the absence of a stipulation to that effect, bind the railroad company to light its depot platform until a reasonable time next preceding the arrival of the train. *Abbot v. Oregon R., etc., Co. (Oregon)*, 7-961.

Platform and steps of train. — A carrier of passengers is required merely to have the platform and steps of its train so lighted that an ordinary passenger can see sufficiently to alight in safety, and not so that a particular person, whose vision may be defective, can see to alight. *Cruise v. Illinois Central R. Co. (Ky.)*, 13-593.

(12) Toward intoxicated passenger.

Helping from car. — The conductor and trainmen on a railroad train are under no obligations to remove an intoxicated passenger from the car, but where they voluntarily undertake to help him from the car, they are bound to use ordinary care in what they do that may affect his safety; and not only in the act of removal, but in the place where they leave him, it is their duty to have a reasonable regard for his safety in view of his manifest condition. *Black v. New York, etc., R. Co. (Mass.)*, 9-485.

(13) Toward passenger boarding or alighting.

a. In general.

Safe means of alighting. — A railroad company must afford reasonable means for passengers to alight, and use careful judgment in the method of construction it adopts, but is not bound to exercise an infallible judgment, and is guilty of no breach of duty if the method of construction adopted is in common use and approved by experience. *Traphagen v. Erie R. Co. (N. J.)*, 9-964.

In an action against a railroad company to recover damages for personal injuries sustained by a passenger while alighting from a passenger coach, where the only negligence alleged is the height of the step of the car, and the evidence shows that the plaintiff's injury was caused by the fact that her heel caught on the step before she touched the ground, and there is no evidence that the height was unusual, but on the contrary the evidence shows that the car was not different from other cars operated by the defendant, there is no evidence which would justify the jury in finding that the defendant was negligent. *Traphagen v. Erie R. Co. (N. J.)*, 9-964.

Safe place of alighting. — It is the duty of the servants of a street railway company to know that the place at which they stop a car for the purpose of allowing passengers to alight is a reasonably safe one for that purpose, and a passenger has a right to assume that such place is reasonably safe,

unless it is obviously dangerous. *Mobile Light, etc., Co. v. Walsh (Ala.)*, 9-852.

In an action against a street railway company to recover damages for personal injuries sustained by a female passenger while alighting from a car, held to be for the jury to determine whether there was an implied invitation to the passenger to alight, and whether there was an implied representation that the place was a proper one at which to alight. *Mobile Light, etc., Co. v. Walsh (Ala.)*, 9-852.

Evidence reviewed, in an action against a street railway company to recover damages for personal injuries sustained by a female passenger while alighting from one of the defendant's cars, and held to show that the question whether the defendant's servants were negligent in inviting the passenger to alight at the place at which she alighted, and whether the invitation to her was a proximate cause of her injury, were properly submitted to the jury for determination. *Mobile Light, etc., Co. v. Walsh (Ala.)*, 9-852.

At place other than regular station. — If a passenger, with the knowledge or consent of the conductor, leaves the train temporarily when it stops at a place where passengers are not customarily received and discharged, the conductor is charged with the same duty he owes to passengers entering or leaving the train at a regular station. *Birmingham R., etc., Co. v. Jung (Ala.)*, 18-557.

Street railway on private right of way. — A street railway operating on a private right of way is subject to the same duty as a steam railroad to furnish its passengers a safe place to alight. *Topp v. United Railways, etc., Co. (Md.)*, 1-912.

A street railway which has provided a platform along a private right of way for the use of passengers is bound to stop its cars at such platform, and if the passengers are required to alight elsewhere the company is liable for injuries resulting. *Topp v. United Railways, etc., Co. (Md.)*, 1-912.

Ice or snow on steps of vehicles. — A carrier of passengers cannot be held liable for negligence in failing to remove ice or snow from the steps of its vehicles during the continuance of a storm, unless it has sufficient time and opportunity, consistently with its duty to transport passengers, to remove the same, and has failed to do so. *Riley v. Rhode Island Co. (R. I.)*, 17-50.

In an action against a railroad company to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant in failing to remove snow and ice from the steps of the car in which the plaintiff was riding, where the evidence shows that a snowstorm had commenced on the night before the accident happened, and, with intermissions of rain, had continued during the day of the accident; that the average temperature until after the accident was below the freezing point; that before starting on the trip on which the accident occurred, the conductor had removed from the steps such snow and ice as had

accumulated there; but that ice or snow was deposited on the steps, by the feet of incoming passengers, during the trip, and existed in a considerable quantity at the time when the plaintiff attempted to alight from the car, a verdict is properly directed in favor of the defendant, on the ground of absence of proof of negligence. *Riley v. Rhode Island Co. (R. I.)*, 17-50.

(b) Sufficient time to alight.

In general. — A railroad company is bound to afford passengers a reasonable opportunity to alight from its train in safety, and is liable for injuries sustained by a passenger by reason of the carelessness of its servants in suddenly starting the train without warning while the passenger is alighting therefrom, provided such servants know, or in the exercise of due care ought to know, that the passenger is alighting. *Hall v. Northern Pacific R. Co. (N. Dak.)*, 14-960.

The duty which a railroad company owes to a passenger to exercise the highest degree of care for his safety which is reasonably practicable does not cease until the passenger has reached his destination and left the train. *Chicago, etc., R. Co. v. Wimmer (Kan.)*, 7-756.

Question for jury. — In an action by a passenger against a railway company to recover for injuries claimed to have been caused by the negligence of the company in starting the train without giving the passenger sufficient time to alight, where the jury in answer to special questions find that the train stopped about one minute, which was the usual and ordinary stop at the station where the injury occurred, and that it ordinarily takes passengers about one minute to leave the train, the court cannot say that the time was sufficient. Whether the stop was reasonably sufficient under the circumstances is a question for the jury. *Chicago, etc., R. Co. v. Wimmer (Kan.)*, 7-756.

Injury due to fault of passenger. — If a train is stopped a sufficient length of time for the passenger to alight in safety, she cannot recover if she fails to avail herself of the opportunity thus afforded her, and, without fault of the servants of the railroad company and without their knowledge, is injured by attempting to alight as the train is started. *Hall v. Northern Pacific R. Co. (N. Dak.)*, 14-960.

(c) Assisting passenger.

Obligation to assist, in general. — A carrier of passengers is under no obligation to supply a servant to assist the passengers to descend from its car; but where the conductor of a train undertakes to assist a female passenger to alight, she has a right to rely upon that officer's careful performance of his undertaking and to hold the carrier responsible for any failure on his part to use reasonable care. *Hanlon v. Central R. Co. (N. Y.)*, 10-366.

Need of assistance known to trainmen. — There is no absolute duty upon the

employees of a railroad company to assist passengers in alighting from trains or to observe the condition of passengers in order to ascertain whether they need assistance in alighting, though the duty to render assistance exists if a passenger's need of assistance is actually known to the trainmen. *Cruse v. Illinois Central R. Co. (Ky.)*, 13-593.

(14) To give information as to route.

Liability for misleading information.

— It is within the scope of the authority of a ticket agent of a railroad company to give persons purchasing tickets information concerning the best and most convenient route to be traveled in using the ticket, and where the agent undertakes to give such information and misleads the passenger to his injury by reason of delay and a greater number of changes of trains, the company is liable for the damage so caused, excluding any injury caused by a failure of the trains of other railroads to run on schedule time or by other negligence of such railroads. *St. Louis Southwestern R. Co. v. White (Tex.)*, 13-965.

(15) Transfer to connecting lines.

Requirement of transfer ticket. —

Where a street railway permits passengers to transfer from one of its cars to another without the payment of additional fare, it is a reasonable condition to require that the passenger shall tender a printed transfer check to be used within the time indicated thereon, provided the car on which the passenger can be transported passes the transfer point within the time so limited. *Hornesby v. Georgia Ry., etc., Co. (Ga.)*, 1-391.

The rule of a street railway company is reasonable which requires that passengers who pay single fare to ride on different cars and to various points on the company's road shall have transfer tickets showing their right so to ride. *Little Rock R., etc., Co. v. Goerner (Ark.)*, 10-273.

Restrictions as to use. — The condition on a transfer issued by a street railway that the "holder, by accepting, agrees that should any controversy rise as to its validity holder will pay fare and call at company's office for correction" is unreasonable and void. *Georgia R., etc., Co. v. Baker (Ga.)*, 5-484.

Effect of incorrect transfer ticket. —

A person who has paid his fare on a street car entitling him to a proper transfer ticket, and who transfers to another car for the purpose of continuing his journey, is a passenger on the second car, provided he presents the transfer ticket in proper time and on the proper car, though the ticket was void when it was given to him, and though he does not intend to pay additional fare in case the ticket given him is refused; but he is not a passenger on the second car if, with knowledge that the ticket is invalid because it has expired by limitation on account of his failure to present it in time, he boards the second car with the intention to use the ticket

for passage and with the intention of not paying his fare in any other way. *Little Rock R., etc., Co. v. Goerner (Ark.)*, 10-273.

The rule stated as to the rights of a passenger on a street railway who receives an erroneous transfer. *Georgia R., etc., Co. v. Baker (Ga.)*, 5-484.

The rule stated as to the right of a passenger on a street railway in reference to a receipt of a transfer. *Georgia R., etc., Co. v. Baker (Ga.)*, 5-484.

f. Right to make rules.

Rule limiting amount to be tendered as fare. — A street railroad company has the right to make a reasonable rule fixing the maximum amount for which change will be made by its conductors for passengers to enable them to pay the amount of their fares on its cars, and such company may refuse to carry passengers who do not comply with such rule. *Burge v. Georgia R., etc., Co. (Ga.)*, 18-42.

Whether a rule of a street railroad company fixing the maximum amount for which change will be made by its conductors is reasonable, is a question of law for the court. *Burge v. Georgia R., etc., Co. (Ga.)*, 18-42.

A rule of a street railroad company prescribing two dollars as the maximum amount for which its conductors shall supply change to passengers to enable them to pay their fares for transportation within the city, is a reasonable rule. *Burge v. Georgia R., etc., Co. (Ga.)*, 18-42.

g. Ejection of passengers.

(1) Refusal to produce ticket or pay fare.

(a) In general.

Duty of passenger. — It is the duty of a passenger when approached by the conductor either to deliver his ticket or to pay fare, and if he refuses to do either, the conductor may then eject him from the train without insult or more force than is necessary. *Anderson v. Louisville, etc., R. Co. (Ky.)*, 20-920.

In the absence of a regulatory statute, when a passenger refuses or fails to produce evidence of his right to transportation or to pay the lawful fare, after a due demand therefor, and after being accorded a reasonable time and opportunity for compliance, he forfeits the rights of a passenger, and subjects himself to ejection from the train. *Missouri, etc., R. Co. v. Smith (U. S.)*, 10-939.

Failure to tender exact fare. — A passenger on a street railroad is not bound to tender the exact amount of fare, nor is the conductor required to change any denomination of money. In order to pay fare, a passenger may tender a reasonable amount and require the conductor to change the same. *Burge v. Georgia R., etc., Co. (Ga.)*, 18-42.

Unreasonable demand for change. — Where a person on a street car tenders to

the conductor, in payment of his own fare and the fares of two other persons, an amount in excess of that fixed by a reasonable rule of the railroad company as the maximum amount for which its conductors shall furnish change, the conductor is not bound to furnish the change therefor, but may require such persons to leave the car, if no other tender is made. *Burge v. Georgia R., etc., Co. (Ga.)*, 18-42.

Time to search for misplaced ticket.

— Where a passenger, on being approached by the conductor for his ticket, states that he has purchased a ticket and has it with him, but has misplaced it and is making an effort to find the ticket, it is the conductor's duty to give him a reasonable time to find it if he can before ejecting him for refusal to present his ticket or pay fare. *Anderson v. Louisville, etc., R. Co. (Ky.)*, 20-920.

Offer to pay fare after wilful refusal.

— When the refusal of a passenger to pay the lawful fare is wilful, persistent, or capricious, or proceeds from a fraudulent purpose to evade paying for the transportation to which he knows he is not otherwise entitled, the passenger cannot, by recanting and tendering the fare, after the process of ejection has begun, entitle himself to transportation and render the completion of the ejection wrongful; and, under such circumstances, a tender of the fare made by a third person, with the passenger's assent, is no more effective than if made by the passenger himself. *Missouri, etc., R. Co. v. Smith (U. S.)*, 10-939.

(b) Invalid tickets.

Erroneous transfer issued by mistake.

— In an action by a passenger to recover damages from a street railway company for wrongfully ejecting him on his refusal to pay fare after tendering an erroneous transfer issued to him by mistake by the conductor of a connecting line owned by the same company, the fact that the plaintiff failed to make a statement or explanation of facts before he was ejected is not of itself sufficient to defeat his right to recovery, though it may under some circumstances have a bearing on the question of damages. *Cleveland City R. Co. v. Connor (Ohio)*, 6-941.

A street railway company has no right to eject, for refusal to pay fare, a passenger who presents an erroneous transfer given to him by mistake by the conductor of a connecting line owned by it, provided the passenger in accepting and using the transfer has exercised the care that would have been exercised by a reasonably prudent man under the same or similar circumstances; and if the company does eject the passenger under such circumstances it is liable to him in damages for tort as well as for breach of the contract to carry. *Cleveland City R. Co. v. Connor (Ohio)*, 6-941.

Where a passenger on a street car pays his fare, and calls for and receives a transfer ticket which is void on its face and which is refused when presented to another con-

ductor, he nevertheless has a valid contract with the company to be carried to his place of destination, and if the company expels him from the second car for a refusal to pay the additional fare, it violates this contract and is liable in damages for the breach. *Little Rock R., etc., Co. v. Goerner* (Ark.), 10-273.

Expiration of time limited by ticket.

— Where a railway company issues a transfer to a passenger, but the car does not reach the transfer point until after the time indicated thereon, no recovery can be had against the company for a refusal to accept the transfer on the second car, where the passenger has made no attempt to have the conductor of the first car correct the transfer or make an arrangement for the passenger's transportation on the transfer car. *Hornesby v. Georgia Ry., etc., Co.* (Ga.), 1-391.

The expulsion from a railroad train of a person who refuses to pay to the conductor any fare other than the tender of a limited ticket which on its face has expired is not actionable, though the passenger has paid for such ticket the full rate for which the railroad company should have given him an unlimited ticket, and though he has communicated this fact to the conductor. *Shelton v. Erie R. Co.* (N. J.), 9-883.

(c) Extra fares.

Failure to procure ticket. — It is law for a railroad company to make a regulation that a passenger who fails to procure a ticket before entering a train shall pay extra fare. But in order that the company may enforce the regulation the passenger must have had an opportunity of purchasing a ticket before the train was entered, and where no such opportunity was presented and the passenger is ejected for refusing to pay more than the ticket fare, the company commits a trespass and is liable to the passenger ejected for damages. *Ammons v. Southern R. Co.* (N. Car.), 3-886.

In such a case, the passenger's right of action for the ejection cannot be made to depend on the conductor's knowledge or ignorance of the fact that the station agent had no tickets for sale to intending passengers. *Ammons v. Southern R. Co.* (N. Car.), 3-886.

One who enters a train to be transported as a passenger, without having provided himself with a ticket, may be compelled to pay fare at the train rate instead of the ticket rate; and if he refuses to pay at the former rate, he may be ejected from the train, without subjecting the railroad company to liability for damages, provided the failure of the passenger to provide himself with a ticket is due to his own fault or negligence, and not to any fault or negligence upon the part of the company. *Southern R. Co. v. Fleming* (Ga.), 10-921.

(2) Violation of rules.

A rule adopted by a street railway company prohibiting passengers from standing

on the front platform of the company's cars is a reasonable one. *Dobbins v. Little Rock R., etc., Co.* (Ark.), 9-84.

Refusal of passenger to comply with conditions of transfer. — A person who fails to comply with the conditions of a street railway as to transfers cannot recover damages for an expulsion from the car when he does not show that his failure to have a valid transfer is the fault of the company. *Hornesby v. Georgia Ry., etc., Co.* (Ga.), 1-391.

(3) Refunding passage money.

Although the circumstances may be such as to justify a steamship company in removing from its ship a person who has purchased a ticket for a voyage thereon, and to exempt the company from liability to such person in an action of tort for so doing, still, it is the duty of the company in such a case to refund the passage money which it has received, or such portion thereof as remains after it has recouped itself for any expense it has incurred in providing for the passage of such person, and if it fails or refuses to do so it is liable in an action for breach of contract. *Connors v. Cunard Steamship Co.* (Mass.), 17-1051.

(4) Threat of ejection.

A threat by the conductor of a street car to expel a passenger on account of a mistake in the transfer slip is a legal wrong, giving the passenger a right of action against the company, though there is nothing insulting in the words or manner of the conductor further than that a mere threat to expel might be deemed an insult. *Georgia R., etc., Co. v. Baker* (Ga.), 5-484.

(5) Action.

(a) Pleading.

In a suit for damages against a street railroad company on account of the ejection of the plaintiff from a car by the conductor thereof, where the petition alleges that the plaintiff tendered the conductor a five dollar gold coin in payment for his fare and that of his two companions, and that the conductor refused to accept it and make the change; that in a loud and offensive manner he ordered the plaintiff to leave the car; that on the plaintiff's remonstrating with him, the conductor seized the plaintiff and forcibly ejected him from the car; that the conduct of the conductor was "an outrage upon petitioner" and in violation of his legal rights; and that the plaintiff was subjected to great mortification and embarrassment in the presence of others on the car, the overruling of a general demurrer to such petition does not conclude the defendant from contending on the trial that five dollars was an unreasonable amount for which to require the conductor to furnish change in order to pay three fares. *Burge v. Georgia R., etc., Co.* (Ga.), 18-42.

Necessity of pleading justification. — In an action by a passenger to recover dam-

ages for an assault alleged to have been committed by the conductor of the car in which the plaintiff was riding, the defense that the plaintiff was rightly ejected from the car by the conductor, and that the conductor used no more force than was necessary, is not available unless pleaded. *Jackson v. Old Colony St. R. Co. (Mass.)*, 19-615.

(b) Evidence.

Time to find misplaced ticket. — In an action against a carrier of passengers for damages for the ejection of the plaintiff from the defendant's train, evidence examined and held to show that the conductor did not give the passenger a reasonable time to find his ticket, when he had purchased one but had misplaced it. *Anderson v. Louisville, etc., R. Co. (Ky.)*, 20-920.

Conductor's disposition towards passengers. — In an action against a carrier of passengers for damages for the ejection of the plaintiff from the defendant's train, evidence of the conductor's general habit or usual disposition concerning the treatment of passengers is inadmissible. *Anderson v. Louisville, etc., R. Co. (Ky.)*, 20-920.

Rude conduct toward other passengers. — In an action by a passenger against a street railway company to recover damages for his ejection from one of the defendant's cars, evidence that the conductor of the car acted in a rude and overbearing manner toward other passengers shortly after the plaintiff's ejection is inadmissible, as the conduct to which it relates is not a part of the *res gestæ*. *Dobbins v. Little Rock R., etc., Co. (Ark.)*, 9-84.

Identity of defendant's servant. — Evidence examined and held sufficient to go to the jury as to the identity of the person who ejected the plaintiff from the defendant's car as a brakeman in the defendant's employ. *Golden v. Northern Pacific R. Co. (Mont.)*, 18-886.

Authority to eject passengers. — A railroad brakeman is presumed to have authority to eject trespassers from the cars in his charge. *Golden v. Northern Pacific R. Co. (Mont.)*, 18-886.

(c) Instructions.

Assessment of damages. — In an action brought by a passenger against a street railway to recover damages for a threat to expel from the car on the ground of a mistake in the transfer, the court should not instruct the jury that the surrounding circumstances of the parties should be weighed in assessing the damages, in the absence of any evidence of such circumstances. *Georgia R., etc., Co. v. Baker (Ga.)*, 5-484.

Disorderly conduct. — In an action by a passenger against a street railway company to recover damages for his ejection from one of the defendant's cars, an instruction that if the plaintiff conducted himself in a disorderly manner and wilfully and knowingly interfered with the apparatus and machinery of the car, the conductor was justified in

ejecting him, is faulty if it fails to define specifically and clearly the disorderly conduct, and the extent and character of the interference by the passenger with the apparatus and machinery of the car that would justify his ejection, but the instruction is not so defective that it is incapable of being rendered proper, or at least harmless, by the evidence or by other instructions. *Dobbins v. Little Rock R., etc., Co. (Ark.)*, 9-84.

(d) Damages.

Loss of time and inconvenience. —

In an action by a passenger to recover damages for his wrongful ejection from a train, where the evidence shows that during the process of ejection, instituted on account of the failure of the passenger to pay his fare, a tender was made by a third person of the passenger's fare, not to the passenger's designation but merely to the next station beyond the point of ejection, the plaintiff, if it appears that the ejection was wrongful, is entitled to damages only for his loss of time and inconvenience in reaching by other means the place to which the fare was tendered. *Missouri, etc., R. Co. v. Smith (U. S.)*, 10-939.

Person inviting expulsion. — A person who is ejected without rudeness or violence from a railway train on his refusal to pay the excess fare required of those having no ticket, is not entitled to recover damages for alleged humiliation and disgrace incident to his ejection although his failure to have a ticket was due to the negligence of the railway company, where it appears that he was willing to be expelled from the train and actually desired the ejection in order to enable him to bring a suit. *Brenner v. Jonesboro, etc., R. Co. (Ark.)*, 12-489.

Assault by conductor in effecting ejection. — Where the conductor on a street car refuses to accept from a passenger a valid transfer ticket issued by the conductor on another car operated by the same street railway company, and, without using more force than is necessary to accomplish the purpose, expels the passenger from the car upon his refusal to pay the additional fare on demand, the railway company is liable in damages for a breach of its contract to carry the passenger, but is not liable for the assault made necessary by the passenger's refusal to leave the car when requested so to do. *Little Rock R., etc., Co. v. Goerner (Ark.)*, 10-273.

Where a street railway company negligently gives a passenger an erroneous transfer, it is liable to him in damages for any loss or injury he may sustain by reason of a breach of contract; but if the conductor of the connecting car refuses to accept the transfer and demands payment of the fare notwithstanding the passenger's explanation of the facts, the passenger must either pay or leave the car, and if he refuses to do either he cannot recover damages from the company as for an assault for the use of reasonable force in an attempt to eject him. *Norton v. Consolidated R. Co. (Conn.)*, 6-943.

Threat of ejection. — The rule stated as to the damages recoverable by a passenger against a street railway company for a threat to expel on account of a mistake in the transfer. *Georgia R., etc., Co. v. Baker (Ga.)*, 5-484.

Excessive damages. — A verdict for \$750 for ejecting plaintiff from the defendant's train is excessive where it appears that no bodily injury was inflicted, and the only evidence of damages is that he was compelled, from lack of means, to remain in the defendant's depot over night without food. *Brian v. Oregon Short Line R. Co. (Mont.)*, 20-311.

Punitive damages. — In an action by a passenger against a street railway company to recover damages for the plaintiff's ejection from one of the defendant's cars, where it appears that the conductor declined to accept a void transfer ticket which had been issued to the plaintiff by the conductor of another car operated by the defendant, and that on the plaintiff's refusal to pay the additional fare on demand he was ejected from the car, and the allegations of the complaint, and the evidence, show that there was a wilful breach of the contract of carriage under such circumstances of insult and aggravation as to constitute a tort, the plaintiff is entitled to recover not only actual and compensatory but also punitive damages. *Little Rock R., etc., Co. v. Goerner (Ark.)*, 10-273.

h. Limitation of liability.

In general. — A common carrier may limit its liability by contract in respect to services not imposed on it as a duty, and in such case the liability of the carrier to one injured by its negligence will depend on the terms of the contract. *Denver, etc., R. Co. v. Whan (Colo.)*, 12-732.

Liability to passenger riding on free pass. — A common carrier cannot contract against liability for damages arising in consequence of its own negligence, even in the case of a passenger riding on a free pass who has released it from liability for the negligence of its servants. *Yazoo, etc., R. Co. v. Grant (Miss.)*, 4-556.

Injuries to shipper's servant. — A person employed by a shipper in caring for milk during its transportation by a railroad company and carried by the company in consideration of his services or the freight charges against his employer can recover against the company for injuries suffered by the carrier's negligence, notwithstanding a contract has been entered into by him with his employer releasing the latter from liability for such a cause, which release is based upon an invalid contract of indemnity furnished the carrier by the employer. *Baker v. Boston, etc., R. R. (N. H.)*, 12-1072.

A passenger on a railroad riding on a free pass stipulating that "the person . . . accepting this pass assumes all risks of accidents and damages without claim upon the company" may nevertheless recover for injuries received through the negligence of the company, since it is against public policy

to allow the carrier to exempt itself from liability for negligence even to a gratuitous passenger. *St. Louis, etc., R. Co. v. Pitcock (Ark.)*, 12-582.

Liability to express messenger. — Under the provisions of the constitution of Kentucky and the code of Virginia forbidding common carriers to contract away their common-law liability, a contract entered into in Virginia between an express messenger and an express company by which the former, in consideration of his employment, releases the latter and the railroad company from liability for personal injuries occasioned with or without negligence, does not prevent a recovery for personal injuries negligently inflicted by the railroad company in Kentucky. *Davis v. Chesapeake, etc., R. Co. (Ky.)*, 12-723.

Under the Kansas statute (Gen. St., §§ 5857, 5858) declaring railroad companies liable to persons injured by the negligence of such companies, and abrogating the fellow-servant doctrine as to them, a railroad company is liable for injuries to an express messenger on its train, and it cannot contract in advance for a release of such liability. *Weir v. Rountree (Wash.)*, 19-1204.

Liability to employee of sleeping car company. — Constitutional provisions against discrimination and against any contract by an employee releasing the employer from liability for negligence, do not restrict the right of a railroad company to limit, by contract, its liability to an employee of a sleeping-car company in charge of and riding upon a sleeping car. *Denver, etc., R. Co. v. Whan (Colo.)*, 12-732.

Where a railroad company and a sleeping-car company enter into a contract limiting the liability of the railroad company for personal injuries to an employee of the sleeping-car company to such liability as would exist if the employee were the servant of the railroad, and the employee enters into a contract with the sleeping-car company releasing the railroad company from all liability for personal injuries to the employee, the latter contract is made for the benefit of the railroad company and that company is entitled to enforce its provisions. *Denver, etc., R. Co., v. Whan (Colo.)*, 12-732.

i. Passenger's effects.

(1) What constitutes baggage.

Drummers' samples. — The Mississippi statute making a railroad company liable for the double value of baggage lost does not apply where the articles are not, in a proper legal sense, baggage, as where they are drummers' samples, for which the railroad is responsible as for baggage solely on the ground of estoppel. *New Orleans, etc., R. Co. v. Shackelford (Miss.)*, 6-826.

A railroad company is responsible for drummers' samples as for baggage where it receipts them for transportation as baggage with the knowledge that the passenger is a drummer and that the receptacle is a sample case. *New Orleans, etc., R. Co. v. Shackelford (Miss.)*, 6-826.

Articles used for minor child. — A father, paying full fare for himself, who travels with a child of such tender years that by custom no fare is demanded for its carriage, may recover upon the contract for carriage in the event of the injury or loss of articles, bought and used for the child, which are packed and carried with the father's baggage, as such articles are the property of the father and are a part of his proper baggage. *Withey v. Pere Marquette R. Co.* (Mich.), 7-57.

Articles belonging to wife. — A contract to carry a husband and his wife and their common baggage is a contract with the husband, and in an action brought by him alone for the loss of the baggage he may recover for articles of jewelry belonging to his wife as her separate and sole property and not purchased by him. *Withey v. Pere Marquette R. Co.* (Mich.), 7-57.

(2) Duty to carry.

Street railways. — Under the Connecticut statutes street railways may make reasonable regulations concerning the kind and size of baggage and packages which may be brought into their cars by passengers. *Sperry v. Consolidated R. Co.* (Conn.), 9-199.

Carriage on train with passenger. — A passenger who, in proper season, delivers a trunk to the baggageman at a railway station, has the right to require that it shall be carried on the same train which he takes. *Conheim v. Chicago Great Western R. Co.* (Minn.), 15-389.

(3) Liability for injury, loss or delay in delivery.

(a) In general.

Delay in delivery. — Knowledge by a carrier that a trunk offered for transportation is a salesman's trunk of samples taken with him on a business trip includes knowledge that delay in its delivery will result in interruption of his business and loss of time and custom. *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 11-834.

Articles not ordinarily regarded as baggage. — A baggage agent of a carrier has implied authority to receive for transportation as baggage articles of a passenger not ordinarily regarded as baggage, and if he does receive such articles for transportation, the carrier will be bound by his act and liable for the loss of the property, unless the passenger is advised that the agent is exceeding his authority. *Bergstrom v. Chicago, etc., R. Co.* (Iowa), 13-239.

Property not belonging to passenger. — Where a passenger carries as baggage property belonging to another person the carrier, as regards such property, is a gratuitous bailee only, and is liable only for the loss of the property by gross negligence or wilful misconduct. *Brick v. Atlantic Coast Line R. R. (N. Car.)*, 13-328.

Where a passenger carries as baggage the property of another not a member of the

passenger's family or traveling with him, an action against the carrier for the loss thereof can only be maintained by the owner. *Brick v. Atlantic Coast Line R. R. (N. Car.)*, 13-328.

Baggage left at station. — The liability of a railroad company as a common carrier, for loss of or injury to the checked baggage of a passenger, which has been left by the passenger with the company's baggage master at one of its stations on the passenger's arrival there by train, with directions to keep it until called for, depends upon whether such baggage is called for within a reasonable time. *Tallman v. Chicago, etc., R. Co.* (Wis.), 16-711.

What constitutes a reasonable time depends on the facts and circumstances of each particular case, and no general rule can be laid down upon that point. *Tallman v. Chicago, etc., R. Co.* (Wis.), 16-711.

Baggage under control of passenger.

— In the absence of a special agreement, a carrier of passengers does not assume a common carrier's liability of an insurer for baggage of which it does not take full possession and which remains under the control of the passenger, but the carrier is only bound to exercise reasonable care to protect from loss or injury such baggage or property as the passenger has a right to bring with him into the car. *Sperry v. Consolidated R. Co.* (Conn.), 9-199.

In order to make a carrier liable for baggage as a common carrier, there must be either actual or constructive delivery of such baggage to the carrier. *Southern R. Co. v. Bickley* (Tenn.), 14-910.

Until the entire and exclusive custody of baggage has been given to a common carrier, no responsibility rests upon it in that character. *Southern R. Co. v. Bickley* (Tenn.), 14-910.

What constitutes custody by carrier.

— In an action by a female passenger against a street railway company to recover damages for the loss of her baggage, evidence that when the plaintiff boarded the car she handed her satchel to the conductor, and that the conductor for the purpose of assisting her took the satchel and placed it in the car within the sight and control of the plaintiff, does not justify the inference that the conductor assumed the custody of the satchel. *Sperry v. Consolidated R. Co.* (Conn.), 9-199.

Delivery of check to connecting carrier.

— The mere delivery of a baggage check of one railroad to the station agent of another railroad for baggage in the custody of the former at a point twelve or fourteen miles distant, upon such agent's agreement to forward the baggage to the passenger's destination, is, in the absence of express or implied authority of the agent to make such an agreement, and in the absence of evidence of the willingness of the former railroad to surrender the baggage, not a constructive delivery to the latter railroad, notwithstanding the fact that its line extends to the station of the former railroad where the baggage is located and that such station is used in com-

mon by both railroads, the agent therein transacting business for both; and unless the baggage comes into the actual possession of the latter railroad, it is not liable for the destruction thereof by fire two weeks thereafter at the common station. *Southern R. Co. v. Bickley* (Tenn.), 14-910.

Connecting carriers. — In an action by a passenger against two connecting street railway companies to recover damages for the loss of the plaintiff's baggage, the plaintiff is not entitled to a verdict unless there is sufficient evidence to justify the jury in finding, either that the defendants, or one of them, accepted the baggage under a contract, express or implied, to carry and deliver it as common carriers, or that the loss of the baggage was due to the negligence of the defendants, or one of them. *Sperry v. Consolidated R. Co.* (Conn.), 9-199.

(b) Limitation of liability.

Effect of provision in ticket. — A provision in a ticket for passage on an ocean steamship that neither the steamship company, its agents, nor the ship shall be "in any way liable for loss of or injury to or delay in delivery of baggage or personal effects of the passengers beyond the amount of fifty dollars, unless the value of the same in excess of that sum be declared at or before the issue of this contract, or at or before the delivery of said luggage to the ship, and freight at current rates for every kind of property is paid thereon," precludes a passenger from recovering more than the stipulated amount for a loss occasioned by the negligence of the steamship company, though the ticket contains no provision expressly absolving the company from liability for its own negligence. *Tewes v. North German Lloyd Steamship Co.* (N. Y.), 9-909.

(4) Actions for damages.

(a) Pleading.

Amendment of complaint. — In an action by a traveling salesman against a carrier for failure to deliver his baggage, it is proper for the trial judge to change the words in the complaint alleging loss of time "and business," to loss of time "from his business," where the change does no more than to make the complaint consistent after certain portions have been stricken out. *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 11-834.

Striking out allegation. — In an action by a traveling salesman against a railroad company for damages for failure to deliver promptly the plaintiff's trunks containing samples, where the complaint charges that the defendant's agent who checked the trunks "knew that said trunks contained samples and that it was necessary for him [the plaintiff] to have them along with him for the sale of goods in his regular business," it cannot be insisted that the trial court should strike out of the complaint allegations that the failure to deliver the trunk was "in utter disregard of the plaintiff's rights" and

"through defendant's wanton and wilful negligence, carelessness, and recklessness" and that the plaintiff "was not able to sell any dry goods in consequence of the delay . . . thereby causing him to lose much time and business," such allegations not being objectionable as relating to damages "special, remote, and speculative" and not in the contemplation of the parties. *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 11-834.

(b) Admissibility of evidence.

Loss of business. — In an action by a traveling salesman against a carrier for failure to deliver his baggage it is not reversible error to admit evidence to show that the time of the failure to transport the trunks was during one of the plaintiff's two seasons of business activity, the knowledge by the defendant that the plaintiff was a traveling salesman imparting knowledge of periods of activity in his business. Nor is the admission of evidence of the loss of sales to certain customers error, the verdict of the jury evidently not being based upon the failure to make particular sales. *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 11-834.

Production of articles in court. — In an action for injury to or loss of baggage, it is not an abuse of discretion for the trial court to refuse to compel the plaintiff to obey a subpoena requiring him to produce in court the principal articles claimed to have been injured, where it appears that the defendant's witnesses were permitted to inspect the articles before the trial. *Withey v. Pere Marquette R. Co.* (Mich.), 7-57.

(c) Sufficiency of evidence.

Negligence of defendants. — Evidence reviewed, in an action by a female passenger against connecting street railway companies to recover damages for the loss of her baggage, and held insufficient to show that the initial railway company assumed the custody of the baggage, and insufficient to justify a finding that the plaintiff's loss was occasioned by the negligence of the defendants, or either of them. *Sperry v. Consolidated R. Co.* (Conn.), 9-199.

In an action by a passenger against a street railway company to recover damages for the loss of her baggage the question whether the defendant exercised reasonable care to prevent the loss is ordinarily one of fact for the jury, but where the evidence is clearly insufficient to sustain a verdict for the plaintiff upon that question, it is not erroneous to refuse to submit the question to the jury. *Sperry v. Consolidated R. Co.* (Conn.), 9-199.

Amount of damages. — In an action to recover damages for delay in delivering a traveling salesman's trunk containing samples which had been checked as baggage, evidence examined and held to be too indefinite and speculative to form a basis for estimating the amount of the damages. *Conheim v. Chicago Great Western R. Co.* (Minn.), 15-389.

Wantonness or recklessness of defendant. — Evidence in the case at bar ex-

amined and held to warrant a finding of indifference to manifest duty in the transportation of the plaintiff's trunk from which wantonness or recklessness might be inferred. *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 11-834.

Liability of defendant as common carrier. — In an action against a railroad company to recover damages for the loss of baggage, where the evidence shows that the plaintiff was a passenger on one of the defendant's trains on a Sunday; that on his arrival at his destination, about five o'clock in the afternoon of that day, he looked for a conveyance to carry to his home a grip which he had checked on the train and which was too heavy for him to carry, but could find none; that he thereupon gave the check for the grip to the defendant's baggage master at the railroad station, telling the latter to keep the grip and that he would call for the same that evening or the next morning; and that on the following morning, about eight-thirty or nine o'clock, plaintiff sent a conveyance for the grip, a finding by the trial court that the defendant's liability as common carrier continued until the baggage was called for will not be disturbed on appeal. *Tallman v. Chicago, etc., R. Co.* (Wis.), 16-711.

(d) Instructions.

Limitation of liability. — In an action by a passenger against an ocean steamship company to recover damages for the negligent destruction of the plaintiff's baggage, it is erroneous to instruct the jury that the plaintiff was not bound by a condition in his passage ticket limiting the liability of the defendant to a specified amount, if that condition was not called to the attention of the plaintiff, and he knew nothing about it, and by the exercise of reasonable attention would not have known it, as there is a just and logical distinction between an ordinary railroad ticket, which may often be regarded as a mere token, and a passage ticket for an ocean voyage, the sale and purchase of which are usually conducted with such caution and deliberation as to invest the transaction with the elements of a contract, the terms of which the purchaser has ample opportunity to ascertain and understand. *Tewes v. North German Lloyd Steamship Co.* (N. Y.), 9-909.

Comments on testimony. — In an action by a traveling salesman against a carrier for failure to deliver his baggage a remark by the trial judge, in admitting certain evidence, that the testimony was that the plaintiff told the defendant's agent to check his sample trunks, and that the defendant must have known why he was traveling, is not error. *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 11-834.

(e) Measure of damages.

For delay in delivery. — The measure of damages for delay in delivering a traveling salesman's trunk containing samples, which was checked as baggage, is the value of the use of the property during the delay,

including such incidental expenses and damages as were in the contemplation of the parties when the contract of carriage was made. *Conheim v. Chicago Great Western R. Co.* (Minn.), 15-389.

Punitive damages. — Punitive damages may be recovered by a traveling salesman for the failure of a carrier to transport the trunks containing his samples. *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 11-834.

j. Contributory negligence.

(a) In general.

Riding on unsuitable part of train.

— A person riding on an unsuitable or exposed part of the train, even if a passenger, is guilty of such contributory negligence as to bar a recovery by him for injuries sustained. *Radley v. Columbia Southern R. Co.* (Oregon), 1-447.

Alighting at place other than platform. — Whether a passenger is guilty of contributory negligence in alighting from a street car elsewhere than at the platform is a question of fact for the jury, where the evidence shows that the appearance of the place of alighting was deceptive and that an invitation to alight was clearly implied by the conduct of the conductor. *Topp v. United Railways, etc., Co.* (Md.), 1-912.

Falling down stairs on station premises. — The act of a passenger who has alighted from a railroad train in the daytime, at a station which he has previously visited, in opening by mistake a door in the station building, which is not marked as a place of entrance for passengers and which leads to a basement stairway, and entering the same without looking where he is going, constitutes contributory negligence, and if he is injured by falling down the stairway, under such circumstances, he cannot recover damages against the railroad company because of the injury. *Speck v. Northern Pacific R. Co.* (Minn.), 17-460.

(2) Intoxication of passenger.

Proximate cause of injury. — A passenger cannot recover damages from a carrier for personal injuries sustained by him, if his voluntary intoxication was a direct and proximate cause of the injury. *Black v. New York, etc., R. Co.* (Mass.), 9-485.

Intoxication not proximate cause of injury. — In an action by a passenger against a carrier to recover damages for injuries sustained by the plaintiff, where it appears that though the plaintiff was intoxicated at the time of the injury his intoxication was not a cause of the injury, but was a mere condition which was well known to the defendant's servants, and it further appears that the acts of such servants were a direct and proximate cause of the injury, with which no other act or omission had any causal connection, the plaintiff is entitled to recover. *Black v. New York, etc., R. Co.* (Mass.), 9-485.

(3) Riding or standing on running board of street car.

Using running board for passage. — A passenger on a street car containing an inside aisle, who voluntarily and unnecessarily uses the running board of the car instead of the aisle, to go from one part of the car to another, is guilty of contributory negligence precluding him from recovering for an injury caused by his collision with a trolley post while on the running board. *Bridges v. Jackson Electric R., etc., Co. (Miss.)*, 4-662.

Trolley post near track. — It cannot be said as a matter of law that a trolley post thirty-three inches distant from the track is dangerously near the track or that its maintenance shows gross negligence on the part of the street railway company, though it is nearer the track than the adjacent posts are, and a passenger riding on the running board is injured by colliding with it. *Bridges v. Jackson Electric R., etc., Co. (Miss.)*, 4-662.

Guard rail up. — The fact that the guard rail on a street car next to the trolley posts is, contrary to custom, up instead of down, does not justify a passenger in exposing himself to danger knowingly and voluntarily by riding on the running board of the car next to the trolley posts. *Bridges v. Jackson Electric R., etc., Co. (Miss.)*, 4-662.

Assent by conductor. — In an action by a passenger against a street railway company to recover damages sustained by the plaintiff by coming in contact with a trolley pole while using the running board of an open car for the purpose of going from one part of the car to another, where it appears that the defendant's tracks, poles, and cars were properly constructed, maintained, and operated, and it does not appear that the plaintiff was ignorant of the conditions surrounding him, evidence that the conductor of the car gave a simple assent when the plaintiff expressed his desire to change his location in the car, and that the conductor failed to give the plaintiff any warning or intimation of danger involved in using the running board while the car was in motion, is not sufficient to show that the conductor was guilty of negligence rendering the defendant liable for the injury. *Tietz v. International R. Co. (N. Y.)*, 9-1020.

Standing temporarily on running board. — A person who passes ten feet in front of an approaching dray and takes his stand temporarily upon the running board of a street car has a right to assume that he need pay no further heed to such dray and is not guilty of contributory negligence in failing to look out and avoid being struck by a hub of the dray. *Sibley v. Nason (Mass.)*, 12-938.

(4) Riding on platform.

Passenger unnecessarily on platform. — Standing or riding upon a platform, when unnecessary, constitutes such contributory negligence as will preclude a recovery for injuries received; and whether it is necessary to stand upon the platform because of the

crowded condition of the cars is a question for the jury. *Rolette v. Great Northern R. Co. (Minn.)*, 1-313.

Passenger necessarily upon platform. — The mere fact that a passenger is injured while necessarily standing upon the platform is not itself a cause for an action against the railroad company, as there must be some intervening act attributable to the company and not to the plaintiff himself or another passenger, to make the company liable. *Rolette v. Great Northern R. Co. (Minn.)*, 1-313.

No seats inside. — The fact that there are no seats in railroad cars does not justify Where a passenger is warned by the conductor a passenger in riding on the platform while the train is in motion, it being his duty to use reasonable effort to find standing room inside. *Rolette v. Great Northern R. Co. (Minn.)*, 1-313.

Passenger warned by conductor. — Conductor of the danger of standing on the platform and ordered to go inside the car, his failure to comply with the order or to attempt to find standing room inside will preclude a recovery from the railroad company for injuries received. *Rolette v. Great Northern R. Co. (Minn.)*, 1-313.

Platform of street car. — It is not contributory negligence *per se* for a passenger to ride, without objection by the railway company, upon the platform of a street car, although there is room inside the car and although there is a notice posted in the car warning passengers that it is dangerous to ride upon the platform. *Capital Traction Co. v. Brown (D. C.)*, 10-813.

(5) Leaving seat before train or car stops.

Railroad train, in general. — The liability of a carrier for injuries to a passenger leaving a seat before the train stops. *Illinois Central R. Co. v. Jolly (Ky.)*, 4-748.

Freight train. — A passenger on a freight train who while the train is slowly moving rises from his seat and stands for a very short time is not for that reason guilty of contributory negligence as a matter of law. *Pasley v. St. Louis, etc., R. Co. (Ark.)*, 13-121.

Where a passenger riding on a drover's pass in the caboose of a long and heavy freight train, who is accustomed to riding on freight trains, voluntarily leaves his seat while the train is moving and is injured by a jar or jerk naturally resulting from the stopping of the train at a station, he cannot hold the railroad company liable for injury in the absence of a showing of negligence on the part of the servants in the management and control of the train or in the stopping of the train at an improper place or in an improper manner. *Hedrick v. Missouri Pacific R. Co. (Mo.)*, 6-793.

Electric car. — In an action by a passenger against an electric railway company to recover damages for personal injuries, the declaration is not rendered demurrable, as showing contributory negligence on its face, by an allegation that as the car was ap-

proaching the plaintiff's destination and had slowed down so as to make it reasonably prudent for him to leave his seat and go out upon the platform for the purpose of alighting as soon as the car should come to a full stop, he went out on the platform for that purpose. *Washington, etc., R. Co. v. Chapman (D. C.), 6-721.*

Instructions reviewed in an action by a passenger against an electric railway company to recover damages for personal injuries sustained by the plaintiff while standing on the platform of the defendant's car as it was slowing down on approaching his destination, and held to be, when considered as a whole, a just and fair statement of the law of the case. *Washington, etc., R. Co. v. Chapman (D. C.), 6-721.*

Evidence reviewed in an action by a passenger against an electric railway company to recover damages for personal injuries sustained while standing on the platform of the defendant's car as it was slowing down on approaching his destination, and held to justify the submission to the jury of the questions of negligence and contributory negligence. *Washington, etc., R. Co. v. Chapman (D. C.), 6-721.*

(6) Part of body protruding from car.

Arm out of window. — It is negligence as a matter of law for a passenger traveling on a rapidly moving railroad car to project, intentionally and needlessly, his arm or a part thereof out of the window of the car. *Interurban R., etc., Co. v. Hancock (Ohio), 8-1036.*

In a suit against an interurban electric railway company for injury to a passenger by reason of his arm being struck by a car passing upon the adjoining track, an instruction as to the contributory negligence of the plaintiff approved. *Interurban R., etc., Co. v. Hancock (Ohio), 8-1036.*

The fact that a passenger was riding with part of his arm protruding from the car window is sufficient to require the submission of the question of contributory negligence to the jury, in an action for injuries caused by an object near the track striking the passenger's arm. (See note, 1 Ann. Cas. 710.) *Gardner v. Metropolitan St. R. Co. (Mo.), 18-1166.*

Head outside of open street car. — A passenger on an open street car is not as a matter of law guilty of contributory negligence in putting his head out ten inches beyond the side of the car. *Cummings v. Wichita R., etc., Co. (Kan.), 1-708.*

(7) Boarding or alighting from moving train.

(a) In general.

Negligence per se. — To get on or off a moving car, whether propelled by steam or electricity, is negligence *per se* in him who attempts it. *Boulfrois v. United Traction Co. (Pa.), 2-938.*

Burden of proof. — The act of getting on or off a moving train is evidence of con-

tributory negligence, and imposes upon one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course. *Hoylman v. Kanawha, etc., R. Co. (W. Va.), 17-1149.*

(b) Boarding.

Injury received after boarding. — Where a person attempts to board a moving car, and before his attempt to get on is complete is thrown off and injured by a sudden jerk of the car, he is not entitled to damages; but if, though negligent in getting on, his attempt is completed in safety and he is thrown off by a jerk of the car before seated, the railroad company is answerable. *Boulfrois v. United Traction Co. (Pa.), 2-938.*

(c) Alighting.

General rule. — The general rule is that passengers getting off a moving railroad train are chargeable with contributory negligence and cannot recover for injury received therefrom. *Hoylman v. Kanawha, etc., R. Co. (W. Va.), 17-1149.*

The fact that in stepping from a moving train the plaintiff may not have been guilty of negligence defeating his right to recover does not entitle him to a verdict unless it also appears that the carrier was guilty of negligence which was a proximate cause of the plaintiff's injury. *Simmons v. Seaboard Air Line Ry. (Ga.), 1-777.*

By advice or command of carrier's servant. — Where it appears that a passenger alighted from a train at a particular point upon the invitation of the conductor or other employee on the train, or under the belief that the train was not in motion, and the circumstances show that there was a reasonable ground for such belief, these facts may be taken into consideration by the jury in determining whether the plaintiff was guilty of contributory negligence. *Baltimore, etc., R. Co. v. Mullen (Ill.), 3-1015.*

The circumstances under which a passenger alighted from a moving train held to authorize a recovery of damages against a railroad company for negligence. *Baltimore, etc., R. Co. v. Mullen (Ill.), 3-1015.*

Where, in an action against a street railway for damages it appears that the conductor of the car, while the same was moving slowly, called out to a passenger to change cars and then jumped from the car and began putting up the rear fender and that the passenger stepped from the car and was injured, such facts do not show as a matter of law either that the railroad company was free from negligence or that the passenger was guilty of contributory negligence. *Elwood v. Connecticut R., etc., Co. (Conn.), 1-779.*

Jumping from car to avoid accident. — A passenger on an electric car which is running away rapidly down a dangerous grade, who has a well-grounded fear of imminent danger, is justified, in obedience to the instinct of self-preservation, in jumping from the car, if that seems to be the best method of escape. *Lehner v. Pittsburg R. Co. (Pa.), 16-83.*

(8) Walking on station premises in dark.

Unnecessarily walking for exercise. — Where, on an unusually dark night, a passenger awaiting the arrival of a train, who has been permitted to occupy as a waiting room a car which is well lighted and is provided with necessary accommodations, leaves the car for the mere purpose of getting exercise, with the result that he is injured while walking on the station premises in the dark, he is guilty of contributory negligence precluding him from recovering for injuries sustained. *Abbot v. Oregon R., etc., Co. (Oregon)*, 7-961.

(9) Alighting from car and crossing track.

View obstructed. — It is contributory negligence, barring a recovery for injuries inflicted by a negligently operated car, for a passenger on alighting from an electric street car and passing to the rear thereof to attempt to cross a parallel track before the car from which he has alighted has moved forward sufficiently to give him an unobstructed view of cars coming from the opposite direction on the parallel track, though he looks and listens in vain before crossing. *Hornstein v. United R. Co. (Mo.)*, 6-699.

Where one who has alighted from a trolley car in which he has been a passenger passes behind the car and proceeds to cross the track on which cars run in the other direction, making no observation for his own safety except to "look up" at a time when the car from which he has alighted prevents his view of the other track, and, without waiting until that car has passed sufficiently far to permit observation, enters on that track and is struck by a car thereon not running at excessive speed, he is guilty of contributory negligence as a matter of law. *Eagen v. Jersey City, etc., St. R. Co. (N. J.)*, 12-911.

The fact that a person crossing behind a street car and struck by a car on the parallel track has been a passenger, does not relieve him of the duty to take reasonable care for his own safety. *Eagen v. Jersey City, etc., St. R. Co. (N. J.)*, 12-911.

Crossing intervening track to station. — A passenger alighting from a train separated from the station by an intervening track has a right to assume that his safety will not be endangered by a train passing upon the intermediate track while he is crossing to the station, and he is not required to observe the rule which compels a person crossing the tracks of a railroad on a highway to stop, look, and listen before attempting to cross, though he is required to exercise ordinary care under the circumstances. *Resecker v. Delaware, etc., R. Co. (Pa.)*, 14-21.

Where, as a train approaches a station, the passengers are notified of that fact, and the doors of the cars are thrown open to permit the exit of passengers, and the speed of the train is reduced, a passenger for that station who, as the train reaches the usual place for discharging passengers, alights from the slowly moving train and in crossing an inter-

vening track between the train and the station is struck and injured by another train on that track, is not guilty of contributory negligence in alighting from his train before it has stopped, as the fact that his train has not entirely stopped is not notice to passengers that the carrier will fail to perform its duty to keep the intervening track clear. *Besecker v. Delaware, etc., R. Co. (Pa.)*, 14-21.

k. Connecting carriers.

Presumption of agency. — Where a railroad company issues and sells a ticket with a coupon attached good over a connecting line, the presumption is, in the absence of other evidence, that the company acts as the agent of the connecting carrier in making the sale. *Pennsylvania Co. v. Loftis (Ohio)*, 3-3.

Contract arising from sale of ticket. — A mere sale by a railroad company of a coupon ticket for transportation of a passenger over its own and a connecting line does not import a contract of the company to become responsible for the safety of the passenger beyond its own line. *Pennsylvania Co. v. Loftis (Ohio)*, 3-3.

Pleading in action for expulsion from station. — In an action by a passenger against two railroad companies operating connecting lines, to recover damages for expulsion from a station at the junction of such lines, where the plaintiff alleged generally that she purchased a ticket over both railroads between two points, by special demurrer she could be required to allege whether she purchased it from one company or the other, or its agents, or from an outsider. *Riley v. Wrightsville, etc., R. Co. (Ga.)*, 18-208.

Parol evidence of contract. — Where a railroad sells a coupon ticket good over a connecting line, it is competent to prove by parol evidence, aside from the ticket sold, the contract made between the carrier and the passenger. *Pennsylvania Co. v. Loftis (Ohio)*, 3-3.

Joint liability. — Where two railroad companies, jointly operating their properties through the agency of a common lessee between two points connected by their roadbeds and tracks, undertake in the discharge of their duty as common carriers to carry a passenger over their tracks between such points, they are jointly liable for an injury sustained by the passenger in consequence of the negligence of the lessees' servants, and therefore the complaint in a joint action against the two lessor corporations to recover for the injury is not demurrable for misjoinder, whether the cause of action is for a breach of contractual duty or for a tort arising out of the breach of contract. *Carleton v. Yadkin R. Co. (N. Car.)*, 10-348.

1. Actions by passengers against carriers.

(1) Jurisdiction.

As to actions for wrongful ejection, see *ante*, 6 g (5).

As to actions for loss of or injury to passengers' baggage, see *ante*, 6 h (4).

Action for failure to heat cars. — The plaintiff's petition showing that the car in which she was transported as a passenger over the defendant's railway was not heated, although the weather was extremely cold, that in consequence of the failure of the defendant's employees to heat the car she contracted a severe illness, that she began her journey over the said railway at Albany in the county of Dougherty and that she suffered as a result of the cold "in a few minutes after the train left Albany, and while in said county of Dougherty," a suit to recover damages for injuries which resulted from the exposure to the cold was properly brought in that county; and it was not error for the court to overrule a demurrer to the petition based upon the want of jurisdiction on the part of the city court of that county, although the hurtful effects resulting from the failure to heat the car may have been increased by the continuation of the journey through other counties. *Atlantic Coast Line R. Co. v. Powell* (Ga.), 9-553.

(2) Statute of limitations.

Common-law action for negligence.

— An action to hold an electric railway company liable as a common carrier of passengers for personal injuries sustained by the plaintiff while traveling on an unconditional free pass issued to him, the injury resulting from a head-on collision between the cars, is based upon the defendant's breach of its common-law duty as a common carrier to carry the plaintiff safely as a passenger, and is not governed by the Ontario statutes limiting the time within which an action may be brought against the railroad company for an injury sustained "by reason of the railway." *Ryckman v. Hamilton, etc., R. Co.* (Ont.), 4-1126.

(3) Plaintiff's pleadings.

(a) Form of action.

Assault by servant. — A passenger may maintain an action *ex contractu* against a carrier to recover damages for an assault committed on him by a servant of the carrier. *Busch v. Interborough Rapid Transit Co.* (N. Y.), 10-460.

Breach of contract to carry. — A declaration in *assumpsit*, by one entitled to the benefit of a contract between a county and a railroad company whereby the latter has agreed to transport persons suffering from an infectious disease to the county pest house, which properly impleads the railroad company thereon and for a breach of its duty to him thereunder, is good upon demurrer. *Jenkins v. Chesapeake, etc., R. Co.* (W. Va.), 11-967.

Contract or tort. — Petition examined, in an action for damages against a carrier of passengers, and held not to state either a cause of action *ex contractu* against a common carrier, or a cause of action at common law for the carrier's negligence. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 9-1096.

(b) Allegations.

Assault by employees. — In an action by a passenger against a carrier, the complaint states a good cause of action *ex contractu*, where it alleges that on a specified date "plaintiff became a passenger of defendant for the purpose of being carried upon one of its cars;" that in consideration of the payment of fare by the plaintiff to the defendant "the defendant promised and agreed safely to carry the plaintiff and to treat him properly and carefully;" and that "the defendant through its agents and employees, wrongfully, illegally, and in violation of the terms of the said contract, assaulted the plaintiff," etc. *Busch v. Interborough Rapid Transit Co.* (N. Y.), 10-460.

Relation of carrier and passenger.

— In order to state a cause of action upon the statutory duty of a railroad company to a passenger who has not actually taken passage upon the train, it is necessary that the facts stated shall show that the person suing is one of the class of persons to whom the remedy is afforded by the statute. To plead that he is a passenger, in a case where the existence of such a relation to the carrier is at issue, pleads a mere conclusion of law and is not sufficient. *Fremont, etc., R. Co. v. Hagblad* (Neb.), 9-1096.

Petition examined, in an action for damages against a carrier of passengers, and held not to set forth facts sufficient to constitute the plaintiff a passenger so as to bring him within the provisions of the Nebraska statute providing that "every railroad company . . . shall be liable for all damages inflicted upon the person of passengers while being transported over its road." *Fremont, etc., R. Co. v. Hagblad* (Neb.), 9-1096.

General allegation of negligence.

— In an action by a passenger against a street railroad company for injuries received through a derailment of the car, it is sufficient to allege generally that such derailment was caused by the negligence of the company or its servants without more particular specification. *Hebert v. Portland R. Co.* (Me.), 13-886.

Failure to stop train at station.

— In an action against a railroad company for breach of its common-law duty to provide a waiting-room at a station, a paragraph in the complaint which counts on a special agreement between the parties that the defendant would stop the train in question at the station where the plaintiff was waiting, sufficiently states a cause of action. *Draper v. Evansville, etc., R. Co.* (Ind.), 6-569.

In an action against a railroad company for damages alleged to have resulted from the failure of the defendant to stop a passenger train at a flag station on signal, an averment in the petition that the plaintiff, "in accordance with the rules of the company and the custom, flagged said train and tried to wave the same down to a stop for the purpose of getting on said train," is not demurrable as failing to specify in what way the train was flagged, or what custom or rule of the com-

pany was violated. *Southern R. Co. v. Wallis* (Ga.), 18-67.

Failure to keep waiting room open. — Complaint in an action against a railroad to recover damages for its violation of the statute requiring it to keep a waiting-room at a station open for a certain period held not to allege facts bringing the plaintiff within the statute. *Draper v. Evansville, etc., R. Co. (Ind.)*, 6-569.

Failure to heat cars. — A petition in an action by a passenger against a carrier for damages for the failure of the carrier to heat the cars held not open to attack by general demurrer. *Atlantic Coast Line R. Co. v. Powell* (Ga.), 9-553.

Where a petition in an action by a passenger against the carrier for damages for a failure to heat the cars alleges that the attention of the agent of the company was called to the condition of the car, and requests were made to have the same heated, such allegation is open to a special demurrer on the ground that it fails to show what agent of the company had his attention called to the condition of the car, and whether said agent was connected with the operation of the train or had anything to do therewith. *Atlantic Coast Line R. Co. v. Powell* (Ga.), 9-553.

Nature of train. — Where a petition in an action by a passenger against the carrier for damages for the failure to heat its cars fails to show whether the plaintiff was a passenger upon a freight or passenger train, the defendant is entitled, upon a special demurrer, to have information in regard to that particular feature of the case. *Atlantic Coast Line R. Co. v. Powell* (Ga.), 9-553.

Mitigation of injuries by passenger. — In an action by a passenger against the carrier for damages for the failure to heat the cars, the trial court held not to have erred in overruling a special demurrer to that paragraph of the petition which set forth the means adopted by the plaintiff to mitigate her suffering, it being competent for her to allege and prove that she resorted to the expedients in her power to avoid or lessen the injuries resulting from the alleged negligence of the defendant. *Atlantic Coast Line R. Co. v. Powell* (Ga.), 9-553.

(c) Amendment.

Changing cause of action. — In an action against a railroad company for personal injuries to the plaintiff alleged "to have been caused proximately by the negligence of defendant in and about carrying plaintiff as a passenger," it is not a departure in pleading to amend the complaint by adding counts alleging that the plaintiff's injuries were "proximately caused by the negligence of the servant or agent of defendant while acting within the line and scope of his employment," and that the injuries were proximately caused by the "wanton, wilful, or intentional conduct of the defendant's servants or agents," since the amendments as well as the original complaint are in case. *Birmingham R., etc., Co. v. Jung* (Ala.), 18-557.

(4) Presumption of negligence.

From happening of accident, in general. — The presumption of negligence which arises in favor of a passenger from the mere fact of an accident exists only where the injury can be attributed reasonably to some defect in the carrier's track, cars, or machinery, or to the movement of the train, or to the conduct of the servants in charge of the train. *Woas v. St. Louis Transit Co. (Mo.)*, 8-584.

In an action by a passenger against the proprietor of a scenic railway to recover for personal injuries alleged to have been caused by the defendant's negligence, evidence tending to show that the plaintiff was using due care at the time of the injury, and that the injury was caused by apparatus wholly under the control of the defendant and furnished and managed by him, and that the accident was of such a character that it would not ordinarily have occurred if due care had been used by the defendant in the management of his railway, constitutes sufficient *prima facie* proof of negligence to impose upon the defendant the onus of rebutting it. On such proof the law raises a presumption of negligence. *O'Callaghan v. Dellwood Park Co. (Ill.)*, 17-407.

From wrecking of train. — Where an injury is inflicted upon a passenger by the breaking or wrecking of a part of the train on which he is riding, it is presumably the result of negligence on the part of the carrier. *Morgan v. Chesapeake, etc., R. Co. (Ky.)*, 16-608.

From collision. — In an action to hold an electric railway company liable as a common carrier of passengers for personal injuries sustained by the plaintiff while traveling on an unconditional free pass issued to him, evidence of a head-on collision between the car on which the plaintiff was riding and another car on the same track is *prima facie* evidence of gross negligence on the part of the defendant sufficient to render it liable for the injury. *Ryckman v. Hamilton, etc., R. Co. (Ont.)*, 4-1126.

In an action for damages for personal injury to a passenger on a street car resulting from a collision between the car and a wagon, the wagon and the driver not being under the control of the street car company, the burden of proof is upon the plaintiff who is required to establish his case by a preponderance of the evidence, since no presumption of negligence necessarily arises because of the collision. *Chicago Union Traction Co. v. Mee* (Ill.), 4-7.

From derailment of car. — Where an injury is sustained by a passenger in a street railway car by reason of the derailment of the car there is a presumption or *prima facie* case of negligence on the part of the carrier, but if the carrier shows that there was no defect in the track, car, or the method of operation, the derailment will be attributed to some independent cause called an accident, and the carrier will not be liable. *Overcash v. Charlotte Electric R., etc., Co. (N. Car.)*, 12-1040.

In an action for damages against a street car company for personal injuries received while the plaintiff was occupying the defendant's car as a passenger, evidence that while the plaintiff was sitting in her seat, the car being operated by the defendant became derailed and came into collision with a telegraph pole on the side of the street, whereby the plaintiff was injured, makes out a *prima facie* case of negligence against the defendant, and a demurrer to such evidence is properly overruled. *O'Gara v. St. Louis Transit Co.* (Mo.), 11-850.

From jolt in stopping freight train. — It cannot be said as a matter of law that negligence, rendering a railroad company liable for an injury to a passenger, can be predicated on the mere fact that a jar or jerk results from the stopping of a long freight train. *Hedrick v. Missouri Pacific R. Co.* (Mo.), 6-793.

(5) Burden of proof.

When specific acts of negligence are alleged. — The doctrine that a passenger makes out a *prima facie* case against the carrier for personal injuries when he shows that he was injured by a collision and was himself free from negligence, does not apply where he specifically pleads the negligent acts which caused the injury. *Gardner v. Metropolitan St. R. Co.* (Mo.), 18-1166.

Latency of defect. — Where a passenger on a railroad train has been injured by reason of a latent defect in one of the cars of the train, whether it was the particular car in which he was riding or not, it is incumbent upon the carrier, in order to avoid liability, to show that the accident was due to a cause or causes which neither it nor the builders of the car could have discovered in the exercise of the utmost human skill and foresight. *Morgan v. Chesapeake, etc., R. Co.* (Ky.), 16-608.

Contributory negligence. — In an action against a carrier of passengers to recover damages for personal injuries, where the plaintiff makes out a *prima facie* case showing that the injuries were inflicted upon him while he was a passenger and that they were the result of the defendant's negligence, the burden is cast upon the defendant of explaining the cause of the accident, and if contributory negligence is set up, of showing that the plaintiff's negligence caused the injuries or contributed to them. *Washington, etc., R. Co. v. Chapman* (D. C.), 6-721.

6. Admissibility of evidence.

Alighting on wrong side of car. — Where it appears, in an action by a passenger against a carrier to recover damages for personal injuries, that the plaintiff received the injuries sued for while alighting from the defendant's train on the opposite side of the track from the passenger station, it is error to permit him to show the amount of freight business done by the defendant at that point and that the freight office was on that side of the track, it further appearing that the

plaintiff had no business to transact at the freight office and did not know at the time that the freight office was so situated. *Louisville, etc., R. Co. v. Payne* (Ky.), 19-294.

Prior accidents of same nature. — Upon the question whether the derailment of a street car was the result of the negligence of the street railway company in permitting an alleged "dip" or depression to exist in the track at the point of derailment, evidence that other cars at other times ran off the track at the same place is not admissible when it is not shown that the condition complained of was the same at or near the time it is alleged the other cars left the track, or that the other cars and appliances and the mode of operation were of the same character and in the same condition as the car in question. *Overcash v. Charlotte Electric R., etc., Co.* (N. Car.), 12-1040.

Occupation of person killed. — In an action against a railroad company for the death of a postal clerk, the admission of evidence that the deceased had been assigned temporarily to fill a certain vacancy, which assignment was to take effect in the future and involved no increase of salary, is not error, especially as such evidence shows no probable increase of salary and could not affect the amount of damages. *Malott v. Central Trust Co.* (Ind.), 11-879.

Competency of carrier's employees. — In an action for injuries to a passenger in an elevator alleged to have resulted from negligence in operating the elevator, it is reversible error to admit evidence that the operator was incompetent. *Minot v. Snively* (U. S.), 19-996.

Amount of conductor's salary. — In an action by a passenger against a carrier of passengers for a personal injury caused by the falling of the window-sash of a car upon her arm, it is not an abuse of the discretion of the trial court to permit the plaintiff, on cross-examination, to inquire as to the amount of monthly salary received by the defendant's conductor. *Cleveland, etc., R. Co. v. Hadley* (Ind.), 16-1.

Custom to carry children free. — In an action against a street railway company to recover damages for personal injuries sustained on one of the defendant's cars by a child four years of age, for whom no fare had been paid but who at the time of the accident was accompanied by his mother, who had paid her fare, it is competent for the plaintiff to show a general custom on the part of the defendant not to charge fare for the carriage of a child of the plaintiff's age. *Ball v. Mobile Light, etc., Co.* (Ala.), 9-962.

Condition of injured limb. — Where a person's arm has been injured by the falling of a window-sash of a railroad car, and it is important to determine whether the injury is permanent or curable, and a witness has testified to the condition of the injured person at the times covered by the question, it is not error to allow the witness to answer the question whether the condition of the person's arm is better or worse at the time of the trial

than it was six months prior thereto. *Cleveland, etc., R. Co. v. Hadley (Ind.)*, 16-1.

Effect of medical treatment. — Where a person's arm has been injured by the falling of a window-sash of a railroad car, a witness who has observed the medical treatment administered and its visible effects, if any, is properly permitted to answer the question as to what effect the treatment had upon the injured arm, if any. *Cleveland, etc., R. Co. v. Hadley (Ind.)*, 16-1.

Free pass exempting carrier from liability. — Under the Mississippi code, where the defendant railroad company in an action by a passenger for personal injuries caused by the negligence of the defendant pleads the general issue only, it is proper to exclude from evidence a letter of the plaintiff requesting a pass, and the pass issued in compliance therewith, exempting the defendant from liability for injuries under any circumstances. *Yazoo, etc., R. Co. v. Grant (Miss.)*, 4-556.

Delay in bringing suit. — In an action by a passenger against the carrier for damages for the failure to heat the cars, where several months have elapsed between the time of the alleged injuries and the bringing of the suit, it is competent for the defendant's counsel to inquire of the plaintiff, while a witness on the stand, why she had delayed so long in bringing the suit. *Atlantic Coast Line R. Co. v. Powell (Ga.)*, 9-553.

Custom of permitting baggage in aisles of car. — In an action against a street railway company for injuries received by a passenger in falling over the baggage of a fellow passenger placed in the aisle of the car evidence offered by the defendant that it was customary not to have racks for baggage or parcels in street cars, and that there was a custom allowing passengers to put hand baggage and dress suit cases on the floor, is admissible, not for the purpose of proving a custom as such, but as bearing upon the question whether the defendant exercised the degree of care required of it. *Pitcher v. Old Colony St. R. Co. (Mass.)*, 12-886.

Inspection of car by jury. — In an action by a passenger against an electric street railway company to recover damages, it is not erroneous to permit the jury to inspect one of the defendant's cars and the controller thereon, where the mode of operating the controller is a pertinent issue, and there is testimony showing that all the controllers on the defendant's cars were "built exactly alike" and that "the controllers were the same; the same mechanism." *Dobbins v. Little Rock R., etc., Co. (Ark.)*, 9-84.

Materiality to issues. — Where the petition in an action by a passenger against a carrier to recover damages for personal injuries specifies the negligence relied on as the sudden starting of the train as the plaintiff was alighting at his destination, it is prejudicial error to admit evidence that the station platform was not properly lighted at the time. *Louisville, etc., R. Co. v. Payne (Ky.)*, 19-294.

(7) Sufficiency of evidence.

Of carrier's negligence, in general. — In an action against a railroad company to recover damages for the wrongful killing of plaintiff's intestate, where there is evidence tending to show that the deceased, a white man, was riding in a coach with colored passengers, contrary to the regulations of the railroad company adopted in pursuance of the statutes of the state, and that the conductor, or person who was acting as conductor, ordered him to leave such car and go into another, while the train was in rapid motion at night, and also caught him by the shoulder and pushed him out of the door and shut the door behind him, and that deceased fell from the train as he was stepping across the coupling between the cars, the giving of a general affirmative charge in favor of the defendant constitutes reversible error. *Carleton v. Central of Georgia R. Co. (Ala.)*, 16-445.

In an action by a passenger against a railroad company for personal injuries, received after alighting from a train, evidence examined and held to show that the railroad company was negligent in failing to call or announce the station; in failing to stop a reasonable length of time to permit passengers to disembark and embark; in not lighting its platform; in permitting a dangerous obstruction to remain upon the platform at a point where passengers ought to have been able to embark and disembark with reasonable safety; and in permitting the train to leave the station without the exercise of reasonable care in observing whether passengers had safely disembarked and embarked; and held to show further that the injury sustained by the plaintiff was not due to the independent wrongful act of a responsible human agency, but was solely due to the negligence of the railway company and its servants and employees. *Atchison, etc., R. Co. v. Calhoun (Okla.)*, 11-681.

In an action against a railroad company for the death of a postal clerk a verdict for the plaintiff is sustained by evidence that the defendant was engaged in carrying the mails on its train under an arrangement with the federal government, that the decedent was a postal clerk in the service of the United States in charge of such mail on defendant's train and was being carried as a postal clerk on such train, and received injuries from which he died by a head-end collision of two of the defendant's trains. *Malott v. Central Trust Co. (Ind.)*, 11-879.

Evidence reviewed in an action against a railroad company to recover damages for personal injuries sustained by one riding on a drover's pass in the caboose of a freight train, and held to show that the negligence of the defendant was not established either by the positive testimony of the witnesses or by any presumption of negligence arising out of the facts developed. *Hedrick v. Missouri Pacific R. Co. (Mo.)*, 6-793.

Negligence in premature starting of train. — In an action by a passenger to recover for personal injuries sustained by the

premature starting of a train while alighting therefrom, evidence reviewed and held to be sufficient to require the submission to the jury of the question of the defendant's negligence. *Hall v. Northern Pacific R. Co.* (N. Dak.), 14-960.

As to cause of accident. — Where in an action brought against a street railway company to recover damages for injuries sustained by a passenger in jumping from an electric car to avoid an apprehended danger it is shown that the plaintiff as well as other passengers pressed to the rear platform of the car, and that directly afterwards she was seen lying upon the street, the evidence is sufficient to enable the jury reasonably to infer that her injuries were the natural and proximate result of jumping from the platform in her effort to escape the effect of the railway company's negligence. The fact that more than one inference may be drawn from the evidence is unimportant. *Lehner v. Pittsburg R. Co.* (Pa.), 16-83.

Safety of station exits. — In an action against a street railway company by a passenger who was injured while passing through a turnstile which afforded means of egress from the defendant's terminal station to the street, evidence to the effect that the lowest revolving arm of the turnstile was at least eight and a half inches above the floor and that the plaintiff's foot was caught between such arm and the floor, is sufficient to sustain the allegation of the declaration that the defendant constructed an unsafe means of egress for its passengers. *Gascoigne v. Metropolitan West Side El. R. Co.* (Ill.), 16-115.

Evidence of notice of dangerous condition. — In an action for damages for injuries received by a passenger in an electric elevator, a letter identified as having been received by the proprietor of the elevator from his agent, and stating that the janitor reported that the elevator was out of repair, and that a certain electrician condemned the whole machine, is admissible for the limited purpose of showing that the proprietor was notified of the elevator's being out of repair. *Ferguson v. Truax* (Wis.), 13-1092.

Relation of carrier and passenger. — In an action for damages for injuries received by a passenger in an elevator evidence examined and held not insufficient as a matter of law to support a finding that the plaintiff, at the time of the accident, was riding in the elevator on his way to the office of a tenant in the defendant's building to see if he was wanted by the tenant to run an errand. *Ferguson v. Truax* (Wis.), 13-1092.

Evidence reviewed in an action against a railroad company to recover damages for the death of a person killed while riding on a drover's pass, and held to justify the jury in finding that the deceased was a "bona fide employee" of the shipper within the meaning of the pass. *Weaver v. Ann Arbor R. Co.* (Mich.), 5-764.

(8) Variance.

Relation of carrier and passenger. — In an action by a free passenger against a

street railway company to recover damages for personal injuries, where the complaint charges the defendant with liability as a common carrier of passengers, but the court incorrectly instructs the jury that the defendant can be held liable only as a private carrier and that it is not charged with liability as a common carrier but only for failure to exercise ordinary care, the defendant, on judgment against it, cannot complain that there is a variance between the pleading and the proof, and cannot object to the instruction on the ground that under the pleadings it can be held liable only as a common carrier and not as a private carrier. *Indianapolis Traction, etc., Co. v. Lawson* (U. S.), 6-666.

Nature of contract of carriage. — In an action by a charity patient against a railroad company for breach of a contract between the county court and the railroad company whereby the latter agreed to transport persons suffering from an infectious disease to the county pest-house, a declaration, which counts as upon a special contract for carriage between the plaintiff and defendant for hire and reward, is not supported by proof of the contract between the county court and the defendant company, or by the implied contract between the carrier and passenger, the variance being fatal. *Jenkins v. Chesapeake, etc., R. Co.* (W. Va.), 11-967.

A writ of error awarded the defendant in such a case does not bring up the action of the trial court in sustaining a demurrer to a count in assumpsit in the declaration, and the appellate court cannot look to such count to support the verdict and judgment for the plaintiff. *Jenkins v. Chesapeake, etc., R. Co.* (W. Va.), 11-967.

(9) Questions for jury.

Existence of relation of carrier and passenger. — In an action against a street railway company to recover damages for personal injuries sustained by a child under four years of age, who was riding without payment of fare but who was accompanied by his mother who had paid her fare, where the witness testifies that "there were about seven or eight passengers on the car, and this little boy . . . was one of the passengers," the question whether the child was a passenger is one for the jury. *Ball v. Mobile Light, etc., Co.* (Ala.), 9-962.

In an action by a passenger against a carrier to recover damages for personal injuries, where the evidence is uncontroverted that after the plaintiff had become a passenger by entering the defendant's street car and paying his fare, he was assaulted by the conductor of the car, but the evidence is conflicting as to whether the assault occurred before or after the plaintiff had left the car, and therefore whether the defendant was liable for the assault by the conductor, that question is for the jury. *Jackson v. Old Colony St. R. Co.* (Mass.), 19-615.

Negligence in stopping car. — In an action against a street railway company to recover damages sustained by a child under four years of age while riding with his mother

on one of the defendant's cars, where there is evidence tending to show that the car was stopped with unusual suddenness and with a jerk, and that by the sudden stopping of the car the child was thrown from the seat and injured, it is for the jury to determine whether the defendant was guilty of negligence in the manner of stopping the car. *Ball v. Mobile Light, etc., Co. (Ala.)*, 9-962.

Contributory negligence. — In an action by a passenger to recover for personal injuries sustained by the premature starting of a train while alighting therefrom, evidence reviewed and held to show that the question whether the passenger was guilty of contributory negligence was one for the determination of the jury. *Hall v. Northern Pacific R. Co. (N. Dak.)*, 14-960.

Evidence reviewed, in an action against a street railway company to recover damages for personal injuries sustained by a female passenger while alighting from one of the defendant's cars, and held to show that the question whether the passenger was guilty of contributory negligence was one for the determination of the jury. *Mobile Light, etc., Co. v. Walsh (Ala.)*, 9-852.

Evidence reviewed, in an action by an intoxicated passenger against a carrier to recover damages for personal injuries sustained by the plaintiff, and held sufficient to require submission to the jury of the question whether the plaintiff was free from any negligence that was a direct and proximate cause of the injury. *Black v. New York, etc., R. Co. (Mass.)*, 9-485.

In an action against a carrier of passengers to recover damages for personal injury to an intoxicated passenger, held to be for the jury to determine whether the plaintiff was guilty of contributory negligence or the defendant was free from negligence. *Fox v. Michigan Cent. R. Co. (Mich.)*, 5-68.

(10) Instructions.

Duty of carrier toward passenger. — In an action by a passenger against a street railway company, an instruction which tells the jury that if the plaintiff became a passenger he "was entitled to courteous treatment," and that if he was without fault and "not treated with care and courtesy he was entitled to recover," but which does not define the duty of the defendant to use ordinary care to protect the plaintiff as a passenger from insult and injuries, is erroneous in that it allows the jury to generalize and speculate as to what is "courteous treatment," and leaves them to say what "care and courtesy" was due from the defendant to the plaintiff. *Little Rock R., etc., Co. v. Goerner (Ark.)*, 10-273.

Duty to keep aisles of cars clear. — In an action against a street railway company for injuries received by a passenger in falling over the bag of a fellow passenger placed in the aisle of the car, a requested instruction "that under all conditions the aisles, entrances, and exits shall be kept free from all obstructions by the use of the high-

est possible degree of care and caution" on the part of the company, is erroneous and properly refused. *Pitcher v. Old Colony St. R. Co. (Mass.)*, 12-886.

Duty to watch for obstructions on track. — In an action by a passenger against a street car company for personal injuries, alleged to have resulted from the derailment of the car in which plaintiff was riding, owing to the action of a small boy in placing a brick upon the track, where it appears that children were playing upon or near the track and that there was an ordinance requiring a vigilant lookout in such cases, a requested instruction calling attention to the engrossing duty of the motorman under such circumstances and amounting to no more than an argument why the motorman did not see the boy place the brick on the track is properly refused, there being nothing in the ordinance in question that exonerated the motorman from the duty to keep his eye upon the track and see if there were any obstructions thereon. *O'Gara v. St. Louis Transit Co. (Mo.)*, 11-850.

In such an action it is proper to refuse a requested instruction making the negligence of the motorman and the plaintiff's right of recovery depend on whether the motorman saw the brick in time to have avoided the accident, and give instead an instruction that the plaintiff could not recover unless the motorman either saw or by exercise of reasonable diligence could have seen the brick on the track in time to avoid the accident. *O'Gara v. St. Louis Transit Co. (Mo.)*, 11-850.

Degree of care required from carrier. — In an action for injuries to a passenger on a street car, where the plaintiff is alleged to have been injured by a beam projecting from one of the trolley poles along the track, he is entitled to an instruction that if the end of the beam extended near enough to the track to endanger passengers on the car, and nearer the track than a very careful and prudent person would have permitted under the circumstances, and the defendant knew, or by the exercise of a high degree of care and caution might have known, of the condition of the beam in time to have changed it and thereby to have prevented the injury to the plaintiff, then the defendant was negligent in that particular. *Gardner v. Metropolitan St. R. Co. (Mo.)*, 18-1166.

Liability for fall of car window. — In an action by a passenger against a carrier of passengers for a personal injury caused by the falling of the window-sash of a car on her arm, where the defendant does not found its defense upon the ground that it is not liable for recent breaks or latent defects, or offer any evidence of an inspection of the car or its appliances previous to the accident, but insists that the window catch was suitable and proper, and in good condition, it is not improper to instruct the jury, at the request of the plaintiff, that if she was a passenger on the defendant's car, and, for the purpose of throwing out fruit parings, or for other reasonable cause, raised the window until the same was locked or caught, and such window,

on account of the broken, weak, or defective lock or catch thereon, fell and injured the plaintiff's arm, without fault or negligence on her part, the defendant would be liable. *Cleveland, etc., R. Co. v. Hadley (Ind.)*, 16-1.

Duty of passenger to exercise care. — In an action by a passenger against a carrier of passengers for a personal injury caused by the falling of the window-sash of a car upon her arm, it is proper to refuse to instruct the jury that passengers upon the cars or carriages of a common carrier must exercise the highest degree of care to protect themselves from injury. *Cleveland, etc., R. Co. v. Hadley (Ind.)*, 16-1.

In such an action it is proper to refuse to instruct the jury that if the passenger, while on a rapidly moving car, raised the window and protruded her arm, and while she was in the act of withdrawing her arm the window fell, inflicting the injury complained of, she was guilty of contributory negligence and cannot recover. *Cleveland, etc., R. Co. v. Hadley (Ind.)*, 16-1.

In an action by a passenger against a carrier of passengers for a personal injury caused by the falling of a window-sash of a car upon her arm, it is not improper to refuse to instruct the jury that the fact that the window fell shortly after the starting of the train constituted a warning to the plaintiff, and that the subsequent protrusion of her arm from the window was contributory negligence. *Cleveland, etc., R. Co. v. Hadley (Ind.)*, 16-1.

In an action against a railroad company for refusing on a proper signal to stop a passenger train at a flag station to receive the plaintiff as a passenger, an instruction that the plaintiff must "show that his injury, if any, was not caused by his own negligence, and that he could not have avoided the injury by the exercise of ordinary care and diligence," is not prejudicial to the defendant as blending two separate and distinct rules of law applicable to the defense. *Southern R. Co. v. Wallis (Ga.)*, 18-67.

Status of person refusing to pay fare. — In an action against a street railway company to recover damages for the death of the plaintiff's husband, where the plaintiff's theory of the case, as shown by her pleadings and proof, is that the deceased was a passenger on one of the defendant's cars, and that he was wrongfully assaulted and thrown from the car by the conductor, an instruction that the deceased was not a passenger, in the contemplation of law, if he boarded the car with the intention of not paying his fare or refused to pay the same when the conductor demanded payment, is proper. *Garrett v. St. Louis Transit Co. (Mo.)*, 16-678.

Theory of case controlling recovery. — In an action by a passenger against a street railway company, where the cause is tried solely on the theory of an unlawful ejection, but evidence that the conductor used abusive and insulting language is introduced in aggravation of the damages, it is not erroneous to instruct the jury that if the evidence shows that there was no ejection there can be no recovery for the insulting and abusive lan-

guage. *Dobbins v. Little Rock R., etc., Co. (Ark.)*, 9-84.

Failure to prove special contract alleged. — In an action for breach of a special contract to carry, an instruction for the defendant which tells the jury that the plaintiff, having alleged in his declaration that the defendant agreed to carry him for hire and reward and having failed to prove such allegation, is not entitled to recover in an action of assumpsit, is improperly refused. *Jenkins v. Chesapeake, etc., R. Co. (W. Va.)*, 11-967.

Ignoring special contract alleged. — In an action by a charity patient against a railroad company for breach of a contract between the county court and the railroad company whereby the latter had agreed to transport persons suffering from an infectious disease to the county pest-house, where the declaration alleges a special contract between the plaintiff and the defendant, instructions for the plaintiff based upon the theory of an implied contract, and which ignore the special contract alleged in the declaration, are inapposite and should be refused. *Jenkins v. Chesapeake, etc., R. Co. (W. Va.)*, 11-967.

Passenger attacking conductor. — In an action against a street railway company to recover damages for the death of the plaintiff's husband, where there is evidence tending to show that the deceased was fighting with the conductor at the time when he was ejected from the car, an instruction to the effect that the defendant is not liable if the deceased was the aggressor and started the fight with the conductor, and during such fight was thrown or pushed from the car, is proper. *Garrett v. St. Louis Transit Co. (Mo.)*, 16-678.

Presumption of negligence from happening of accident. — In an action by a passenger against a carrier of passengers to recover damages for personal injuries where it does not appear that the question of the plaintiff's contributory negligence is so involved as to take the case out of the general rule that a passenger injured without his fault, by a defective appliance of the carrier, has a *prima facie* right of recovery, it is not improper to instruct the jury, at the request of the plaintiff, that if an injury is suffered by a passenger on account of the weak, broken, or defective condition of the car in which such passenger is riding, or any of the equipments and appliances connected therewith, the mere happening of such accident and injury is *prima facie* evidence of negligence of the carrier owning, controlling, and using such car. *Cleveland, etc., R. Co. v. Hadley (Ind.)*, 16-1.

Presumption of negligence from derailment of car. — In an action for damages for personal injuries by a passenger on a street car by reason of the derailment of the car, instructions by the court that the fact of a derailment raises a presumption of negligence which, if not rebutted, is "evidence of negligence," sufficiently imposes upon the defendant the duty of persuading the jury, from the evidence introduced by the plaintiff or by going forward with independent proof, that there was no negligence on its part, al-

though the court refuses to instruct specifically that after the fact of derailment is shown the burden is upon the defendant to satisfy the jury that the derailment was not caused by its negligence. *Overcash v. Charlotte Electric R., etc., Co. (N. Car.), 12-1040.*

Burden of rebutting presumption of negligence. — In such an action, wherein the court has properly instructed the jury, at the request of the plaintiff, that if a passenger receives an injury on account of the weak, broken, or defective condition of any appliance connected with a car owned, controlled, and used by the carrier, and in which such passenger is being transported, the happening of the accident is *prima facie* evidence of the negligence of the carrier, it is not improper to instruct the jury that the carrier has the burden of proving, in order to rebut the presumption of negligence, under the circumstances, that the accident could not have been avoided by the exercise of the highest degree of practical care and diligence. *Cleveland, etc., R. Co. v. Hadley (Ind.), 16-1.*

In an action against a street car company for damages for personal injuries to a passenger, an instruction that if, while the plaintiff was a passenger of the defendant, the car became derailed and struck a post causing her to be thrown from her seat and injured, she is entitled to recover unless the defendant has shown by the greater weight of evidence that it could not have prevented the derailment of the car by the exercise of the high degree of care that a very careful railroad would employ under similar circumstances in maintaining its track in safe condition and in the management and control of the car, is a correct statement of the law and properly given. *O'Gara v. St. Louis Transit Co. (Mo.), 11-850.*

Burden of explaining accident. — Instructions reviewed in an action against a carrier of passengers to recover damages for personal injuries sustained by a passenger and held not open to the objection that they impose upon the defendant the burden of explaining to the jury the manner in which the plaintiff received her injuries. *Standen v. Pennsylvania R. Co. (Pa.), 6-408.*

Burden of proving criminal intent. — Where an action against a street railway company to recover damages for the death of the plaintiff's husband is brought under a statute which requires proof of "criminal intent" on the part of the defendant, it is not error for the trial court to instruct the jury that the burden is on the plaintiff to show that the act of the conductor in ejecting deceased from the car was "an act of criminal conduct." *Garrett v. St. Louis Transit Co. (Mo.), 16-678.*

(11) Damages.

Refusal to carry. — In an action against a sleeping-car company for its refusal to carry the plaintiff after he had purchased a ticket, the plaintiff, if he is entitled to recover at all, is entitled to at least the amount paid for the ticket, and this amount, though small, constitutes substantial as distinguished from

nominal damages. *Pullman Car Co. v. Krauss (Ala.), 8-218.*

In an action against a sleeping-car company for its refusal to carry the plaintiff after he had purchased a ticket, where it appears that the plaintiff, at the time he presented himself for passage on the defendant's car, was afflicted with a contagious or infectious disease, the measure of damages is the amount paid for the ticket, together with interest to the date of the recovery. *Pullman Car Co. v. Krauss (Ala.), 8-218.*

Carrying beyond destination. — In the absence of other inculpatory facts, such as wantonness, violence, or insulting or oppressive conduct on the part of its employees, the act of a railroad company in carrying a passenger beyond his destination amounts to a mere breach of contract, and the damages recoverable therefor must be limited to compensation for loss of time and expenses incurred, together with a fair and reasonable compensation for any substantial inconvenience that may be suffered. *Dalton v. Kansas City, etc., R. Co. (Kan.), 16-185.*

In an action by a passenger against a railroad company to recover damages for being carried beyond his destination, where there is any evidence of substantial inconvenience, the question of damages should be left to the jury, under proper instructions; and where, in such a case, the jury, by a special finding, award the plaintiff a designated sum as damages for inconvenience, it is reversible error for the trial court to reduce the verdict by striking out the entire amount so awarded. *Dalton v. Kansas City, etc., R. Co. (Kan.), 16-185.*

In an action by a passenger against a railroad company to recover damages for being carried beyond his destination, where the evidence shows that the inconvenience suffered by the plaintiff was very slight, an award by the jury of three hundred dollars damages for inconvenience is excessive. *Dalton v. Kansas City, etc., R. Co. (Kan.), 16-185.*

Failure to stop at flag station. — A railroad company failing to stop its train on appropriate signal to take up passengers at a flag station is liable for actual damages if the failure to stop is due to the negligence of the engineer in not keeping a proper lookout, and for punitive damages if the failure to stop is due to the wilful refusal of the engineer to obey the signal. *Williams v. Carolina, etc., R. Co. (N. Car.), 12-1000.*

Persons for whom a railroad company negligently fails to stop its train on signal at a flag station are not bound to wait for the next train to take them to their destination a mile and a half away, but may proceed on foot, and are entitled to recover for the personal annoyance, inconvenience, discomfort, and physical exertion incident to their doing so. *Williams v. Carolina, etc., R. Co. (N. Car.), 12-1000.*

A verdict for \$250 for the refusal of a railroad company to stop a regular passenger train on a proper signal at a flag station is not excessive where the plaintiff, a physician, in consequence of the refusal, was obliged to

walk seven miles on a winter night over dark and muddy roads, causing an illness which confined him to his bed for some time and from which he had not entirely recovered at the time the action was brought. *Southern R. Co. v. Wallis* (Ga.), 18-67.

Personal injuries. — The amount of the verdict in an action against a street car company for damages for personal injuries to a passenger is held not excessive in view of the evidence of the plaintiff's injuries and the right of the jury to determine the amount of damage, so long as their verdict is free from bias or prejudice and not unreasonable. *O'Gara v. St. Louis Transit Co.* (Mo.), 11-850.

Punitive damages. — In an action by a passenger against a carrier to recover damages for personal injuries, where there is some evidence of wantonness on the part of the engineer in backing the train suddenly, violently, and without warning at a place where passengers might be expected to alight, it is not erroneous to refuse the defendant's request for an instruction that there is no evidence to sustain a verdict for punitive damages. *Hiers v. Atlantic Coast Line R. Co.* (S. Car.), 9-1114.

Nominal damages. — In an action by a passenger against a street railway company to recover damages for an assault committed on the plaintiff by the defendant's servant, the plaintiff held not restricted to nominal damages under the evidence. *Ford v. Minneapolis S. R. Co.* (Minn.), 8-902.

(12) Verdict and judgment.

Effect of special findings. — In an action by a passenger against a railway company to recover for injuries which it is claimed were caused by the negligence of the company in starting its train without giving him sufficient time to get off in safety, where the jury finds generally for the plaintiff, a special finding by the jury that the train stopped the usual and ordinary length of time will not warrant the court in rendering judgment for the railway company *non obstante veredicto*. *Chicago, etc., R. Co. v. Wimmer* (Kan.), 7-756.

7. SLEEPING CAR COMPANIES.

Statutory regulations as to berths. —

A law providing that the upper berth in a sleeping car shall, when unoccupied, at the option of the occupant of the lower berth, be closed, is not for the promotion of public health and comfort, in the judgment of the legislature, in that the option is given in each instance where the regulation is applicable to say whether it shall operate or not, manifestly suggesting it is for private rather than for public interests. *State v. Redmon* (Wis.), 15-408.

If it were legitimate to give the occupant of a lower berth in a sleeping car control of the upper berth in case of its not being occupied, it would not be reasonable to confer such control by confiscating for his benefit the use of such berth. *State v. Redmon* (Wis.), 15-408.

A law absolutely giving to the occupant of a lower berth in a sleeping car control, at his option, of the upper berth in case of its not being occupied, is an unconstitutional appropriation of the property of one for the benefit of another, and an infraction of several constitutional safeguards. *State v. Redmon* (Wis.), 15-408.

Liability for passenger's effects. — A sleeping-car company is not liable to a passenger for the loss, by theft of the porter or otherwise, of jewelry carried in a hand bag by the passenger without any purpose or intention of using the same during the journey, but solely for the purpose of transportation. *Bacon v. Pullman Co.* (U. S.), 14-516.

A sick passenger on a sleeping car who by the wrongful act of the porter is deprived of a hand bag containing medicines that would have relieved the physical pain and mental distress incident to the diseased condition, is entitled to recover from the sleeping-car company compensatory damages for the suffering and distress caused by the deprivation of the medicines, although such suffering is caused by the sickness concurring with the wrong complained of. *Bacon v. Pullman Co.* (U. S.), 14-516.

The physical suffering and mental distress suffered by a sick passenger in a sleeping car as the result of the wrongful taking by the porter of the passenger's hand bag containing medicines adapted to the relief of the sickness, is not such a remote and unforeseeable consequence of loss of the bag as to relieve the company of liability for compensatory damages. *Bacon v. Pullman Co.* (U. S.), 14-516.

In an action against a sleeping-car company for the loss of a passenger's personal effects, a complaint alleging the contract between the plaintiff and the company, and setting out as a gravamen of the action a breach of duty on the part of the company through the wrongful act of its porter in taking and carrying away the plaintiff's hand bag containing the property in question, alleges by implication a duty on the part of the defendant and by reasonable intendment supports an action *ex delicto*, although it does not contain a direct affirmative allegation of the duty on the part of the defendant company arising out of the contract to furnish sleeping-car facilities. *Bacon v. Pullman* (U. S.), 14-516.

It is the duty of a sleeping-car company to exercise reasonable care to guard the personal effects of a passenger from theft; and if, through want of that care, such effects as the passenger may properly carry with him on the journey are stolen, the company will be liable therefor. The personal effects which a passenger may properly carry with him on a journey may include articles of personal adornment, such as jewels and the like. *Pullman Co. v. Green* (Ga.), 10-893.

Person with contagious or infectious disease. — It is not only the right but the duty of a sleeping-car company to make rules and regulations to insure the safety and comfort of its patrons; and the reasonableness

of any given rule or regulation is a question of law to be determined by the court. Pullman Car Co. v. Krauss (Ala.), 8-218.

A rule of a sleeping-car company providing that "persons known to be afflicted with any contagious or infectious disease will not be permitted in the cars" of the company, is, as a matter of law, a reasonable one. Pullman Car Co. v. Krauss (Ala.), 8-218.

A sleeping-car company may refuse to contract with a person afflicted with a loathsome contagious or infectious disease to carry him as a passenger or to furnish him a berth in its cars. Pullman Car Co. v. Krauss (Ala.), 8-218.

Rescission of contract to carry. — Where a sleeping-car company, after receiving a person as a passenger or making a contract to carry him, becomes aware that he is afflicted with a loathsome contagious or infectious disease, it may, in view of the duty it owes to other passengers, put an end to the contract and refuse to carry him as a passenger; but in order to perfect the rescission so that it will be a defense to an action for breach of the contract, the company must offer to return the purchase price of the ticket. Pullman Car Co. v. Krauss, (Ala.), 8-218.

Relation between railroad company and employee of sleeping car company. — It is not a part of the duties of a railroad company as a common carrier to haul a sleeping car of a sleeping-car company, and an employee of the sleeping-car company riding in such car is not a passenger of the railroad company. Denver, etc., R. Co. v. Whan (Colo.), 12-732.

Liability of railroad company for acts of employee of sleeping car company. — A railroad company is not liable to a passenger riding in a sleeping car for any act of an employee of the sleeping-car company in regard to the passenger's berth accommodations, as distinguished from his right to safe and comfortable accommodation, unless there is evidence connecting the railroad company with the special contract between the passenger and the sleeping-car company. Taber v. Seaboard Air Line Ry. (S. Car.), 19-1132.

CARRYING WEAPONS.

See WEAPONS.

CARS.

See CARRIERS; RAILROADS; STREET RAILWAYS.

Car couplers, see MASTER AND SERVANT, 3 c (1), 3 e (2).

Garnishment of railroad cars, see GARNISHMENT.

Motor cars, see MOTOR VEHICLES.

Power of municipality to require fenders on street cars, see MUNICIPAL CORPORATIONS, 5 f (2).

CASE.

See TRESPASS ON THE CASE.

When proper form of action, see ACTIONS.

CASE MADE.

See AGREED CASE.

CASHIER.

Authority of bank cashier, see BANKS AND BANKING, 3 a.

CATTLE GUARDS.

On railroads, see FENCES, 3.

CAUSA MORTIS.

Gifts *causa mortis*, see GIFTS, 2.

CAUSE.

Probable cause, see MALICIOUS PROSECUTION.
Rule to show cause in contempt proceeding, see CONTEMPT, 3 a.

CAUSE OF ACTION.

Accrual of cause of action, see ACTIONS.

Conclusiveness of judgment as to existence of cause of action, see JUDGMENTS, 6 b (1).

Identity of cause of action as affecting conclusiveness of judgment, see JUDGMENTS, 6 b (3).

Joinder of causes, see ACTIONS.

Merger in judgment, see JUDGMENTS, 5 a.

Splitting causes, see ACTIONS.

CAUSE OF DEATH.

See INSURANCE, 7 f (4).

CAUTIONARY INSTRUCTIONS.

Propriety of refusal, see CRIMINAL LAW, 6 q (1).

CAVEAT EMPTOR.

Application of rule to judicial sales, see JUDICIAL SALES, 4.

Application of rule to tax sales, see TAXATION, 10 f (3).

CELLARS.

Right to construct cellars under sidewalks, see STREETS AND HIGHWAYS, 6.

CEMETERIES.

1. DEDICATION AND ABANDONMENT.
2. ADVERSE POSSESSION OF CEMETERY LANDS.
3. INJUNCTION TO PREVENT OBSTRUCTION OF USE.
4. VALIDITY OF STATUTORY OR MUNICIPAL REGULATIONS.

Cemetery as nuisance, see **NUISANCES**, 1 b.

Partition of cemetery lots, see **PARTITION**, 2 c.

Trust for care of burial lot as charity, see **CHARITIES**, 1.

1. DEDICATION AND ABANDONMENT.

Common-law dedication.—Land may be devoted by a common-law dedication to the use of the public as a cemetery. *Tracy v. Bittle* (Mo.), 15-167.

Where an owner stakes off and fences part of his land in order that it may be used by the public as a cemetery and puts in a gate on the side which adjoins a public road, and such land is accepted and used as a cemetery by the public with the acquiescence of the owner and his successors in title, there is a valid common-law dedication of the land for cemetery purposes. *Tracy v. Bittle* (Mo.), 15-167.

Notice to purchaser of land.—Although the deed of an owner of land does not contain a reservation of a part thereof which has been dedicated for the purpose of a cemetery, yet where one of the deeds of record in his chain of title contains such a reservation, neither he nor his grantor can disclaim such notice as would at least have put him upon inquiry. *Tracy v. Bittle* (Mo.), 15-167.

Non-user as abandonment.—If the bodies interred in a public cemetery remain therein, the fact that for a number of years the graves are entirely neglected and no new interments are made, does not operate as an abandonment of such cemetery. *Tracy v. Bittle* (Mo.), 15-167.

Reverter on abandonment.—An owner of land which has been dedicated to the public for the purpose of a cemetery has a right of reverter which takes effect if the cemetery is subsequently abandoned. *Tracy v. Bittle* (Mo.), 15-167.

2. ADVERSE POSSESSION OF CEMETERY LANDS.

Missouri statute.—The exemption from the Missouri statute of limitations of land used for "public, religious, or charitable" purposes includes land dedicated to the public for the purposes of a cemetery, and title to such land cannot be acquired by adverse possession. *Tracy v. Bittle* (Mo.), 15-167.

3. INJUNCTION TO PREVENT OBSTRUCTION OF USE.

Who may sue.—A person who has near relatives buried in a public cemetery has a peculiar right in the maintenance of a cemetery as a public use, and may maintain an

action for an injunction to prevent the obstruction of such public use. *Tracy v. Bittle* (Mo.), 15-167.

4. VALIDITY OF STATUTORY OR MUNICIPAL REGULATIONS.

Ordinance prohibiting further interments.—An ordinance which has the effect of prohibiting further interments in existing cemeteries situated in densely populated portions of the municipality is a reasonable exercise of the police power of the municipality. *Laurel Hill Cemetery v. San Francisco* (Cal.), 14-1080.

The owner of the cemetery which, when originally dedicated, was one mile from any habitation, but which, by the growth of the municipality wherein it is situated, has become surrounded by a thickly settled portion of such municipality, is not deprived of its property without due process of law by an ordinance, which is to take effect eighteen months after its passage, prohibiting further interments within the limits of the municipality. *Laurel Hill Cemetery v. San Francisco* (Cal.), 14-1080.

The fact that a municipality has made a grant of land for the purpose of a cemetery and has for many years acquiesced in the existence of such cemetery does not estop the municipality from exercising its police power by prohibiting further interments therein for the purpose of preventing apprehended injury to the public health. *Laurel Hill Cemetery v. San Francisco* (Cal.), 14-1080.

The fact that a municipality has acquiesced in the establishment of a cemetery and in the expenditure of large sums of money in its improvement does not estop the municipality from prohibiting further interments in such cemetery when the growth of the municipality has changed its relation to the cemetery. *Laurel Hill Cemetery v. San Francisco* (Cal.), 14-1080.

The fact that a particular cemetery situated in a densely populated neighborhood may not, on account of the nature of its soil, be detrimental to health, does not affect the validity of such ordinance or exempt such cemetery from the operation thereof, because the courts take judicial notice of the fact that such cemeteries are likely to be injurious to the public health, and are therefore, as to further use, within the control of the legislative authority. *Laurel Hill Cemetery v. San Francisco* (Cal.), 14-1080.

The incorporation of a cemetery association under a statute authorizing the incorporation of rural cemetery associations and the purchase by such association of land for cemetery purposes within the limits of a municipality is not a contract, the obligation of which is impaired by an ordinance prohibiting further interments within the limits of the municipality. *Laurel Hill Cemetery v. San Francisco* (Cal.), 14-1080.

CENSUS.

Reports as evidence.—Properly certified copies of the United States census re-

ports are admissible in evidence on an issue as to the age of a person. *Priddy v. Boice*, 9-874.

CEREMONY.

Religious ceremony as essential to marriage, see MARRIAGE, 1 b.

CERTAINTY.

Requirement of contract in suit for specific performance, see SPECIFIC PERFORMANCE, 3 f (2).

Test of certainty in indictment, see INDICTMENTS AND INFORMATIONS, 4.

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Amendment of certification of ground of judgment after writ of error, see APPEAL AND ERROR, 8 d.

Certificate of election, see ELECTIONS.

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CERTIFIED CHECKS.

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CERTIORARI.

1. WHEN WRIT WILL ISSUE, 465.

2. WHO MAY MAINTAIN, 465.

3. TIME FOR APPLICATION, 466.

4. PETITION FOR WRIT, 466.

5. THE HEARING, 466.

Review of acts of governor, see STATES, 2 b.

Review of search warrant proceedings, see SEARCHES AND SEIZURES.

1. WHEN WRIT WILL ISSUE.

To review verdict in justice's court.

—A petition for certiorari from a justice of the peace should be granted when it appears that the verdict in that court was for a greater amount than claimed by the plaintiff. *Kenyon v. Brightwell* (Ga.), 1-169.

In aid of appellate jurisdiction.

—While the supreme court may only direct the issuance of the writ of certiorari as auxiliary to, or in aid of, or to protect its ap-
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pellate jurisdiction, the writ is properly issued to prevent the illegal act of a judge in interfering by habeas corpus proceedings with the execution of a judgment in a criminal case which the supreme court has affirmed, and has directed the lower court to carry into effect, as such use of the writ is protective to the appellate jurisdiction. *People ex rel. Stead v. Superior Court* (Ill.), 14-753.

Determination of speculative question. — The writ of certiorari will not be issued unless it will avail to relieve some actual and substantial wrong or injury of the applicant; and where, upon a writ to review the action of the governor in removing the applicants from office, it appears that between the day of the issuance of the rule and the day of the hearing the legislature adopted an act abolishing the office, the proceeding raises merely a speculative question which the court is not required to consider, the title to the office and the accrual of the emoluments thereof not being involved in the proceeding. *State ex rel. Rawlinson v. Ansel* (S. Car.), 11-613.

Existence of other remedy. — The fact that there is a remedy by appeal does not preclude a party from maintaining a certiorari proceeding to test the validity of an order granting a temporary injunction prohibiting the use of voting machines at an election, where it is claimed that the order was made in excess of the jurisdiction of the court, and where an appeal would postpone any test of the validity of the order until after the election in question. *United States Standard Voting Machine Co. v. Hobson* (Iowa), 10-972.

2. WHO MAY MAINTAIN.

Person not party. — The widow of a judgment debtor is not entitled to prosecute a writ of certiorari to review the judgment where she was not a party to the proceeding in which the judgment was rendered and it does not appear that she has any interest in the reversal of the judgment or that she can be in any manner injuriously affected by it. *State ex rel. Sullivan v. Drake* (Wis.), 10-860.

Persons without interest in proceedings. — When it appears that petitioners for the writ of certiorari, who are not parties to the record, have no direct, legal, statute interest in the proceedings complained of, they have not shown such an interest in the proceedings sought to be quashed as entitles them to maintain the writ. *Lord v. County Commissioners* (Me.), 18-665.

To quash proceedings laying out highway. — Where petitioners prayed for the writ of certiorari to quash the proceedings of the county commissioners in Cumberland county in laying out a town way in the town of Naples in that county, and it appeared that the only ground for their claim of right to petition for the writ was that they were "citizens and taxpayers of said town of Naples," held that they had no legal right to petition for the writ. *Lord v. County Commissioners* (Me.), 18-665.

3. TIME FOR APPLICATION.

Pending execution of order.—An application for a writ of certiorari to annul an order of the court adjudging the applicant to be in contempt is not premature if it is made after the court has finally disposed of the proceeding, though the execution of the order has been suspended to a day certain to allow the applicant to attend to a business matter of importance. *State ex rel. Carlton v. District Court (Mont.)*, 8-752.

Before final judgment or order.—Where a judge of an inferior court acts without jurisdiction in issuing the writ of habeas corpus to test the validity of a judgment of conviction which the supreme court has affirmed, the latter court will issue the writ of certiorari to review the proceeding without awaiting a final judgment or order therein. *People ex rel. Stead v. Superior Court (Ill.)*, 14-753.

4. PETITION FOR WRIT.

Sufficiency of allegations.—When a petition for certiorari, brought to review a judgment rendered in a municipal court, assigns error upon the judgment of that court on the ground that the same is contrary to the evidence, and the existence of the ordinance alleged to have been violated is admitted in the petition, but the provisions of the ordinance are not set out, it is impossible to tell whether any error has been committed, and the judge of the superior court may refuse to sanction the petition. *Hill v. Atlanta (Ga.)*, 5-614.

Effect of granting petition.—Although it has been the uniform practice in Maine to hear the whole case upon a petition for the writ of certiorari, nevertheless, the judgment upon the petition granting the writ and ordering the record sent up is not a judgment that the record when sent up in response to the writ is to be quashed, but when the record has been certified up as directed in the writ the question whether the petitioners are entitled to have the record quashed is then to be determined upon the record as certified. *Lord v. County Commissioners (Me.)*, 18-665.

5. THE HEARING.

Admissibility of evidence outside of record.—When the writ of certiorari issues and in response thereto the record is sent up, the court can only act upon such record. No evidence outside of the record is receivable to show any error therein. If the record is incorrect and amendable it should be amended before being sent up. *Lord v. County Commissioners (Me.)*, 18-665.

CESTUI QUE TRUST.

See TRUSTS AND TRUSTEES.

CHAIN GANG.

Punishment for violating municipal ordinance, see CRIMINAL LAW, 7 a (1).

CHAINS.

Requiring convict to wear chain and ball as cruel and unusual punishment, see CRIMINAL LAW, 7 a (1).

CHALLENGE.

Challenge to fight duel, see DUELING.

Challenging jurors, see JURY, 6.

Objections to grand jurors, see GRAND JURY, 2.

Questioning right to vote, see ELECTIONS, 7 d.

CHAMPERTY AND MAINTENANCE.

Contract encouraging litigation, see CONTRACTS, 4 d.

What constitutes.—A contract by a citizen to assist a city in an action to test the validity of certain liquor licenses is not champertous where one of the essential elements of champerty, namely an agreement to divide the proceeds of the litigation, if successful, is wanting. *Brush v. Carbondale (Ill.)*, 11-121.

The Illinois statute providing that any person shall be guilty of maintenance who shall officiously intermeddle in any suit that in nowise belongs to or concerns such person, by assisting either party with money to prosecute or defend such suit with a view to promote litigation, is not violated by a contract on the part of the citizen with a city to pay all costs in a suit which the city is prosecuting to test the validity of certain liquor licenses, provided the city will carry the suit to a final hearing in the supreme court; and the city having violated a part of the contract by having the appeal to the supreme court dismissed before final decision, an action by such citizen to recover from the city the moneys expended by him in the prosecution of the litigation cannot be resisted on the ground of maintenance. *Brush v. Carbondale (Ill.)* 11-121.

Where a manufacturer of certain appliances induces customers of a rival manufacturer to break their contracts with the rival and to use its own appliances, and enters into an agreement to indemnify such customers against any claims by the rival against them for breach of their contracts, such contract of indemnity is made by the manufacturer in the legitimate defense of its commercial interests, and does not render it liable to the rival for maintenance. *British Cash, etc., Conveyors v. Lamson Store Service Co. (Eng.)*, 14-554.

Assistance rendered by persons of means to poor persons in defending a suit brought by an institution to recover children that had been committed to its custody and removed because of the religious instruction it gave, is within the exception to the law against maintenance founded on the interest arising out of charity, though such assistance is rendered by reason of charity induced by a com-

mon religious belief. *Holden v. Thompson* (Eng.), 11-68.

An assignment of a money claim which authorizes the assignee to sue for the amount, and out of the proceeds to pay costs and divide the balance between the assignor and assignee, is champertous and void. *Colville v. Small* (Can.), 19-515.

As civil injury.—A defendant against whom a lawsuit has been successfully prosecuted cannot recover the costs incurred for his defense as damages for the unlawful maintenance of the suit by a third person who has not thereby been guilty of maliciously prosecuting unnecessary litigation. *Newswander v. Giegerich* (Can.), 9-860.

As affecting contracts.—The fact that a plaintiff has made a champertous agreement with a third person for the maintenance of the action is no bar to his right to recover. *Rockwell v. Capital Traction Co.* (D. C.), 4-648.

Action by champertous assignee.—In an action by the assignee in a champertous assignment the court will not grant leave to amend by substituting the assignor as plaintiff, but will dismiss the action. *Colville v. Small* (Can.), 19-515.

CHANCE.

See GAMING AND GAMING HOUSES; LOTTERIES.

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CHANCERY.

See EQUITY; MASTERS IN CHANCERY.

CHANGE.

Changing grades of streets, see STREETS AND HIGHWAYS, 3 b.

Changing position of employee as breach of contract, see MASTER AND SERVANT, 1 e.

Changing words in construction of statute, see STATUTES, 4 e.

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Change of circumstances as defense to enforcement of building restrictions, see DEEDS, 3 c.

Change of conditions as affecting liability on contract, see SALES, 5 d (1)

Change of conditions as affecting right to specific performance, see SPECIFIC PERFORMANCE, 3 f (11).

Change of judge, see JUDGES 5; CRIMINAL LAW, 6 k.

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Change of name of railroad, see RAILROADS, 5 b.

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CHANGE OF VENUE.

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Review on appeal, see APPEAL AND ERROR, 13.

1. CIVIL CASES.

a. Constitutional and statutory provisions.

The provision of the Idaho constitution that "right and justice shall be administered without sale, denial, delay, or prejudice" is self-executing, and the legislature cannot, by failing to provide by proper legislation that the prejudice of the judge is a cause for a change of the place of trial, nullify the constitutional provision, and thus compel the trial of the case before a prejudiced judge. *Day v. Day* (Idaho), 10-260.

The provision of the Idaho constitution that "right and justice shall be administered without sale, denial, delay, or prejudice" makes the prejudice of a judge a ground for his disqualification; and the provision of the state statute that "the court may on motion change the place of trial . . . when from any cause the judge is disqualified from acting," is broad enough in its terms to include disqualification on the ground of the prejudice of the judge, though the statute was enacted before the adoption of the constitution. *Day v. Day* (Idaho), 10-260.

The provision of the constitution of Utah that "all civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken in such cases as provided by law," does not grant or limit jurisdiction, or change the common-law practice in respect to venue, or destroy the universal distinction between local and transitory actions, but relates merely to the subject-matter of a change of venue and pro-

hibits a change of venue except as authorized by law; and notwithstanding this provision of the constitution, a transitory action, such as an action for negligence, can be instituted in any county in which the defendant can be served with process, and the defendant in such action has no right to insist that it shall be tried in the county where it arose. *Sanipoli v. Pleasant Valley Coal Co.* (Utah), 10-1142.

b. Nature of cause.

Garnishment.—The Washington statute authorizing a change of venue applies to a garnishment proceeding. *State ex rel. Wyman v. Superior Court* (Wash.), 5-775.

Mandamus.—Mandamus proceedings are civil actions within the meaning of the Michigan statute regulating changes of venue in civil actions. *Woodworth v. Old Second National Bank* (Mich.), 8-310.

c. Stage of cause.

Under the Oregon statutes providing for a change of judge or a change of place of trial "at any time before the day appointed or fixed for the hearing or trial" of any "action, motion, or proceeding," an affidavit imputing bias and prejudice on the part of the trial judge as ground for a change of judge or of the place of trial may be filed after the rendition of judgment and before the day set for the hearing of a pending motion for a new trial; and it is not contempt to file such an affidavit. *State ex rel. Carleton v. District Court* (Mont.), 8-752.

d. Grounds for change.

Bias or prejudice cannot be imputed to a judge merely because, in a will contest which is decided for the caveatees on the ground of the testamentary capacity of the testatrix, the judge makes a formal finding based on the legal presumption of the absence of undue influence, there being no allegation or proof on the subject, and such finding is not ground for a change of venue in a subsequent contest of the same will on the ground of undue influence. *Estate of Dolbeer* (Cal.), 15-207.

The alleged bias or prejudice of a judge, not against a litigant, but against a particular will contest because a contest of the same will has been determined by a jury in his court adversely to the contestant, is not a basis for a motion for a change of venue or for the amotion of the judge. *Estate of Dolbeer* (Cal.), 15-207.

e. Discretion of court.

Under the Pennsylvania statute a court is bound to grant the plaintiff's petition for a change of venue in an action against the county, where the plaintiff makes an oath "that local prejudice exists, and that a fair trial cannot be had in such county." *Brittain v. Monroe County* (Pa.), 6-617.

f. Change from one division to another of same court.

Where the trial court of a county is composed of several divisions and in an action

pending in one of the divisions a change of venue is granted on the ground of prejudice, the change should be made to another of the divisions of the court instead of to another county, in the absence of evidence tending to show prejudice on the part of the judges of the other divisions. *Priddy v. Boice* (Mo.), 9-874.

g. Hearing and determination.

Under the Pennsylvania statute, where the plaintiff's petition for a change of venue alleges that a large number of the inhabitants of the county in which the case is pending "have an interest in the question involved therein adverse to the plaintiff," it is the duty of the court to hear evidence in support of and against the allegations of the petition. *Brittain v. Monroe County* (Pa.), 6-617.

h. Effect of change.

A trial court loses jurisdiction of an action by granting a change of venue, and any steps taken in the court after the change has been granted are of no effect. *Priddy v. Boice* (Mo.), 9-874.

2. CRIMINAL CASES.

a. Constitutional and statutory provisions.

The Indiana statute authorizing a court to change the venue of an indictment does not conflict with any other provision of the Indiana Code of Criminal Procedure. *Welty v. Ward* (Ind.), 3-556.

The system of trial by jury in criminal cases which existed in the territory now constituting the state of North Dakota prior to the adoption of the constitution gave the state as well as the defendant the right to have the place of trial changed to another county when necessary, and it is the right thus known and understood which is secured by the constitution. *Barry v. Truax* (N. Dak.), 3-191.

The North Dakota statute providing for a change of place of trial to another county in a criminal case on the application of the state's attorney when a fair trial cannot be had in the original county merely perpetuates the right known when the constitution was adopted, and existing at common law, and does not violate the right of trial by jury as secured by the state constitution. *Barry v. Truax* (N. Dak.), 3-191.

The Indiana statute authorizing a court to change the venue of an indictment is not unconstitutional because giving power to the court to amend the indictment. *Welty v. Ward* (Ind.), 3-556.

b. Right to change.

At common law the right of trial by a jury of the county where the offense was committed was a general right, not unconditional, but subject to the exception that the indictment and trial might be removed to another county on the application of either the prosecution or the defendant when

necessary to secure a fair trial. *Barry v. Truax* (N. Dak.), 3-191.

The Indiana statute providing that a court may order the venue of an indictment changed in a proper case, does not violate a provision of the state constitution that in criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offense shall have been committed. *Welty v. Ward* (Ind.), 3-556.

c. Stage of cause.

Under the Wisconsin statute a person who has been convicted of a criminal offense, but whose conviction has been reversed on a writ of error, is entitled to a change of venue on a new trial, provided his moving papers satisfy the statute, notwithstanding the fact that he procured the change of venue before his conviction in the first instance. *State ex rel. Schutz v. Williams* (Wis.), 7-303.

Under the Wisconsin statute where a judgment against the defendant in a criminal prosecution is reversed by the supreme court and the cause is remanded for a new trial, the defendant on filing an affidavit that he has good reason to and does believe that he cannot have a fair trial on account of the prejudice of the trial judge should be granted a change of venue. *State ex rel. Schutz v. Williams* (Wis.), 7-303.

d. Discretion of court.

The granting of a change of venue in a criminal action on motion of the defendant is a matter within the discretion of the court, and the denial of such motion will not authorize a reversal of a judgment when it appears that the defendant had a fair and impartial trial by an impartial jury. *State v. Gilbert* (Idaho), 1-280.

The granting or denial of a motion in a criminal case for a change of venue on the ground of popular feeling against the accused is within the sound discretion of the trial court. *Strong v. State* (Ark.), 14-229.

An application for a change of venue is addressed to the sound discretion of the trial judge, and, in the absence of an abuse of this discretion, his judgment is not subject to review. *Johnson v. State* (Okla.), 18-300.

Under the constitution of Maryland the allowance of a change of venue in all criminal cases, except where the offense is punishable by death, rests in the discretion of the court to which the application is made, and the exercise of such discretion will not be interfered with by an appellate court except in a case of manifest abuse. *Downs v. State* (Md.), 18-786.

e. To what county venue may be changed.

When a change of place of trial is obtained by the defendant in a criminal prosecution because of local prejudice, the duty of selecting the place for trial rests exclusively on the presiding judge, in the exercise of sound judicial discretion. *Murphy v. District Court* (N. Dak.), 9-170.

Under the North Dakota statutes regulating changes of place of trial in criminal

cases on the defendant's application, because of prejudice which precludes a fair and impartial trial in the county where the indictment or information is laid, the presiding judge is not limited, in selecting a place for trial, to adjoining counties or judicial districts, as the single statutory requirement is that he shall send the case "where the cause complained of does not exist." *Murphy v. District Court* (N. Dak.), 9-170.

f. Affidavits and other proofs.

On an application for change of venue in a criminal case, facts must be shown from which the court can deduce the conclusion that the ground relied on for the change actually exists; and, as a rule, mere belief, opinions or conclusions will not be sufficient to warrant the court in exercising its power, unless the information on which the belief is founded, or the grounds on which the opinions or conclusions are based, are sufficiently shown. *Downs v. State* (Md.), 18-786.

Newspaper articles denunciatory of the accused in a criminal case are not, in themselves, sufficient to evidence the existence of such prejudice against the accused as will justify a change of venue. *Downs v. State* (Md.), 18-786.

On appeal from an order denying a motion for a change of venue in a prosecution for larceny of public funds, based on the ground that public opinion had been so inflamed against the accused by denunciatory articles in the newspapers that he could not have a fair and impartial trial in the county where the indictment was found, affidavits examined and held insufficient to show that the denial of the motion by the trial court constituted an abuse of discretion. *Downs v. State* (Md.), 18-786.

g. Hearing and determination.

Before a court is justified in sustaining an application for a change of venue in a homicide case on account of the prejudice of the inhabitants of the county it must affirmatively appear that there is such a feeling of prejudice prevailing in the community as will be reasonably certain to prevent a fair and impartial trial. The intemperate expressions of a mass of people congregated on the streets at the time of the killing and the contemporaneous publication in daily papers of two inflammatory articles, nearly a year prior to the trial, might properly be considered by the trial judge insufficient to show the impossibility of a fair trial in a large county containing a city of more than ten thousand inhabitants. *Elias v. Territory* (Ariz.), 11-1153.

Under the Arkansas statute requiring the petition for a change of venue to be supported by the affidavits of two credible persons, the only question before the court is whether the affiants are credible persons, and while the court may permit the witnesses themselves to be examined to determine that question, it is not permissible to inquire into the truth or falsity of the affidavits, and

therefore, on an application for a change of venue by a person charged with murder, testimony by the sheriff "that feeling against the defendant in the county was so strong that he (the sheriff) deemed it advisable to take him to an adjoining county for safe keeping, to keep him from being mobbed," is properly excluded. *Strong v. State* (Ark.), 14-229.

Where there are no compurgators in connection with a motion for a change of venue on the ground of prejudice against the accused and a formidable combination adverse to him in the county in which he is being tried, it is not incumbent on the court to consider the motion. *Smith v. State* (Tex.), 15-357.

The burden is on the defendant to show clearly, on an application for a change of venue, his inability to obtain a fair and impartial trial in the county in which the offense was committed. *Johnson v. State* (Okla.), 18-300.

h. Effect of change.

The Indiana statute authorizing a court to change the venue of an indictment gives the court of the county to which the venue is changed jurisdiction of the person of the defendant and of the prosecution against him as if he had been indicted and arrested in such county. *Wely v. Ward* (Ind.), 3-556.

CHANNEL.

Artificial channel as watercourse, see **WATERS AND WATERCOURSES**, 3 b (4).

Change of channel as affecting boundaries of lands, see **WATERS AND WATERCOURSES**, 3 b (2).

Right of riparian owners to value of water in natural channel, see **WATERS AND WATERCOURSES**.

CHARACTER.

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Bad character of parent as affecting right to custody of child, see **PARENT AND CHILD**, 1 b.

Instructions as to character evidence in criminal cases, see **CRIMINAL LAW**, 6 q (6).

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Prerequisite to right to naturalization, see **NATURALIZATION**.

Proof of character of accused, see **CRIMINAL LAW**, 6 n (3); **HOMICIDE**, 6 a (2).

CHARGE.

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Works of charity within exceptions to Sunday laws, see **SUNDAYS AND HOLIDAYS**, 1 b.

1. WHAT INSTITUTIONS OR PURPOSES ARE CHARITABLE.

In general. — A charity, in the legal sense, may be defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. *Estate of Graves* (Ill.), 17-137.

Motives of donor. — In determining whether a gift is charitable, the courts will look to the nature of the gift and the object which will be attained by it, rather than to the motives of the donor. A gift which is charitable in its nature is not rendered any the less so by the fact that there is a condition attached thereto that the name of the donor shall in some manner, by inscription or otherwise, be identified therewith and perpetuated thereby. *Estate of Graves* (Ill.), 17-737.

Incorporated university. — A university which is organized as a private corporation without power to declare dividends and is dependent upon the income from the property and upon endowments and gifts for the funds to carry out the purpose for which it was created, *i. e.*, the dissemination of learning, the benefits of the institution being secured to all persons of good moral character who have made sufficient preliminary advancement, is a charitable institution. *Parks v. Northwestern University* (Ill.), 4-103.

Schools requiring payment of tuition. — Under the statute of charitable uses,

which is a part of the common law of Illinois, "schools of learning, free schools," etc., are charitable objects, and their character as such is not altered by the fact that their students are required to pay tuition. *Parks v. Northwestern University* (Ill.), 4-103.

Free school for boys.— A bequest to trustees for the establishment and support of a school for the free education of boys who reside within the state of the testator's domicile "and who are unable to educate themselves" is a valid charitable use, and is not rendered void for indefiniteness by the fact that the class to be benefited by the charity is not restricted in any way by the capacity, color, or condition of the beneficiaries, or by the fact that the public school system is maintained by the state. *Tincher v. Arnold* (U. S.), 8-917.

Where a bequest to a charitable use discloses the main charitable purpose with reasonable clearness, the directions of the testator relating to the management of the trust, which are not intended as limitations, will be regarded as directory and not mandatory, if such a construction is necessary to preserve the trust and carry out its purpose, as in such a case it will be presumed that the specified details of the management were meant by the testator to be governed by circumstances. *Tincher v. Arnold* (U. S.), 8-917.

Unincorporated home for destitute boys.— A home which is maintained under a trust for the sole purpose of affording free education and maintenance to destitute boys is a valid public charity, even though it is unincorporated. *Farrigan v. Pevear* (Mass.), 8-1109.

Home for orphans and indigents.— A trust for the establishment, maintenance, and support of a home for fatherless or motherless and indigent children residing in certain specified states, and for elderly indigent widows residing in such states, is valid. *Rader v. Stubblefield* (Wash.), 10-20.

Devise for benefit of church.— A devise to the vestry of a church for the benefit of the church is a charitable use. *Biscoe v. Thweatt* (Ark.), 4-1136.

A devise for charitable use to the vestry of a church will be sustained though the church is unincorporated and not capable in law of holding and transmitting property. *Biscoe v. Thweatt* (Ark.), 4-1136.

Fund for widows and orphans of deceased clergymen.— A gift to a church for the creation of a fund for the benefit of the widows and orphans of the deceased clergymen of a particular church of a specified denomination, which is made with the proviso that if the accumulations become sufficiently large the money is to be devoted to such other uses in connection with the church as the wardens and vestry thereof may in their judgment deem fit and advisable, is a good gift to a charitable use, and the fund may, on a proper case being made out, be directed by the court to be applied *cy pres*. *Sears v. Attorney-General* (Mass.), 9-1200.

Gift for masses.— The bequest of a sum of money for the purpose of celebrating masses for the testator's soul is not a bequest for a charitable use within the California civil code restricting devises and bequests for charitable uses, and is therefore valid. *Estate of Lennon* (Cal.), 14-1024.

Perpetual trust for care of burial lot.— A perpetual trust for the care of a private burial lot is for a purely private and secular purpose and is not a gift to any public use. Such a trust is therefore repugnant to the rule against perpetuities, and is void unless its creation is authorized by statute. *Mason v. Bloomington Library Assoc.* (Ill.), 15-603.

The creation of such a trust is not authorized by a statute providing for the creation of trusts in the hands of boards of directors for the purpose of providing for "the proper care and management of county cemetery grounds." *Mason v. Bloomington Library Assoc.* (Ill.), 15-603.

Gift for benefit of animals.— The motives which prompt bequests intended to relieve the suffering or increase the comfort or enjoyment of animals should be, and are, regarded as charitable, and should receive the same favorable consideration accorded to like sentiments when manifested in behalf of human beings. *Estate of Graves* (Ill.), 17-137.

Fire insurance patrol.— The association known as the fire insurance patrol, organized under the Louisiana statute, which is composed of insurance companies doing business in New Orleans, and has authority to maintain a corps of men and suitable apparatus to save life and property at and after fires, and which is supported by assessments levied on all persons, natural or artificial, engaged in the fire insurance business is said city, is a private association, whose main purpose, as appears from a reasonable construction of the law under which it is established, is to minimize the losses and promote the pecuniary interests of its members. Such association is neither a public corporation nor a public charity, and it is liable in damages for injuries sustained by a member of the fire department, engaged in the discharge of his duties, as the result of the negligence of its servants in driving one of its vehicles through the streets of the city; and this notwithstanding that the statute referred to includes the saving of life among the purposes for which such associations may be established, and prohibits them from charging for their services or from distinguishing between insured and uninsured property. *Coleman v. Fire Ins. Patrol* (La.), 16-1217.

Public charities — Masonic orphan asylum.— A testamentary trust to establish and maintain an orphan asylum for the maintenance and education of the orphan children under seventeen years of age of members of a secret society is a "public charity," and valid, within the Kentucky statute (St. c. 317) relating to gifts to charity. *Green v. Fidelity Trust Co.* (Ky.), 20-861.

2. WHAT LAW GOVERNS.

A charitable trust will be administered according to the law of the donor's domicile, and the fact that it is to be administered abroad does not make the gift void, when it does not appear that it is not a valid charity in the foreign country, and a bequest to a charity or on a trust to be administered in another state, when lawful in the place of the testator's domicile, may be sustained in the state in which the fund is to be administered, though it contravenes the statute of the state against perpetuities, since it is not the policy of one state to interdict perpetuities in other states. *Green v. Fidelity Trust Co. (Ky.)*, 20-861.

Where a testator who resides in Kentucky devises his property, situated in Kentucky, in trust to establish and maintain in another state an orphan asylum for the nurture and education of orphans under the age of seventeen years of members of a secret society of such other state, the courts of equity of Kentucky will administer the trust in Kentucky, and require the trustee in Kentucky to protect the trust by paying the income over to a trustee appointed by the courts of the other state, on its being found necessary to have two trustees to carry the trust into effect. *Green v. Fidelity Trust Co. (Ky.)*, 20-861.

3. THE CY PRES DOCTRINE.

Beneficiary not in existence.—Where a charitable corporation named in a will ceases to exist legally before the death of the testator, because consolidated, the court will not apply the *cy pres* doctrine unless a general charitable intent can be inferred from the will as distinguished from a mere charitable purpose limited to a particular object or institution. *Gladding v. St. Matthew's Church (R. I.)*, 1-537.

Beneficiary incapacitated to take.—Although a charitable corporation may for some reason be incapacitated to take under a will and to carry out the intent of the testator, the bequest or devise will not be void for this reason, as the court will apply the doctrine of *cy pres* and will appoint a trustee to act in its place. *Hubbard v. Worcester Art Museum (Mass.)*, 10-1025.

Doctrine of approximation.—While the doctrine of *cy pres*, as indicative of prerogative authority on the part of the courts in dealing with charitable uses, does not prevail in Illinois, the "doctrine of approximation" gives the courts the right to deal by liberal rules of construction with a trust having a designated particular purpose expressed in general terms, and to enforce the trust within the limits of such purposes, supplying trustees if necessary. *Tincher v. Arnold (U. S.)*, 8-917.

Use of income for incidental purposes.—Where a bequest to trustees for the establishment of a free school, which provides that the income shall be used for the purpose of paying teachers, discloses clearly that the dominant purpose of the testator

was to found a school and furnish the means of free education, a court of equity will apply the doctrine of *cy pres* or the "doctrine of approximation" and hold the trust to be valid and enforceable as a charitable use, though the enforcement of the trust will require the diversion of a portion of the income to the payment of expenses other than teachers' salaries which are necessary to the maintenance of the school, such as the expenses of heating, lighting, etc. *Tincher v. Arnold (U. S.)*, 8-917.

Substitution of beneficiary.—Where it appears that a library association, in connection with which a public art gallery and studio, for the advancement of education in art, was to be established under the provisions of a testamentary trust, has transferred its property to a public library and has ceased to exercise its charter powers, a court of chancery has, under the doctrine of *cy pres*, the power to substitute as the administrator of such charitable trust the public library in the place of the library association. *Mason v. Bloomington Library Assoc. (Ill.)*, 15-603.

4. TERMS AND VALIDITY OF GIFT.

Massachusetts rule.—In Massachusetts the power of a testator to dispose of his property by will is unlimited except where a limitation is placed on the right for the protection of the statutory rights of a husband or wife. Hence a testator is not restrained from giving free course to his charitable inclinations as long as he is in possession of a sound and disposing mind; nor is the making of a charitable gift against public policy. *Hubbard v. Worcester Art Museum (Mass.)*, 10-1025.

Policy of law to uphold validity.—It has always been the policy of the law to uphold charitable bequests and give effect to them whenever possible, and the fact that the statute now exempts such bequests from the payment of the Illinois inheritance tax is no reason for departing from or modifying this ancient rule of construction favoring such gifts. *Estate of Graves (Ill.)*, 17-137.

Bequest in evasion of statute.—Where a testator devises and bequeaths all the residue of his estate to charities which, under a statute limiting devises and bequests to charities, cannot take under the will in the event of the death of the testator within thirty days from the date of the will, and then provides in the will that in case of his death within thirty days the estate is devised and bequeathed absolutely to a certain individual who has no acquaintance with the testator and on whom no trust is imposed, the disposition of the property to such individual is valid, although the wish of the testator is that if his charitable disposition fails by his death within thirty days his estate will reach the charities through the individual devisee, and the devisee regards himself bound in conscience, but not in law, to appropriate the estate to the charities named in the will. *Flood v. Ryan (Pa.)*, 13-1189.

Gift with condition of inalienability.—A condition of inalienability attached to a donation for pious uses is void, and reputed not written—both as creating a tenure of property not provided for by our code, and therefore impliedly forbidden; and as putting property out of commerce, and therefore contrary to public policy. *Female Orphan Society v. Y. M. C. A. (La.)*, 12-811.

Who may question validity.—Where a charitable corporation is limited by statute in the amount of property which it may hold, such limitation does not prohibit it from holding property in excess of the specified amount except as against the objection of the state, as the limitation is for the benefit of the state only. *Hubbard v. Worcester Art Museum (Mass.)*, 10-1025.

A petition in the nature of a *quo warranto* will not lie at the instance of the heirs of a testator to declare void a bequest or devise to a charitable corporation in excess of the amount of property which it is authorized to hold. *Hubbard v. Worcester Art Museum (Mass.)*, 10-1025.

Waiver of right to question.—Where a charitable corporation is limited by statute in the amount of property which it may hold, and it receives by will real and personal property in excess of such amount, the passage of another statute after probate of the will authorizing it to hold property in an amount greater than that received will be deemed to be a waiver by the state of the right to object to its taking property in excess of the first limitation. *Hubbard v. Worcester Art Museum (Mass.)*, 10-1025.

Bill to determine validity.—A bill in equity by a legatee to determine whether his testator's will creates a valid charitable use will not be dismissed on the ground that the complainant's delay in bringing the suit constitutes laches, as the validity of the bequest is to be determined by the will, and if the bequest is valid the delay is of no consequence, while if it is void the laches of the complainant cannot make it valid. *Tincher v. Arnold (U. S.)*, 8-917.

Designation of beneficiaries.—A testamentary trust to establish and maintain an orphan asylum for the maintenance and education of the poor orphan children under seventeen years of age of members of a certain secret society is not void for indefiniteness, and the beneficiaries are named with sufficient certainty. *Green v. Fidelity Trust Co. (Ky.)*, 20-861.

Powers of trustee.—A testamentary gift to an incorporated hospital in trust to provide free medical treatment for sick, injured, or infirm poor persons, the object of which is "to benefit as many such poor persons as practicable," does not make it an imperative duty of the trustees to maintain a ward for the treatment of contagious diseases, but leaves it to the discretion of the trustees to decide whether the expressed object can be attained more successfully by excluding persons afflicted with contagious diseases than by treating them; and an erroneous decision of this question will not

constitute a breach of trust. *Stearns v. Newport Hospital (R. I.)*, 8-1176.

Use of principal of fund.—Where a testamentary gift in trust to a hospital is of "the whole residue and remainder of said trust property," as well as "the proceeds, rents, issues, profits, and income thereof," for the purposes of the trust, and the will states that the object is "to benefit as many . . . poor persons as practicable, and at the same time to provide and secure the permanent source of aid, remedy, and relief," and provides that "the employment of said trust funds and property for the general support and maintenance of said hospital is hereby authorized, so far as may be requisite, to uphold it and preserve it, and perpetuate the charity hereby created and designed," the trustee has authority to expend part of the capital in case of necessity. *Stearns v. Newport Hospital (R. I.)*, 8-1176.

5. EXEMPTION FROM TAXATION.

Succession tax.—A bequest to the park commissioners of a city for the erection, in a public park, of a drinking fountain or drinking basin for horses, and in connection therewith of a bronze statue of a horse formerly owned by the testator, is a charitable bequest, and therefore not subject to taxation under the inheritance tax law of Illinois, which exempts bequests for benevolent or charitable purposes. *Estate of Graves (Ill.)*, 17-137.

6. ACCUMULATION OF INCOME.

Charitable gifts are not exempt from the provisions of the New York statutes prohibiting the accumulation of income except for the benefit of minors. *St. John v. Andrews Institute (N. Y.)*, 14-708.

7. ENFORCEMENT OF TRUST.

Parties.—The mayor of a city is not, either in his capacity as mayor and as *ex-officio* trustee of a charitable institution or in his individual capacity as a taxpayer, a proper party plaintiff to a bill against the institution and its trustees for an injunction and accounting. *Stearns v. Newport Hospital (R. I.)*, 8-1176.

Pleadings.—In a suit against an incorporated hospital and its trustees to compel them to render an account of their administration of a testamentary gift to the hospital in trust for the benefit of sick and infirm poor persons, allegations as to the use made by the defendants of the moneys given to the hospital by charitable persons other than the testator are not relevant. *Stearns v. Newport Hospital (R. I.)*, 8-1176.

8. LIABILITY OF CHARITABLE INSTITUTION FOR NEGLIGENCE.

In general.—A corporation administering a charitable trust is, like all other corporations, subject to the laws of the land, and cannot claim exemption from responsibility for the torts of its agents except by

contract with the person injured by such tort. *Bruce v. Central M. E. Church* (Mich.), 11-150.

Incorporated church.—In an action against an incorporated church for an injury received by the plaintiff while at work on its church building, a declaration alleging that while the plaintiff was so at work for a contractor of the defendant the scaffolding on which he stood, and which was furnished by the defendant, was defective so that it broke and caused the plaintiff to be thrown to the floor and injured, is not demurrable on the ground that the defendant as a corporation administering a charitable trust is not liable for the neglect or default of its agent or servant having the care or custody of its property. *Bruce v. Central M. E. Church* (Mich.), 11-150.

University.—The funds and property of a university which is a charitable institution cannot be diverted to pay damages to a student caused by the negligence of an employee of the institution. *Parks v. Northwestern University* (Ill.), 4-103.

Home for destitute boys.—Where the trustees of an unincorporated charitable institution, such as a home for destitute boys, have used reasonable care to select competent servants, they are not liable for personal injuries resulting from the negligence of such servants. *Farrigan v. Pevear* (Mass.), 8-1109.

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CHATTEL MORTGAGES.

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Real estate mortgages, see **MORTGAGES**.

1. NATURE AND EFFECT.

No transfer of title.—A chattel mortgage creates a lien only and does not pass title to the mortgagee. *Demers v. Graham* (Mont.), 13-97.

Parol reservation of title.—Under the Texas statute providing that reservations of title to chattels as security for the purchase price shall be held to be chattel mortgages, a verbal reservation of title, made at the time of the sale of personal property to secure the payment of the purchase money, constitutes, as between the parties, a valid chattel mortgage. *Crews v. Harlan* (Tex.), 13-863.

Equitable mortgage.—A working contract which provides that the contractor shall furnish his own tools, but that in the event of his failure to carry out the contract the other party shall have the right to take possession of such tools for the purpose of completing the work, is not a mortgage, equitable or otherwise. *Lewman & Co. v. Ogden Bros.* (Ala.), 5-265.

2. TO SECURE FUTURE ADVANCES.

Validity and effect.—A chattel mortgage may be made to secure future advances which are contemplated by the parties at the time of the making of the mortgage; but when the indebtedness secured, including the advances contemplated, has been fully satisfied and discharged, the mortgage is canceled and extinguished by the operation of the law. *Wright v. Voorhees* (Iowa), 9-1149.

Construction.—A mortgage on two horses and "future acquisitions to the above-described property," which provides that it is given to secure payment of certain specified notes, "together with any future advances made or indebtedness owing by said mortgagor to said mortgagee, including all renewals thereof until this mortgage is canceled," cannot be given a construction which would make it cover all future acquisitions of property and all future indebtedness, re-

gardless of the contemplation of the parties at the time the mortgage was executed that any such indebtedness should be incurred. *Wright v. Voorhees* (Iowa), 9-1149.

Advances not contemplated at time of execution.— A chattel mortgage executed to secure future advances contemplated by the parties at the time of its execution cannot, by a subsequent arrangement between the parties, be made to cover other advances not in contemplation at the time the mortgage was executed, unless perhaps the new agreement amounts to a new mortgage in parol. *Wright v. Voorhees* (Iowa), 9-1149.

3. DESCRIPTION OF PROPERTY.

Sufficiency as between parties.— A chattel mortgage which would be invalid as against creditors and purchasers in good faith by reason of defective description of the property mortgaged may be good as between mortgagor and mortgagee where the property in fact mortgaged is identified. Such a case differs from one where no specific chattels are mortgaged but there is an attempt to mortgage a certain number out of a mass without separating or identifying them. *First Nat. Bank v. Johnson* (Neb.), 4-485.

Separation or identification of chattels.— No lien upon specific chattels is created by a mortgage on a certain number of chattels out of a mass until such chattels are separated or identified and it is agreed that the mortgage shall apply to them. *First Nat. Bank v. Johnson* (Neb.), 4-485.

Question for jury.— Evidence in a case examined and held to present a question for the jury whether the specific chattels in controversy were mortgaged in the first instance or were afterwards agreed upon as the mortgaged property. *First Nat. Bank v. Johnson* (Neb.), 4-485.

4. LIEN.

a. In general.

On real estate.— An attempt to mortgage real estate on a chattel creates no lien thereon. *Beeler v. C. C. Mercantile Co.* (Idaho), 1-310.

Priority over lien of livery-stable keeper.— The lien of a valid recorded chattel mortgage will take precedence over the subsequently acquired lien of a livery-stable keeper or agistor upon animals placed in his charge, unless such animals were delivered to such lienholder to be kept and cared for by him with the consent of the mortgagee. *National Bank of Commerce v. Jones* (Okla.), 11-1041.

Extinguishment by tender after default.— A tender made after default and before sale is sufficient to extinguish the lien of a chattel mortgage; and it is not necessary that such tender should be kept good or that the money should be brought into court. *Thomas v. Seattle Brewing, etc.* (Wash.), 15-494.

b. How affected by removal of property.

Removal to another county.— Where the owner of chattels covered by a valid recorded mortgage removes the chattels without the knowledge or consent of the mortgagee to another county, it is not necessary for the mortgagee in order to preserve the lien to file the mortgage or a copy thereof for the registry in the county to which the property is removed. *National Bank of Commerce v. Jones* (Okla.), 11-1041.

Removal to foreign state.— A chattel mortgage good in the place where executed and recorded and where the property is situated will be good in any state to which the property may be removed by the mortgagor without the consent of the mortgagee, in the absence of a statute of the latter state to the contrary; and this is true as against an innocent purchaser for value from the mortgagor. *Creelman Lumber Co. v. Lesh* (Ark.), 3-108.

California statute.— Under the California statute providing that when mortgaged property is removed by the mortgagor from the county in which it is situated the property shall be exempt from the operation of the mortgage unless the mortgagee, within thirty days after such removal, causes the mortgage to be recorded in the county to which the property is removed or takes possession of the property, the mortgage on property removed to another county remains for thirty days a valid and subsisting lien, of which the original record is constructive notice to the world, although neither of the steps prescribed by statute to preserve the lien are taken. *Hammels v. Sentous* (Cal.), 12-945.

5. WHO MAY QUESTION VALIDITY.

Administrator of deceased mortgagor.— The administrator of an insolvent decedent, as representing general creditors, whose interest in the estate attaches at the decedent's death, may resist the enforcement of a chattel mortgage given by the deceased to secure a valid indebtedness but not recorded, or possession of the property taken thereunder until after his death. *Blackman v. Baxter, Reed & Co.* (Iowa), 2-707.

6. UNFAIR SALE BY MORTGAGEE.

Liability for value of property.— A mortgagee who has taken possession of the animals included in the mortgage and has not legally foreclosed the mortgage, but has converted the property and put it out of the power of the mortgagors to redeem by suppressing competition at the sale and buying in the property himself, afterwards selling the property in small lots to different persons, is chargeable with the value of the property at the time of the seizure, and cannot be allowed the net expense of keeping the animals between the time of seizure and sale, nor be credited with the value of an animal which died after he took possession. *Kellogg v. Malik* (Wis.), 4-893.

7. WAIVER OF MORTGAGE SECURITY.

Other proceeding to collect debt. — The holder of a promissory note which is secured by a chattel mortgage does not waive or lose his mortgage security by attempting to collect the note by proceedings in attachment or other recognized process provided by law for the collection of debts. *Kansas City Live Stock Commission Co. v. Hamlin Bank* (Kan.), 17-956.

Attempt to collect debt by attachment. — Where the holder of a promissory note secured by a chattel mortgage commences an action on the note before it is due, and takes certain steps to obtain an attachment therein, but afterwards, when the note has matured and is past due and while a motion by another attaching creditor to dissolve the proceedings so taken is pending, dismisses his action without prejudice, and files an interplea in the attachment action brought by such other creditor, claiming a lien upon the attached property by virtue of his mortgage, it is error for the court to dismiss such interplea on the ground that the remedy under the mortgage is inconsistent with that sought to be obtained in the former action of attachment. *Kansas City Live Stock Commission Co. v. Hamlin Bank* (Kan.), 17-956.

Attachment as waiver. — A mortgagee of chattels does not waive or lose his lien by causing an attachment to be levied upon the mortgaged property. *First Nat. Bank v. Johnson* (Neb.), 4-485.

8. FORECLOSURE.

Conversion by mortgagee pending action. — Where, pending an action to foreclose a chattel mortgage upon grain, a warrant is issued under the provisions of the North Dakota statute (Rev. Codes 1905, § 7513), and all of the grain grown on the land described in the mortgage is seized by the plaintiff pursuant thereto, and wrongfully converted by him, by sale, before the trial of the action, the lien of the mortgage is thereby extinguished, and the plaintiff's cause of action for foreclosure ceases to exist. *Strehlow v. McLeod* (N. Dak.), 17-423.

Deficiency judgment. — The Washington statute authorizing a deficiency judgment on the foreclosure of a chattel mortgage (Ball. Code, § 5880) is not affected by the later enactment (Laws 1899, p. 85) limited by its title to "the sales of property under execution, decrees, and orders of sale, and the confirmation of sheriffs' sales, and redemption therefrom." *Bradley Engineering, etc., Co.* (Wash.), 18-1072.

A decree foreclosing a chattel mortgage without giving a deficiency judgment as required by the Washington statute (Ball. Code, § 5880) is *res judicata* as to the plaintiff's right of recovery, and he cannot afterwards bring a separate action for the deficiency, but his only remedy is to appeal from the decree of foreclosure to correct the omission therein. *Bradley Engineering, etc., Co.* (Wash.), 18-1072.

Injunction. — In an action to enjoin a money-lender from taking possession under a bill of sale, on the ground that the agreement for the loan, the advance of the money and the taking of the security were all transacted at the borrower's private residence, in violation of the statute requiring the money-lending business to be carried on at the registered address or addresses of the money-lender and at no other address, evidence examined and held to call for the discharge of an *interim* injunction granted by the court of appeals. *Kirkwood v. Gadd* (Eng.), 18-25.

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CHECKS.

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1. NATURE AND EFFECT OF INSTRUMENT.

As assignments pro tanto.—A check operates as an assignment *pro tanto* of the drawer's funds on deposit with the bank upon which it is drawn; and a *bona fide* holder may maintain an action against the bank for its wrongful refusal to pay the check. *Turner v. Hot Springs National Bank* (S. Dak.), 5-937.

A check drawn in the ordinary form does not constitute an assignment of the funds of the drawer; therefore, if the holder of the check fails to present it properly for payment he cannot claim priority over a third person who has attached or garnished the drawer's funds in the bank since the drawing of the check. *Love v. Ardmore Stock Exchange* (Ind. Ter.), 5-183.

Signature of drawer as notice of trust relation.—A person who receives a check with the words "deputy sheriff" appended to the signature of the drawer is hereby affected with notice that the funds upon which the check is drawn were deposited by the drawer to his credit as deputy sheriff, and is put upon inquiry as to whether such funds belong to the drawer individually or to the state and county. If he fails to make such inquiry, and the funds in fact belong to the state and county, he takes the amount of the check impressed with a trust in their favor. *Hill v. Fleming* (Ky.), 16-840.

2. PRESENTMENT FOR PAYMENT.

a. Parties residing in same place.

What constitutes reasonable time.—Where the drawer, drawee, and payee of a check all reside in the same city or town, the check, to be presented for payment within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued. *Gordon v. Levine* (Mass.), 10-1119.

Effect of delay.—Where the drawer, drawee, and payee of a check reside in the same city or town, and the check is not presented for payment before the close of banking hours of the day following its issuance, and a loss is thereby incurred, the loss falls upon the holder thereof. *Gordon v. Levine* (Mass.), 10-1119.

Extension of time for presentment.—Where the drawer, drawee, and payee of a check all reside in the same town, and presentment for payment thereof should be made before the close of banking hours on the day following in order to be presented within a reasonable time, its circulation from hand to hand will not extend the time of presentment for payment to the detriment of the drawer. *Gordon v. Levine* (Mass.), 10-1119.

b. Forwarding for collection.

Effect of delay.—Where a debtor sends his creditor, in payment of his debt, a third person's check made payable to the creditor and not signed or indorsed by the debtor, the creditor is bound to forward the check for collection on the day following its receipt, and if he holds it for several days, and it is dishonored when presented, while it would have been paid if presented at the proper time, he is guilty of such negligence as will convert the provisional payment into absolute payment of the debt. Under such circumstances the South Dakota statute providing for the exoneration of the drawer and indorsers of a bill of exchange not presented for payment within ten days is not applicable. *Manitoba Mtg., etc., Co. v. Weiss* (S. Dak.), 5-868.

Question for jury.—The question as to the time a check forwarded by mail was received by the addressee of the letter is one of fact for the jury. *Manitoba Mtg., etc., Co. v. Weiss* (S. Dak.), 5-868.

c. Circumstances making presentation impossible.

A person is relieved from a failure to perform an obligation imposed on him by law, e. g. the presentation of a check for payment, when the performance is rendered impossible by causes for which he is not responsible, although he would not for similar reasons be relieved from the performance of express contract stipulations. *First National Bank v. McConnell* (Minn.), 14-396.

3. ACCEPTANCE.

What sufficient to bind drawee.—The drawee of a bank check cannot be held liable upon a claimed contract of acceptance external to the bill unless the language used clearly and unequivocally imports an absolute promise to pay. Such a promise is not made by returning to the telegraphic inquiry, "Is J. F. McDonald's check on you for \$350 good?" the telegraphic response, "J. F. McDonald's check is good for sum named." *First National Bank v. Commercial Savings Bank* (Kan.), 11-281.

4. STOPPING PAYMENT.

Sufficiency of telegram.—A telegram by a depositor notifying a bank to stop payment of a check, and which through the negligence of the servants of the bank is not brought to the attention of the bank manager in time to notify him of the depositor's desire to stop payment, is not an effectual countermand within the meaning of section 75 of the English Bills of Exchange Act of 1882. *Curtice v. London City, etc., Bank* (Eng.), 13-466.

A telegram countermanding a check may reasonably be acted upon by a banker, at least to the extent of postponing the honoring of the check until further inquiry can be made, but a banker is not bound to accept an unauthenticated telegram as sufficient auth-

ority for refusing payment. *Curtice v. London City, etc., Bank (Eng.)*, 13-406.

5. PAYMENT BY MISTAKE.

After payment stopped.—The payment of a check cannot be said to have been made by mistake where the alleged mistake consists in having overlooked the fact that the payment of the check had been stopped. *National Bank of New Jersey v. Berrall (N. J.)*, 1-630.

Recovery by bank of amount paid.—Where the payee of a check after indorsing it generally deposits it to his account in his own bank by which it is forwarded to the bank upon which drawn for collection, and the latter pays it by mistake, there is no privity between the paying bank and the payee to support an action by the former against the latter to recover the amount of the check as for money paid by mistake. *National Bank of New Jersey v. Berrall (N. J.)*, 1-630.

6. FORGED CHECKS.

a. Signature forged.

Presumption as to knowledge of signature.—In the case of payment by a bank of a forged check drawn upon it, the presumption that the bank knows the signature of its depositor is conclusive only when the person receiving the money has in no way contributed to the success of the fraud or to the mistake of fact under which the payment has been made. In the absence of actual fraud on the part of the drawee, its constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude it from recovering from one who took the check under suspicious circumstances without proper precaution, or whose conduct has been such as to mislead the drawee and induce it to pay the check without the usual security against fraud. *Ford v. People's Bank (S. Car.)*, 7-744.

Unrestricted indorsement as warranty of genuineness.—An unrestricted indorsement of a draft on a bank is calculated to mislead the drawee into the belief that the paper is what it purports to be. *Ford v. People's Bank (S. Cal.)*, 7-744.

b. Amount raised.

Duty of drawer to fill blanks.—Whatever duty a customer may owe to his banker in reference to the drawing of checks, the mere fact that he draws a check with such spaces that a forger can utilize them for purposes of altering the check by inserting additional words and figures in the statement of the amount for which it is drawn does not of itself constitute a violation of that duty. *Colonial Bank v. Marshall (Eng.)*, 5-771.

Liability of bank to depositor.—In an action by depositors against a bank to recover the excessive amount negligently paid out by the defendant on raised checks, the evidence of the plaintiff's negligence held

not to be sufficient to go to the jury. *Colonial Bank v. Marshall (Eng.)*, 5-771.

7. LOST CHECKS.

Liability of drawer to owner.—Whether or not a bank check not accepted as an unconditional payment operates as an equitable assignment of that part of the drawer's deposit as between the drawer and the payee, the drawer is liable to the owner where by reason of the loss of the check presentment to the bank for payment is rendered impossible. *First National Bank v. McConnell (Minn.)*, 14-396.

Requirement of indemnity bond.—The owner of a bank check which has been lost without his fault before presentment to the bank upon which it was drawn, may recover thereon against the drawer of the same upon filing a proper indemnity bond, as required by the Minnesota statute. *First National Bank v. McConnell (Minn.)*, 14-396.

8. CERTIFIED CHECKS.

Effect of certification in general.—A certificate by a bank that a check is good is equivalent to acceptance, and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. *Blake v. Hamilton Dime Savings Bank Co. (Ohio)*, 210.

Certification for indorsee.—The certification of a check on presentation by the indorsee is equivalent to payment although the drawee bank has no funds with which to make payment. *First National Bank v. Currie (Mich.)*, 11-241.

Where the indorsee of a check procures its certification by the bank upon which it is drawn, an indorser of the check is thereby discharged, especially where the indorsee thereupon parts with the value of the check, and a demand by the indorsee for payment instead of certification would have protected all the parties. *First National Bank v. Currie (Mich.)*, 11-241.

Effect of transfer.—The transfer of a certified check is an assignment of money to meet it, and the bank which made the certification is liable therefor to the holder. *Blake v. Hamilton Dime Savings Bank Co. (Ohio)*, 210.

Right to stop payment.—The object of certifying a check is to enable a holder to use it as money. The drawer or indorser of a certified check cannot, after its delivery revoke it or stop payment upon it by notice to the drawee not to pay, and a bank that has received a certified check for deposit and has credited the depositor with the amount of it, is a *bona fide* holder and may enforce payment of it notwithstanding the fact that it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor. *Blake v. Hamilton Dime Savings Bank Co. (Ohio)*, 210.

9. ACTION FOR WRONGFUL DISHONOR.**a. Right to damages in general.**

Dishonor by mistake. — Where a bank, upon presentation of a check drawn upon it, erroneously informs the payee that while the drawer has funds to his credit sufficient to pay the check, such funds are deposited in the savings department of the bank, the rules of which require that all checks presented for payment shall be accompanied by the depositor's pass book, the action of the bank is tantamount to a refusal to pay the check, and the drawer of the check is entitled to recover temperate damages for such refusal. *Lorick v. Palmetto Bank, etc., Co.* (S. Car.), 7-818.

Depositor not engaged in mercantile pursuits. — The wrongful refusal of payment of a check by a bank entitles the depositor to recover substantial damages, although he is not engaged in mercantile pursuits, but is a professional man. If no special damage is proved, the jury may give such temperate damages as they may conceive to be a reasonable compensation for the injury which must have been sustained. *Bank v. MacKnight* (D. C.), 10-897.

b. Defenses.

Check drawn to order of attorney. — In the action for the wrongful dishonor of a check, the fact that the check was drawn to the order of the plaintiff's attorney is no defense to the action. *Columbia Nat. Bank v. MacKnight* (D. C.), 10-897.

Depositor convicted of crime. — In an action to recover for the wrongful dishonor of a check, the fact that the depositor has been convicted of a crime constitutes no defense to the action. If the man has served one or more sentences in a penitentiary, and is a depositor in the bank, the refusal to pay his check may operate even more injury than similar treatment might inflict upon a better citizen. *Columbia Nat. Bank v. MacKnight* (D. C.), 10-897.

c. Evidence.

Repeated refusals to pay. — A depositor need not sue a bank after the wrongful dishonor of his check, but may repeatedly draw checks demanding the payment of his money, and evidence of each wrongful refusal of the bank to pay is admissible. *Columbia Nat. Bank v. MacKnight* (D. C.), 10-897.

Financial credit and standing of depositor. — In a suit by a customer against a bank to recover damages for the wrongful dishonor of his check, evidence relating to the customer's financial credit and standing is allowable, though there is no claim for special damages. *Hilton v. Jesup Banking Co.* (Ga.), 10-887.

d. Measure of damages.

Reasonable compensation for injury. — In a suit by a customer against a bank to recover damages for the wrongful dishonor of his check, the damages recoverable are

such temperate damages as would be a reasonable compensation for the injury. *Hilton v. Jesup Banking Co.* (Ga.), 10-987.

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Injuries to trespassing children, see **EXPLOSIONS AND EXPLOSIVES**, 1 a; **NEGLIGENCE**, 3; **RAILROADS**, 8 d (3); **WATERCOURSES**, 4 d.

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Permitting attendant to accompany infant witness on witness stand, see **WITNESSES**, 6 m (12).

Power to commit wayward children, see **JURY**, 1 b (2).

Privilege of naming child as consideration for contract, see **CONTRACTS**, 2 d.
 Prohibiting sale of cigarettes to children, see **HEALTH**, 2 c.
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 Revocation of will by subsequent birth of children, see **WILLS**, 6 b (7).
 Right of parent to sue for death of child, see **DEATH BY WRONGFUL ACT**.
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 Singleness of subject of statute relating to delinquent children, see **STATUTES**, 3 b.
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Diversity of citizenship as ground for removal of causes, see **REMOVAL OF CAUSES**, 3 a. Privileges and immunities of, see **CONSTITUTIONAL LAW**, 16.

Removal of disabilities, see **PAEDON, REPRIEVE AND AMNESTY**, 2 a.

Forfeiture by desertion from army.

—The penalty of loss of citizenship imposed by the federal statutes upon a deserter from the United States army does not take effect

until the rendition of a judgment of desertion by a competent tribunal, and a mere record of desertion in the office of the adjutant-general of the commonwealth is not conclusive proof of actual loss of citizenship. *Com. v. Wong Chung* (Mass.), 1-193.

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CIVIL RIGHTS ACTS.

Barber shop accommodations. — A barber shop is not a "place of public accommodation" within the meaning of the Connecticut statute giving a colored person a right of action against any other person who shall deprive him, on account of his color, of the "full and equal enjoyment of the advantages, facilities, accommodations, or privileges of any place of public accommodation." notwithstanding the facts that a barber cannot ply his business without a license and that all barber shops are under sanitary regulation and are subject to sanitary inspection by the state board. *Faulkner v. Solazzi* (Conn.), 9-67.

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Taking deposition by clerks, see DEPOSITIONS, 4 c.

Right to require advance payment for services. — A party requiring the service of the clerk of the supreme court may lawfully be required to make payment therefor at the time the request for the service is

made, and the clerk may lawfully decline to render the service until reasonable compensation is tendered therefor. *Bohart v. Anderson* (Okla.), 20-142.

Liability for interest on funds paid in court as tender. — Where the clerk of a court receives interest on money in his custody which has been paid into court as a tender, he is liable for the amount of such interest to the party entitled to the money tendered. *Rhea v. Brewster* (Iowa), 8-389.

Statutory regulation of fees. — The sections of the act of the legislature of Oklahoma contained in chapter 15, page 160, Laws 1897, relating to the fees of the clerk of the supreme court and the payment thereof, are void: following *Pitts v. Logan County*, 3 Okla. 719, 41 Pac. 584, and *United States v. MacMillan*, 165 U. S. 504, 17 Sup. Ct., 395, 41 L. Ed. 805. *Bohart v. Anderson* (Okla.), 20-142.

Section 13 of the Organic Act (Wilson's Rev. & Ann. St. 1903, § 73) and chapter 16, title "Judiciary," section 833, of the Revised Statutes of the United States (4 Fed. St. Ann. 120), relating to the fees and compensation of the clerk of the supreme court of the territory of Oklahoma, are inconsistent with and repugnant to the schedule of the constitution, as well as locally inapplicable; hence they were not extended to nor did they remain in force in the state. *Bohart v. Anderson* (Okla.), 20-142.

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Presumption of negligence from fact of collision, see **RAILROADS**, 7 c (4).

Runaway horse colliding with street car, see **ANIMALS**, 2 c (2).

Failure to take timely precautions.

— Where a steam vessel proceeding out of a harbor through a narrow channel at a speed of six miles an hour fails to reverse her engines when an incoming vessel is sighted about three hundred feet away and the danger of collision is imminent, but tries to cross the bows of the incoming vessel and is injured in a collision, the outgoing vessel is guilty of negligence causing the accident, and the failure of those on the incoming vessel to hear the signals of the outgoing vessel is not negligence contributing in any material degree to the accident. *Rosalind v. Steamship Senlac Co.* (Can.), 13-445.

Display of signal lights. — Where there is no statute, municipal ordinance, port or harbor regulation requiring the displaying of a signal light on a steamer, vessel, or craft at particular times or under given circumstances, it is not negligence *per se* not to display such light, but the necessity will be a question of fact to be determined by the jury under the particular facts and circumstances of each separate case. *Carscallen v. Cœur d'Alene, etc., Transp. Co.* (Idaho), 16-544.

Where a vessel is moored in a place of usual and ordinary safety and where but few vessels are plying, and at a point where other vessels are not likely to be running, and out of the way of incoming and outgoing vessels, and there is no law or harbor rule or regulation requiring the displaying of a signal

light, it is not negligence to fail to display such light. *Carscallen v. Cœur d'Alene, etc., Transp. Co.* (Idaho), 16-544.

Test of negligence. — In an action for damages caused by a collision between two boats, the test of negligence is not whether the pilot might have done any one of a number of things other than what he did do under the particular circumstances and thereby have avoided the accident, but whether he was negligent and careless in doing the particular thing he did do at the time and under the circumstances as they confronted him. His acts and conduct must be judged in view of the dangers, emergency, and conditions as they surrounded him at the time and place, when and where, the accident occurred. *Carscallen v. Cœur d'Alene, etc., Transp. Co.* (Idaho), 16-544.

Measure of damages. — In a proceeding to recover damages for a vessel totally lost by a collision at a time when she was proceeding from a home port with cargo under a charter to a foreign port, thence to proceed under the charter to another port, and thence home under the charter, the measure of damages is her value on the date when she would have accomplished the homeward voyage, together with such sum as will represent the profit which would have been realized under the three successive charters, less a reasonable percentage for contingencies. *The Racine* (Eng.), 6-129.

Where a combination steamboat and pile driver is shown to have been engaged in regular work and to have had such employment as would have kept it employed until the bay in which it was working froze up, and it appears clearly and satisfactorily what its net earnings were *per diem* at the time, it is not erroneous in an action for damages caused by a collision to allow the owners of the injured vessel to recover the *per diem* shown to have been its net earnings for the number of days the vessel was being raised and was undergoing repairs. *Carscallen v. Cœur d'Alene, etc., Transp. Co.* (Idaho), 16-544.

Instructions. — In an action to recover damages for a collision between two boats, whereby the plaintiffs' boat was caused to sink, an instruction given by the court of its own motion, that in order to find for the plaintiffs the jury must be satisfied that the defendant caused the plaintiffs' boat "to sink without any fault on the part of the plaintiffs or either of them," while not entirely accurate, is sufficiently favorable to the defendant on the question of contributory negligence, in the absence of any request by the defendant for a correct instruction on that point. *Carscallen v. Cœur d'Alene, etc., Transp. Co.* (Idaho), 16-544.

Failure to hear fog signals. — Notwithstanding the alleged unwillingness of the court to infer negligence from the fact that fog signals proved to have been sounded in the vicinity were not heard, failure to hear such signals may be sufficient, by itself, to justify a finding that those in charge of the vessel concerned were not keeping a good lookout. *The Curran* (Eng.), 18-526.

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1. IN GENERAL.

Meaning of term in Nebraska statutes. — Construction of the term "common law" as used in the Nebraska statutes. *Williams v. Miles* (Neb.), 4-306.

Repeal of declaratory statute. — When a statute that is declaratory of the common law is repealed, the common law is not thereby repealed but remains in force. *Harper v. Middle States Loan, etc., Co.* (W. Va.), 2-42.

Presumption as to common law of foreign state. — In an action on a contract made in a foreign state, where the laws of the foreign state are not proved, the con-

tract must be construed by the principles of the common law; and in the absence of pleading and proof to the contrary, the court will presume that the common law in a foreign state is the same as it is in the domestic state. *Southern Express Co. v. Owens* (Ala.), 9-1143.

English decisions as evidence of common law. — The English decisions rendered prior to the war of the Revolution are evidence of what the common law is; but in order to be binding here, these decisions must be clear and unequivocal. *Ex parte Beville* (Fla.), 19-48.

2. TO WHAT EXTENT IN FORCE.

In Georgia. — The common law in force prior to May 14, 1776, was adopted as the law of the state of Georgia by the Act of Feb. 25, 1784, except where modified by statutes or not adjusted to the conditions or system of government existing in that state. *Harris v. Powers* (Ga.), 12-475.

In Indiana. — The common law, together with acts passed by the British Parliament in aid thereof, prior to the fourth year of the reign of James I., is, by adoption, in force in the state of Indiana in so far as applicable and not inconsistent with the state or federal constitutions or statutes. *Sopher v. State* (Ind.), 14-27.

In Nebraska. — By statute in Nebraska, so much of the common law of England as is applicable and not inconsistent with the constitution of the United States or the constitution and statutes of the state is in force in that state. *Kinhead v. Turgeon* (Neb.), 13-43.

In New York. — The adoption by the people of the state of New York of such parts of the common law as were in force on April 20, 1777, does not compel the courts to incorporate into the system of jurisprudence of the state principles which are inapplicable to cases arising within the state and inconsistent with a just consideration of their demands, especially where no vested rights are involved. *Brookhaven v. Smith* (N. Y.), 11-1.

In Texas. — Since the passage of the Texas statute adopting the common law of England "so far as it is not inconsistent with the constitution and laws of this state," the common law is as much a rule of decision in Texas as in those states wherein it was the law from the beginning of their political existence. *Swayne v. Lone Acre Oil Co.* (Tex.), 8-1117.

In West Virginia. — Such parts of the common law as are not displaced by existing statutes and have not been expressly repealed are still in effect in West Virginia. *Harper v. Middle States Loan, etc., Co.* (W. Va.), 2-42.

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As affecting right to injunction, see **INJUNCTIONS**, 1 b.

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Abutting owner's right to compensation for destruction of shade trees in streets, see **STREETS AND HIGHWAYS**, 3 d.
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 Partner's right to compensation for services to firm, see **PARTNERSHIP**, 4 a.
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COMPOUNDING DEBTS.

Power of guardian to compound debts of ward, see **GUARDIAN AND WARD**, 2.

COMPOUNDING OFFENSES.

Validity of collateral contract. — Where a mortgage is given to secure a valid existing indebtedness between the parties, the indebtedness is a sufficient consideration, and the mortgage is enforceable notwithstanding the fact that it is induced by the promise of the mortgagee, made before the commencement of any prosecution, not to prosecute the mortgagor for the violation of a labor contract if the mortgage shall be paid within a certain time. *Bankhead v. Shed* (S. Car.), 15-308.

Sufficiency of indictment. — A conviction for compounding a felony cannot be sustained where the indictment fails to allege that the person with whom the defendant is alleged to have made the corrupt agreement was guilty of the felony charged against him. *State v. Hodge* (N. Car.), 9-563.

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 Power of county commissioners, see COUNTIES, 5 a.
 Power of guardian *ad litem* to compromise claims, see INFANTS, 3 f (4).
 Power of guardian to compromise claims against ward, see GUARDIAN AND WARD, 2.
 Power of insurance agents to compromise claims for premiums, see INSURANCE, 2 b.
 Power of parent to compromise cause of action in favor of child, see PARENT AND CHILD, 1 d.
 Proof of attempt to compromise, see BREACH OF PROMISE OF MARRIAGE, 2 c.

Suppression of facts. — Where there is no such relation of trust and confidence between the parties to a compromise and settlement as imposes upon one an obligation to give full information, and no artifice for a fraudulent purpose is employed which lulls the other into repose, the latter cannot, notwithstanding his failure to make any inquiry or investigation, afterwards complain that the former did not disclose information in his possession. *Multnomah County v. Dekum* (Oregon), 16-933.

There is no such fiduciary relation between a county and an owner of property which has been sold to the county for taxes, and where the complaint in a proceeding to set aside a compromise and settlement whereby the county surrendered the tax certificates to the owner does not negative the county's knowledge of the affirmance of a decree dismissing a suit for the cancellation of such certificates, the owner's failure to inform the county of the affirmance of such decree does not warrant the setting aside of the compromise and settlement. The county, having been a party to such suit, is chargeable with knowledge of the decree which had been rendered and is bound to know what the record discloses. *Multnomah County v. Dekum* (Oregon), 16-933.

Admissibility of evidence. — Where it does not appear that a defendant made any offer to compromise or authorized any one to do so for him or knew that such offer was made, evidence of a compromise is properly rejected. *Marks v. Hardy* (Ky.), 4-814.

Consideration. — A denial by a street railway company of any liability to a city on account of the cost of repaving the streets occupied by the railway, and the promise by the company to make certain changes in its tracks, constitute a sufficient consideration to support an agreement by the city to accept from the company a less amount than was claimed in full satisfaction of the obligation

of the company for street paving. *McKenna v. Charlottesville, etc., R. Co.* (Va.), 18-1027.

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1. PUBLIC POLICY AS AFFECTING APPLICATION OF FOREIGN LAWS.

Removal of disabilities of married women. — The general legislative policy of Wisconsin as to relieving married women from common-law disabilities to contract, and other considerations, negative the idea that full right in that regard would involve anything inherently bad and would warrant a refusal by the courts of Wisconsin to enforce the foreign contract of a married woman as accommodation maker of a promissory note on grounds of public policy. *International Harvester Co. v. McAdam* (Wis.), 20-614.

Accommodation notes made by married women. — The contract of a married woman as accommodation maker of commercial paper not having been judicially declared against the public policy of the state where it was sued, nor prohibited by legislation as pernicious, is enforceable in the courts of such state in case of its having been made in another state where such contracts are valid, unless such contracts are, in fact, inherently bad. *International Harvester Co. v. McAdam* (Wis.), 20-614.

2. IMMOVABLES.

The division of property into movable and immovable is called into operation only when the English courts have to determine rights between a domiciled Englishman and a person domiciled in a country which does not adopt the English division of property into real and personal. It does not apply where the law is the same in the two countries. *Per Farwell, L. J., In re Hoyles* (Eng.), 20-713.

Liens on real estate. — Liens on real estate and on immovables are governed by the law of the situs of the things on which the liens are sought to be enforced; and a lien on the roadbed, buildings, and equipment of a railroad is a lien on the immovables within this rule, though the lien also extends to the personal property and to the corporation's franchise, as the railroad must be considered

as an entirety. *Midland Valley R. Co. v. Moran Bolt, etc., Co.* (Ark.), 10-372.

3. CONTRACTS.

a. In general.

"Place of contract" defined. — The intent as to the place of the contract in any case is generally determinable by presumption of fact that the place of the contract was intended to be that where it was actually made, unless the place of performance was elsewhere, and then the presumption is that the latter was intended; but such presumptions are rebuttable. The term "place of the contract" means the place mutually intended for reference as to validity and interpretation. *International Harvester Co. v. McAdam* (Wis.), 20-614.

Place of contract governed by intent of parties. — As to mere personal contracts, their validity and interpretation is referable to the *lex loci contractus*, unless the parties intended they should be governed by the *lex loci solutionis* or that of some other place, the real place of the contract being a matter of mutual intention, except in exceptional circumstances evincing a purpose in making the contract to commit a fraud on the law. *International Harvester Co. v. McAdam* (Wis.), 20-614.

Place of contract fixed by agreement. — A building and loan association is domiciled in and subject to the laws of the jurisdiction in which its principal office is located, and in which its books are kept and its business is transacted, although its charter was obtained in another state; and a contract with the association, to be performed in the state of its domicile, by parties who do not reside in the state granting the charter, is subject to the usury laws of its domicile, notwithstanding a stipulation in the contract that it shall be governed by the laws of the state granting the charter of the association. *Washington Nat. Bldg., etc., Assoc. v. Pifer* (D. C.), 14-734.

Performance in several jurisdictions.

Where a single contract is to be performed in different jurisdictions, the law of each jurisdiction enters into the essence of the performance in the respective jurisdictions. *Midland Valley R. Co. v. Moran Bolt, etc., Co.* (Ark.), 10x372.

b. Construction.

A building and loan contract, payments under which are to be made at the home office of the corporation in another state, is to be construed according to the laws of the latter state, as the place of performance. *Columbian B. & L. Assoc. v. Rice* (S. Car.), 1-239.

c. Validity.

(1) In general.

A contract valid by the law of the place thereof is valid everywhere. *International Harvester Co. v. McAdam* (Wis.), 20-614.

A contract made in one jurisdiction to be

performed in another is regulated by the law of the place of performance as to the nature, validity, interpretation, and effect, unless a contrary intention appears. *Brown v. Gates* (Wis.), 1-85.

(2) Usurious contract.

See also **USURY**, 1 b.

Where a loan is made by a building and loan association organized in Missouri, but negotiations are had with an agent in Kansas and the bond and mortgage are executed in Kansas by residents thereof, and the mortgage is on land in Kansas and the money borrowed is paid back to the agent in Kansas, and the recitals in the mortgage as well as the actions of the parties indicate an intention to treat the transaction as a Kansas contract, the contract is governed by the usury laws of Kansas. *Royal Loan Assoc. v. Forter* (Kan.), 1-794.

(3) Capacity to contract.

Married women. — The capacity of a married woman to contract is governed by the law of the place where the contract is made, and not by the place of her domicile. *Forsyth v. Barnes* (Ill.), 10-710.

The rule that the law of a place of a contract governs, as to its validity and interpretation, applies in the capacity, including that of married women, to contract. *International Harvester Co. v. McAdam* (Wis.), 20-614.

d. Particular contracts.

(1) Contracts relating to realty.

Contract secured by mortgage on land. — A contract made and to be performed in a certain state and secured by a mortgage on lands in that state is a contract of that state and subject to interpretation by and enforcement under its laws. *Stack v. Detour Lumber, etc., Co.* (Mich.), 14-112.

A contract with a building and loan association is ordinarily governed by the law of the place of performance, and this rule is not changed by the fact that the contract is secured by a mortgage on land situated in another state. *Washington Nat. Bldg., etc., Assoc. v. Pifer* (D. C.), 14-734.

Contract to give mortgage. — An English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the *lex situs*, is a contract to give a mortgage which, *inter partes*, is to be treated as an English mortgage subject to such rights of redemption and other equities as the law of England regards as necessarily incident to a mortgage. *British So. Africa Co. v. De Beers Consol. Mines* (Eng.), 20-461.

(2) Bills and notes.

Validity of notes made on Sunday. — Promissory notes executed on Sunday in one jurisdiction and made payable in another where the law makes void executory con-

tracts for the payment of money made and delivered on Sunday, are not enforceable, since the law of the place of payment prevails. *Brown v. Gates* (Wis.), 1-85.

Transfer of bills and notes. — The rule that the validity of the transfer of chattels must be governed by the law of the country in which the transfer takes place applies to the transfer of bills or checks by indorsement. *Embiricos v. Anglo-Austrian Bank* (Eng.), 2-703.

Intention of parties. — The fact that a note is made payable at the domicile of the payee is persuasive evidence of the intention of the parties that the contract should be governed by the law of the place of payment. *Brown v. Gates* (Wis.), 1-85.

(3) Insurance contracts.

See also **INSURANCE**, 3 b.

Parties in different jurisdictions. — Where the parties to an insurance contract are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into. *McElroy v. Metropolitan Life Ins. Co.* (Neb.), 19-28.

Forfeiture for non-payment of premiums. — Insurance business transacted in this state by New York insurance companies without any provision that the New York laws shall govern is not subject to the provision of the New York statute requiring a notice to be mailed to the policyholder in that state as a condition of forfeiture for nonpayment of premiums. *McElroy v. Metropolitan Life Ins. Co.* (Neb.), 19-28.

4. MARRIAGE AND DIVORCE.

Capacity of parties. — The capacity or incapacity of parties to marry depends on the law of the place where the marriage is celebrated and not on that of the domicile of the parties. *In re Chace* (R. I.), 3-1050.

Dissolution by absence of spouse. — The Tennessee statute providing that a first marriage shall be regarded as dissolved for the purpose of enabling the contracting of a second marriage, "if either party has been absent for five years and is not known to the other to be living," has no extraterritorial force, and therefore cannot in any way change the status of a husband who has absented himself from the domestic state and acquired a domicile in a foreign state. *Snuffer v. Karr* (Mo.), 7-780.

If the Tennessee statute providing that a first marriage shall be regarded as dissolved for the purpose of enabling the contracting of a second marriage, "if either party has been absent for five years and is not known to the other to be living," is valid at all, it must be limited to the confines of the domestic state, and must be construed there to operate only for the benefit of the injured and innocent party to the marriage contract, or at least of one shown to have acted with the best of faith. *Snuffer v. Karr* (Mo.), 7-780.

5. WILLS.

a. Wills of personality.

See also WILLS, 3 b.

A will bequeathing personal property is valid if it is executed according to the law of the place where the testator is domiciled at the time of his death, though it does not conform to the requirements of the law of the place where it was executed and where the testator was domiciled at the time of its execution. *Beunmont's Estate* (Pa.), 9-42.

b. Wills of realty.

See also WILLS, 3 b.

A will conveying real property executed in a foreign state by a citizen of that state, and attested by only two witnesses, which is sufficient under the laws of that state, cannot be probated in Georgia so far as the realty is concerned, nor can it be used as a conveyance of the real estate devised. *Castens v. Murray* (Ga.), 2-590.

A will disposing of real property must be governed as to its execution, sufficiency, and construction according to the intent of the testator, by the laws of the state where the property is situated, and not by the laws of a foreign country or sister state where the maker may have resided at the time of its execution. *Peet v. Peet* (Ill.), 11-492.

The validity of a will made in Louisiana by a citizen of Louisiana, bequeathing real estate situated in Mississippi, must be tested by the laws of Mississippi. *Hasting v. Martin* (La.), 3-861.

A devise of real estate is governed by the *lex loci rei sitæ*, and therefore the question whether a vested or a contingent remainder is created by a will executed at the testator's domicile in Pennsylvania devising real estate in Massachusetts is to be determined with reference to the law of Massachusetts. *Jacobs v. Whitney* (Mass.), 18-576.

The validity of the provisions of a will relating to the holding, investment, accumulation, and application of property devised to a corporation is for the determination of the courts of the domicile of the corporation. *St. John v. Andrews Institute* (N. Y.), 14-708.

6. TORTS.

Character of act in general. — The general and almost universal rule is that the character of an act as lawful or unlawful must be determined by the law of the country where the act is done. *American Banana Co. v. United Fruit Co.* (U. S.), 16-1047.

Injuries to servant by negligence of master. — In an action for negligence by a servant against his master, the contract of employment having been entered into in another state and the employment carried on there, and the act complained of as negligent committed there, the liability of the defendant must be determined by the laws of such latter state. *Fogarty v. St. Louis Transfer Co.* (Mo.), 1-136.

In an action against a master to recover damages for personal injuries sustained in a foreign state by a servant during the course of his employment there, the law of the foreign state controls in determining the question whether the servant is entitled to recover, where the contract of employment was made in that state. *Christiansen v. William Graver Tank Works* (Ill.), 7-69.

In an action against a master to recover damages for a personal injury sustained in a foreign state by a servant during the course of his employment there, the defendant may, under the general issue raised by his plea of not guilty, introduce in evidence as part of his defense the law of the foreign state, in so far as it is material to show that he is not liable for the injuries sustained by the plaintiff. *Christiansen v. William Graver Tank Works* (Ill.), 7-69.

Fellow servants. — In the absence of a state statute on the subject, the federal court regards the question who are fellow servants as one of general law to be determined by reference to all the authorities and consideration of the principles underlying the relation of master and servant, and not as a question of local law to be settled by the decisions of the highest court of the state in which the cause of action has arisen. *Jones v. Southern Pacific Co.* (U. S.), 7-256.

Delay in delivery of telegram. — The addressee of an interstate telegram may recover damages for mental anguish alone, in an action brought by him in the state where the telegram was delivered, for negligent delay in delivery, if the laws of that state permit such recovery, though no such recovery is permitted by the laws of the state whence the telegram was sent, and though the negligence occurred in the latter state. *Howard v. Western Union Tel. Co.* (Ky.), 7-1065.

The fact that damages for mental anguish alone are not recoverable under the laws of a state from which a telegram was sent will not preclude the recovery of such damages in the state to which the message was directed, where the laws of the latter state permit such recovery, particularly if it appears that the negligence complained of occurred mainly in the state where the action is brought. *Howard v. Western Union Tel. Co.* (Ky.), 7-1065.

Where a telegram is sent from one state to another for delivery in the latter, the law of the place of delivery governs as to the right of the addressee to recover damages for mental anguish caused by delay in the delivery of the telegram. *Western Union Tel. Co. v. Hill* (Ala.), 19-1058.

Wrongful attachment. — Under the Iowa code, providing that in an action for wrongful attachment, actual damages may be recovered in an action on the bond if the writ was wrongfully sued out without probable cause, and if sued out maliciously, exemplary damages may also be recovered, injury to credit is too remote and speculative to form an element of damage, whether the action be on the bond or on the case, and the fact that the cause of action arose by the

suing out of the attachment in another state in which the injury to credit is a proper element of damage does not affect the application of this rule. *Dorr Cattle Co. v. Des Moines Nat. Bank* (Iowa), 4-519.

Death by wrongful act. — The law of the state where the injury and death occurred governs in determining whether the right of action of the widow of a man whose death was caused by the wrongful act of another is defeated by an agreement by the decedent to waive liability for his injury or death. *Weir v. Rountree* (U. S.), 19-1204.

7. PENALTIES AND FORFEITURES.

The courts of one jurisdiction will not enforce the penal statutes of another. *Raisor v. Chicago, etc., R. Co.* (Ill.), 2-802.

A Missouri statute providing for the forfeiture of a fixed sum as a penalty for negligence without proof of damages is a penal statute and will not be enforced by the Illinois courts. *Raisor v. Chicago, etc., R. Co.* (Ill.), 2-802.

8. REMEDIES.

The statutes of the state wherein an action upon a foreign judgment is brought control as to what character of set-off, if any, may be pleaded. *Leathe v. Thomas* (Ill.), 4-79.

The decisions of a court as to the meaning of the substantive provisions of a statute of the domestic state are binding on the courts of other jurisdictions, but the mode of procedure and the practice in giving the remedies provided by such statute depend on the law of the place where the remedy is sought. *Clark v. Knowles* (Mass.), 2-26.

The affording of remedies in one country for enforcing a contract which would not be valid if made in such country, but is valid by the law of the place where it was made, depends on judicial comity of nations; and this comity is uniformly extended, unless such contracts as the one sought to be enforced are contrary to the public policy of the country of the *forum*. *International Harvester Co. v. McAdam* (Wis.), 20-614.

The law as to manner of performance of a contract is referable to the place of performance, while remedies for nonperformance are referable to the law of the *forum* where performance is sought to be enforced. *International Harvester Co. v. McAdam* (Wis.), 20-614.

9. PLEADING AND PROOF.

Place of making contract. — In an action on an oral promise to indemnify against loss by reason of suretyship on an official bond, which promise is void under the statute of frauds of the *forum*, the plaintiff can derive no benefit from the fact that the promise is valid under the law of a foreign state where the bond was executed, if his declaration does not aver that the promise was made in the foreign state. *Craft v. Lott* (Miss.), 6-670.

Law of place of contract. — In an action on a contract made in a foreign state, the doctrine of *lex loci contractus* can be in-

voked only by appropriate pleading and proof of the laws of the foreign jurisdiction, and the court cannot take judicial notice of the decisions of the courts of the foreign state. *Southern Express Co. v. Owens* (Ala.), 9-1143.

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Remedies — replevin. — Where the identity of specific articles is lost by the wrongful act of another taking possession thereof, and commingling the same with his own of the same nature and character, the owner may recover in replevin from the mass a quantity equal to the amount he owns, without identifying the property as his original property. *Nashville Lumber Co. v. Barefield* (Ark.), 20-968.

Extent of recovery. — A plaintiff in replevin may show by facts that the defendant has taken his property and has commingled it with property of his own of the same nature and character, and by facts trace the possession thereof to the defendant, and recover from the mass a quantity equal to the amount he owns. *Nashville Lumber Co. v. Barefield* (Ark.), 20-968.

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1. CRIMINAL CONSPIRACY.

- a. What constitutes, in general.

Definition. — A criminal conspiracy is a confederation to do something unlawful either as a means or an end. *State v. Eastern Coal Co. (R. I.)*, 17-96.

A conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose, or a lawful purpose by criminal or unlawful means. *J. F. Parkinson Co. v. Building Trades Council (Cal.)*, 16-1165.

Overt act. — The gist of the offense of conspiracy at common law is the combination, and therefore no overt act pursuant to it need be proved. *Knight, etc., Co. v. Miller (Ind.)*, 18-1146.

Combination to acquire power. — A charge of conspiracy to exercise a certain power presupposes the acquisition of the power, but the gravamen of the offense consists in combining to acquire the power. Prosecutions for conspiracy are preventive rather than curative. *State v. Eastern Coal Co. (R. I.)*, 17-96.

Acts lawful when performed by individual. — Whatever a person may lawfully do, a number of persons may unite with him in doing without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. *State v. Eastern Coal Co. (R. I.)*, 17-96.

Inducing husband to desert wife. — Under the Wisconsin statutes it is a criminal conspiracy for several persons to combine for the purpose of inducing maliciously a husband to desert his wife, and of preventing maliciously the wife from performing her marital duties and enjoying her marital rights. *Randall v. Lonstorf (Wis.)*, 5-371.

Intimidation of employer. — An indictment for a criminal conspiracy charging that the defendants, pursuant to an agreement, notified the prosecutor that he could not be considered in sympathy with organized labor if he employed other than union men, and that upon his refusal to discharge non-union men the defendants published in a newspaper a statement that the prosecutor had been placed on an unfair list by the union, is properly quashed as charging no act amounting to a conspiracy. *State v. Van Pelt (N. Car.)*, 1-495.

Preventing exercise of trade or calling. — The members of an association of theatre managers who exclude by their voluntary individual action a dramatic critic from their places of amusement, pursuant to a statement made at a meeting of their association by one of the members thereof disavowing any desire to interfere with dramatic criticism but calling the attention of the members to the fact that the critic in question had made certain scurrilous, libelous, and malicious attacks on the members of the association, affecting their personal integrity and holding their religion up to ridicule, and suggesting that such continued attacks demanded action for the protection of their business interests, are not guilty of a violation of a penal statute directed against a conspiracy to prevent another from exercising a lawful trade or calling. *People ex rel. Burnham v. Flynn (N. Y.)*, 12-420.

- b. Conspiracy to defraud United States.

Obtaining cotton crops reports. — In order to establish a conspiracy to defraud the United States, under section 5440 of the revised statutes (2 Fed. St. Ann. 247), it is not necessary to allege or prove that the acts constituting the conspiracy were intended to or did result in a direct pecuniary loss to the government. Assuming that the statistical work of the department of agriculture in preparing cotton crop reports is the exercise of a function within the purview of the constitution, it follows that any conspiracy which is calculated to obstruct the work of the department, and destroy the value of its operations and reports as fair, impartial, and reasonably accurate, such as a conspiracy to falsify such reports or to obtain knowledge of their contents in advance for speculative purposes, would result in defrauding the United States by depriving it of its right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation, and, therefore, would constitute a conspiracy under the statute. *Haas v. Henkel (U. S.)*, 17-1112.

Bribing official to give information regarding cotton reports. — A conspiracy to bribe an official or employee of the department of agriculture to give out advance information regarding the contents of the cotton crop reports of the department, in violation of a department rule, constitutes a conspiracy to defraud the United States, even though there is no statute which prohibits the

giving out of such information in advance. *Haas v. Henkel* (U. S.), 17-1112.

c. Who may be guilty.

Corporations. — A corporation may be guilty of the crime of conspiracy. *State v. Eastern Coal Co.* (R. I.), 17-96.

d. Statute of limitations.

Overt acts within statutory period. — Where a conspiracy has been formed and an overt act has been done in execution of it more than three years before the filing of an indictment, a prosecution for that conspiracy and overt act is barred by the statute of limitations; but where there is proof that subsequent overt acts have been committed under the old conspiracy within the three years, and that the defendant has consciously participated therein, a prosecution for the conspiracy may be maintained. *Ware v. United States* (U. S.), 12-233.

e. Indictment.

Showing criminal object or means. — An indictment for conspiracy must show that the object of the conspiracy was criminal, or, if the object itself was not criminal, that the means employed to accomplish it were criminal. *State v. Eno* (Iowa), 9-856.

Description of unlawful means. — An indictment for conspiracy to obtain real property by false pretenses is insufficient, if it fails to set forth with particularity the unlawful means by which the object of the conspiracy was accomplished. *State v. Eno* (Iowa), 9-856.

Duration of unlawful agreement. — If an indictment for conspiracy is sufficient in other respects, it will not be held defective merely because it fails to state how long the unlawful agreement between the defendants was to continue. In such a case, the duration of the illegal contract is not of the essence of the crime. *State v. Eastern Coal Co.* (R. I.), 17-96.

Use of words, "with others." — Where an indictment against a person for conspiracy charges that he "conspired with others," the words "with others" are tautological and unnecessary; and the indictment is not rendered insufficient by the fact that it fails to charge that the "others" are "to the jurors unknown." *State v. Lewis* (N. Car.), 9-604.

Fraudulent concealment of property by bankrupt. — An indictment charging a bankrupt, his trustee in bankruptcy, and another person, with a conspiracy to commit the statutory crime which consists of the fraudulently concealing by a bankrupt of part of his property "from his trustee," is fatally defective in that it charges the trustee with participation in and knowledge of a transaction which can only be an offense against the law when it is concealed from him. *Johnson v. United States* (U. S.), 14-153.

Combination to regulate and fix prices. — An indictment which charges, in separate counts, that the defendants have unlawfully and fraudulently combined, confed-

erated, and conspired together, unlawfully to regulate and fix the price at which coal shall be sold in a certain city; that said defendants have unlawfully created, entered into and become members of and parties to a trust agreement, combination, confederation, and understanding with each other, wrongfully and unlawfully to regulate and fix the price of coal in said city; and that defendants have conspired and agreed together to do an illegal act injurious to public trade, to wit, unlawfully to regulate and fix the price of coal in said city, and have unlawfully and fraudulently fixed and regulated the price of coal therein, does not charge, except by implication and inference, that the defendants have conspired to create a monopoly in order to regulate and fix the price of coal, and in the absence of any direct averment of the latter fact, and of any averments showing that the defendants have power to regulate and fix the price of the commodity in question, it charges no offense. *State v. Eastern Coal Co.* (R. I.), 17-96.

Conspiracy to defraud government.

— An indictment against a representative of a corporation furnishing supplies to a department of the government, for conspiring to defraud the government by making an arrangement with an officer thereof whose duty it was to determine the quantity needed and the satisfactoriness and the price of the supplies furnished, whereby such officer was to have a secret interest in the contract between the corporation and the government, is sufficient although there is no allegation therein that the interest was given to such officer to influence his official conduct, and it is not specified whether the purpose of the conspirators was to have the government pay more for supplies or for more or for inferior supplies than it would pay but for such conspiracy. *Crawford v. United States* (U. S.), 15-392.

Indictments for conspiracy to defraud the United States by procuring advance information regarding the contents of cotton crop reports, by falsifying such reports, and by bribing an official of the department of agriculture to give advance information concerning the same, examined and held to be sufficient to sustain a proceeding to procure the removal of the accused to another district for trial. *Haas v. Henkel* (U. S.), 17-1112.

f. Evidence.

Declarations and acts of co-conspirators. — When a conspiracy is established, declarations and acts of the co-conspirators before the conspiracy was abandoned are competent evidence. *People v. Mol* (Mich.), 4-960.

Admissibility in evidence of the declarations and acts of the co-conspirator in a trial for conspiracy. *Knox v. State* (Ind.), 3-539.

In a criminal prosecution involving an alleged conspiracy to commit the crime charged, the declarations of one of the defendants, made in the absence of his co-defendant, are not admissible in evidence against the latter, until the prosecution has shown that such

declarations were made pending the conspiracy and before the object was accomplished for which the conspiracy was entered into. In such a case the admission of declarations made before the conspiracy is claimed to have been entered into constitutes reversible error. *Gill v. State* (Tex.), 17-1164.

Acts or statements prior to conspiracy. — Where the guilt of one of several defendants, jointly indicted for a felony, is sought to be established by evidence showing or tending to show a conspiracy between him and the others for the commission of crime, evidence as to acts or statements of the others must be confined to such statements as were made, or acts done, at times when the proofs in the case permit of a finding that a conspiracy existed, and the acts or statements of one of the defendants prior to the formation of the conspiracy are inadmissible as evidence against others. *Driggers v. U. S.* (Okla.), 17-66.

Conversation after abandonment of conspiracy. — A conversation between co-conspirators devising means to avoid exposure, though occurring after the abandonment of the conspiracy, is admissible in evidence in the separate prosecution of one conspirator, notwithstanding the general rule that the acts and declarations made after the consummation or abandonment of the conspiracy are inadmissible. *People v. Mol* (Mich.), 4-960.

Evidence of conspiracy on indictment for assault. — In a prosecution for assault with intent to kill, it is competent for the state to prove that others not indicted had conspired with the defendant to commit the assault, though the information does not charge conspiracy and does not charge that the assault was committed by the defendant and others jointly. *State v. Ruck* (Mo.), 5-976.

Acts barred by statute of limitations. — In a prosecution for conspiracy, proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment and of an overt act thereunder prior to the three years, is insufficient to sustain the charge of a conspiracy within the three years; but, in connection with evidence *aliunde* of the existence of the conspiracy and of the defendant's conscious participation in it within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. *Ware v. United States* (U. S.), 12-233.

In a prosecution for conspiracy, evidence of an overt act committed by one of the alleged coconspirators within three years prior to the filing of the indictment, pursuant to a conspiracy between him and the defendant formed and followed by an overt act more than three years prior to the filing of the indictment, without the defendant's consent or agreement within the three years to the continued existence and execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years. *Ware v. United States* (U. S.), 12-233.

Former conspiracy. — In a prosecution for conspiracy, the same rules of law and evidence govern the trial and decision of the issue whether a defendant jointly with others consented or agreed to the existence of a former conspiracy within three years prior to the filing of the indictment and the subsequent execution of it, as govern the issue whether the conspiracy was originally formed. *Ware v. United States* (Fed. Rep.), 12-233.

g. Instructions.

Evidence of declarations of conspirator. — Standing alone, an instruction in a conspiracy case that the declarations of a conspirator made during and in furtherance of the conspiracy are admissible in evidence against a co-conspirator, and that such declarations "when so proven and so admissible, if made against interest, are presumed in law to be true by reason thereof," though correct as an abstract proposition of law, is subject to the objection that it invades the province of the jury; but the objection is obviated by a further instruction making a correct application of such abstract proposition to the facts of the case. *Ausmus v. People* (Colo.), 19-491.

2. CIVIL LIABILITY.

What constitutes actionable conspiracy, in general. — An actionable conspiracy defined. *Randall v. Lonstorf* (Wis.), 5-371.

Acts lawful if performed by one person. — Persons guilty of a criminal conspiracy are liable civilly in damages for their acts, though such acts, if done by one person, would not render him liable for an action for damages. *Randall v. Lonstorf* (Wis.), 5-371.

Whatever one man may do all may do, and whatever all may do singly they may do in concert, provided they act lawfully and the sole purpose of combination is to advance the proper interest of its members. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union* (Ind.), 6-829.

Necessity of purpose to injure another. — A combination is not a conspiracy unless its purpose is to injure another by force, fraud, intimidation, or other artificial means. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union* (Ind.), 6-829.

Combination to damage business of another. — A combination which is lawful within itself may become a conspiracy when the purpose in view is to ruin or damage the business of another because of his refusal to do some act against his will or judgment. *Everett Waddey Co. v. Richmond Typographical Union* (Va.), 8-798.

Separate or joint liability. — In an action for conspiracy a recovery cannot be had against one of the defendants alone, where the injury is such as could have been caused only by two or more of the defendants acting in concert. *St. Louis, R., etc., Co. v. Thompson* (Tex.), 19-1250.

Inducing employees to break contract. — A combination of several persons to

injure one in his trade by inducing his employees to break their contract of employment is an actionable wrong if it results in damage. *Employing Printers Club v. Dr. Blosser Co.* (Ga.), 2-694.

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Habitual criminal statutes, see **CRIMINAL LAW**, 7 a.

Jurisdiction as to delinquent children defined, see **INFANTS**, 4 c.

Labor laws, see **LABOR LAWS**, 1.

Labor unions regulated, see **LABOR COMBINATIONS**, 1 d.

Lessor made liable for water and light furnished to tenant, see **LANDLORD AND TENANT**, 5 g.

Liability for injuries by dogs imposed on owners, see **ANIMALS**, 2 d.

Liability imposed on municipalities for damage done by mobs, see **MUNICIPAL CORPORATIONS**, 9 d.

Liability imposed on railroads for fire communicated by locomotive, see **RAILROADS**, 3 a (2).

License tax acts, see **LICENSES**.

Licensing horse racing, see **GAMING AND GAMING HOUSES**, 1 e.

Licensing peddlers, see **HAWKERS AND PEDDLERS**.

Licensing physicians, see **PHYSICIANS AND SURGEONS**, 1.

Liquor laws, see **INTOXICATING LIQUORS**, 3.

Local assessments authorized, see **SPECIAL OR LOCAL ASSESSMENTS**, 1.

Mechanics' lien laws, see **MECHANICS' LIENS**, 1.

Patent laws, see **PATENTS**, 3.

Prescribing duration of judgment lien, see **JUDGMENTS**, 5 b.

Prevention of cruelty to animals, see **ANIMALS**, 5.

Railroads required to construct private switches, see **RAILROADS**, 3 a (2).

Safety devices required at railroad crossings, see **RAILROADS**, 3 a (2).

Sales in bulk acts, see **FRAUDULENT CONVEYANCES**, 3 a.

Separate accommodations for white and colored passengers, see **CARRIERS**, 6 b.

Special punishment for delinquent children, see **CRIMINAL LAW**, 7 a (1).

State regulation of corporations engaged in interstate business, see **CORPORATIONS**, 3 d.

Taxation of franchises, see **TAXATION**, 11 a.

Taxation of inheritances, see **TAXATION**, 13.

Taxation of oleomargarine, see **REVENUE LAWS**.

Taxation of peddlers, see **HAWKERS AND PEDDLERS**, 3.

Trading stamps prohibited, see TRADING STAMPS.

Waste of mineral waters prohibited, see MINES AND MINERALS, 9.

1. PREAMBLE TO FEDERAL CONSTITUTION.

As source of power to federal government. — The preamble of the United States Constitution is not the source of any substantive power conferred on the federal government or any of its departments, and a state statute cannot be held unconstitutional as being in derogation of the rights secured by the preamble unless the right so derogated is also secured expressly or by implication in the body of the Constitution. *Jacobson v. Massachusetts* (U. S.), 3-765.

2. FIRST TEN AMENDMENTS TO FEDERAL CONSTITUTION.

Operation confined to national government. — The first ten amendments to the Federal Constitution operate on the national government only, and were not intended to and do not limit the powers of the states in respect to their own people. *Jack v. Kansas* (U. S.), 4-689.

The Eighth Amendment of the Constitution of the United States, which provides that "excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted," refers to powers exercised by the government of the United States, and not to those of the individual states. *Loeb v. Jennings* (Ga.), 18-376.

3. POWERS OF CONGRESS IN GENERAL.

Regulating performance of contracts with United States. — The fact that Congress does not have general control over the conditions of labor, or does not possess the general power of legislation possessed by the legislatures of the states, does not make unconstitutional a law otherwise valid or limit the power of Congress over the manner in which contracts with the United States shall be performed. *Ellis v. United States* (U. S.), 11-589.

Making breach of contract a crime. — The United States government by entering into a contract does not waive its sovereignty or surrender its power to enact a law which declares a breach of the contract to be a crime. *Ellis v. United States* (U. S.), 11-589.

Interference with powers of states. — By the provisions of the Federal Constitution, the sovereignty of each of the states is as carefully guarded as that of the United States. Each is to remain free to maintain its own executive, legislative, and judicial magistrates. Nothing can be done by Congress to impair this right in any state so long as it preserves a republican form of government. The power to maintain a judicial department is one incident to the inherent sovereignty of each state, in respect to which the state is as independent of the

general government as that government is independent of the states. As to that power the two governments are on an equality. *Hoxie v. New York, etc., R. Co.* (Conn.), 17-324.

4. POWER OF STATE LEGISLATURES, IN GENERAL.

Constitutional limitations. — There are no limits upon the constitutional power of the legislature of a state, except such as may be found in the state and federal constitutions. *Ratcliff v. Wichita Union Stockyards Co.* (Kan.), 10-1016.

The legislature of Maine has by the constitution of Maine "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, not repugnant to this constitution, nor that of the United States." *Opinion of Justices*, 13-745.

A state constitution is a limitation upon and not a grant of power to the legislature, and the legislature has a right to exercise any power not prohibited by the state or federal constitutions. *Harder's Fire Proof Storage, etc., Co. v. Chicago* (Ill.), 14-536.

Powers not reserved to federal government. — The legislature has the supreme power in all matters of government not prohibited by constitutional limitations, and while the powers of the federal government are restricted to those delegated, those of the state government embrace all not forbidden. *Ex parte Boyce* (Nev.), 1x66.

Constitution the supreme law. — The constitution is the supreme law for the legislature and the court alike, and in declaring any act of the legislature unconstitutional the court does not proceed upon any theory of superiority over the legislature, but simply adjudges that it will follow the organic law, which creates both the legislature and the court, and is alike binding upon each. *Chicago, etc., R. Co. v. Gildersleeve* (Mo.), 16-749.

Opposition to spirit of constitution. — Where the meaning of the words of sections of the Federal Constitution which it is claimed are infringed by a state statute is obvious, the court will not pass upon the suggestion that the statute is opposed to the spirit of the constitution. *Jacobson v. Massachusetts* (U. S.), 3-765.

Laws regulating titles to land. — The state has full control of the mode of transferring titles to property within its limits, and has power to provide a special proceeding in the nature of a proceeding *in rem* to fix the status of land and declare the nature of the titles and interests therein and the persons in whom such titles and interests are vested. *Robinson v. Kerrigan* (Cal.), 12-829.

Laws regulating right to assemble. — The right to assemble, guaranteed by the Wisconsin constitution (art. 1, § 4), is subject to reasonable regulations. *State v. Frear* (Wis.), 20-633.

5. POLICE POWER OF STATES.

a. In general.

Destruction of private property, see **HEALTH**, 1.

Enactment of criminal statutes, see **CRIMINAL LAW**, 2 a.

Inspection of factories, see **LABOR LAWS**, 1 a.

Prohibiting contracts in restraint of trade, see **MONOPOLIES AND CORPORATE TRUSTS**, 3 a.

Reciprocal demurrage for failure to furnish railroad cars, see **CARRIERS**, 3.

Regulation of commerce, see **INTERSTATE COMMERCE**, 2 b (1).

Regulation of keeping and selling of articles of food, see **FOOD**.

Sales in bulk acts, see **FRAUDULENT CONVEYANCES**, 3 a.

Summary seizure and destruction of gambling implements, see **GAMING AND GAMING HOUSES**, 4.

Authority of state supreme. — With respect to its internal police, the authority of each state is supreme and exclusive. *State v. Hyman* (Md.), 1-742.

Constitutional limitations. — Legislation under the police power, as in any other field, is subject to constitutional limitations, some of which are expressed and others implied. *State v. Redmon* (Wis.), 15-408.

Regulations incidentally affecting constitutional rights. — A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not rendered invalid by the fact that it may affect incidentally the exercise of some right guaranteed by the constitution. *In re Anderson* (Neb.), 5-421.

Regulations invading letter of constitution. — Police regulations which are reasonable are not inhibited by the constitution, though invading its letter, since the exercise of the police power is so essential to the public welfare that it is presumed that such exercise within reasonable limits was not intended to be prohibited, but on the contrary guaranteed by the general declared purposes of civil government and the manifest purpose of the constitution. *State v. Redmon* (Wis.), 15-408.

Presumption as to validity of regulations. — The inquiries as to an enactment respecting its legitimacy include these: "Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles?" the judgment of the legislature to be taken as correct unless it appears to be wrong beyond reasonable controversy. *State v. Redmon* (Wis.), 15-408.

Real intent to be considered. — A legislative declaration respecting the character of a law, as that its purpose is to promote public health, is not absolutely binding on the courts. It is their function to deter-

mine the real intent of the law and, if its ostensible is not the real purpose, to give effect to the constitution of condemning the enactment. *State v. Redmon* (Wis.), 15-408.

Validity as dependent upon necessity. — The doctrine that the police power is a law of necessity may well be said to furnish the key to what is within and what is without the boundaries of such power; not that a police regulation to be legitimate must be an absolute essential to the public welfare, but that the exigency to be met must so concern such welfare as to suggest, reasonably, necessity for legislative remedy; the legislature to be the primary judge and the supreme judge as well as to interferences not so unreasonable as to be excessive beyond reasonable controversy. *State v. Redmon* (Wis.), 15-408.

To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference, and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *State v. Redmon* (Wis.), 15-408.

It is fundamental law that no constitutional guaranty is violated by an exercise of the police power of the state when manifestly necessary and tending to secure general and public benefits. *State v. Mayo* (Me.), 20-512.

Discrimination. — Though the police power may be exercised by discriminating against minors, or places used exclusively by minors, yet a discriminating statute will not be upheld merely because minors among others resort to the place in question. *People v. Wilber* (N. Y.), 19-626.

Effect of fourteenth amendment. — The legitimate exercise by a state of its police power is not controlled or affected by the provisions of the Fourteenth Amendment to the Federal Constitution. *Shreveport v. Schulsinger* (La.), 2-69.

Respective functions of courts and legislature. — It is a judicial function to determine the proper subjects for police regulation, and a legislative function to determine, primarily, the expediency of regulation and the character thereof, subject to judicial supervision to the extent of determining, in cases as they arise, whether the boundaries of reason have been so clearly exceeded as to violate some constitutional prohibition, express or implied; the judgment of the legislature being controlling unless it appears beyond reasonable controversy that the inference is unreasonable. *State v. Redmon* (Wis.), 15-408.

Surrender of the power. — Neither the state, nor a municipality to which it has delegated the right to exercise police power, can, by affirmative action or by inaction, permanently divest itself of the right to exercise such power. *State ex rel. Minneapolis v. St. Paul, etc., R. Co.* (Minn.), 8-1047.

The power of a state to protect the lives, health, and property of all persons within its

limits, exists at all times, and its proper exercise cannot be restricted by any previous attempt to grant to any person, natural or artificial, immunity from its exercise. *Venner v. Chicago City R. Co.* (Ill.), 20-607.

b. Scope of the power.

In general. — The legislature cannot, properly, by police regulations deal with a matter not in reason forming a proper subject therefor nor deal with a proper subject by means which are clearly unreasonable. *State v. Redmon* (Wis.), 15-408.

By the exercise of the police power of the state, through legislative enactments, individuals may be subjected to restraints, and the enjoyment of personal and property rights may be limited or even prevented, if manifestly necessary to develop the resources of the state, improve its industrial conditions, and secure and advance the safety, comfort, and prosperity of its people. *State v. Mayo* (Me.), 20-512.

Promotion of public safety and welfare. — The legislature has authority under the police power to enact laws for the promotion of the health, safety, and welfare of the people. *Ex p. Boyce* (Nev.), 1-66.

The police power of a state embraces regulations designed to promote the public convenience or the general prosperity or the public welfare. *Atlantic Coast Line Railroad Co. v. Coachman*, 20-1047.

The police power extends to the enactment of all laws which in contemplation promote the public welfare. "It has been not inaptly termed 'the law of necessity.'" *State v. Redmon* (Wis.), 15-408.

Compulsory vaccination. — The authority of a state to enact a statute authorizing the boards of health of municipal corporations to compel the citizens to submit to vaccination is referable to the police power. *Jacobson v. Massachusetts* (U. S.), 3-765.

Promotion of public convenience or prosperity. — The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, public morals, or the public safety. Chicago, etc., R. Co. *v. People* (U. S.), 4-1175.

Prevention of fraud. — The police power of the state is not limited to regulations necessary for the preservation of good order or the public health and safety. The prevention of fraud and deceit, cheating and imposition, is equally within the power. *People v. Freeman* (Ill.), 17-1098.

Reasonable legislative regulations regarding the adaptability of things placed on sale for human consumption, such as the products of mineral oil, and the proper keeping and handling thereof, for the prevention of fraud, are as well within sovereign police authority, as such regulations for conservation of public safety. *Wadhams Oil Co. v. Tracy* (Wis.), 18-779.

Summary abatement of nuisance. — The police power of the state extends to

everything necessary or essential to the due and ample protection of the public morals and the maintenance of the peace and quiet of the state, as well as to the protection of life and property, and in the exercise of that power the state may authorize its officers summarily to abate and destroy nuisances and those things specifically designed and prepared for the commission of crime. *Mullen v. Moseley* (Idaho), 13-450.

Restriction of liberty of contract. — In the reasonable exercise of the police power for the protection of the public health, morals, safety, and welfare, the state may restrict the general right of contract. *Knight, etc., Co. v. Miller* (Ind.), 18-1146.

Suppression of business. — The power to regulate does not include the power intentionally to suppress, but where the police power is exercised with the *bona fide* intention to regulate a business, it is lawfully exercised, though such business may thereby be made unprofitable and perish for lack of support. *Shreveport v. Schulsinger* (La.), 2-69.

c. Regulation of business.

Ticket brokerage. — The California statute making it a misdemeanor for any person to sell or offer for sale "any ticket or tickets to any theatre or other public place of amusement at a price in excess of that charged originally by the management of such theatre or public place of amusement," is not a valid exercise of the state's police power, but is void as infringing upon the rights of property guaranteed by the state constitution, and existing in the individual. *Ex p. Quarg* (Cal.), 9-747.

The Oregon statute prohibiting ticket brokerage is a valid exercise of the state's police power, and is not, as to interstate tickets, an unlawful interference with interstate commerce. *State v. Thompson* (Ore.), 8-646.

The legislature of a state has the power, for the purpose of protecting travelers from fraud, to prohibit ticket brokerage, notwithstanding the fact that the business is in itself legal and may be honestly conducted. *State v. Thompson* (Ore.), 8-646.

The Washington statute making it unlawful for any person to sell railway tickets unless he has a certificate from the railway company showing his authority so to do is a valid exercise of the state's police power, and is not, as to a ticket broker who had an established and lucrative business prior to the passage of the statute, unconstitutional as depriving him of his business and property without due process of law or as interfering with his liberty as a citizen in the pursuit of his business. *In re O'Neill* (Wash.), 6-869.

Employment agencies. — The New York statute (L. 1904, c. 432) entitled "An act to regulate the keeping of employment agencies in the cities of the first and second class where fees are charged for procuring employment or situations," and requiring such agencies to procure licenses before doing business, being intended to regulate employ-

ment agencies in large cities and to prevent fraud, and probably to suppress immorality, is within the police power of the state, and therefore constitutional, notwithstanding that it may interfere in some respects with one's right to follow a lawful employment. *People v. Warden of City Prison* (N. Y.), 5-325.

A statute defining the duties and liabilities of employment agents and prescribing the rate of compensation for services is unconstitutional, as the business of an employment agent is not dangerous to the public health and cannot be subjected to a police regulation which does not fall within the power of taxation for revenue. *Ex p. Dickey* (Cal.), 1-428.

Manufacture and sale of imitation butter. — The Iowa statute regulating the manufacture and sale of imitation butter is a valid enactment within the police power of the legislature. *State v. Armour Packing Co.* (Iowa), 2-448.

Public stockyards. — The carrying on of stockyards at a commercial centre, with which all the railroads entering the city connect, and which is the only available market in the city and for a large scope of the country around it, for the selling, feeding, resting, and shipping of live stock, is a business affected with a public interest, and is subject to public regulation and control in respect to rates. *Ratcliff v. Wichita Union Stockyards Co.* (Kan.), 10-1016.

The Kansas statute defining public stockyards and regulating the charges thereof is not repugnant to the Kansas constitution. *Ratcliff v. Wichita Union Stockyards Co.* (Kan.), 10-1016.

Slaughterhouses. — Section 624 Wilson's Rev. & Ann. St. 1903, prohibiting the maintenance of a slaughterhouse within one-half mile of the corporate limits of a city of the first class, etc., is a legitimate exercise of the police power upon the part of the legislature. *Kuchler v. Weaver* (Okla.), 18-462.

Payment of wages. — A statute defining certain classes of employers to pay their employees their wages in lawful money every week to a day not more than six days prior to such payment, is not unconstitutional as an unwarranted interference with the right of contract; such right of contract not being absolute, but subject to such reasonable restraint as the public good may require. *Lawrence v. Rutland R. Co.* (Vt.), 13-475.

A statute prohibiting the payment of wages by check or order not redeemable in money and making a violation thereof punishable as a misdemeanor is invalid as a police regulation in respect to a corporation and its adult employees, where such corporation is not pursuing a public business and has not devoted its property to a public use. *State v. Missouri Tie, etc., Co.* (Mo.), 2-119.

d. Building regulations.

Statutory regulation of height. — It is within the police power of a state to regulate the height of buildings in a city, provided the regulations are reasonable in their

character and are adapted to accomplish the purposes for which they are designed. *Cochran v. Preston* (Md.), 15-1048.

Where the purpose of a statute restricting the height of buildings in a particular district of a city is to protect from destruction by fire the handsome buildings and their contents as well as the works of art located within such district, such statute is a valid exercise of the police power of the state. *Cochran v. Preston* (Md.), 15-1048.

e. Municipal ordinances.

Health regulations. — Reasonable municipal health regulations under the authority of a state are not void as taking private property without due process of law, or as taking private property without just compensation. *State v. Robb* (Me.), 4-275.

Power of courts to determine reasonableness. — When the police power has been delegated by the legislature to a municipal corporation, the courts may inquire into the reasonableness of the measures enacted by the municipality. *State v. Hyman* (Md.), 1-742.

f. Taxation under guise of police power.

What constitutes. — A legislative enactment under the police power cannot be condemned as a taxing measure and out of harmony with the constitutional rule of uniformity in that regard, unless the fees exacted are so clearly excessive that the legislature could not reasonably have had in contemplation an equivalent for the mere expense of executing the law. *Wadhams Oil Co. v. Tracy* (Wis.), 18-779.

An allegation in a complaint, challenging the legitimacy of an ostensible police regulation on the ground that the fees provided for are so large as to show, clearly, that the object thereof was revenue, does not tender an issue of fact for confession or denial by the adverse party, when it can be clearly seen from the face of the pleading, in the light of common knowledge and established judicial rules, that the fees are within reason as mere expenses of executing the law. *Wadhams Oil Co. v. Tracy* (Wis.), 18-779.

Validity of statute. — The oleomargarine tax, because so large as to destroy the business of manufacturing oleomargarine, does not violate the fundamental rights protected by the due process of the Fifth Amendment, as the tendency of the product to deceive the public is such that even the states may in the exercise of police powers and without violating the due process clause of the Fourteenth Amendment absolutely prohibit its manufacture. *McCray v. United States* (U. S.), 1-561.

6. JUDICIAL POWER OF UNITED STATES.

Jurisdiction of supreme court of United States in cases involving constitutional questions, see *APPEAL AND ERROR*, 3 c (2).

In what tribunals vested. — The judicial power of the United States is, by the

first section of their constitution (Art. III), vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish, and, by the second section, extends, among other things, to all cases arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. The first section grants the entire judicial power of the nation, and the second is neither a limitation nor an enumeration, but a definite declaration that the judicial power shall include the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. All the judicial power which the nation is capable of exercising is vested in the tribunals described in the first section. *Hoxie v. New York, etc., R. Co. (Conn.), 17-324.*

7. POWER OF CONGRESS TO ESTABLISH POST OFFICES AND POST ROADS.

Regulation of right of action for personal injuries. — The Pennsylvania statute providing that any person sustaining injury or loss of life, while lawfully engaged or employed on or about a railroad, though not employed by the railroad, may recover against the railroad only as if he were its employee, but exempting passengers from its operation, is not, when applied to railway postal clerks in the employ of the federal government, unconstitutional as conflicting with the power of Congress to establish post offices and post roads. *Martin v. Pittsburg, etc., R. Co. (U. S.), 8-87.*

8. INTERSTATE COMMERCE CLAUSE OF FEDERAL CONSTITUTION.

Prohibiting use of state arms or seal for advertising. — The Massachusetts statute prohibiting the use of the state arms or seal for advertising purposes is not in conflict with the interstate commerce clause of the Federal Constitution. *Commonwealth v. R. I. Sherman Mfg. Co. (Mass.), 4-208.*

Regulating right of actions for injuries on railroads. — The Pennsylvania statute providing that any person sustaining injury or loss of life while lawfully engaged or employed on or about a railroad, though not employed by the railroad, may recover against the railroad only as if he were its employee, but exempting passengers from its operation, is not repugnant to the commerce clause of the Federal Constitution. *Martin v. Pittsburg, etc., R. Co. (U. S.), 8-87.*

Police regulations. — A valid police regulation is not subject to successful attack under the commerce clause of the national constitution. *Wadhams Oil Co. v. Tracy (Wis.), 18-779.*

9. DEPRIVATION OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.

a. Deprivation of liberty.

Liberty of contract in general, see also **CONTRACTS, 4 a.**

Prohibiting contracts in restraint of trade, see **MONOPOLIES AND CORPORATE TRUSTS, 3 a.**

Prohibiting discrimination against members of labor unions, see **LABOR COMBINATIONS, 1 b.**

Prosecution by information without indictment, see **INDICTMENTS AND INFORMATION, 1.**

Regulation of hours of labor, see **LABOR LAWS, 1.**

Sales in bulk acts, see **FRAUDULENT CONVEYANCES, 3 a.**

Sentence to chain gang without jury trial, see **CRIMINAL LAW, 7 a (1).**

What included in right of personal security. — Personal security includes the right to exist and the right to the enjoyment of life while existing, and is invaded not only by a deprivation of life, but also by a deprivation of those things which are necessary to the enjoyment of life according to the nature, temperament, and lawful desires of the individual. *Pavesich v. New England Mut. L. Ins. Co. (Ga.), 2-561.*

Right to purchase, hold and sell property. — The word "liberty" in a constitutional provision against deprivation of liberty without due process of law includes the right of an individual to purchase, hold, and sell property in the same way as any other individual. *Block v. Schwartz (Utah), 1-550.*

Right to make contracts. — The general right to make a contract in relation to his business, including the right to purchase or to sell labor, is part of the liberty of the individual protected by the due process clause of the Federal Constitution. *Lochner v. New York (U. S.), 3-1133.*

The provision of the New Jersey constitution establishing the inalienable right of all men to acquire property and to pursue and obtain safety and happiness includes the right of making contracts for personal services as a means of acquiring property, and it is therefore the right of every man to engage in such lawful business or occupation as he may choose, free from hindrance or obstruction by his fellow men, except such as may result from the exercise of equal or superior rights on their part. *Brennan v. United Hatters, etc. (N. J.), 9-698.*

Regulation of payment of wages. — A statute regulating the payment of wages does not deprive the employers of liberty or property in contravention of the Fourteenth Amendment of the Federal Constitution, because it requires weekly payments of wages in lawful money. *Lawrence v. Rutland R. Co. (Vt.), 13-475.*

A statute, in providing that the employer shall pay wages weekly in lawful money and that no future assignment of such wages by the employee shall be valid, is not unconstitutional as restricting the right of employees to contract with the employer. *Lawrence v. Rutland R. Co. (Vt.), 13-475.*

A statute prohibiting the payment of wages by checks or orders not redeemable in cash

is unconstitutional as abridging the freedom of contract. *State v. Missouri Tie, etc., Co.* (Mo.), 2-119.

The Indiana statute regulating the time and mode of the payment of wages does not profess to restrict or abridge the right of employers and employees to contract, except in so far as it requires that the amounts due the employees for labor shall be paid "in lawful money of the United States;" and this requirement is constitutional. *Seelyville Coal, etc., Co. v. McGlosson* (Ind.), 9-234.

The Texas "store order" statute providing that "it shall be unlawful for any person, firm, association of persons, corporations, or agent of either, to issue any ticket, check, or writing obligatory to any servant or employee for labor performed, redeemable in goods or merchandise," is an interference with the right of contract between citizens of the state in relation to their private matters, not warranted by the police power, and therefore in violation of the state and federal constitutions. *Jordan v. State* (Tex.), 14-616.

Regulation of barbering.—The Washington statute regulating the occupation of barbering tends to promote the health, safety, and comfort of the public, and is not unconstitutional as an abridgment of the liberty and natural rights of the citizens. *State v. Walker* (Wash.), 15-257.

But the section of such statute which provides as a prerequisite to obtaining a certificate of registration that the applicant shall have "studied the trade for two years as an apprentice under or as a qualified and practicing barber" is unreasonable and arbitrary, and such requirement is void. The invalidity of such provision does not, however, affect the validity of the statute as a whole. *State v. Walker* (Wash.), 15-257.

Compulsory vaccination.—The Massachusetts compulsory vaccination law is not unconstitutional as being an unreasonable invasion of the liberty of the citizen. *Jacobson v. Massachusetts* (U. S.), 3-765.

What persons protected.—The liberty referred to in the due process of law clause of the Fourteenth Amendment of the Federal Constitution is the liberty of natural, and not artificial, persons. *Northwestern National Life Ins. Co. v. Riggs* (U. S.), 7-1104.

b. Deprivation of property.

Abrogation of fellow servant rule, see **MASTER AND SERVANT**, 2 d.

Administration on estates of absent persons, see **EXECUTORS AND ADMINISTRATORS**.

Imposing liability for injuries by dogs, see **ANIMALS**, 2 d.

Imposing liability on lessor for water and light supplied to tenant, see **LANDLORD AND TENANT**, 5 g.

Requiring railroads to construct private switches, see **RAILROADS**, 3 a (2).

Right to acquire and hold property, see also **GAME AND GAME LAWS**, 3 b.

Sales in bulk acts, see **FRAUDULENT CONVEYANCES**, 3 a.

Security as to property rights, see **CORPORATIONS**, 4 a.

Statute of limitations as denial of due process of law, see **LIMITATION OF ACTIONS**, 1 b.

Business or occupation as property.

—A person's business, occupation, or calling is property within the meaning of the law and entitled to constitutional protection. *Gray v. Building Trades Council* (Minn.), 1-172.

Right to sell.—The constitutional guaranty securing to every person the right of "acquiring, possessing, and protecting property" refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, includes the right on the part of the owner to dispose of his property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. *Ex p. Quarg* (Cal.), 9-747.

Things not the subject of private property.—The first section of the bill of rights contained in the New Jersey constitution, which declares that all men have certain inalienable rights, among which are those of acquiring, possessing, and protecting property, etc., does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law, or the right of disposing of property that has not been duly acquired under the law of the land. *Carter v. Hudson County Water Co.* (N. J.), 10-116.

Fines imposed for contempt of court.

—The provision of the Vermont statute requiring corporations to produce their books and papers, for punishment for contempt by fine in case of noncompliance with the order to produce the books and papers called for, is not in conflict with the Fourteenth Amendment of the Federal Constitution as depriving the corporation of its property without due process of law. *In re Consolidated Rendering Co.* (Vt.), 11-1069.

Statute requiring production of documents.—The failure of the Vermont statute requiring corporations to produce their books and papers, to provide compensation for the time, trouble, and expense of bringing books and documents from other states does not amount to a taking of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution, the injury, if any, being incidental to the legitimate exercise of the powers of government. *In re Consolidated Rendering Co.* (Vt.), 11-1069.

A state statute requiring corporations to produce books and papers in court and providing no compensation for the time, trouble, and expense imposed upon a corporation in a foreign state or country in collecting and sending the documents to the state demanding them does not operate, in this respect, to take private property for public use without compensation, where the general law of the state

in reference to the compensation of witnesses has been construed as applicable to this statute. *Consolidated Rendering Co. v. Vermont* (U. S.), 12-658.

Proceedings under the Vermont statute requiring corporations to produce their books and papers are not unconstitutional because no tender is made to the corporation to cover its fees and expenses for appearing before the court with its books and documents, a witness having no right to refuse to attend because his fees are not tendered. *In re Consolidated Rendering Co.* (Vt.), 11-1069.

A state statute requiring corporations to produce books and papers before a court or grand jury upon notice, does not deny the due process of law guaranteed under the Fourteenth Amendment of the Federal Constitution, where a hearing is given before any proceeding to enforce the production of papers is concluded, and in case a production before the grand jury is required, any objection made before that body must be reported to the court for its action. *Consolidated Rendering Co. v. Vermont* (U. S.), 12-658.

Such a statute does not deny due process of law in requiring a corporation doing business in the state to produce books and papers in its custody and control though temporarily outside the borders of the state. *Consolidated Rendering Co. v. Vermont* (U. S.), 12-658.

Confiscation of dead animals.—A municipal ordinance which, immediately upon the death of a domestic animal and before it becomes a nuisance, deprives the owner of the property therein and invests it in a public contractor, is a taking of private property without due process of law and unconstitutional. *Richmond v. Caruthers* (Va.), 2-495.

Statute prohibiting ticket brokerage.—The Oregon statute prohibiting ticket brokerage does not deprive purchasers of tickets of their property without due process of law, as it merely limits the manner in which they shall use the tickets. *State v. Thompson* (Ore.), 8-646.

Regulation of charges of public stockyards.—The averments of an answer examined, in an action against a stockyards company to recover for overcharges on stock, and held not to show that the rates prescribed by the Kansas statute defining public stockyards and regulating the charges thereof are so palpably unreasonable and unjust when applied to the defendant as to amount to a taking of private property without just compensation or due process of law. *Ratcliff v. Wichita Union Stockyards Co.* (Kan.), 10-1016.

Federal employers' liability act.—The provision of section 5 of the Federal Employers' Liability Act of 1908 (Act of April 22, 1908, c. 149, 35 St. L. 65, Fed. St. Ann. Supp. 1909, p. 584) that any contract between an interstate carrier and any of its employees in such business, intended to enable it to exempt itself from any liability vested by the act, shall to that extent be void, and the provision of section 3, which, in effect,

sanctions a recovery where the injured employee has been guilty of gross negligence, and the carrier of slight negligence or none at all, are also unconstitutional, as arbitrary and unlawful deprivations of property within the meaning of the Fifth Amendment to the Constitution of the United States. *Hoxie v. New York, etc., R. Co.* (Conn.), 17-324.

Use of arms or seal of state as trademark.—The Massachusetts statute prohibiting the use of the arms or great seal of the state for advertising or commercial purposes is not unconstitutional as interfering with a trademark alleged to have been obtained by one in the arms of the state, for as against the state nobody can claim a trademark in its arms or great seal. *Commonwealth v. R. I. Sherman Mfg. Co.* (Mass.), 4-268.

Use of flag for advertising purposes.—The Nebraska statute making it a misdemeanor for any one to sell, expose, offer for sale, or have in possession for sale, any article of merchandise upon which shall have been printed or placed for the purpose of advertising a representation of the flag of the United States, is not unconstitutional, either as relating to a subject exclusively committed to the national government, or as depriving citizens of any privilege of citizenship or of any right of personal liberty or of any right of property. *Halter v. Nebraska* (U. S.), 10-525.

When court can declare law invalid.—A court has no right to invalidate or overthrow legislation depriving a person of his liberty or property or making a discrimination as to the person to whom it is applicable, unless it is palpably clear that the legislation has no real or substantial relation to the public welfare, and it is not sufficient cause for overthrowing such legislation that the court believes to a certain degree that it has no real or substantial relation to the public welfare. *Grainger v. Douglas Park Jockey Club* (U. S.), 8-997.

10. EQUAL PROTECTION OF THE LAWS.

See GAME AND GAME LAWS, 3 b.

Abrogation of fellow servant rule, see MASTER AND SERVANT, 2 d.

Compelling production of documents, see DISCOVERY.

Different punishment for different persons for same offense, see CRIMINAL LAW, 7 a (1).

Imposing penalty on carrier for failure to pay claim, see CARRIERS.

Making breach of contract of employment a crime, see MASTER AND SERVANT, 2 c.

Separate accommodations for white and colored passengers, see CARRIERS, 6 b.

Statute regulating gas and electric light companies.—The provision of the New York statute authorizing a commission appointed by the governor to fix the maximum rate chargeable by gas and electric light companies, that the price for gas or electricity in a municipality "so fixed by the

commission shall be the maximum price to be charged by such person or corporation for gas or electricity in such municipality for a term of three years, and until, after the expiration of such term, such commission shall, upon complaint as provided in this section, again fix the price of such gas or electricity," is not objectionable in fixing three years as the time for which the rate shall remain as established, but the provision that the rate as established shall continue indefinitely until fixed anew on complaint which, under the terms of the statute, can only be made by certain municipal officers or purchasers of gas or electricity, and giving the lighting corporation no opportunity at the end of three years to apply for a new adjustment of rates, denies the corporation the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution. *Saratoga Springs v. Saratoga Gas, etc., Co.* (N. Y.), 14-606.

Statute regulating right of action.—The Pennsylvania statute providing that any person sustaining injury or loss of life while lawfully engaged or employed on or about a railroad, though not employed by the railroad, may recover against the railroad only as if he were its employee, but exempting passengers from its operation, is not open to the objection that it denies railway postal clerks the equal protection of the laws. *Martin v. Pittsburg, etc., R. Co.* (U. S.), 8-87.

Application of provision to corporations.—It is well settled that a corporation is a person within the meaning of the Fourteenth Amendment of the Federal Constitution. *Southern R. Co. v. Greene* (U. S.), 17-1247.

A corporation is a person within the meaning of the due process of law clause and the equity clause of the Fourteenth Amendment of the Federal Constitution. *Lawrence v. Rutland R. Co.* (Vt.), 13-475.

A foreign corporation which has come into a state in compliance with its laws, and acquired property therein, and paid taxes upon the same, and is subject to the jurisdiction of its courts, is a person within the jurisdiction of the state within the meaning of the Fourteenth Amendment of the Federal Constitution. *Southern R. Co. v. Greene* (U. S.), 17-1247.

Discrimination in general.—A law is not to be regarded as class legislation simply because it affects one class and not another, provided it affects all members of that same class alike, and the classification involved is founded upon a reasonable basis. Such a law is general and not special. *State v. Mayo* (Me.), 20-512.

It is not necessary that a statute passed in the exercise of the police power shall apply equally and uniformly to all persons of the state. It is sufficient to satisfy the constitutional requirements of equal protection of the law if it applies equally and uniformly to all persons similarly situated. *Atlanta Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

Discrimination between corporations and persons.—The Vermont statute requiring corporations to produce their books and papers does not violate the Fourteenth Amendment of the Constitution of the United States as arbitrarily discriminating between corporations and natural persons and denying to the former the equal protection of the laws, the general difference between corporations and natural persons in this respect making the distinction a proper one. *In re Consolidated Rendering Co.* (Vt.), 11-1069.

A statute providing for the production of books and papers in court which is confined to corporations alone does not make an improper classification in this regard, or deny to corporations the equal protection of the laws. *Consolidated Rendering Co. v. Vermont* (U. S.), 12-658.

The Washington statute making it unlawful for any person to sell railway tickets unless he has a certificate from the railway company showing his authority so to do is not unconstitutional as denying ticket brokers the equal protection of the laws or as granting to railroad companies special privileges which are not enjoyed by other citizens. *In re O'Neill* (Wash.), 6-869.

Discrimination between different kinds of corporations.—A statute providing that every "mining, quarrying, manufacturing, mercantile, telegraph, telephone, railroad, or other transportation corporation" and every "incorporated express, water, electric light or power company doing business in this state shall pay each week, in lawful money, each employee engaged in the business, the wages earned by such employee to a day not more than six days prior to the date of such payment," and that "no such corporation shall pay its employees in scrip, vouchers, due bills, nor store orders, except it be a co-operative corporation in which the employee is a stockholder, but shall on request of such shareholding employee pay him as provided in the act," does not deny to a railroad corporation the equal protection of the laws, as the statute includes all corporations of the class of railroad companies, and need not include all corporations doing business in the state in order to conform to the equality clause of the Fourteenth Amendment. *Lawrence v. Rutland R. Co.* (Vt.), 13-475.

Such statute is not open to the constitutional objection that it cannot operate equally upon all employers with its provisions because it may include foreign corporations which the state cannot control, as such foreign corporations doing business in the state are just as amenable to the laws of the state in respect to business done in the state as are domestic corporations. *Lawrence v. Rutland R. Co.* (Vt.), 13-475.

Discrimination between adults and children.—The Massachusetts compulsory vaccination law does not deny equal protection of the laws because it makes an exception in favor of children certified by a registered physician to be unfit for vaccination,

but does not except adults in a like condition. *Jacobson v. Massachusetts* (U. S.), 3-763.

Statute discriminating between places.—The New York statute (L. 1904, c. 432) entitled "An act to regulate the keeping of employment agencies in the cities of the first and second class where fees are charged for procuring employment or situations," and requiring such agencies to procure licenses before doing business, is not, on account of its applying only to cities of the first and second class, in violation of the equal rights clause of the Fourteenth Amendment of the Federal Constitution, as the equality within the meaning of that clause does not necessarily mean a territorial equality, and the clause does not prohibit legislation which, though limited in the sphere of its operations, affects alike all persons similarly situated within such sphere. *People v. Warden of City Prison* (N. Y.), 5-325.

Building regulations.—Where a statute restricts the height of buildings within a particular district of a city, the fact that the land within such district is hilly and that under the statute the maximum height of buildings permitted to be erected is measured from the highest point within the district, does not, by enabling owners of lower ground to build taller buildings than owners of higher ground, deny the latter the equal protection of the laws. *Cochran v. Preston* (Md.), 15-1048.

Validity of statute exempting churches.—Such statute is not invalid on the ground that it exempts churches from its operation, because there is not the same reason for regulating the height of churches as of some other buildings. *Cochran v. Preston* (Md.), 15-1048.

Regulation of dancing schools.—The New York statute (Laws 1909, c. 400) providing that dancing shall not be taught or permitted "in any public dancing academy," defined as a room or place in which dancing is taught, and which is so designated by public notices, unless such place shall be licensed, is unreasonably discriminative, in that it applies only to places where dancing is "taught," that it does not prescribe any moral or other standard in the conduct of the dance, and that it contains no requirements as to the healthfulness of the place which are not covered by other statutes. *People v. Wilber* (N. Y.), 19-626.

Prohibiting use of flag for advertising purposes.—The provisions of the Nebraska statute making it a misdemeanor to use the national flag for advertising purposes, which expressly excepts from the operation of the statute any periodical, newspaper, book, etc., on which shall be printed, painted, or placed a representation of the national flag, "disconnected from any advertisement," does not render the statute unconstitutional as making an unreasonable or arbitrary classification, or as denying to one class the equal protection of the laws. *Halter v. Nebraska* (U. S.), 10-525.

Litigation between white persons and negroes.—Where the plaintiffs did not al-

lege or base their proceedings on the fact that the defendants were colored persons, and the judge charging the jury made no reference to the racial or social status of either the plaintiffs or the defendants but submitted the issues as to the rights of the parties without reference to race or color, and the evidence authorized the finding against the defendants regardless of any consideration of their color, it cannot be held that such finding was in conflict with that provision of the constitution of the United States which declares, "nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *Creswill v. Grand Lodge* (Ga.), 18-453.

11. RIGHT TO SPEEDY TRIAL.

In general.—The Minnesota statute making it an offense for any newspaper to publish any account of the details of an execution of a sentence of death beyond a statement of the fact that the "convict was on the day in question duly executed according to law," is not violative of the provision of the state constitution that in all criminal prosecutions the accused shall have a right to a speedy and public trial. *State v. Pioneer Press Co.* (Minn.), 10-351.

Reasonable time to secure witnesses.—The constitutional provision guaranteeing to an accused person a "speedy public trial" must be construed so as to allow officers representing the state in a criminal prosecution reasonable time in which to secure the attendance of witnesses, and is not violated by granting one continuance, on the motion of the state's attorney, on the ground of the absence of material witnesses. *State v. Pratt* (S. Dak.), 11-1049.

12. IMMUNITY FROM SEARCHES AND SEIZURES.

Validity of statute authorizing seizure and destruction of gaming paraphernalia, see GAMING AND GAMING HOUSES, 4.

Statute requiring production of documents.—The Vermont statute providing in substance that any corporation doing business in the state shall, upon notice, produce before any court, grand jury, tribunal, or commission acting under the authority of the state, all of the books, documents, correspondence, memoranda, papers, and data, containing any account of, reference to, or information concerning the suit, proceedings, action, charge, or subject of inquiry, pending before or to be heard by such court or tribunal, is not in contravention of the Vermont constitution as authorizing a search and seizure of books and papers of the corporation, or as compelling the production of the books and papers in court without providing compensation, or as requiring the production of all the books and papers in the custody of the corporation instead of only such as are admissible in evidence. *In re Consolidated Rendering Co.* (Vt.), 11-1069.

A statute requiring corporations to produce

their books and papers before a court or grand jury upon notice is not invalid as authorizing an unreasonable search and seizure of private books and documents. *Consolidated Rendering Co. v. Vermont* (U. S.), 12-658.

13. REPUBLICAN FORM OF GOVERNMENT.

Initiative and referendum. — The initiative and referendum provisions in the Oklahoma constitution (art. 5, §§ 1, 2, 3, 4, 5, and art. 18, § 4, 5) are not in conflict with the Constitution of the United States (§ 4, art. 4), guaranteeing to every state a republican form of government. *Ex parte Wagner* (Okla.), 18-197.

Initiative and referendum as consistent with republican form of government, see also **MUNICIPAL CORPORATIONS**, 2.

14. INTERFERENCE WITH VESTED RIGHTS.

Regulation of right of action for personal injuries. — The Pennsylvania statute providing that any person sustaining injury or loss of life while lawfully engaged or employed on or about a railroad, though not employed by the railroad, may recover against the railroad only as if he were its employee, but exempting passengers from its operation, is not, as applied to persons injured after its passage, violative of the Federal Constitution as taking away a vested right of recovery or a vested right of property. *Martin v. Pittsburg, etc., R. Co.* (U. S.), 8-87.

Retrospective laws applicable to county. — The constitutional prohibition against retroactive legislation which would affect vested rights is intended for the protection of individuals and does not apply to legislation recognizing and affirming a moral obligation of a subordinate branch of the state (*e. g.*, a county) with respect to a past transaction. *Cullman County v. Blount County* (Ala.), 18-322.

15. IMPAIRMENT OF OBLIGATION OF CONTRACTS.

a. In general.

Effect of statute of limitations, see **LIMITATION OF ACTIONS**, 1 b.

Statute prescribing duration of judgment lien, see **JUDGMENTS**, 5 b.

Judicial decisions. — The provision of the Federal Constitution that no state shall pass any law impairing the obligation of contracts applies only to legislative enactment, and has no application to judicial decisions. *King v. Phenix Ins. Co.* (Mo.), 6-618.

The prohibition of the Federal Constitution against the enforcement by the state of a law impairing the obligation of contracts is not infringed by the refusal of the court of last resort to follow the decision of the inferior court. *Sedalia v. Donohue* (Mo.), 4-89.

In an action to enforce the payment of municipal bonds, where it is alleged that the bonds are void because they were issued for

a purpose for which the municipality was not authorized to issue bonds, the plaintiff cannot contend that the court is committed to the doctrine that a municipality may issue negotiable bonds for such a purpose and that to hold to the contrary now would be violative of the constitutional prohibition against the impairment of the obligations of contracts, if it appears that in the only cases which tend to support the plaintiff's contention the language used was *obiter*, and that in one of those cases the language was based upon a then overruled case decided by the United States supreme court. *Swanson v. Ottumwa* (Iowa), 9-1117.

Contracts made pending enactment of law. — Where a valid act has been passed by the legislature it is no defense to a prosecution for a violation thereof that before its taking effect contracts had been entered into by the defendant with which the law interfered. *Commonwealth v. R. I. Sherman Mfg. Co.* (Mass.), 4-268.

Repeal or change of remedy. — Repeal or change of remedy for the enforcement of a contract as impairing its obligations. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

Exemption from taxation as contract. — The Michigan statute in reference to road improvement providing that a township which shall adopt and carry out the provisions of an act shall not be liable for any tax for a county road system, and the action of a township in pursuance thereof, do not constitute a contract which cannot, by subsequent legislation, be impaired without doing violence to the federal and state constitutions. *Board of Supervisors v. Hubinger* (Mich.), 4-792.

Statute changing priority of liens. — An act of the legislature which postpones an existing valid mortgage lien and makes a subsequently created lien superior to the mortgage lien is a law impairing vested property rights and impairing the obligations of a contract, and is void for conflict with the constitution of the United States. *National Bank of Commerce v. Jones* (Okla.), 11-1041.

Right of action for personal injuries. — A claim on an action for tort for a personal injury is not within the protection of the constitutional provision which forbids the passing of laws impairing the obligation of contracts, though it is a valuable personal right, and probably within some of the broad provisions of the declaration of rights in the constitution of Massachusetts. *Mulvey v. Boston* (Mass.), 14-349.

Statute prohibiting ticket brokerage. — The Oregon statute prohibiting ticket brokerage is prospective and not retrospective in effect, and is neither a law impairing the obligation of contracts nor an *ex post facto* law. *State v. Thompson* (Oregon), 8-646.

Statute regulating payment of wages. — Under a provision of a corporate charter reserving to the state the power to amend, alter, or repeal the charter as the public good requires, the legislature has power to

require the corporation to pay its employees their wages in lawful money each week to a day not more than six days prior to such payment, and such requirement does not impair any obligation of the charter contract in violation of the Federal Constitution, especially where the corporation belongs to a class of corporations clothed with a public trust and discharging duties of public concern affecting the community at large. *Lawrence v. Rutland R. Co. (Vt.)*, 13-475.

A statute providing that certain corporations shall pay the wages of their employees within a certain time in lawful money does not impair the constitutional rights of the stockholders of a corporation affected thereby, as persons who become stockholders in a corporation must be considered to have assented to any legislation enacted within the reserved power of the state to amend the corporation's charter. *Lawrence v. Rutland R. Co. (Vt.)*, 13-475.

b. Franchises as contracts.

Franchise granted by municipal ordinance.— The section of the Alabama constitution which provides that every grant of a franchise shall remain subject to revocation refers to grants made by the legislature and to revocations by the legislature, or perhaps by its authority of grants of franchises made by that body, and does not authorize the adoption by the municipality of an ordinance revoking a prior ordinance granting for a valuable consideration a franchise for a waterworks system, at least when the legislature has not attempted to confer on the city council the power to revoke such franchise. *Weller v. Gadsden (Ala.)*, 3-981.

Where a gas company accepts a municipal ordinance granting the privilege of using the streets for the purpose of supplying gas to consumers, a contract is constituted binding equally upon the city and the company under which, when acted upon, rights become vested, and which cannot be impaired by subsequent municipal action. *Rushville v. Rushville Natural Gas Co. (Ind.)*, 3-86.

Franchise not purporting to be exclusive.— A contract whereby a city grants to a waterworks company the right to construct, own, and operate the waterworks for a specified number of years does not exclude the city from entering into competition with the company during the life of the franchise, unless it contains words clearly depriving the city of the right of competition; and the construction and operation of the waterworks by the city neither impair the contract nor amount to taking property without due process of law or without just compensation. *Meridian v. Farmers' Loan, etc., Co. (U. S.)*, 6-599.

Exclusive franchise.— A valid contract, whereby a city grants a waterworks company the exclusive right to supply water in the city for a definite period, must be construed as excluding the city itself from competing with the company during the specified period; and when so construed the contract is entitled to the protection afforded contracts by the

constitution of the United States. *Vicksburg v. Vicksburg Waterworks Co. (U. S.)*, 6-253.

Where a city has entered into a binding contract granting the exclusive right to supply water to a waterworks company which holds its charter subject to a constitutional provision which so restricts the right of alteration, amendment, or repeal that "no injustice shall be done to the stockholders," a statute authorizing the city to build its own waterworks does not justify the city in entering into competition with the company. *Vicksburg v. Vicksburg Waterworks Co. (U. S.)*, 6-253.

Ordinance fixing rates chargeable by waterworks company.— An accepted ordinance which provides for such rates "as may be agreed upon between the consumer and water company not exceeding" specified rates constitutes a contract by the city that it will not reduce the rates below those specified during the term of the contract, and any such attempted reduction thereof by the city or its water board under the law of the state impairs the obligation of this contract. *Omaha Water Co. v. Omaha (U. S.)*, 8-614.

16. PRIVILEGES AND IMMUNITIES.

Privilege of witnesses as to self-crimination, see **WITNESSES**, 4 g.

Right to bear arms, see **WEAPONS**.

Self-crimination by trying on garment, see **CRIMINAL LAW**, 6 n (1).

Meaning of constitutional provision.

— The clause of the Federal Constitution declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" does not guarantee to the citizens in one state, while residents there, all the privileges that they would enjoy if they resided in another state. *McCart v. Hudson County Water Co. (N. J.)*, 10-116.

The Fourteenth Amendment to the Federal Constitution deals only with the rights of citizens of the United States as such, and the privileges and immunities protected thereby are those of citizens of the United States, as distinguished from the citizens of a state. *Shaw v. Marshalltown (Iowa)*, 9-1039.

Privilege of witness.— The constitutional inhibition against compelling a person to incriminate himself does not apply to a criminal prosecution wherein the accused is not compelled to testify or to produce any private papers that would incriminate him, and where no presumption is indulged or permitted against him because of his silence. *Cohn v. State (Tenn.)*, 15-1201.

Statute prohibiting ticket brokerage.— An individual has not an unqualified right to sell and deal in tickets of a railroad, and therefore a statute prohibiting ticket brokerage does not deprive him of the privilege or immunity protected by the Fourteenth Amendment to the Federal Constitution as the right in question is not one of the fundamental rights embraced in that amendment. *State v. Thompson (Oregon)*, 8-646.

The Oregon statute prohibiting ticket brok-

erage is not repugnant to the provisions of the state constitution prohibiting laws "granting to any citizen or citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens," nor is it repugnant to the provision of the Fourteenth Amendment to the Federal Constitution prohibiting laws "which shall abridge the privileges or immunities of citizens of the United States." *State v. Thompson* (Oregon), 8-646.

Production of documents in liquor prosecution.—The constitutional guaranty against compelling a person accused of crime to give evidence against himself is violated by compelling a druggist to produce before the grand jury prescriptions and statements on which he has sold intoxicating liquors, under the Indiana statute (Burns's Ann. § 1908, §§ 8351, 8352) providing that any person not licensed who shall sell spirituous liquors, except as therein provided, shall be guilty of misdemeanor, except that none of the provisions of such section shall apply to any licensed druggist, and that any druggist may sell liquor for medicinal, industrial, or scientific purposes on the written prescription of a physician or written application of any other person stating that the liquor is desired and will be used for medicinal, scientific, or educational purposes only, which prescriptions and statements must be preserved by the druggist for at least a year. Since there is no provision authorizing police inspection of such statements and prescriptions, or requiring them to be filed in a public office, they are private documents. *State v. Pence* (Ind.), 20-1180.

17. LIBERTY OF SPEECH, PRESS, AND ASSEMBLAGE.

Prohibiting publication of reports on candidates.—A statute prohibiting civic leagues and similar associations from publishing reports on candidates or nominees for public office which do not contain the information on which such reports are based, the names and addresses of the persons furnishing such information, and the information furnished by each of them, such statute not being limited to reports containing blasphemous, obscene, seditious, or defamatory matter, impairs the constitutional guaranty of freedom of speech. *Ex parte Harrison* (Mo.), 15-1.

Prohibiting publication of report of execution of death penalty.—The Minnesota statute making it an offense for any newspaper to publish any account of the details of an execution of a sentence of death beyond the statement of the fact that the "convict was on the day in question duly executed according to law," is not violative of the provisions of the state constitution preserving the liberty of the press. *State v. Pioneer Press Co.* (Minn.), 10-351.

Right of assemblage.—The Wisconsin constitution (art. 1, § 4), guaranteeing the right of the people to assemble and consult for the common good, guarantees the right of assemblage and of consultation, and the

primary election law (Laws 1903, c. 451) does not interfere with that right, and, in lieu of congregating at caucuses and selecting delegates to assemble and represent them, the voters may assemble at the polls in different polling places and consult and express their choice of candidates, and the right of any political party to assemble in convention and consult for the public good is unimpaired. *State v. Frear* (Wis.), 20-633.

18. UNIFORM OPERATION OF GENERAL LAWS.

Uniform operation of criminal statutes, see **GAME AND GAME LAWS**, 3 a (2).

What constitutes.—A law which applies alike to all the subjects upon which it acts, or a law which applies equally to all persons or things within a legitimate class to which alone it is addressed, is neither local nor special, and does not violate a constitutional provision requiring laws of a general nature to have a uniform operation; but the classification is not a proper one for distinct legislation unless it is founded upon some natural, intrinsic, or constitutional distinction which bears some relation to, or furnishes a cause for, the particular legislation embraced in the statute. *Ex parte Sohneke* (Cal.), 7-475.

Municipal ordinances.—An ordinance is not invalid if it operates alike upon all persons similarly situated, except in case of those who acquired contract rights prior to its adoption. *J. Burton Co. v. Chicago* (Ill.), 15-965.

Exception of agricultural contracts.—A statute prohibiting the payment of wages for labor by order or check not redeemable in cash is not unconstitutional because containing an exception in favor of agricultural contracts or advances made for agricultural purposes. *Johnson, Lytle & Co. v. Spartan Mills* (S. Car.), 1-409.

19. SPECIAL LEGISLATION.

Sales in bulk act as class legislation, see **FRAUDULENT CONVEYANCES**, 3 a.
Statutes relating to Indians as class legislation, see **INDIANS**.

Prohibition confined to direct legislation.—The restrictions of the Pennsylvania constitution on special legislation apply to direct legislation only, and not to the incidental operation of statutes which are constitutional in themselves upon other subjects than those with which they deal directly. *Stull v. Reber* (Pa.), 7-415.

If a statute relates to persons, places, and things as a class, and is neither local nor temporary, the mere fact that its practical effect is special and private does not necessarily prove that it violates constitutional provisions against special legislation. *St. John v. Andrews Institute* (N. Y.), 14-708.

Laws regulating county or township business.—The construction of a courthouse by a county for county purposes is county business within the meaning of a constitutional provision prohibiting the legislature

from passing local or special laws regulating "county and township business," and a statute prohibiting the building of courthouses in counties having a prescribed population except upon the petition of a specified number of freeholders is a regulation of county business. *Kraus v. Lehman* (Ind.), 15-849.

Class legislation. — A statute that relates to persons or things as a class is a general law, and when conditions reasonably justify the distinguishing of a class, and the law affects equally all who come within that class, such law does not violate the constitutional provision against class legislation. *State v. Swagerty* (Mo.), 11-725.

Classification for purpose of regulation. — Assuming that in enacting a law upon a subject upon which local or special laws are expressly prohibited by the constitution the legislature may, by resorting to a classification, make a general law within the meaning of such prohibition, there must be reason or necessity for the classification which must inhere in the subject-matter and must be natural and not artificial, and the question whether the classification is reasonable or necessary is reviewable by the courts. *Kraus v. Lehman* (Ind.), 15-849.

Classification adopted for legislative regulation should have some just relation to, or reasonable basis in, essential differences of conditions and circumstances with reference to the subject regulated, and should not be merely arbitrary, and all similarly situated or having similar legal duties and obligations in regard to the subject regulated should be included in one class, at least where there are no practical differences that are sufficient to legally warrant a further or special classification in the interest of the general welfare. *Seaboard Air Line R. v. Simon* (Fla.), 16-1234.

The legality of classification adopted for legislative regulation may be determined with reference to the process of law provision of a state constitution; but as such determination involves a federal question the decisions of the supreme court of the United States control. *Seaboard Air Line R. v. Simon* (Fla.), 16-1234.

Classification according to population. — In a statute prohibiting the board of commissioners of every county having a population of more than twenty-five thousand from contracting for the construction of a new courthouse except upon the petition of five hundred of the freeholders of the county, the classification according to population is purely arbitrary, and such statute is therefore a special or local law within a constitutional provision prohibiting the legislature from passing local or special laws "regulating county and township business." *Kraus v. Lehman* (Ind.), 15-849.

Indiana statute regulating mode of payment of wages. — The Indiana statute regulating the time and mode of payment of wages is not unconstitutional as special legislation. *Seelyville Coal, etc., Co. v. McGlosson* (Ind.), 9-234.

20. DELEGATION OF LEGISLATIVE POWER.

In general. — The entire legislative power of the state is by the constitution vested exclusively in the legislature, and no part of that power can be transferred or delegated by the legislature to either of the other departments of the government. *State v. Butler* (Me.), 18-484.

Except as authorized by the constitution, the legislature cannot delegate power to make a law. *State v. Frear* (Wis.), 20-633.

The Wisconsin constitution, outside of article 4, section 22, and article 11, section 3, empowering the legislature to confer on boards of supervisors powers of a local legislative character, and requiring the legislature to provide for the organization of incorporated cities and villages, does not recognize any distinction between general and local laws, and no reason exists for applying a different rule to a local law from that applicable to a general law on the question whether either law shall not become operative until approved by the people. *State v. Frear* (Wis.), 20-633.

Referendum. — A referendum on any general law is constitutional, because the power to make the law is not thereby delegated to the electors. *State v. Frear* (Wis.), 20-633.

The legislature may enact conditional laws of a purely local nature, and refer the same to the people locally to decide whether the same shall become effective in the locality in which they reside. *State v. Frear* (Wis.), 20-633.

Creation of public office by governor. — Section 8 of chapter 92 of the Maine Public Laws of 1905, enacting that "the governor may, after notice to and opportunity for the attorney for the state for any county to show cause why the same should not be done, create the office of special attorney for the state in such county and appoint an attorney to perform the duties thereof" is unconstitutional and without any force of law for the reason that the creation of the office is left to the discretion of the governor contrary to the constitution. *State v. Butler* (Me.), 18-484.

Power to determine fact. — The legislature of a state may designate the power to determine some fact or state of things upon which a statute makes, or intends to make, its own action depend. *Elwell v. Comstock* (Minn.), 9-270.

The legislature, though having no right to delegate its power to make a law, can make a law to become operative on the happening of a certain contingency, or on the ascertainment of a fact on which the law makes or intends to make its own action depend. *State v. Frear* (Wis.), 20-633.

Power to fix rates. — The New York statute enacting that there shall be maximum rates for the charges of gas and electric light companies, and conferring on a commission to be appointed by the governor the duty to investigate, determine, and fix, upon complaint of municipal authorities or consumers, and after a public hearing, a rea-

sonable maximum rate to be charged in the particular case, is not unconstitutional as delegating to an administrative body legislative and administrative powers, or as blending legislative and administrative powers in the same officers in violation of the provision of the Federal Constitution guaranteeing to every state a republican form of government. *Saratoga Springs v. Saratoga Gas, etc., Co.* (N. Y.), 14-606.

Such statute, in providing that the commission for fixing gas and electric light rates shall fix the rates within the limits prescribed by law, refers to both statute and common-law limitations and thus requires that the rates shall be reasonable, and therefore the act is not objectionable as committing to an administrative board arbitrary power to determine the tariff of rates. *Saratoga Springs v. Saratoga Gas, etc., Co.* (N. Y.), 14-606.

Such statute, in providing that on written complaint being made as to the illuminating power, purity, pressure, or price of gas or electricity sold by any company, the commission shall investigate the cause of complaint, and may by its agents and inspectors inspect the works, plants, and books of the company, and providing for a public hearing, that notice of the complaint shall be served on the corporation affected thereby and that both the complainants and the corporation shall have an opportunity to be heard and to be represented by counsel, and giving the commission power to subpoena witnesses, take testimony, and administer oaths in any proceeding or examination instituted before it or conducted by it under the provisions of the act, and providing that orders of the commission on its own notice or without complaint shall be made only after reasonable notice to the corporation to prepare its defense or objection to the demands of the commission, contemplates that the investigation and report of agents and inspectors are to follow the filing of any complaint and to precede or to be made during the public hearing, and that the whole proceeding shall assume a quasi-judicial aspect, and is not objectionable as authorizing orders by the commission based not only on the evidence and proceedings had at the public hearing but on the *ex parte* statements of the officers, agents, and inspectors of the commission which the company may have no knowledge or opportunity to controvert, *Saratoga Springs v. Saratoga Gas, etc., Co.* (N. Y.), 14-606.

The provision of such statute which empowers the appellate division of the supreme court to review the orders of the commission is not open to the objection that it confers nonjudicial functions on the reviewing court. *Saratoga Springs v. Saratoga Gas, etc., Co.* (N. Y.) 14-606.

Power to determine qualification for license.—The Oregon statute providing for the licensing of barbers is not unconstitutional as a delegation of legislative power because it vests authority in a board of examiners to prescribe the qualifications of barbers. *State v. Briggs* (Oregon), 2-424.

21. STATUTES CONFERRING JUDICIAL FUNCTIONS.

Kansas anti-trust act.—A proceeding before a court or judge upon the application of the prosecuting attorney under the Kansas anti-trust law of 1897 to subpoena witnesses to testify of their knowledge of the violations of the provisions of such act is a valid exercise of judicial power, and the procedure is due process of law within the Federal Constitution. *State v. Jack* (Kan.), 2-171.

Nonjudicial bodies.—No provision of the Federal Constitution directly or impliedly prohibits a state from conferring upon nonjudicial bodies functions of a judicial nature. *Consolidated Rendering Co. v. Vermont* (U. S.), 12-658.

The Washington statute making it unlawful for any person to sell railway tickets unless he has a certificate from the railway company showing his authority so to do is not open to the objection that, by empowering railroad companies to issue or withhold certificates of authority at their own will, it delegates to such companies the power to create crimes and to say who are criminals. *In re O'Neill* (Wash.), 6-869.

22. AMENDATORY LEGISLATION.

Modification of existing laws by general statute.—Changes or modifications of existing statutes as an incidental result of a new law covering the entire subject are not forbidden by section 11, article III, of the Nebraska constitution. *Eaton v. Eaton* (Neb.), 1-199.

23. UNWISE, UNJUST, OR IMPOLITIC LEGISLATION.

In general.—The constitutionality of a legislative act can be determined only by reference to constitutional restraints and no statute will be held void because unwise or unjust in the opinion of the court. *Block v. Schwartz* (Utah), 1-550.

If it is within the power of the legislature to enact a statute, the courts will not declare the statute invalid merely because it may seem harsh and unreasonable. *State v. Swagerty* (Mo.), 11-725.

It is for the legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defense and benefit of the people; and however inconvenienced, restricted, or even damaged particular persons and corporations may be, such general laws and regulations are to be held valid unless there can be pointed out some provision in the state or United States Constitution which clearly prohibits them. *Opinion of Justices* (Me.), 13-745.

When the legislature has constitutional authority to enact a law to promote the public safety, and does enact it, the expediency of its enactment is not to be passed upon by the court. In such case the legislature determines by the enactment that the law is reasonable and necessary. *State v. Mayo* (Me.), 20-512.

The reasonableness of a penalty for the failure to perform a public duty is primarily for the judgment of legislators, and courts will not interfere with the discretion of the legislature in this regard as long as it keeps within the fair and reasonable scope of its powers. If such liabilities are considered inexpedient or illogical the court cannot say the legislature has transcended its power. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

Contravention of public policy.—The courts will not declare a constitutional statute void as against public policy, as a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned. *Board of Park Com'rs v. Diamond Ice Co.* (Iowa), 8-28.

Motive not subject to judicial inquiry.—The purpose and motive of Congress in exercising its lawful legislative powers is not a subject for judicial inquiry. *McCray v. United States* (U. S.), 1-561.

Questions relating to the wisdom, policy, and expediency of statutes are for the legislature and not for the courts to determine. *Ex p. Boyce* (Nev.), 1-66.

Statute imposing burden on trade or business.—The fact that a statute or ordinance which may reasonably be regarded as conducive to the public welfare regulates a trade or business or lays some burden upon it does not render it unconstitutional. *Indiana R. Co. v. Calvert* (Ind.), 11-635.

Regulation under police power.—When any measure adopted by the legislative department of the state has a real and substantial relation to the police power, the courts may not vacate the same upon the ground that it is unreasonable or unwise. *State v. Hyman* (Md.), 1-742.

24. SELF-EXECUTING CONSTITUTIONAL PROVISIONS.

See also CHANGE OF VENUE, 1 a; MUNICIPAL CORPORATIONS, 2.

What provisions are self-executing, in general.—When a provision of a constitution is self-executing. *Newport News v. Woodward* (Va.), 7-625.

The provision of the Virginia constitution concerning the suspension and removal of policemen is not self-executing. *Newport News v. Woodward* (Va.), 7-625.

Statute prohibiting miscegenation.—A constitutional provision, prohibiting marriages between white persons and persons having one-eighth, or more, negro blood, is self-acting, in the absence of any other provision in the same instrument limiting its operation. *Succession of Gabisso* (La.), 12-574.

Initiative and referendum.—The initiative and referendum provisions of the Oklahoma constitution are not self-executing, but are made effective by an act of the legislature approved April 16, 1908. *Ex p. Wagner* (Okla.), 18-197.

Until the initiative and referendum provisions. 1-20 — ANN. CAS. DIGEST. — 33.

visions of the Oklahoma constitution were made effective by legislation, a petition for a referendum of an ordinance filed with the chief executive officer of a municipality of the first class was of no effect. *Ex p. Wagner* (Okla.), 18-197.

Effect upon prior inconsistent statute.—A constitutional provision is self-executing as to, and *proprio vigore* annuls, an inconsistent act of the legislature passed prior to its adoption. *Monaghan v. Lewis* (Del.), 10-1048.

25. GENERAL PRINCIPLES GOVERNING DETERMINATION AS TO CONSTITUTIONALITY OF STATUTES.

a. Who may raise constitutional question.

A litigant who is not shown to have been prejudiced by the enforcement of an act of the legislature is not in position to assail such act on the ground of its being unconstitutional. *Cram v. Chicago, etc., R. Co.* (Neb.), 19-170.

Who may question constitutionality of ordinances, see MUNICIPAL CORPORATIONS, 5 f (1).

Until the highest court of Massachusetts has decided that the Massachusetts compulsory vaccination law establishes an absolute rule that an adult must submit to vaccination, though by reason of his physical condition he is not a fit subject thereof, the United States supreme court will not hold such statute unconstitutional at the instance of an adult who has refused to obey it, but who fails to show that he was not a fit subject of vaccination at the time of the refusal to obey. *Jacobson v. Massachusetts* (U. S.), 3-765.

b. Duty of courts to maintain constitution.

Statute clearly unconstitutional.—While an act of the legislature should not be held unconstitutional except in cases where the conflict between the legislative act and the constitution is clear and irreconcilable by any reasonable interpretation, yet when there is such a conflict as in the case at bar, the court must declare the act void, for the duty of the court to maintain the constitution as the fundamental law of the state is imperative and unceasing. *State v. Butler* (Me.), 18-484.

c. Presumption in favor of constitutionality. See also STATUTES, 2.

In general.—The acts of the legislature are presumed to be valid until it is clearly shown that they violate some constitutional restriction. *Ex p. Boyce* (Nev.), 1-66.

The presumption always is that an act of the legislature is constitutional; and when the constitutionality of an act depends upon the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the legislature, and the courts will acquiesce in the legislature's de-

cision unless it appears to be clearly erroneous. *In re Spencer* (Cal.), 9-1105.

There are no limitations upon the power of the legislature in South Dakota except such as are imposed by the state and federal constitutions, and no legislative act should be declared unconstitutional if there is any reasonable doubt of its invalidity and if it is susceptible of any reasonable construction consistent with the constitution. *In re Watson* (S. Dak.), 2-321.

A statute should not be declared unconstitutional unless it clearly runs counter to the letter or the spirit of some provision of the state or federal constitution. *State v. Frear* (Wis.), 20-633.

A liberal rule of construction should be applied when the constitutionality of a statute is questioned and every reasonable doubt should be resolved in favor of the validity of the statute assailed. The court should, in deference to the legislative department of the government, uphold a statute alleged to be unconstitutional, unless it is clearly made to appear beyond a reasonable doubt that the statute is unconstitutional. *Atlantic Coast Line R. Co. v. Coachman* (Fla.), 20-1047.

All doubts as to the constitutionality of a statute should be solved in its favor. *Ex p. Berry* (S. C.), 20-1344.

Statute in force for many years. — A state court will not declare a statute unconstitutional unless its invalidity is clear, certain, and beyond question, where the statute has been regarded as valid and has been enforced without question as to its constitutionality by the court and other courts of the state for about fifty years. *Hill v. Tohill* (Ill.), 8-423.

Compulsory vaccination act. — It will be presumed that a state legislature when enacting a compulsory vaccination statute knew of the theory against vaccination and deliberately adopted the opposite theory, and it is therefore not error to reject an offer to prove the inadvisability of vaccination, as the discretion of the legislature in adopting the latter theory will not be reviewed by the courts. *Jacobson v. Massachusetts* (U. S.), 3-765.

Statute prohibiting sale of cigarettes. — That the Indiana statute prohibiting the sale, etc., of cigarettes was not designed to apply to the act of smoking cigarettes, or to the act of having them in possession for the sole purpose of smoking, is shown by the fact that if the statute could be construed as prohibiting such acts it would be unconstitutional as to persons importing cigarettes in original packages for personal consumption, and that construction would violate the rule that the statute should be so construed if possible as to prevent it from being unconstitutional under any circumstances. *State v. Lowry* (Ind.), 9-350.

d. Declaring statute unconstitutional in part.

In general. — A statute may be unconstitutional and void as to its application to a part of its subject-matter, and valid as to other parts. *Woods v. Carl* (Ark.), 5-423.

Independent provisions. — An unconstitutional section of a statute, if it is so independent of other sections as not to affect their constitutionality, may be declared void without invalidating the entire statute. *Fite v. State* (Tenn.), 4-1108.

Though certain sections of an ordinance are unconstitutional, if the general object of the enactment is not affected thereby, a severable section will not be rendered invalid by the unconstitutionality of the others. *St. Louis v. Liessing* (Mo.), 4-112.

Nonseparable provisions. — Where a statute is partially unconstitutional, and the obnoxious section or part is of such import that the other sections or parts, without it, would cause results not contemplated or desired by the legislature, the entire statute must be held void. *State v. Patterson* (Fla.), 7-272.

Where the unconstitutional provisions of a statute are not separable from those which are valid, in such a way as to raise the presumption that the legislature would have enacted the valid without the invalid portion, the statute will not be enforced even as to that portion which standing alone would be valid. *Commonwealth v. Hana* (Mass.), 11-514.

In case of a scheme of legislation for a particular purpose, created by the enactment of a law specially referring to the subject, and to other laws required for a complete plan, if the special enactment is the inducing provision and is unconstitutional, the whole is inefficient. The matter is governed by the rule that where a part of the law is unconstitutional and was the inducement to the rest, which by itself would not have been enacted, the whole is void. *Huber v. Martin* (Wis.), 7-400.

If a statute is unconstitutional as to a part so connected with the general scope of the statute that it cannot be separately enforced, the whole statute is invalid. *International Text-book Co. v. Pigg* (U. S.), 18-1103.

Penal statutes. — A highly penal statute must be declared void as a whole, where a portion of it is unconstitutional and the legislative intent cannot be given effect by sustaining and enforcing the valid portions. *State v. Cudahy Packing Co.* (Mont.), 8-717.

26. INTERPRETATION AND CONSTRUCTION OF CONSTITUTIONS.

a. In general.

Recourse to common law. — In interpreting the Federal Constitution, recourse must be had to the aid of the common law. *South Carolina v. United States* (U. S.), 4-737.

Supplying omissions. — The courts cannot supply what they deem to be unwise omissions from the constitution. *State v. Frear* (Wis.), 20-633.

Implied provisions. — That which is implied is as much a part of the Federal Constitution as that which is expressed. *South Carolina v. United States* (U. S.), 4-737.

Consideration of changed conditions.

— While the Federal Constitution is a written instrument, the meaning of which does not alter, it must be so applied as to meet changed conditions embracing new conditions which are within the scope of powers in terms conferred. *South Carolina v. United States* (U. S.), 4-737.

Consideration of surrounding facts and circumstances.— In construing a constitutional provision, the rule *expressio unius est exclusio alterius*, like all other mere rules of construction applied to ambiguous words, yields to proof of surrounding facts and circumstances which satisfactorily demonstrates that the meaning intended by the parties was different. *Nunnenmacher v. State* (Wis.), 9-711.

Provision requiring enactment of laws.— The provision of the Nevada constitution requiring the legislature to enact laws for the removal of public officers guilty of malfeasance or nonfeasance does not authorize the legislature, in passing such laws, to disregard other provisions of the constitution applicable to the enactment of laws. *Bell v. First Judicial District Court* (Nev.), 6-982.

Declaration of purposes of civil government.— The general declaration in the constitution of the purposes of civil government is a limitation upon legislative power, designed, in part at least, to prevent clearly unreasonable enactments restricting natural rights. *State v. Redmon* (Wis.), 15-408.

Weight of practical construction by administrative officers.— In case of an ambiguous law being executed by administrative officers as having a particular meaning which is reasonable, such practical construction is entitled to more or less weight, according to circumstances, in determining the intent of the lawmakers. Where such practical construction has obtained uninterruptedly for a very long period, particularly so long as fifty years, it is entitled to controlling weight in determining such intent. *State v. Frear* (Wis.), 16-1019.

Consideration of contemporaneous judicial decisions.— Where it appears that at the time of the adoption of a constitutional provision the judicial decisions on the subject were uniform, the court will, in the absence of anything indicating a contrary view, assume that the framers of the constitution intended the rule of interpretation then in vogue to be applied to it. *Johnson v. Great Falls* (Mont.), 16-974.

Scope, effect and purpose of statute.

— In passing upon the constitutionality, under the United States Constitution, of a state statute, regard must be had to the scope and effect of the statute and the results it was intended to accomplish, in ascertaining which the United States supreme court will follow the decision of the state court. *Jacobson v. Massachusetts* (U. S.), 3-765.

b. Proceedings of constitutional convention.

Right of courts to examine.— Courts are justified in examining the proceedings of the constitutional convention in order to de-

termine the meaning of a doubtful provision of the constitution. *Sanipoli v. Pleasant Valley Coal Co.* (Utah), 10-1142.

c. Contemporaneous legislative construction.

Weight and effect.— Where, under identical provisions in two successive state constitutions exempting "manufacturers" from license taxation, the legislature has for more than twenty years imposed license taxes on the business of gas, electric, waterworks, telegraph, and telephone companies, such construction is entitled to great weight. *State v. New Orleans R., etc., Co.* (La.), 7-724.

The construction given by the legislature to the constitutional provisions dealing with legislative procedure is, though not conclusive, entitled to great weight. *Johnson v. Great Falls* (Mont.), 16-974.

27. AMENDMENT OF CONSTITUTIONS.

Method of submitting to electors.—

When a constitution is silent as to the manner of submitting a proposed amendment to the electors, the method is subject to legislative control, and a general statute requiring the substance of a proposed amendment to be printed upon the ballot is not controlling when the joint resolution of the legislature submitting an amendment contains explicit provisions as to what the ballots shall contain. *People ex rel. Board of Supervisors v. Loomis* (Mich.), 3-751.

Entry on legislative journals.— A requirement of the Michigan constitution as to the entry of a proposed amendment to the constitution on the legislative journals held to have been duly complied with. *People ex rel. Board of Supervisors v. Loomis* (Mich.), 3-751.

Necessity of approval by governor.

— A proposition to amend the constitution, when formulated by the general assembly in the manner prescribed by the Maryland constitution and when no measures which are distinctively and essentially legislative in their nature are appended to it, does not require the approval of the governor before it can be voted on by the people, and the governor has no authority to veto it. *Warfield v. Vandiver* (Md.), 4-692.

A proposed constitutional amendment which differs somewhat in phraseology from, but which is substantially in compliance with, the form required by law, does not embody such a legislative enactment as to be inoperative without the governor's approval. *Warfield v. Vandiver* (Md.), 4-692.

Publication by governor.— If the governor refuses to publish a proposed constitutional amendment as required by the Maryland constitution, mandamus may be issued commanding such publication. *Warfield v. Vandiver* (Md.), 4-692.

Compliance with constitutional requirements.— A question submitted as a constitutional amendment does not become a constitutional amendment unless submitted and adopted in accordance with the provisions of the constitution. *Utter v. Moseley* (Idaho), 18-723.

The self-imposed limitations on the power of the people to amend their fundamental law should not be so construed as to defeat the will of the people, plainly expressed, on account of a slight and unimportant failure to comply literally with such limitations, if the requirements are substantially observed. *State ex rel. Thompson v. Winnett* (Neb.), 15-781.

Where there has been a substantial compliance with a constitutional requirement that proposed amendments to the constitution shall be "published once each week in at least one newspaper in each county where a newspaper is published, for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection," the fact that in one county of the state the publication was made for one week less than the required time will not invalidate the amendment. *State ex rel. Thompson v. Winnett* (Neb.), 15-781.

Voting on proposed amendments. — Under the Nebraska constitution the manner of voting upon a constitutional amendment and the general conduct of the election are for the legislature to provide, subject to the limitation that "when more than one amendment is submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately;" and when the legislature by resolution submits such question at a general election, as required by the constitution, it will be presumed that the legislature intends that the requirements of the general election law are to be observed. *State ex rel. Thompson* (Neb.), 15-781.

It is not necessary that the entire proposed amendment shall be printed upon the official ballot. If enough is printed upon the ballot to identify the amendment and to show its character and purpose, it is sufficient. *State ex rel. Thompson* (Neb.), 15-781.

The Nebraska statute of 1901 amending various sections of the general election law so as to provide for counting straight party votes when such party has indorsed such amendment, does not violate the provisions of the Nebraska constitution relating to amendments thereto. It is within the power of the legislature to make such a regulation. *State ex rel. Thompson v. Winnett* (Neb.), 15-781.

Effect upon existing statutes. — A state statute is not superseded by a provision in a subsequent constitution covering the same subject-matter, unless the constitutional provision is self-executing. *Newport News v. Woodward* (Va.), 7-625.

Conflict between contemporaneous amendments. — Where a section of the constitution is amended at the same time by two different amendments and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the constitution or to reconcile the same, then they must both fail. *Utter v. Moseley* (Idaho), 18-723.

If, however, one of such proposed amendments is not submitted in accordance with the provisions of the constitution and is not adopted or made a part of the constitution, and the other amendment is regularly submitted in accordance with the provisions of the constitution and adopted, then there can be no conflict between two amendments, and the latter will not fail because of conflict. *Utter v. Moseley* (Idaho), 18-723.

The rule of law that where two conflicting amendments are adopted at the same time, they both must fail, is based upon the assumption that both amendments are regularly submitted and adopted in accordance with the provisions of the constitution and are amendments to the constitution. *Utter v. Moseley* (Idaho), 18-723.

28. PLEADING AND PRACTICE.

Admission of invalidity of law. — A party cannot admit the invalidity of a law by a failure to deny the allegation that the law was not constitutionally enacted. *Adams v. Clark* (Colo.), 10-774.

Raising constitutional question by demurrer. — Where an action under the Federal Employers' Liability Act of 1908 (Act of April 22, 1908, c. 149, 35 St. L. 65, Fed. St. Ann. Supp. 1909, p. 584) is brought in a state court, a demurrer to the complaint on the general ground that the statute is unconstitutional is properly sustained, since the invalid portions of the statute are not capable of being separated from the remainder. In such a case it is not material that the demurrer fails to specify the particular grounds upon which the constitutionality of the statute is attached. *Hoxie v. New York, etc., R. Co.* (Conn.), 17-324.

Proof where question of fact is involved. — Where a party seeks to question the constitutionality of a statute, upon a ground which involves a question of fact, he must in some appropriate way raise it in the trial court and present the testimony upon which he relies to establish such fact. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

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1. CONDUCT CONSTITUTING CONTEMPT.

a. Defamation or criticism of court.

Common-law power to punish. — The Vermont statute (Pub. St., § 5898) providing that any person who defames a court or the judge of a court as to an act or sentence passed therein shall be fined in a certain amount does not abrogate the common-law power of the court to punish for such a contempt. *State v. Hildreth* (Vt.), 18-661.

After final determination of action. — Every citizen has the right to comment upon and criticise without any restriction the rulings of a judicial officer in an action which has been finally determined, and is not answerable therefor otherwise than in an action triable by a jury. *State Board v. Hart* (Minn.), 15-197.

It is a contempt at common law to scandalize a court of record by a newspaper publication in respect to its decision in a case no longer pending. *State v. Hildreth* (Vt.), 18-661.

Performance of ministerial duties.

— A court has no power to punish for contempt one who publishes a libelous article relating to the performance by a judge of his ministerial functions. *Hamma v. People* (Colo.), 15-655.

Truth as justification. — In a prosecution for contempt consisting in the publication of articles reflecting upon the motives and conduct of the court in reference to cases pending therein, the defendant has no right, under any provision of the Federal Constitution, to justify the publication of the articles complained of by proving the truth thereof. *Patterson v. Colorado ex rel. Attorney General* (U. S.), 10-454.

b. Contempt by newspaper publication.

Statements calculated to intimidate witnesses. — The publication of newspaper articles the first of which appears two days before the trial of a cause begins, but after it has been set for trial, which assumes to state the evidence to be produced upon the trial with improper comment thereon, and which reflects upon the parties to the action with an improper expression of opinion as to the merits of the controversy, and the second of which is a full-page illustrated article appearing during the trial, which purports to relate to what is transpiring on the trial, but which misstates the occurrences of the trial and the evidence, and which makes statements calculated to intimidate possible witnesses and comments improperly upon the case, amounts to a contempt of court. *State v. Howell* (Conn.), 13-501.

Disclosing evidence procured by state. — A publication in a newspaper rela-

tive to a criminal prosecution disclosing the efforts of the state's attorneys in the examination and preparation of evidence held to constitute a contempt of court. *Globe Newspaper Co. v. Com. (Mass.)*, 3-761.

Article not seen by court or jury. — It is not necessary, in order to constitute a contempt by the publication of articles calculated to interfere with the fair trial of a pending cause and thus obstruct justice, that the articles should actually reach the eyes of the court or jury. *State v. Howell (Conn.)*, 13-501.

Necessity that cause be pending. — A publication in a newspaper relative to a criminal prosecution held to relate to a pending cause. *Globe Newspaper Co. v. Com. (Mass.)*, 3-761.

Necessity of criminal intent. — It is not essential to a contempt of court by the newspaper publication of articles improperly commenting upon a cause on trial and tending to prevent a fair trial and obstruct the administration of justice, that the publication should have been made with any criminal intent or intent to interfere with the due course of justice in the disposition of the cause. *State v. Howell (Conn.)*, 13-501.

Truth as justification. — A newspaper paragraph relative to a criminal prosecution disclosing and commenting on the evidence is not justified by showing that the statements were true and that the publication was made without intent to injure the parties, to reflect upon the dignity of the court, or to interfere with the administration of justice. *Globe Newspaper Co. v. Com. (Mass.)*, 3-761.

c. Attempt to influence jurors.

In general. — Facts showing an attempt to influence jurors held to amount to criminal contempt. *Hurley v. Com. (Mass.)*, 3-757.

Attempt out of court's presence. — Under a statute providing that any unlawful interference with the process or proceedings of a court shall be a contempt of the authority of such court, an attempt, out of the court's presence, to influence the vote of a juror who is a member of the panel from which the jury is to be selected, is a constructive contempt. *State ex rel. Webb v. District Court (Mont.)*, 15-743.

d. Resistance to process of court.

In general. — Resistance wilfully offered by any person to a lawful process of the court is punishable as criminal contempt under the code, but one cannot be convicted under this statute of the wilful resistance of a search warrant of which he had no notice or knowledge at the time the resistance was made. *State ex rel. Register v. McGahey (N. Dak.)*, 1-650.

Void search warrant. — The process of the court, resistance of which when wilfully offered is punishable as a contempt, must be a lawful process, and resistance of a void search warrant is not punishable as a contempt. *State ex rel. Register v. McGahey (N. Dak.)*, 1-650.

e. Disobedience of order or mandate of court, in general.

Order of appellate court. — The United States supreme court has power to punish for contempt a person who has disobeyed one of its orders pending an appeal from the United States circuit court in a proceeding wherein the circuit court has denied a petition for *habeas corpus* filed after the conviction of the petitioner in a state court for violation of the criminal law of the state, though the circuit court had no jurisdiction to entertain the petition, and though the supreme court has no jurisdiction of the appeal. *United States v. Shipp (U. S.)*, 8-265.

Order made without jurisdiction. — A United States court has no power to punish a party to an action for contempt for disobeying an order made without jurisdiction. *Drew v. Hogan (D. C.)*, 6-589.

Subpoena issued by district attorney. — A subpoena issued by the district attorney for the appearance of a witness before the grand jury is a mandate of the court within the meaning of the New York statute (Code Civ. Pro., § 8) defining criminal contempts as wilful disobedience to or resistance of a lawful mandate of the court. *People ex rel. Drake v. Andrews (N. Y.)*, 18-317.

Advising disobedience of mandate. — One who advises a witness to disobey a subpoena *duces tecum* in a criminal case is guilty of a criminal contempt defined by the New York statute (Code Civ. Pro., § 8) as resistance wilfully offered to the lawful mandate of the court, and it is immaterial that the witness does not follow such advice. *People ex rel. Drake v. Andrews (N. Y.)*, 18-317.

f. Disobedience of order to pay money.

Order for payment of alimony. — It is a civil and not a criminal contempt for a person to fail to comply with an order of the court requiring him to pay money for his wife's support. *Perry v. Pernet (Ind.)*, 6-533.

An imprisonment for contempt, imposed by a court of competent jurisdiction, for the contemnor's failure to comply with an order of the court to pay money for his wife's support, is not an imprisonment for debt within the meaning of the Indiana constitution. *Perry v. Pernet (Ind.)*, 6-533.

Imprisonment of woman. — A woman may be imprisoned for contempt for refusing to pay a specific fund over to her husband as ordered in a decree granting her a divorce, notwithstanding the provisions of the Michigan constitution and statutes prohibiting imprisonment for debt and the provision of the Michigan statutes that "no female shall be imprisoned on any process in any civil action." *Carnahan v. Carnahan (Mich.)*, 8-53.

g. Violation of injunction.

Person not served with order. — A member of an unincorporated association who disobeys an injunction against the association and its members, of which he has knowledge, is guilty of criminal contempt, though not a

party to the action and not personally served with the injunction order. *People ex rel. Stearns v. Marr* (N. Y.), 3-25.

Person not party to suit. — A person not a party to an injunction may be punished for doing the things enjoined, where he acted as the defendant's agent with knowledge of the injunction, and aided and abetted the defendant in disobeying it. *Ex p. Testard* (Tex.), 20-117.

Dissolved injunction. — Where a bill for an injunction has been dismissed and a preliminary injunction dissolved, the petitioner cannot further prosecute the respondent for contempt for a violation of the dissolved injunction. *Old Dom. Tel. Co. v. Powers* (Ala.), 1-119.

Violation pending appeal. — It is a contempt to disobey a permanent injunction pending an appeal from the decree granting it, as the appeal does not dissolve the injunction. *Wilkinson v. Dunkley-Williams Co.* (Mich.), 7-40.

An appeal having been taken to the Ohio circuit court from a judgment of the common pleas granting a perpetual injunction, a subsequent violation of the decree should be punished as a contempt by the circuit court, the statute providing that notwithstanding the appeal the injunction shall continue in force until suspended by the circuit court or two judges thereof. *Menuet v. Grimes Candy Co.* (Ohio), 11-1037.

Injunction improperly granted. — Where a court grants a restraining order without requiring the undertaking prescribed by its rules as a condition precedent, the defendants may disobey the order without rendering themselves liable to punishment for contempt. *Drew v. Hogan* (D. C.), 6-589.

h. Disclosure of evidence by grand juror.

Disclosure after discharge of grand jury. — Even if the oath of a grand juror should be held to require perpetual secrecy on his part, the United States circuit or district court is not, under the Act of Congress limiting the power of federal courts to punish for contempt, authorized to attach for contempt a grand juror who discloses evidence which has been adduced before the grand jury, where the disclosure does not occur until after the grand jury has been discharged from further service. *Atwell v. United States* (U. S.), 15-253.

i. Filing of motions.

Motion suggesting disqualification of judge. — The filing of a motion suggesting the disqualification of the judge on a ground such as his relationship to a person directly interested in the subject-matter of the litigation, which does not reflect on his integrity or impartiality, is not a contempt of court, even if the suggested ground is not in law a disqualification. *Johnson v. State* (Ark.), 15-531.

Vexatious or dilatory motion. — Unless a motion is presented in a disrespectful or contemptuous manner or in violation of

the court's orders so as to amount to an obstruction of the administration of justice, or unless such motion contains matter which of itself constitutes a contempt, the court cannot treat such motion as contemptuous merely because it is thought to be vexatious or dilatory. *Johnson v. State* (Ark.), 15-531.

j. Acts obstructive of justice.

Murder of convicted person pending appeal. — Where, after a justice of the supreme court of the United States has allowed an appeal from an order of a federal circuit court denying a writ of *habeas corpus* applied for by a person convicted of murder in a state court and has ordered that all proceedings against the appellant shall be stayed pending the appeal, the appellant is murdered by persons who are unwilling to submit to the delay required for the trial of the appeal, the persons participating in the murder are guilty of a contempt against the supreme court. *United States v. Shipp* (U. S.), 8-265.

k. Contempt in presence of court.

Acts committed during recess. — The action of the defendant in a prosecution in a town court for a violation of the liquor law, in purloining from the lawyer's table in the court room the bottle of whiskey alleged to have been illegally sold by him, and which has been produced in court by the prosecuting attorney as an exhibit in the case, and substituting therefor a bottle of ginger ale, during a recess taken for the purpose of procuring an interpreter, and while the presiding judge is in his retiring room immediately adjoining the court room, constitutes a criminal contempt in the presence of the court. *McCarthy v. Hugo* (Conn.), 17-219.

Refusal of witness to answer. — In an action for slander based upon statements alleged to have been made by the defendant concerning the plaintiff to the grand jury and to the district attorney, it is proper for the trial court to refuse to punish the defendant as for contempt for refusing to disclose such statements. *Schultz v. Straus* (Wis.), 7-528.

2. POWER TO PUNISH.

Inherent power of court. — Having given the offending party an opportunity to be heard, the court has an inherent right to punish as for a contempt the violation of an order lawfully made to maintain its dignity, authority, and efficiency in the administration of the law. *Ex parte Beville* (Fla.), 19-48.

The circuit court of St. Louis was created by the constitution and not by the legislature, and therefore the statute which provides that in contempt cases a fine shall not exceed fifty dollars, nor a term of imprisonment ten days, is unconstitutional and void as applied to that court. *Chicago, etc., R. Co. v. Gildersleeve* (Mo.), 16-749.

Committing magistrates. — A committing magistrate or justice of the peace has no inherent power to punish witnesses for contempt. *Farnham v. Colman* (S. Dak.), 9-314.

The South Dakota statutes do not give a committing magistrate power to punish for contempt a witness who appears and testifies but who refuses to produce papers called for by a subpoena *duces tecum*. *Farnham v. Colman* (S. Dak.), 9-314.

Legislative committees. — The power of a legislative committee to punish a witness for contempt. *Ex parte Parker* (S. Car.), 7-874.

Town court. — Under the statutes of Connecticut a town court has power to punish a criminal contempt in the presence of the court by fine and imprisonment. *McCarthy v. Hugo* (Conn.), 17-219.

Judge other than one making order. — Contempts of court being punished as offenses against the administration of justice and not as personal affronts to those who exercise judicial functions, it is not indispensable that the violation of an injunction should be punished by the judge who made the decree. *Menuet v. Grimes Candy Co.* (Ohio), 11-1037.

Legislative regulation of power. — The right of punishment for contempt is inherent in every constitutional court having common-law powers, and such courts cannot be shorn of that power by the legislative branch of the state government. *Chicago, etc., R. Co. v. Gildersleeve* (Mo.), 16-749.

The legislature has no power to abridge, limit, or regulate, in any manner whatever, the power of a constitutional court to punish for contempt. *Chicago, etc., R. Co. v. Gildersleeve* (Mo.), 16-749.

3. PROCEEDINGS FOR PUNISHMENT.

a. How instituted.

Nature of process. — The process in contempt proceedings is criminal and not civil in its nature. *Carnahan v. Carnahan*. (Mich.), 8-53.

Institution by information. — Proceedings for the punishment of contempts should generally conform as nearly as possible to proceedings in criminal cases, and when witnesses are required to prove the act of contempt, it is proper for an informing officer to bring the offense to the attention of the court. *McCarthy v. Hugo* (Conn.), 17-219.

Institution by affidavit. — Although a grand jury when in session and in attendance on business connected with the court is an adjunct or appendage of the court, yet it is not a part of the court within the contemplation of the Nevada statute (Comp. Laws, § 3556) so as to authorize a judge summarily to punish an act committed before the grand jury as an act committed in the "presence of the court," and it is necessary in such case to proceed against the offender by affidavit and give him an opportunity to show cause why he should not be punished. *Ex parte Hedden* (Nev.), 13-1173.

Service of rule to show cause. — A rule to show cause why a person shall not be adjudged guilty of contempt must be

served in person on the party charged. *Ex p. Mylius* (W. Va.), 11-812.

b. Parties.

Court not a party. — In contempt proceedings based on an act committed outside the court room and out of the presence of the judges, the court is not a party, as there is nothing that affects the judges in their own persons. *United States v. Shipp* (U. S.), 8-265.

c. Sufficiency of affidavit or complaint.

In general. — In the absence of a statute prescribing the form in which one accused of a contempt of court must be charged therewith, a general and substantial statement of the facts constituting the alleged contempt is sufficient to give the court jurisdiction. *State ex rel. Webb v. District Court* (Mont.), 15-743.

In contempt proceedings for the violation of an injunction against persons having actual knowledge of the injunction writ and its contents, it is not necessary that the petitions and affidavits shall set out the charges against the alleged contemnors with the same particularity that would be required in an indictment. *O'Brien v. People* (Ill.), 3-966.

Allegation of intent. — In a contempt proceeding wherein the intent is part of the act which is alleged to constitute a contempt of court, as where it is alleged that the person charged with contempt in attempting to influence the vote of a juror took steps to convey the information to the juror that he would reward him and other jurors if they would render a favorable verdict, the intent need not be alleged specifically. *State ex rel. Webb v. District Court* (Mont.), 15-743.

Affidavit upon information and belief. — An affidavit upon information and belief is insufficient as a basis for constructive contempt proceedings, and under such an affidavit the court acquires no jurisdiction to issue an attachment for contempt. *State ex rel. Harvey v. Newton* (N. Dak.), 14-1035.

Such want of jurisdiction is not waived by pleading guilty to the charge thus insufficiently alleged. *State ex rel. Harvey v. Newton* (N. Dak.), 14-1035.

Unverified complaint. — While an indirect contempt is usually brought to the knowledge of the court by an affidavit setting forth the facts, a formal complaint stating facts amounting to an indirect criminal contempt made by the assistant district attorney, he being an officer of the court duly sworn to the proper performance of duties, is a sufficient basis for judicial action though not verified. *Hurley v. Com.* (Mass.), 3-757.

d. Right to jury trial.

Constructive contempt. — The defendants in a proceeding for constructive contempt are not entitled to trial by jury. *O'Flynn v. State* (Miss.), 11-530.

Violation of injunction. — In a proceeding to punish for contempt for the violation of an injunction, the persons charged with

contempt are not entitled to trial by jury, notwithstanding the existence of a statute providing for trial by jury in every case where the judgment is to be satisfied by imprisonment. *O'Brien v. People* (Ill.), 3-966.

e. Defenses.

Inability to comply with order. — Inability to comply with an order of court is a good defense to a charge of contempt of court in failing to obey such order, unless it appears that the person charged has voluntarily and contumaciously brought the disability upon himself. *State ex rel. McLean v. District Court* (Mont.), 15-941.

f. Evidence.

(1) Admissibility.

Affidavits. — On a hearing before a judge in a proceeding for contempt for the violation of a restraining order granted on application for an injunction, affidavits are admissible in evidence to prove the fact of violation. *Warner v. Martin* (Ga.), 4-180.

Knowledge of publication complained of. — Where the defendant in a proceeding for a contempt charged to have been committed by the publication in a newspaper of articles relating to a pending cause, and tending to interfere with the administration of justice by prejudicing the public and jury, offers himself as a witness and testifies for the purpose of purging himself of the contempt that he did not read the articles in question, and had no actual knowledge of their contents, it is competent to ask the witness on cross-examination to identify other similar articles relating to the same cause and appearing in his papers prior to the assignment of the cause for trial, and to introduce such articles in evidence, as tending to contradict his statement that he had no knowledge of the articles complained of; and such evidence, even if incompetent, is not prejudicial where the court finds as a fact that the defendant had no actual knowledge of the articles complained of. *State v. Howell* (Conn.), 13-501.

(2) Sufficiency.

Attempt to corrupt juror. — In a contempt proceeding for attempting corruptly to influence the vote of a juror, evidence examined and held to be sufficient to sustain the charge. *State ex rel. Webb v. District Court* (Mont.), 15-743.

Violation of injunction. — Evidence held to establish the violation of an injunction restraining interference with the complainant's business and intimidation of his employees. *O'Brien v. People* (Ill.), 3-966.

Corroboration of testimony of accomplice. — As a trial for contempt is a criminal proceeding, a statute providing that a person accused of crime shall not be found guilty upon the uncorroborated testimony of an accomplice applies to such a trial. *State ex rel. Webb v. District Court* (Mont.), 15-743.

g. Costs.

Criminal contempt. — In New York costs cannot be awarded in a proceeding to punish for a criminal contempt. *People ex rel. Stearns v. Marr* (N. Y.), 3-25.

Costs in addition to fine. — The costs in a proceeding for contempt constitute no part of the fine imposed and may be awarded against the contemnor in addition to a fine. *Warner v. Martin* (Ga.), 4-180.

4. PURGING OF CONTEMPT.

Sufficiency of sworn answer. — The sworn answer of the defendant in proceedings for constructive contempt does not conclusively entitle the defendant to discharge, but the court may take testimony to prove that the answer is untrue. *O'Flynn v. State* (Miss.), 11-530.

In contempt proceedings in an appellate court, where the contemnors are charged with having disobeyed an order of the court staying the proceedings in a criminal cause pending the determination of an appeal taken therein, the disobedience consisting of the participation by the contemnors by their personal presence and by overt acts in the murder of the appellant, the contemnors cannot purge themselves by denying under oath that they had anything to do with the murder. *United States v. Shipp* (U. S.), 8-265.

A proceeding to punish for contempt committed out of the presence of the court, such as a violation of an injunction, is purely civil in its nature, and the fact that the alleged contemnors file sworn answers which, if true, are sufficient to purge them of contempt, does not of itself entitle them to discharge. *O'Brien v. People* (Ill.), 3-966.

5. PUNISHMENT FOR CONTEMPT.

Limitation as to amount of fine. — A judge of the superior court of Georgia has no power to impose a fine for more than \$200 for contempt in violating a temporary restraining order, where the violation is treated by the judge as a single act. *Warner v. Martin* (Ga.), 4-180.

Commitment for indefinite term. — A commitment for contempt need not be for a definite term where the imprisonment is inflicted as a means of compelling the contemnor to do some act ordered by the court and not as a punishment. *Perry v. Pernet* (Ind.), 6-533.

A commitment for contempt, ordered by a court having jurisdiction, is not rendered absolutely void by the fact that it orders imprisonment for an indefinite period instead of for the limited definite term prescribed by statute, though it may be invalid as to the excess of the punishment inflicted. *Perry v. Pernet* (Ind.), 6-533.

Imprisonment until further order of court. — An order committing a woman for contempt for refusing to obey a decree requiring her to pay a certain fund to her divorced husband comes within the provision of the Michigan statute permitting the imprisonment of a contemnor until he shall have performed the act or duty for the nonperform-

ance of which the contempt proceedings have been instituted, and does not come within the provisions of the statute limiting the duration of imprisonment for contempt in cases of a certain class for six months, and therefore the order is not rendered void for indefiniteness by the fact that it provides that the contemnor shall be imprisoned until the further order of the court. *Carnahan v. Carnahan* (Mich.), 8-53.

Imprisonment in house of correction.

— Under the Massachusetts statutes, contempts of court may be punished by imprisonment in jail but not in a house of correction. *Hurley v. Com.* (Mass.), 3-757.

Indiana statute. — The Indiana statute limiting the power of courts to punish contempts does not apply to proceedings to punish civil contempts. *Perry v. Pernet* (Ind.), 6-533.

Texas statutes. — A statute providing that disobedience to an injunction may be punished by imprisonment until the defendant purges himself of his contempt in such manner and form as may be directed by the court or judge (Rev. St. Tex., art. 3013) does not conflict with another provision (art. 3011) that disobedience to an injunction may be punished as a contempt the punishment for which is limited (art. 1101) to a fine of one hundred dollars and imprisonment not exceeding three days. The court may proceed under either provision. *Ex parte Testard* (Tex.), 20-117.

Discharge from custody. — Where a person has been committed for contempt for failing to obey an order of the court requiring him to pay money for his wife's support, the court has power to discharge him from custody upon his showing that his failure to pay the money since the commitment is due to his actual inability to do so. *Perry v. Pernet* (Ind.), 6-533.

6. REVIEW OF PROCEEDINGS FOR PUNISHMENT.

a. Habeas corpus.

Improper unless judgment is void. — A person committed to jail for contempt will not be released on habeas corpus, unless the judgment of the commitment is absolutely void, as the habeas corpus proceeding is a collateral attack on the judgment of commitment. *Perry v. Pernet* (Ind.), 6-533.

b. Writ of error.

Criminal contempt. — Under the Massachusetts statutes, a sentence to punishment for a distinctively criminal contempt is a judgment in a criminal case which may be reviewed upon a writ of error. *Hurley v. Com.* (Mass.), 3-757.

Where one has been found guilty of contempt of court in the Massachusetts superior court, a writ of error lies to that court from the supreme judicial court to correct alleged errors in the proceedings. *Globe Newspaper Co. v. Com.* (Mass.), 3-761.

c. Appeal.

Civil contempts. — There is a distinction between criminal contempts and those which

are civil in their nature, and it is well settled that an appeal will lie in cases of civil contempt. *Jastram v. McAuslan* (R. I.), 17-320.

Judgments punishing ticket brokers for contempt committed by disobeying temporary injunctions forbidding them to deal in the return-trip portions of railroad tickets are civil in nature, and under the Missouri statutes are appealable as judgments in civil cases. *State v. Bland* (Mo.), 3-1044.

Indirect contempt. — The Missouri statute held to give no right of appeal from a conviction for indirect contempt in disobeying an order in a pending civil suit, which conviction is had upon a verified complaint filed by the plaintiff's counsel in such a suit informing the court that said order has been disobeyed. *State v. Bland* (Mo.), 3-1044.

Remedy by appeal exclusive. — Errors committed by the court in a contempt proceeding can be reviewed and corrected only on appeal. *Perry v. Pernet* (Ind.), 6-533.

d. Matters and questions reviewable.

Sufficiency of bill for injunction. —

On an appeal from a conviction for contempt for violation of an injunction, the contemnor cannot question the sufficiency of the bill unless it is so defective as to render the order granting the injunction void. *O'Brien v. People* (Ill.), 3-966.

Exercise of discretionary power. — The power to punish for contempt is a discretionary power, and when fairly exercised in a case within the jurisdiction of the court is not reviewable. *In re Consolidated Rendering Co.* (Vt.), 11-1069.

Judgment rendered on a hearing before a judge in a proceeding for contempt for a violation of an injunction will not be disturbed by the supreme court, unless the judge has grossly abused the sound discretion vested in him in such cases. *Warner v. Martin* (Ga.), 4-180.

Harmless admission of irrelevant evidence. — Where on a hearing before a judge in a proceeding for contempt for the violation of an injunction irrelevant evidence is admitted over the objection of the person upon trial, such error is not a cause for reversing a judgment against him, where his case is not injuriously affected and there is admissible evidence to warrant the judgment. *Warner v. Martin* (Ga.), 4-180.

7. DISABILITIES OF PERSON IN CONTEMPT.

Stay of proceedings in action. — A plaintiff in contempt of court is not entitled to proceed with the trial of his case against the defendant as a matter of right. *Campbell v. Justices* (Mass.), 2-462.

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CONTINGENT FEES.

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See REMAINDERS.

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CONTINUANCES.

See CRIMINAL LAW, 6 d.

Defective deposition as ground for continuance, see DEPOSITIONS, 7.

Right to speedy trial waived by consent to continuance, see CRIMINAL LAW, 6 c (1).

When properly refused. — Where the affidavit to a motion for continuance on the ground of the absence of a witness fails to state what efforts have been made to procure the attendance of the witness or to prepare for trial in respect to the point to which the testimony of such witness relates, and it appears that the party asking for the continuance has made no preparation whatever to meet the case which the complaint advised him would be presented, the motion is properly denied. *State ex rel. Hallam v. Lally* (Wis.), 15-242.

Abuse of discretion. — No abuse of discretion by a trial court in refusing to grant a continuance for the defendant is made to appear by a showing that four days before the date set for trial the plaintiffs were allowed to amend their complaint, possibly changing the cause of action, but without exception by the defendant, and that the defendant had an opportunity to take the deposition of the witness whose absence was made the basis of the motion for a continuance, and would not say that the testimony of such witness was other than cumulative. *Creek v. Aberdeen* (Wash.), 12-370.

It is not an abuse of discretion for the trial judge to deny the defendant's motion for continuance based on the ground of the sickness of two of his witnesses, where the defendant has previously been granted two continuances, one of them on the ground of the sickness which is made the basis of the present motion, and the court allows the substance of the testimony expected from the absent witness to go to the jury as the evidence they would give if present, and no showing is made as to the probable duration of the illness of the witness. *Heirs v. Atlantic Coast Line R. Co.* (S. Car.), 9-1114.

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- Married women's contracts, see HUSBAND AND WIFE, 1 a.
- Municipal contracts, see MUNICIPAL CORPORATIONS, 7.
- Oral contracts, see FRAUDS, STATUTE OF, 8.
- Oral modification of written contract, see FRAUDS, STATUTE OF, 1 b.
- Place of contract, see CONFLICT OF LAWS, 3 a.
- Power of officers and agents to bind corporations, see CORPORATIONS, 7.
- Proof of contract to marry, see BREACH OF PROMISE OF MARRIAGE.
- Purchase and sale of land, see VENDOR AND PURCHASER.
- Railroad contracts, see RAILROADS, 4.
- Release of liability for injuries to servant, see MASTER AND SERVANT, 3 k.
- Removal by contract of state restrictions on riparian rights, see WATERS AND WATERCOURSES, 3 b (1).
- Restraining performance of illegal contracts by municipalities and public officers, see INJUNCTIONS, 2 d.
- Revival of expired contract, see FRAUDS, STATUTE OF, 4 d (1).
- Sales of standing timber, see LOGS AND LUMBER.
- Sales of stock, see CORPORATIONS, 8 b (4).
- Set-off of claim for breach of contract, see SET-OFF AND COUNTERCLAIM, 1 a.
- Severable contracts by agent, see AGENCY, 3 g (1).
- Specific performance of contracts, see SPECIFIC PERFORMANCE.
- State contracts, see STATES, 9.
- Statute of frauds not applicable to executed contracts, see FRAUDS, STATUTE OF, 4 b (6).
- Stipulation as to time of performance, see TIME.
- Time for removal of fixtures, see FIXTURES, 6 c (2).
- Waiver of privilege, see WITNESSES, 3 d (7).

1. NATURE AND FORM.

In general. — A promise, to be enforceable, must be based on a consideration, and it must be put in such form as to be available under the rules relating to contracts and the admission of evidence; and such promise, so

far as it relates to the future, can be enforced as a promise only under the general rules governing contracts. *Adams v. Gillig* (N. Y.), 20-910.

Parol or in writing.— A contract of employment between a dentist and his assistant, which is partly in writing, in the shape of letters and telegrams, and partly in parol, is a parol contract. *Turner v. Abbott* (Tenn.), 8-150.

An oral restrictive covenant, or any oral promise to do or to refrain from doing something affecting the real estate about which a written contract is executed between the parties, will not be enforced, because the entire agreement between the parties is deemed to be merged in the writing. *Adams v. Gillig* (N. Y.), 20-910.

2. ELEMENTS.

a. Persons capable of contracting.

Capacity to contract, see also **BILLS AND NOTES**, 3.

Insanity as affecting liability on contract, see **INSANITY**, 5.

Intoxication as affecting contractual liability, see **DRUNKENNESS AND INTOXICATION**, 3 a.

Law governing capacity of parties, see **CONFLICT OF LAWS**, 3 c (3).

Contractual capacity of deaf mute.

— A deaf mute is not regarded in law as a person *non compos mentis*, but is capable of entering into a valid contract if shown to have sufficient mental capacity. *Alexier v. Matzke* (Mich.), 14-52.

b. Offer and acceptance.

Acceptance of bids, see **AUCTIONS AND AUCTIONEERS**.

Acceptance of contract of insurance, see **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, 3.

Acceptance of offer of reward as constituting contract, see **REWARDS**.

Acceptance of subscription, see **SUBSCRIPTIONS**.

In general.— Where a written offer to sell certain goods at a stated price is orally accepted, the law implies a promise to receive and pay for the goods, and the offer to sell is not unenforceable as unilateral or without consideration. *Bailey v. Leishman* (Utah), 13-1116.

A memorandum containing an offer to sell certain goods, and signed by the party making the offer, but not showing on its face that the minds of the parties met in respect to its terms, must be supplemented by proof of an acceptance of the offer made. *Bailey v. Leishman* (Utah), 13-1116.

What acceptance sufficient.— In order to conclude a binding contract by the acceptance of an offer, the offer must be accepted substantially as made. *Frahm v. Metcalf* (Neb.), 13-312.

The fact that, in accepting a proposed contract by letter, a party stipulates for a

further minor condition, does not invalidate the contract, although such letter is not replied to, where the parties enter on performance as though such condition had been accepted, and continue such performance for several years. *McKill v. Chesapeake, etc., R. Co.* (U. S.), 20-1097.

Under an option contract for the sale of certain notes and the assignment of a certain decree, which provides that an option may be accepted by paying a certain sum in person to, or by depositing said sum in a named bank to the credit of, the one granting the option, there is a sufficient acceptance of the option by an offer to deposit the prescribed sum at the designated bank; and the offer to deposit is none the less a sufficient tender because coupled with a demand upon the bank for the delivery of the notes and the assignment of the decree. *O'Donnell v. Chamberlain* (Colo.), 10-931.

Where, in an action to enforce a claim against the estate of a deceased person for a part interest in the business conducted by the deceased at the time of his death, it appears that the deceased some years prior to his death, having a stock of goods worth approximately \$10,000, had proposed to the plaintiff by letter that if the plaintiff would go with him to a certain place where he wished to take his stock of goods and open a store, and remain with him until he should be able to draw \$10,000 from the concern besides keeping up the stock and paying personal and store expenses, he would pay the plaintiff, who was to use his best endeavor to make the store the "greatest possible success," a stated sum of salary, and at the time he could draw the \$10,000 from the business, he would give the plaintiff a one-fourth interest in the store, as additional compensation for his services, and that the plaintiff went with deceased, complying in all respects with the terms of the proposition until the time the deceased died, such facts show an acceptance by the plaintiff of the proposition made by the deceased not only as to the salary to be paid but as to the promised one-fourth interest in the business. *Ott v. Boring* (Wis.), 11-857.

Oral acceptance of written offer.— A memorandum containing an offer to sell certain goods, and designating the parties, the quantity offered for sale, the price to be paid therefor, and the conditions and place of delivery, is, upon proof of oral acceptance of the offer, sufficiently specific to sustain an action for the breach of the offer made. *Bailey v. Leishman* (Utah), 13-1116.

Time and place of acceptance.— When an offer is made by one person to another, the minds of the parties meet and the contract is deemed to be concluded the moment the telegram or letter of acceptance is duly sent or posted by the acceptor, providing the offer is accepted within a reasonable time and before the acceptor has knowledge or notice of its withdrawal; and the contract is concluded at the place whence the acceptance is sent. *Burton v. United States* (U. S.), 6-362.

Mistake as avoiding contract. — Where there is a mistake that amounts to a mutual misunderstanding, or that on its face is so palpable as to place a person of reasonable intelligence upon his guard, there is no meeting of the minds of the parties and no contract. *Cunningham Mfg. Co. v. Rotograph Co.* (D. C.), 13-1147.

c. Mutuality of obligation.

What sufficient. — A written contract, signed by both parties, whereby the defendant appointed the plaintiffs its executive agents for a definite term to sell fish at an agreed commission, and the plaintiffs obligated themselves to use their best efforts to sell such fish, in pursuance of which the plaintiffs in fact performed the services and incurred expenses in introducing and vending the fish, is not invalid for want of mutuality of the obligation. An action for damages will lie upon breach of such contract without cause. *Emerson v. Pacific Coast, etc., Packing Co.* (Minn.), 6-973.

d. Consideration.

Promise to pay debt discharged in bankruptcy, see *BANKRUPTCY*, 16.

Promise of remuneration for services to be performed. — A promise of remuneration for services to be performed makes a valid consideration for a contract. *Rowan v. Hull* (W. Va.), 2-384.

Mutual benefits to be derived. — The benefit to be derived by each party to a contract furnishes a sufficient consideration for it. *Rowan v. Hull* (W. Va.), 2-384.

Promise to refrain from doing act. — To constitute a mere promise to refrain from doing an act a consideration sufficient to support a contract, an advantage must accrue therefrom to the promisee or a loss or disadvantage must be sustained by the promisor. *Anderson v. Nystrom* (Minn.), 14-54.

Promise not to present claims against estate. — A promise to make the estate of a deceased person no trouble in the matter of attempting to enforce claims against it, where the claims are barred by the statute of limitations and the estate is insolvent, does not constitute a sufficient consideration for a promissory note given by the heirs of the deceased person. *Anderson v. Nystrom* (Minn.), 14-54.

Acceptance of benefits under contract. — The acceptance of benefits under a contract which will impose consent to all the obligations arising from such acceptance must be voluntary and with knowledge of the facts, and payment to the agent does not constitute such voluntary acceptance unless the agent was authorized to accept such payment. *Halsell v. Renfrew* (Okla.), 2-286.

Services rendered under unenforceable contract. — Services rendered under an agreement which is not enforceable because it is not in writing, as required by the statute of frauds, furnish a sufficient consideration to support a subsequent written promise

to pay for the services. *Muir v. Kane* (Wash.), 19-1180.

Promise to one for benefit of another.

— If a person, for a consideration moving to him from another, agrees to pay that or any other's debt to a third person, the law, at once, operating upon the acts of the immediate parties to the transaction, supplies the essentials of privity between such person and such third person, establishing binding contractual relations between them, even though such third person is a stranger to, and has no knowledge of, the transaction. *Fanning v. Murphy* (Wis.), 5-435.

A stipulation *pour autrui* under the Louisiana code may result from implication. *Allen, etc., Mfg. Co. v. Sureport Waterworks Co.* (La.), 2-471.

Privilege of naming child. — The privilege of naming a child, granted by the child's parents, is a valuable consideration sufficient to support a contract for the benefit of the child, and rests on such privity between the parents and the child as to enable the child to ratify the transaction and enforce the contract in its favor. *Freeman v. Morris* (Wis.), 11-481.

Instrument under seal. — Want of consideration is not a valid defense to an action upon a sealed instrument. *Glymer v. Groff* (Pa.), 14-256.

Substitution of new promise for old. — Where a contractor who has entered into a working contract encounters difficulties in the work which are substantial, unforeseen, and not within the contemplation of the parties, and on that account refuses to complete the contract, and the other party promises to pay him extra compensation if he will complete the contract, the new promise becomes substituted for the original contract and is enforceable although there is no express rescission of the original contract. *Linz v. Schuck* (Md.), 14-495.

Extension of option without additional consideration. — An oral extension of the time for the enforcement of an option contract given without a consideration is merely a parol offer to sell and may be withdrawn at any time before acceptance. *Cummins v. Beavers* (Va.), 1-986.

3. CONSTRUCTION AND INTERPRETATION.

a. In general.

Rules and principles of law applicable. — All contracts are to be construed in the light of the rules and principles of law applicable to the subject-matter of the transaction, and those rules and principles control the rights of the parties, except where the contract discloses an intention to depart therefrom. *Haugen v. Sundseth* (Minn.), 16-259.

Construction against party preparing. — A written contract should, in case of doubt, be interpreted against the party who has drawn it up. *Canada Glue Co. v. Galibert* (Can.), 18-791.

Practical construction by parties. — Practical construction placed by the parties

in interest upon doubtful or ambiguous terms in a contract will exercise a great and sometimes a controlling influence in determining the construction to be placed thereon by the courts. *Burton v. Douglass* (Wis.), 18-734.

Where a business established in a certain city is sold under a contract which provides that the vendor shall not, for a period of ten years, engage in a similar business in that city "or vicinity," and within a few months after the sale the vendor establishes a similar business at two different villages, each about six miles from the city in question, and the vendee, with full knowledge of such action on the part of the vendor, makes no objection thereto for upwards of four years, although in the meantime he objects to the proposed establishment by the vendor of a similar business in the city itself and threatens to bring suit on that account, the actions of the respective parties will be treated as a practical construction of the word "vicinity" as not embracing the villages in question, and an injunction will not be granted to restrain the vendor from carrying on his business in such villages. *Burton v. Douglass* (Wis.), 18-734.

Parol agreement as to meaning of words used.—It seems that parol evidence is admissible, in an action on a written contract, for the purpose of showing that prior to the execution of the contract the parties thereto substantially agreed on the meaning of an ambiguous word occurring in the contract as drafted. Such evidence does not alter or add to the written contract, but simply goes to show what the parties meant when they used the word in question. *Burton v. Douglass* (Wis.), 18-734.

Contract partly oral and partly in writing.—When a contract is partly written and partly oral, the written and oral parts must be construed together in determining what the whole contract expresses. *American Mercantile Exchange v. Blunt* (Me.), 10-1022.

Several instruments executed at same time.—Instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance. *Myrick v. Purcell* (Minn.), 5-148.

Disregard of grammatical construction.—While a court, in construing a contract, will give due force to the grammatical arrangement of the clauses, it will disregard the grammatical construction if it is at variance with the intent of the parties as indicated by the contract as a whole. *Beadle v. Sage Land, etc., Co.* (Mich.), 6-53.

Construction emasculating contract.—A construction that will completely emasculate a clause of a contract will not be adopted if any other reasonable construction is admissible. *State ex rel. Davis v. Mortensen* (Neb.), 5-291.

Natural meaning of language.—In an action on a note against persons who, in consideration of the transfer to them of all

the assets of a bank, have assumed all its liabilities aggregating a specified sum, the defendants cannot escape liability on the note because it was not included in the estimate of the sum of the bank's liabilities. *Moore v. First National Bank* (Colo.), 12-268.

Words having definite legal meaning.

—When words or terms having a definite legal meaning and effect are knowingly used in a written instrument the parties thereto will be presumed to have intended such words or terms to have their proper legal meaning and effect, at least in the absence of any contrary intention appearing in the instrument. *Langley v. Owens* (Fla.), 11-247.

Intention and understanding of parties.—When a written contract is uncertain or ambiguous, the court may ascertain and give effect to the mutual intention and understanding of the contracting parties. *American Soda Fountain Co. v. Gerrer* (Okla.), 2-318.

The question whether a contract is of such a character as to require the personal service of all the joint contractors in its performance, or whether it is to be terminated by the death of one of them, is to be determined by a construction of the contract itself and depends on the intention of the parties. *Babcock v. Farwell* (Ill.), 19-74.

Surrounding facts and circumstances.

—The rule stated as to the construction of an ambiguous or obscure contract by the aid of extraneous evidence of the surrounding facts and circumstances. *L'Engle v. Scottish Union, etc., Ins. Co.* (Fla.), 5-748.

A contract between a manufacturer and his commission merchants, whereby the manufacturer agreed to guarantee the merchants "against all losses from failures, for and in consideration of the sum of one per cent. upon the net amount of their sales for" a specified year, construed, and held to show that in view of its terms and of previous dealings between the parties, the parties contemplated that the merchants should continue their commission business and continue to accept and sell the manufacturer's goods during the whole of the specified year. *Wilson v. Wernwag* (Pa.), 10-649.

Consideration of preliminary negotiations.—In construing a written contract, preliminary negotiations between the parties may be considered for the purpose of determining their meaning and intention, but not to vary or contradict the plain terms of the instrument. *Chicago Auditorium Assoc. v. Corporation of Fine Arts Bldg.* (Ill.), 18-253.

In construing a lease written options preceding the execution of the lease afford some light in ascertaining the understanding and meaning of the parties and may be considered for that purpose. *Chicago Auditorium Assoc. v. Corporation of Fine Arts Bldg.* (Ill.), 18-253.

Contingencies not provided for.—A party entering into a contract to furnish a certain article or commodity must express in the contract a contingency against which he desires to be protected, and failing to do so, he cannot show, in the absence of fraud

or mistake, that his absolute contract is only a conditional engagement. *Covington v. Kanawha Coal, etc., Co. (Ky.)*, 12-211.

A contract to pay the expenses of another's education at a certain institution, which contemplates payments "for the next four years," does not bind the person who assumes the obligation to pay the expenses of a fifth year, notwithstanding the fact that soon after the person for whose benefit the contract is made enters upon his course it is discovered that he cannot complete the course in four years. *In re Youngerman (Ia.)*, 15-245.

Implied covenants.— One who undertakes to accomplish a certain result by implication agrees to supply all the means necessary thereto. *Vogt v. Schienebeck (Wis.)*, 2-814.

Question for court.— The construction of the words in a written contract is generally for the court. If the words are ambiguous, the meaning intended may be gathered by the aid of parol or other extrinsic evidence, and if the words are used in a sense peculiar to some special calling or trade, the custom which has given the words their extraordinary meaning may be shown by parol. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co. (Ky.)*, 9-324.

The meaning and legal effect of a promise in writing to pay money should be determined by the court on an inspection of the writing itself as executed, and the intention of the maker in so executing it should be gathered from the terms of the writing itself where there is no ambiguity or fraud in the execution. *Langley v. Owens (Fla.)*, 11-247.

When a written instrument is complete within itself and is not ambiguous or uncertain in its meaning, the intention of the maker and the legal effect of the terms used in the instrument should be determined by the court from an inspection of the instrument itself; and a plea averring that the intention of the maker differs from the legal effect of the terms used in executing the written instrument is demurrable. *Langley v. Owens (Fla.)*, 11-247.

Where there is no conflict in the evidence as to what the terms of a contract actually were, its interpretation is for the court. *Freeman v. Hedington (Mass.)*, 17-741.

b. Proof of business custom or usage.

For what purpose admissible.— A custom among tobacco dealers to accept checks in payment for tobacco sold in large lots may be shown, not for the purpose of varying the contract but as interpreting its terms. *Hughes v. Knott (N. Car.)*, 3-903.

When not admissible.— In the absence of an agreement to the contrary, the usage or custom of a particular business will enter into and form a part of a contract made by persons engaged in such business and those dealing with them with knowledge of such usage or custom; but proof of usage or custom is never admissible to give interpretation to a contract inconsistent with its language. *Savage v. Salem Mills Co. (Ore.)*, 10-1065.

A custom of trade or business does not by

implication become a part of a written contract, when there is a distinct provision in the writing expressly denying the right claimed under the custom. *Vardeman v. Mutual L. Ins. Co. (Ga.)*, 5-221.

A written contract, clear and unequivocal in its terms, by which one party agrees to furnish the other all the coal the latter shall require between certain dates, at specified prices, cannot be varied or contradicted by parol evidence of a local custom that contracts of that nature are made subject to a strike at the mine from which the coal contracted for is to be shipped. *Covington v. Kanawha Coal, etc., Co. (Ky.)*, 12-311.

Question of law or fact.— In an action for a salesman's commissions under a contract to pay certain commissions on specified amounts of sales, it cannot be declared as a matter of law that according to a custom among traveling salesmen and their employers, the words "sales," "sell," and "sold" have acquired a meaning that includes the soliciting of sales which the employer accepts and fills, and that such words in the contract in question were used and intended in that sense by the parties. *Schultz v. Ford (Iowa)*, 12-428.

c. Liquidated damages or penalty.

In general.— When the sum stipulated in a contract to be paid upon a breach thereof is to be regarded as liquidated damages, and when as a penalty. *Stony Creek Lumber Co. v. Fields (Va.)*, 1-242.

Building contract.— A stipulation in a building contract that the contractor "will forfeit" a specified sum for every day elapsing between the time prescribed for the completion of the contract and the time it is actually completed will be enforced as a stipulation for liquidated damages, where the evidence and all the circumstances surrounding the making of the contract show clearly that both parties understood that they were stipulating for damages likely to result from the default, and not for a penalty or forfeiture as such, and the sum agreed to be paid is not out of proportion with the probable and presumable damage, notwithstanding the contract uses the words "will forfeit" instead of "will pay." *Western Gas Construction Co. v. Dowagiac Gas, etc., Co. (Mich.)*, 10-224.

Whether a stipulation in a building contract fixing the damages for delay in the completion of the building at a certain sum per day is to be taken literally so as to exclude recovery of the actual damages suffered, is to be determined by the intention of the parties; and, applying certain well established tests, if it appears that the stipulated damages are not largely, if at all, in excess of the actual damages reasonably to be anticipated from the standpoint of the parties at the inception of the contract, as the probable result of a breach of it, and that the character of the building is such as to render the actual damages caused by delay in its completion difficult if not impossible of ascertainment with any reasonable degree of certainty,

the contract provision as to damages will be enforced literally. *Davis v. La Crosse Hospital Assoc. (Wis.)*, 1-950.

Logging contract.—A provision in a logging contract that a part of the consideration shall be reserved till the contract is completed, is to be regarded as reserving a penalty or security for the completion of the work and not as liquidated damages. *Stony Creek Lumber Co. v. Fields (Va.)*, 1-242.

Liquor dealer's bond.—In an action by the state of New Hampshire for breach of the bond of a licensed dealer in intoxicating liquors, the sum named in the bond must be considered as liquidated damages and not as a penalty. *State v. Corron (N. H.)*, 6-486.

d. Duration of contract.

A contract between the owner of a tract of coal land and a railroad company, by which the landowner agrees to develop mines on his land to a stated capacity, and the company agrees to build a branch line to the mines and to purchase the coal produced at the ruling price of a certain other coal, which contains no provision as to its duration, is not terminable at the will of one party, but is permanent so long as the stipulated production is maintained, unless sooner terminated by consent of both parties. *McKell v. Chesapeake, etc., R. Co. (U. S.)*, 20-1097.

e. Particular contracts.

Building contract.—A provision in a building contract whereby the architect is made the agent and representative of the owner in superintending the work under the contract, does not confer any authority upon the architect to bind the owner by an oral order for extra work, contrary to a provision in the contract requiring such order to be in writing. *Bannon v. Jackson (Tenn.)*, 17-77.

Where at the time of a payment to a building contractor, under a building loan agreement between the owner of the premises to be improved and a third person, the owner consents that the lender shall retain a commission, and also the amount paid for insurance and attorney's fees, out of the payment, such items are properly chargeable against the owner and in favor of the lender on a subsequent accounting between the parties; but the owner is not properly chargeable, on such accounting, with the amount of an advance payment made by the lender to the contractor without his knowledge or consent. *Tice v. Moore (Conn.)*, 17-113.

A provision in a building contract that "no new work of any description done on the premises, or any work of any kind whatsoever, shall be considered extra, unless a written order for the same shall have been given to the contractors by the architects, and their signature obtained thereto," must be construed as requiring a written order for all extra work, which order must be given before the work is performed and not afterwards. *Bannon v. Jackson (Tenn.)*, 17-77.

Purchase of mining products.—Correspondence between a railroad company and

a landowner considered and held to constitute a present contract by the railroad company to purchase coal mined from the land, whether mined by the landowner personally or by his lessees. *McKell v. Chesapeake, etc., R. Co. (U. S.)*, 20-1097.

Contract not to engage in similar business.—The word "vicinity" has no fixed meaning in law. Used in some connections it may mean a very trifling space, while used in others it may mean a distance of many miles. Where a contract for the sale of a business established in a certain city provides that the vendor shall not engage in a similar business in that city "or vicinity," it will be presumed that the intention was to prevent the vendor from materially depreciating the value of the good will of the business sold by entering into competition with the vendee for trade naturally tributary to such business as established in the city in question; but what constitutes a breach of the contract must depend upon the circumstances of the particular case. *Burton v. Douglass (Wis.)*, 18-734.

4. VALIDITY.

a. In general.

Contracts between physician and patient, see **PHYSICIANS AND SURGEONS**, 5.

Contracts relating to probate and contest of wills, see **WILLS**, 7 o.

Contracts to devise or bequeath property, see **WILLS**, 1.

Contracts with unlicensed pawnbrokers, see **PAWNBROKERS**.

Limitation of liability of railroad for fire caused by locomotives, see **RAILROADS**, 7 c (7).

Sunday contracts, see **SUNDAYS AND HOLIDAYS**, 2.

Surrender or restriction of municipal powers, see **MUNICIPAL CORPORATIONS**, 7 d.

Freedom of contract.—Public policy requires that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. *Allen Mfg. Co. v. Murphy (Can.)*, 20-657.

As a general rule a contract should not be declared invalid as against public policy unless the corrupt or dangerous tendency clearly and unequivocally appears upon its face, or is necessarily inferred from the matters which are expressed therein. *Cole v. Brown-Hurley Hardware Co. (Iowa)*, 16-846.

Determination of public policy.—The public policy of the state or nation must be determined exclusively by its constitution, laws and judicial decisions. *Zeigler v. Illinois Trust, etc., Bank (Ill.)*, 19-127.

Hard bargain.—The fact that a bargain is a hard one does not entitle a party to be relieved therefrom who fairly and voluntarily assumes it. *Southington v. Southington Water Co. (Conn.)*, 13-411.

Restraint of marriage.—Contracts in

restraint of marriage, or which tend to induce the separation of husband and wife, are, on the broad grounds of public policy, utterly void. *Appleby v. Appleby* (Minn.), 10-563.

Where an ante-nuptial contract contains a provision that in consideration of a contemplated marriage and the release and relinquishment by the intended husband of all his rights and interests in and to the property and estate of the intended wife, she shall provide from her estate after her death an annuity for him so long as he shall remain unmarried, the provision is not a condition in restraint of marriage, but one limiting the duration of the income, terminable at the voluntary election of the husband. *Appleby v. Appleby* (Minn.), 10-563.

Marriage brokerage.—A contract for reward to assist a person in getting married by means of introductions to persons of the opposite sex is a marriage brokerage contract and illegal, and money paid thereunder may be recovered in spite of part performance of the contract by the other party thereto. *Hermann v. Charlesworth* (Eng.), 1-691.

Contract partly illegal.—A contract for the performance of several items in consideration of a single and lump sum, is not severable, and if any one or more of the items to be performed is unlawful the entire contract is void. *Hughes v. Mullins* (Mont.), 13-209.

b. Contracts in violation of statute.

Penal statute.—A contract made in direct violation of a statute providing a penalty for the violation thereof is illegal though the contract is not in express terms prohibited or pronounced void. *Pinney v. First Nat. Bank* (Kan.), 1-331.

Effect of subsequent statute.—When any material part of an entire contract which was legal when made becomes illegal by reason of a statute subsequently enacted, such contract is thereby wholly terminated as soon as the statute takes effect, although the time specified in the contract for its performance has not then fully expired. *American Mercantile Exchange v. Blunt* (Me.), 10-1022.

While it is true that a contract which was legal at its inception may become illegal by a subsequent statutory enactment, yet it does not follow that acts done under the contract before the enactment of the statute are illegal. In such a case the statute puts an end to the contract and no recovery can be had thereon for nonperformance after the time when the contract is thus terminated. *American Mercantile Exchange Co. v. Blunt* (Me.), 10-1022.

c. Contracts to procure legislation.

Specific performance of a contract to sell land will not be decreed at the suit of the purchaser where part of the consideration consists of the purchaser's services in procuring legislation by Congress authorizing the purchase of the land by the United States for a public purpose, as a contract providing that the compensation of one of the parties shall be contingent on his success in procur-

ing legislation is void as against public policy. *Hazleton v. Sheckells* (U. S.), 6-217.

A covenant in a lease of a business building, whereby the lessor agrees to supply the building with railroad trackage in an alley at the rear thereof, will not be held invalid as against public policy where there is nothing on its face to indicate that the employment of corrupt or improper methods is contemplated in procuring the consent of the municipal authorities to the laying of the tracks. *Cole v. Brown-Hurley Hardware Co.* (Iowa), 16-846.

If such agreement to furnish trackage were void as against public policy, and therefore unenforceable against the lessor, the taint or illegality would extend to the whole contract of lease, and render the same equally unenforceable against the lessee. *Cole v. Brown-Hurley Hardware Co.* (Iowa), 16-846.

d. Contracts relating to judicial proceedings.

Contract to procure testimony.—A contract by which one person, having certain suits pending in the courts, agrees to pay another the sum of fifty thousand dollars provided the other will furnish evidence resulting in the winning of one or both of the suits on trial or of putting the litigant in such a position that he can force a favorable settlement of one or both suits, has a tendency to impede the due administration of justice and is void as against the policy of the law. *Hughes v. Mullins* (Mont.), 13-209.

Contract to facilitate procurement of divorce.—A contract intended to facilitate the procuring of a divorce at the suit of either of the parties thereto is void. *Davis v. Hinman* (Neb.), 11-376.

Encouraging litigation.—A contract between an attorney and a third person by which the latter agrees to procure the employment of the former by others for the prosecution of suits and also to assist in looking after and procuring witnesses, in consideration of a share of the fees which the attorney shall receive for services, is against public policy and void. *Langdon v. Conlin* (Neb.), 2-834.

e. Contracts relating to public service or officers.

Agreement to perform official services for less than legal compensation, see **PUBLIC OFFICERS**, 6 a.

Location of public buildings.—A contract, whereby a city agrees to locate and erect a public building near the property of a certain landowner in consideration of the payment of a sum of money by the landowner, is void as being against public policy and as being founded upon an illegal consideration, even though no actual injury results to the public. *Edwards v. Goldsboro* (N. Car.), 8-479.

Assistance in prosecuting action.—A contract by a citizen to assist a city in an action to test the validity of certain liquor licenses held not one the tendency of which is improperly to influence the judgment of a

public official in the performance of his duties, and not contrary to public policy. *Brush v. Carbondale (Ill.)*, 11-121.

Appointment or election of officers. — Agreements which tend to injure the public service are opposed to the policy of the law and will not be enforced by the courts. Of this character are agreements to use one's influence to secure the election or appointment of a person to a public office, and those which restrict the free exercise of the discretion vested in a public officer for the public good. *Schneider v. Local Union (La.)*, 7-868.

It is the duty of a public officer having the power of appointment to make the best appointment in his power at the time the appointment is made, and it is against public policy that he should be deprived of the exercise of his best judgment by a contract previously made or an obligation previously assumed. *Schneider v. Local Union (La.)*, 7-868.

f. Contracts for suppression of bidding.

Public auction. — Contracts for the purpose of suppressing and chilling competitive bidding upon property offered for sale at public auction, in order to obtain it at an under value, or to obtain undue and unconscientious advantages, are fraudulent and void, and will not be enforced at the instance of the contracting parties, or either of them. *Henderson v. Henrie (W. Va.)*, 11-741.

A contract between two or more persons to purchase, jointly, property offered for sale at public auction, is not invalid, if free from fraud and collusion, as where their uniting to purchase the property is in good faith and with an honest purpose in view, and not with the intention of stifling and suppressing the bidding, in order to obtain the property at an under value. *Henderson v. Henrie (W. Va.)*, 11-741.

Sale under trust deed. — An agreement by a stockholder of a debtor corporation that he will buy property of the corporation at a public sale under a deed of trust at a sum equal to the indebtedness secured by the deed of trust and pay the indebtedness in full is not void as an agreement to suppress competitive bidding. *Satterfield v. Kindley (N. Car.)*, 12-1098.

Bidding for public contract. — A secret agreement between M. and C., the proposed bidders for a public contract, by which they bid on separate portions of the proposed work, pursuant to a mutual agreement, M. bidding on the largest portion of such work, with the understanding that if his bid is accepted M. and C. are to share as partners in such contract, is illegal in its nature and tendency; it not being necessary to show the particular effect of the contract, as such contract is condemned by public policy. *Citizens' Nat. Bank v. Mitchell (Okla.)*, 20-371.

Contract collateral to contract for suppression of bidding. — A bank, having advanced money under a separate and independent collateral contract for the purpose of carrying out a contract which was void as

against public policy on account of a secret agreement as to bidding, but was otherwise lawful, will not, by reason of the illegality of the principal contract, be precluded from recovering the money so loaned or advanced, it not having been a party to nor having aided in the execution of such illegal contract in any way. *Citizens' Nat. Bank v. Mitchell (Okla.)*, 20-371.

g. Gambling contracts.

Agreement for medical services to be paid for after death. — An agreement between a physician and his patient for medical services to be rendered so long as the patient lives, for a fixed sum to be paid out of her estate, is not a wagering contract. *Zeigler v. Illinois Trust, etc., Bank (Ill.)*, 19-127.

h. Contracts for purchase of editorial comment.

A contract between a railroad company and the editor of a newspaper for the purchase of the editorial comment of such newspaper and for the services of the editor in attempting to carry elections along the line of the proposed road in favor of the issuance of bonds for the benefit of the railroad company, is against public policy and unenforceable. *King v. Raleigh, etc., R. Co. (N. Car.)*, 15-40.

i. Contracts for purchase of counterfeit money.

A conspiracy between two men to purchase counterfeit money constitutes an illegal contract and is void, and one who has paid good and lawful money to the other in consideration for the promised return of a much larger amount in counterfeit money cannot recover the amount paid. *Chapman v. Haley (Ky.)*, 4-712.

j. Contracts to procure return of stolen property.

Where, for the sole purpose of regaining his property, the person from whom the property has been stolen gives a third person a check for a sum of money in consideration of the latter's promise to procure the return of the property, the transaction does not violate any rule of law, and the third person, upon delivering the property to the owner, is entitled to enforce the payment of the check. *Schirm v. Wieman (Md.)*, 7-1008.

k. Contracts impossible of performance.

Contracts in which promises made by one party are impossible of performance are unlawful. *State ex rel. Prout v. Nebraska Home Co. (Neb.)*, 1-88.

l. Contracts for custody of child.

Validity of contract transferring custody of child, see PARENT AND CHILD, 1 b.

A contract between a man and a woman whereby the former agrees to give an illegitimate child of both property in consideration

of retaining custody of the child, held not illegal. *Doty v. Doty* (Ky.), 4-1064.

m. Contracts furnishing incentive for crime.

Medical services to be paid for after death of patient. — A contract between a physician and his patient for medical services during the lifetime of the patient, for which a fixed sum is to be paid out of her estate after her death, is not illegal as furnishing an incentive to the physician to cause the death of the patient. *Zeigler v. Illinois Trust, etc., Bank* (Ill.), 19-127.

n. Usurious contracts.

Payment of attorney's fees. — Where a contract is held not to be usurious, a stipulation therein for the payment of the attorney's fees will be enforced. *Columbia B. & L. Assoc. v. Rice* (S. Car.), 1-239.

o. Building contracts.

Payment for extra work. — A provision in a building contract that "no extra work will be allowed in any case unless itemized estimate is submitted by contractor and architect's order in writing is given for the same" is reasonable, valid, and enforceable. *Langley v. Rouss* (N. Y.), 7-210.

p. Contracts by corporate officer for personal benefit.

A contract made by a managing officer of a railroad company by which he is to receive a personal benefit in consideration of the location of a station at a particular place is void as against public policy. *Peckham v. Lane* (Kan.), 19-369.

q. Effect of invalidity.

Enforcement of contract rights. — Where the parties to an illegal contract are equally at fault and one obtains an advantage over the other, the courts will not grant the other party relief; and where the parties have united in an unlawful transaction to injure another or others or the public, or to defeat the due administration of the law, or where the contract is against public policy or against sound morals, the courts will not enforce it in favor of either party. *Edwards v. Goldsboro* (N. Car.), 8-479.

No action can be maintained either by the payee or purchaser upon nonnegotiable promissory notes given in consideration of the compromise of a suit upon a claim, also represented by nonnegotiable notes, which is based wholly upon an alleged indebtedness for money lost in gambling. *Union Collection Co. v. Buckman* (Cal.), 11-609.

In any action brought in which it is necessary to prove an illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce alleged rights directly springing from such contract. *Citizens' Nat. Bank v. Mitchell* (Okla.), 20-371.

If it appears that the consideration and inducement for an agreement are such as are contrary to public morality or public policy,

it is the duty of the court to refuse to enforce the agreement, even though no objection to its enforcement on that ground is raised by either of the parties. *McCowen v. Pew* (Cal.), 15-630.

Contract rendered invalid by subsequent statute. — When a contract legal at its inception becomes illegal by a subsequent statutory enactment, no action can be maintained on such contract for a failure to continue to perform the conditions of such contract after illegality has attached. *American Mercantile Exchange v. Blunt* (Me.), 10-1022.

Recovery on quantum meruit. — There can be no recovery on a *quantum meruit* for services rendered or other considerations furnished under a contract which is void for illegality or for reasons of public policy. *Cole v. Brown-Hurley Hardware Co.* (Iowa), 16-846.

Where labor and materials have been furnished by a builder in the construction of a building under a contract which contains an element which is illegal merely because prohibited by statute, and while the contract remains entirely executory in the part that is illegal the builder disaffirms it because of the illegality, of which he was ignorant at the time of the execution of the contract, he can maintain an action for the labor done and materials furnished prior to the disaffirmance. In such an action the fact that some work was done by an engineer of the plaintiff on the plans for that part of the building which, if constructed according to contract, would have been illegal, does not affect the right of action, where the illegal construction was not undertaken, and no claim is made for such services of the engineer. In such an action the plaintiff's right to recover is not defeated by evidence that the supporting portions of the frame of the building needed reinforcement, it necessarily being within the contemplation of the parties that if reinforcement was anywhere needed to make the strength of the building conform to the requirements of the law it would be furnished, and the evidence only affects the amount to be recovered. *Eastern Expanded Metal Co. v. Webb Granite, etc., Co.* (Mass.), 11-631.

Recovery of consideration paid. — Where illicit sexual intercourse is a consideration for the payment of money by a man to a woman, and the money has been paid, the courts will not aid the payor to recover it back. *Platt v. Elias* (N. Y.), 9-780.

In order to deprive a party of the right to repudiate an illegal contract and to recover the money paid by him thereunder, it is not necessary that the illegal transaction shall have been fully executed, but it is sufficient if there has been a substantial performance by the party to whom the money has been paid. *Edwards v. Goldsboro* (N. Car.), 8-479.

In an action by a landowner against a city to recover money paid by the plaintiff in consideration of the defendant's agreement to erect two public buildings near the plaintiff's land, where the contract is held void as

being against public policy and as being founded upon an illegal consideration, but it appears that the defendant has erected one of the buildings, the plaintiff cannot recover the money paid by him, and the defendant cannot set up by way of counterclaim the enhancement in value of the plaintiff's property resulting from the erection of the building. *Edwards v. Goldsboro* (N. Car.), 8-479.

Where a landowner has paid a city a sum of money in consideration of its illegal undertaking to erect two public buildings near his land, and the city has erected one of the buildings but has refused to erect the other, the landowner is not entitled to recover the money paid by him to the city, especially if it appears that by reason of the enhancement of the value of his property he has received a benefit fully commensurate with the amount paid by him under the contract. *Edwards v. Goldsboro* (N. Car.), 8-479.

The fact that a provision of a contract by a citizen to assist a city in prosecuting an action to test the validity of certain liquor licenses, that the city shall prosecute the suit to a final decision, is not enforceable, as against the policy of the law favoring the settlement of controversies, does not present any defense to the recovery of the moneys paid in good faith in reliance upon that stipulation. *Brush v. Carbondale* (Ill.), 11-121.

Where the provision of a contract by a citizen to assist a city in prosecuting an action to test the validity of certain liquor licenses, that the city shall prosecute an appeal to the supreme court to final decision, has been violated, the fact that there was no agreement on the part of the city to reimburse the other party to the contract in case of its failure so to prosecute the appeal does not prevent the recovery of the money furnished under the contract. *Brush v. Carbondale* (Ill.), 11-121.

Where an illegal contract has been executed, and the parties thereto are *in pari delicto*, no action lies to recover back money paid under it or for restitution of property delivered in pursuance of its terms. *Davis v. Hinman* (Neb.), 11-376.

5. PERFORMANCE.

a. Waiver.

Payment of similar claim as waiver of exemption. — Where a building contract expressly provides that the owner shall not be liable for any loss or damage the contractor may sustain through the fault of other contractors employed upon the same building, the action of the owner in paying a part of a claim by the contractor for such damages cannot be regarded as an implied promise to pay the remainder of the claim, or as a waiver of the provision in the contract exempting him from liability. *Bannon v. Jackson* (Tenn.), 17-77.

Ignoring stipulation. — An express stipulation in a building contract that claims for extra work are to be deemed forfeited unless noted on the contract will not be held

to have been waived because the extra work was done without any notice being taken of such stipulation. *Davis v. La Crosse Hospital Assoc.* (Wis.), 1-950.

Waiver of stipulation by architect for owner. — A provision in a building contract that "no extra work will be allowed in any case unless itemized estimate is submitted by contractor and architect's order in writing is given for the same" is for the benefit of the builder, and cannot be waived by the architect without the consent of the builder, and therefore the contractor cannot recover from the builder for extra work done under the architect's verbal orders. *Langley v. Rouss* (N. Y.), 7-210.

b. Breach or abandonment.

(1) Acts constituting breach.

Declaration of intention not to perform. — A declaration by one of the parties to an executory contract of an intention not to perform it, which is retracted almost immediately and before an act done by or injury to the other party, does not constitute a breach, except perhaps in the case of a contract of marriage or other similar contract. *Swiger v. Hayman* (W. Va.), 3-1030.

A valid contract cannot be abrogated or modified unless both parties assent, and if one of the parties manifests in unequivocal language his intention not to perform the contract unless it is modified, he breaks the contract, and is liable therefor. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

No formal putting in default is necessary, where the obligor denies the existence of the alleged contract and declares his intention not to perform his part. *Johnson v. Levy* (La.), 16-978.

Where a contract embodies mutual and interdependent obligations and one party either disables himself or prevents the other from performing, or repudiates in advance his obligations and communicates such fact to the other party, the latter is excused from further performance and may also treat the contract as terminated and maintain an action for damages without awaiting the time fixed by the contract for the performance by the defendant. *O'Neill v. Supreme Council American Legion of Honor* (N. J.), 1-422.

Where a life insurance and trust company agrees to make a loan of money to be advanced when a building costing a certain sum shall be completed, with immediate security for such agreement consisting of a mortgage on the premises which is delivered and recorded, and life insurance contracts on the lives of the borrower and another, the contract for the loan is complete and based upon a valid consideration, and upon the repudiation of the contract by the company a right of action for damages for its breach at once arises, and the borrower need not await the arrival of the date when under the terms of the contract the money is to be advanced. *Holt v. United Security Life Ins., etc., Co.* (N. J.), 12-1105.

(2) Remedies for breach.

Action for damages. — The breach of a contract for ordinary personal services is fully remediable at law. *Simms v. Burnette* (Fla.), 15-690.

A seller who has refused to perform an oral contract for the sale of goods validated by part payment, cannot, in an action by the purchaser for the breach of such contract, urge that as the title had passed to the purchaser, the latter should not be awarded damages as for the breach of an executory contract. *Driggs v. Bush* (Mich.), 15-30.

Subject-matter destroyed. — Where a contractor is unable to complete the annex to a building because the latter has been destroyed by fire, and the contract provides that full consideration shall not be paid to the contractor until the work is complete, and the contractor has received all due him for the work actually done, he cannot further recover either under the contract or upon the common count. *Krause v. Board of Trustees* (Ind.), 1-460.

Where a contractor is unable to complete the annex to a building because the latter has been destroyed by fire, the remedy of the owner, if any, against the contractor is in assumpsit to recover for advancements in excess of expenditures; and where the contractor has paid out more than he has received, the payments made by the owner must be treated as an execution of the contract *pro tanto*. *Krause v. Board of Trustees* (Ind.), 1-460.

(3) Waiver of breach.

Action for one breach as waiver of another. — Where a contractor is unable to finish the annex to a building because the latter has been destroyed by fire, a suit against the contractor upon the theory that breach of contract lay in the failure to proceed with the work after the fire constitutes a waiver of any breach committed prior thereto. *Krause v. Board of Trustees* (Ind.), 1-460.

(4) Excuses for nonperformance.

Destruction of subject-matter. — Where the completion of an annex to a building is rendered impossible by the destruction of the building, the contractor is not liable for breach of contract though he might have performed it before the building was destroyed. *Krause v. Board of Trustees* (Ind.), 1-460.

Where a contractor is unable to complete the annex to a building because the latter has been destroyed by fire, his liability is not affected by a provision of the contract relieving the owner of the building from responsibility for loss or damage to the work. *Krause v. Board of Trustees* (Ind.), 1-460.

Where a contractor is unable to complete the annex to a building because the latter has been destroyed by fire, it is not material that if the contractor had completed the contract without delay, the owner might have

insured the building against fire. *Krause v. Board of Trustees* (Ind.), 1-460.

Where a contractor is unable to complete the annex to a building because the latter has been destroyed by fire, an offer by the owners to restore the building so that work upon the annex may proceed does not change the rights of the parties. *Krause v. Board of Trustees* (Ind.), 1-460.

Financial condition of party. — The fact that one of the parties to a contract, because of a financial stringency, is unable to get money to carry on his contract, does not excuse him from nonperformance. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

Building contracts. — The only cases in which a building contractor can be completely exempted from liability for the penalties fixed by the contract for failure to complete the work on a specified day are where the delay has been wholly due to the fault of the owner, or of persons for whose conduct the owner was responsible, or where the delay has been principally due to the fault of the owner, and it is impossible to apportion the responsibility between the parties, or where the owner has failed to perform certain obligations on his part, which, under the contract, were conditions precedent to performance by the contractor within the time specified, or where delay caused by the owner has so altered the circumstances that it would be manifestly unfair to regard the stipulations concerning time as remaining in force. *Wallis v. Wenham* (Mass.), 17-644.

Where a building contract provides that the work shall be completed on a certain day, and fixes the penalty, or liquidated damages, for failure to complete on that day, at a specified sum for every day thereafter that the work remains unfinished, the owner cannot recover such penalty or damages for delays which have been caused by himself, or by those for whose conduct he is responsible. *Wallis v. Wenham* (Mass.), 17-644.

Architect's approval of work. — A building contract which provides that the work shall be performed in the best manner and of materials of the best quality, subject to the acceptance or rejection of the architect, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect final and conclusive, and will not relieve the contractor from his agreement to perform according to plans and specifications; and this is especially so where the contract provides that the architect's certificate shall in no way lessen the total and final responsibility of the contractor, and shall not exempt the contractor from liability to replace work done in disregard of the specifications. To make the architect's certificate conclusive requires plain language in the contract. *Mercantile Trust Co. v. Hensley* (U. S.), 10-572.

Prohibitory statute. — Where a contract for the erection of the framework and certain other parts of a building contains a general provision that the building shall be erected in conformity with the statute regu-

lating buildings in that locality, but also contains a particular provision calling for a roof having a pitch of thirty degrees, the erection of which is forbidden by the statute, and the contractor, after partially performing the contract, refuses to violate the law by constructing the roof with a pitch of thirty degrees according to the stipulation of the contract, being ignorant of such stipulation at the time the contract was executed, such breach of contract furnishes neither ground for an action for damages nor defense to an action for labor and materials furnished in partial performance of the contract. *Eastern Expanded Metal Co. v. Webb Granite, etc., Co.* (Mass.), 11-631.

(5) Abandonment.

What constitutes. — A contract will be treated as abandoned where the acts of one party, inconsistent with its existence, are acquiesced in by the other. *Herpolsheimer v. Christopher* (Neb.), 14-399.

6. AVOIDANCE FOR FRAUD.

In general. — A contract induced by fraud as to a matter material to the party defrauded is voidable. *Adams v. Gillig* (N. Y.), 20-910.

What constitutes fraud. — Any statement of an existing fact material to the person to whom it is made, which is false and known by the person making it to be false, and which is made to induce the execution of a contract and does induce the contract, is a fraud, which will sustain an action to avoid the contract. *Adams v. Gillig* (N. Y.), 20-910.

Remedies of party defrauded. — Where a party has been induced to enter into a contract by fraud, he has in general the choice of two remedies. He may elect to rescind the contract, if he can restore what he has received in the same state or condition in which he received it, and sue for and recover back the consideration he has paid or given; or, if he has not paid anything, he may repudiate the contract and rely, when sued, upon fraud as a complete defense; or he may elect to retain what he has received under the contract and bring an action to recover damages for the injury he has sustained by the deceit. *Jordan v. Annex Corporation* (Va.), 17-267.

Nature of evidence required. — The courts are vigilant to prevent the rescission of a contract for fraud unless the fraud is admitted or proved by most satisfactory evidence. *Adams v. Gillig* (N. Y.), 20-910.

7. ACTIONS.

a. In general.

Accrual of cause of action on contract, see

LIMITATION OF ACTIONS, 4 a (2) (a).

Action for breach of contract of affreightment, see **CARRIERS, 4 j (2).**

Limitation of actions on foreign contracts, see **LIMITATION OF ACTIONS, 2.**

Restraining breach of contract, see **INJUNCTIONS, 2 c.**

Specific performance of contracts, see **SPECIFIC PERFORMANCE.**

Venue of action to cancel contract for sale of land, see **VENUE, 1.**

In an action by a painter to recover the value of a portrait painted by him for the defendant, where it appears that the plaintiff contracted with the defendant to paint the portrait of the latter's deceased wife, and that the defendant furnished photographs of his wife to the plaintiff for the purpose of aiding him in his work, and that the portrait was painted, delivered, and paid for, and that the plaintiff, without any authority, painted a second portrait from the photograph, and that the defendant, when informed of this fact, requested that the second portrait should be brought to his house, which was done, and that the second portrait has never been returned or paid for, the case does not turn upon the so-called "right of privacy," but upon contract relations; and the plaintiff cannot recover from the defendant the value of the second portrait, as he acquired no property therein, inasmuch as he had no right to use the photographs for any other purpose than to aid him in painting the original portrait, and his conduct in using them for another purpose amounted to a breach of the trust reposed in him under the contract relations existing between him and the defendant. *Klug v. Sheriffs* (Wis.), 9-1013.

Notice of forfeiture as condition precedent. — If a contract provides for a forfeiture upon a certain default for thirty days after a specified notice, and is enforceable, in order for a forfeiture to take place it must appear that the notice was given in compliance with the contract both as to time and contents, and that the default therein specified occurred. *Georgia R., etc., Co. v. Haas* (Ga.), 9-677.

Repudiation of liability by plaintiff.

— In an action upon a contract, the party seeking to recover cannot claim the benefits thereunder, and at the same time repudiate the burden. *Willoughby v. Fidelity, etc., Co.* (Okla.), 8-603.

Enforcement of promissory statements. — Statements promissory in their nature and relating to future actions, made by a party to a contract, must be enforced, if at all, by action on the contract. *Adams v. Gillig* (N. Y.), 20-910.

b. Parties.

Action by person not party, see **ANNUITIES.**
Right of person not party to lease to sue on covenants therein, see **LANDLORD AND TENANT, 5 h (5).**

Beneficiary not party to contract. —

A beneficiary named in a contract may maintain an action thereon in his own name though he did not sign the same. *Painter v. Kaiser* (Nev.), 1-765.

Where one person contracts with another on a sufficient consideration to do a thing for the benefit of a third person, the latter may, on acceptance of such contract before it is re-

scinded, sue to enforce it. *Zimmerman v. Zehendner* (Ind.), 3-655.

Real party in interest. — Under the provisions of the Iowa code requiring every action to be prosecuted in the name of "the real party in interest," one for whose benefit a contract is made is the real party in interest as to an action for the breach thereof, regardless of whether the consideration proceeded from him or from another. *In re Youngerman* (Ia.), 15-245.

c. Pleading.

Joinder of tort and contract, see ACTIONS.
Pleading contracts, see PLEADING, 4 a (2).

Description of parties. — The proper way to set out in a pleading the parties to a contract is by their names, and in a declaration on a contract of lease that the letting was to "the plaintiff and his family," the word family is too indefinite to describe the party. *Davis v. Smith* (R. I.), 3-832.

Averments as to damages. — A petition which alleges the making of an enforceable contract, and a breach by the defendant, will entitle the defendant to nominal damages and is sufficient to withstand a general demurrer. *Gabriel v. Kildare Elevator Co.* (Okla.), 11-517.

Meeting of minds. — In an action for the breach of a contract to sell certain goods, a complaint alleging that the parties "entered into a certain written contract," and setting forth as such contract a memorandum containing an offer to sell signed by the defendant, sufficiently alleges that the minds of the parties met in respect to the terms and conditions set forth in the memorandum and admits of proof that the contract was completed by the delivery of the memorandum and acceptance of the offer contained therein. *Bailey v. Leishman* (Utah), 13-1116.

Acceptance of offer. — In an action for breach of a contract to sell certain goods as offered in a memorandum signed by the defendant, an allegation in the complaint that the plaintiff on a certain date about three weeks subsequent to the date of the memorandum "and at divers other times prior thereto" demanded a delivery of the goods from the defendant, is sufficient to admit proof of timely acceptance of the offer, although the complaint also alleges that ten days from the making of the memorandum was a reasonable time in which to deliver the goods. *Bailey v. Leishman* (Utah), 13-1116.

Waiver of performance of conditions. — Waiver of the performance of conditions in a contract by the party in whose favor the conditions are to be performed is not performance but must be alleged as an excuse for nonperformance, before proof of such waiver can be received; and in the absence of such an allegation it is error to charge the jury that certain facts appearing in evidence constitute such a waiver. *List & Son Co. v. Chase* (Ohio), 17-61.

Allegation of condition precedent. — In an action for work performed under a

building contract which makes the certificate of an architect or engineer a condition precedent to the right of recovery, the plaintiff must either allege performance of the condition or state facts showing a proper excuse for nonperformance. *Korbly v. Loomis* (Ind.), 19-904.

In a suit in equity to recover an amount alleged to be due to the contractor under a building contract, where the bill contains no allegation that the plaintiff has obtained the architect's certificate, which is required by the contract as a condition precedent to payment, and sets up no excuse for failure to obtain such certificate, and where the failure to obtain the certificate is set up in the answer as a defense, the plaintiff, in order to avail himself of a certificate obtained from the architect after the commencement of the action, must set up such certificate by a supplemental bill, and if he fails to do so, it cannot be introduced in evidence or considered by the court. *Bannon v. Jackson* (Tenn.), 17-77.

Where a building contract provides that the architect's certificate shall be a condition precedent to the right of the contractor to require payment, the contractor cannot recover from the builder upon common counts, in the absence of the architect's final certificate, though he alleges that such certificate has been withheld fraudulently. In such a case a recovery can be had only on the contract. *Hart v. Carsley Mfg. Co.* (Ill.), 5-720.

Breach of condition precedent by plaintiff. — In an action on a contract, where the plaintiff has alleged the performance of conditions precedent, the defendant, if he desires to rely upon the breach of any such condition, must point out specifically in his pleading the condition and breach upon which he relies, a general denial being insufficient for that purpose. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Presumption in favor of pleading. — In passing upon a demurrer to a petition in an action by a managing officer of a railroad company for the specific performance of a contract by which the owner of a tract of land agreed to convey a part of it to him in consideration of the location of a station thereon, the court will not presume, in the absence of averments to that effect, that he made the contract and brought the suit in behalf of the company or that he had contracted with it for the right to hold the land himself. *Peckham v. Lane* (Kan.), 19-369.

Complaint for legal and illegal items. — Where in an action for services it appears from the complaint that some of the services are legal and others illegal, and the latter are so mixed with the former as to poison the entire cause of action, a demurrer to the complaint should be sustained. *King v. Raleigh, etc., R. Co.* (N. Car.), 15-40.

d. Condition precedent to recovery.

Architect's certificate. — An action to recover on a contract for the alteration of a building which provides expressly that pay-

ments are to be made on the certificate of the architect, cannot be maintained, where it appears that the architect refused to give the certificate on the ground that the work had not been done in accordance with the contract, there being no evidence that such refusal was due to fraud or bad faith. *Pope v. King* (Md.), 15-970.

Where a building contract provides that the contractor shall not be entitled to any payment until he has obtained a certificate from the architect that the work has been done in strict accordance with the drawings and specifications, and that the payment is properly due, the contractor cannot recover for work performed under the contract without obtaining such certificate, unless the provision requiring it has been waived, or he is prevented from obtaining it by some cause over which he has no control, such as the fraudulent, malicious, capricious, or unreasonable refusal of the architect to issue it. *Bannon v. Jackson* (Tenn.), 17-77.

Order for extra work. — Where a building contract contains a provision that no work done on the premises shall be considered extra work unless a written order therefor, signed by the architect, shall have been given to the contractor, the latter cannot recover for extra work performed by him without such written order, unless the provision of the contract has been waived by the owner or his authorized agent. *Bannon v. Jackson* (Tenn.), 17-77.

When certificate deemed fraudulent. — Where a building contract provides that a notice of delays must be given to the architect, a certificate by the architect that the work could have been performed in the stipulated time will not be deemed fraudulent because the delays are not considered therein of which the architect received no notice. *Davis v. La Crosse Hospital Assoc.* (Wis.), 1-950.

Waiver of certificate. — The use of a building by the owner thereof under circumstances negating an intention to accept the work as a compliance with the contract does not constitute such an acceptance as relieves the contractor from being required to produce the certificate of the architect that the work has been completed in accordance with the contract. *Pope v. King* (Md.), 15-970.

e. Defenses.

Wilful default after part performance. — A wilful default after part performance of a contract bars a recovery on the contract by the defaulter, though the default is in the performance of a stipulation which does not go to the essence of the contract. *Sibley v. Stickney* (Mass.), 5-611.

Subsequent agreement. — Where the signature of one party to a contract is followed by a seal, and there is no seal following the signature of the other party, any subsequent agreement of the parties affecting the liability of the other party is available as a defense in an action against him on the contract, and admissible in evidence, as the contract is a simple contract so far as that

party is concerned. *Baltimore Pearl Hominy Co. v. Linthicum* (Md.), 20-1325.

Custom and usage. — An architect who has been employed to plan and superintend the making of alterations in buildings and who refuses after the completion of the work and the payment for his services to deliver the plans to the owner of the building cannot prove in defense of an action brought to recover the plans a custom whereby he is entitled to retain them as his own property. *Gibbon v. Pease* (Eng.), 2-713.

f. Evidence.

Sufficiency to establish contract. — Evidence held sufficient to show the existence of an alleged contract. *Doty v. Doty* (Ky.), 4-1064.

Evidence reviewed, in a suit by a dentist to restrain a former employee from violating his contract not to engage in competition with the complainant, and held to establish the existence of the contract. *Turner v. Abbott* (Tenn.), 8-150.

Application of payments. — In an action by a contractor to enforce an agreement for extra compensation promised, by reason of unforeseen difficulties encountered in the progress of the work, evidence is admissible to show on what part of the work payments to the plaintiff were made, so as to enable the jury to determine what, if anything, is due on the work in controversy. *Linz v. Schuck* (Md.), 14-495.

Judicial notice of public policy. — Courts can take judicial notice of all questions relating to public policy, inform themselves from any accessible sources of facts bearing on the same, and apply the principle that a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society. It is the province of a court to expound the law only, in its opinion, for the advantage of the community. *Hall v. O'Neil Turpentine Co.* (Fla.), 16-738.

Burden of proving performance of conditions. — Where a plaintiff sets forth in his petition a contract with the defendant, and avers that he has performed all of the conditions on his part, and the defendant for answer denies the allegations of the petition and alleges a contract differing in material conditions from that alleged by the plaintiff, the burden remains with the plaintiff to prove the contract and his performance as alleged in his petition; and it is error for the court to charge the jury that as to the claim made in the defendant's answer the burden is on the defendant, and that the contract as alleged in the answer and denied in the reply must be made out by a preponderance of the evidence. *List & Son Co. v. Chase* (Ohio), 17-61.

g. Instructions.

Disregarding failure of proof. — In an action to recover damages for breach of a contract, where the complaint alleges that the breach was maliciously, wilfully, or wantonly committed and was committed in

bad faith, but there is no evidence of bad faith or malice, it is erroneous to instruct the jury that if they believe the evidence they must find that the allegations of the complaint are true. *Pullman Car Co. v. Krauss* (Ala.), 8-218.

Peremptory instruction. — Where in an action involving the validity of a contract signed by a deaf mute the evidence is undisputed and conclusive that he understood the contract at the time he signed it, a verdict sustaining the contract should be directed. *Alexier v. Matzke* (Mich.), 14-52.

h. Damages.

Damages for breach of contract, see **DAMAGES**, 9 b.

Exemplary or punitive damages. — In an action arising out of a breach of contract, attended with a fraudulent act, the defendant is liable for exemplary damages. *Welborn v. Dixon* (S. Car.), 3-407.

Where land is conveyed as security for a loan and is wrongfully sold by the grantee, the grantor may follow the proceeds of the sale and recover them in a court of equity, but punitive damages cannot be awarded. *Welborn v. Dixon* (S. Car.), 3-407.

Segregation of items. — In an action for a breach of a building contract, brought by the owner against the surety on the contractor's bond, where the plaintiff claims damages on account of structural defects, defective materials, and omissions, and the plaintiff's witnesses testify as to the total damages without segregating the items, and the defendant requests but is refused an instruction that the jury are not at liberty to consider anything but omissions, there is no occasion for segregating the items of damages proved, and the jury may find a verdict for the plaintiff on the evidence given by his witnesses. *Mercantile Trust Co. v. Hensley* (U. S.), 10-572.

CONTRADICTION.

Alleging contradictory facts in pleading, see **PLEADING**, 1.

Contradicting release, see **RELEASE AND DISCHARGE**, 6.

Contradicting witnesses, see **WITNESSES**, 5 b (2) (b).

CONTRA PACEM.

Conclusion of indictment, see **INDICTMENTS AND INFORMATIONS**, 3.

CONTRIBUTION.

Between legatees, see **WILLS**, 10 d (3).

Between sureties, see **SURETYSHIP**, 7.

Discharge of incumbrances by tenant in common, see **JOINT TENANTS AND TENANTS IN COMMON**, 2.

Expenditures by partner for firm purposes, see **MINES AND MINERALS**, 5.
Jurisdiction of admiralty court, see **ADMIRALTY**.

Between tortfeasors. — The rule that the right of contribution does not exist as between joint tortfeasors has no application to torts which are the result of mere negligence. *Mayberry v. Northern Pac. R. Co.* (Minn.), 10-754.

Where a railroad company delivers a car containing a discernible defect to a terminal company under a contract to deliver the car to its ultimate destination and the terminal company is compelled to pay damages to an employee for injuries on account of the defect in the car, the latter company is not entitled to recover indemnity from the railroad company, both companies having been equally negligent in failing to inspect the car. *Union Stock Yards Co. v. Chicago, etc., R. Co.* (U. S.), 2-525.

CONTRIBUTORY NEGLIGENCE.

See **NEGLIGENCE**, 7.

Assumption of risk and contributory negligence distinguished, see **MASTER AND SERVANT**, 3 g (1).

Defense in action for injuries to infant servant, see **MASTER AND SERVANT**, 3 e (3).

Effect as to criminal responsibility for causing death, see **HOMICIDE**, 4 b.

CONTRIBUTORY WRONG.

Defense to action for nuisance, see **NUISANCE**, 2 a.

CONTROL.

Appointment of county board of control by district judges, see **JUDGES**, 3 b.

CONVENTIONS.

Proceedings of convention to aid in construing constitution, see **CONSTITUTIONAL LAW**, 26 b.

CONVERSATIONS.

Admissibility in prosecution for rape, see **RAPE**, 2 d (2).

Admissibility to prove confession, see **CRIMINAL LAW**, 6 n (11) (a).

Evidence of insanity in criminal cases, see **INSANITY**, 7 c (1).

Proof of telephonic conversation, see **EVIDENCE**, 18.

CONVERSION.

See **TROVER AND CONVERSION**.

Equitable conversion, see **CONVERSION AND RECONVERSION**.

CONVERSION AND RECONVERSION.

1. IN GENERAL.
2. WHEN CONVERSION TAKES PLACE.
3. EFFECT OF CONVERSION.

Application of doctrine to reach property for taxation, see **TAXATION**, 3 a.

1. IN GENERAL.

Definition. — Equitable conversion is defined as a constructive alteration in the nature of property by which in equity real estate is regarded as personalty or personal estate as realty. It grows out of the old equitable maxim that equity regards that done which ought to be done, and has been adopted for the purpose of executing trusts. It is essential to the application of the doctrine that the property should be subject to a trust or imperative direction for conversion. *Beaver v. Ross* (Ia.), 17-640.

Necessity of express devise to trustees. — There need be no devise in terms to executors or trustees, in order that the doctrine of equitable conversion may apply, nor is the fact that the sale is postponed to a time subsequent to the death of the testator controlling. *Beaver v. Ross* (Ia.), 17-640.

Direction to sell property. — A direction to an executor to sell the decedent's property and pay the proceeds to the widow works a conversion. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

2. WHEN CONVERSION TAKES PLACE.

Death of testator. — Where a will provides that all of the testator's real estate shall be sold by trustees, and the testator's intention that there shall be a sale at all events is clear and unmistakable, equity will treat the conversion of the realty as taking place at the time of the testator's death, even though the time, manner, and terms of the sale are left to the discretion of the trustees. *Lambert v. Morgan* (Md.), 17-439.

Sale postponed by will. — In cases where the doctrine of equitable conversion of real estate into personalty applies, the conversion is regarded as taking place at the instant of the testator's death, and the rights of the parties are to be determined accordingly, even though the will postpones the sale to a time subsequent to the testator's death. *Beaver v. Ross* (Ia.), 17-640.

3. EFFECT OF CONVERSION.

Lien of judgment or execution. — In such a case the property passes as personalty, and the legatees have no such estate in the land as is subject to a judgment or lien or to an execution for the sale of real estate. Nor does the fact that one of the legatees is also an heir of the testator and, as such, the owner of the legal title to the land until its actual sale or conversion, alter the rule, or enable a judgment creditor of such legatee and heir to obtain a valid lien on the property as real estate. *Beaver v. Ross* (Ia.), 17-640.

Priority of assignment over judgment. — A beneficiary under a will which works an equitable conversion of the testator's real estate may assign his interest in the estate as personalty, and, in the absence of fraud, such an assignment takes precedence over any lien or interest of judgment creditors of such beneficiary under executions subsequently levied, whether by garnishment or otherwise. *Beaver v. Ross* (Ia.), 17-640.

Effect on widow's distributive share. — A widow is, under the law, entitled to dower in the real estate of her deceased husband and a share of his personal property subject to distribution, when he dies intestate or without making provision for her by his will; and when provision is made for her by his will she may elect to retain her dower and distributive share and not to take under the will; and when she retains her dower and distributive share, either by election or because no provision is made for her by will, such share is to be ascertained by regarding the husband's estate as if he had died intestate, leaving children, and can be neither increased nor diminished by any of the provisions of the will. The doctrine of equitable conversion, in such case, can have no application in ascertaining her share. *Geiger v. Bitzer* (Ohio St.), 17-151.

CONVEYANCES.

By wife to husband, see **HUSBAND AND WIFE**, 1 a.

Compelling conveyance of land in another state, see **JUDGMENTS**, 18.

Conveyance of patents, see **PATENTS**, 2.

Conveyance of remainder, see **REMAINDERS**.

Regulation of mode of transfer of title, see **CONSTITUTIONAL LAW**, 3.

Transfers in fraud of creditors, see **FRAUDULENT CONVEYANCES**.

Transfer of minerals, see **MINES AND MINERALS**, 2.

Transfer of partnership property, see **PARTNERSHIP**, 3.

Tax deeds, see **TAXATION**, 10 c.

CONVICTION.

See **CONVICTS**; **JEOPARDY**.

Lesser degree of crime charged, see **CRIMINAL LAW**, 6 r (4).

Prior conviction as evidence of guilt, see **CRIMINAL LAW**, 6 n (5).

CONVICT LABOR.

See **CONVICTS**.

CONVICTS.

Escape, see **PRISON BREAKING AND RESCUE**; **PRISONS**.

Absence from homestead in consequence of confining in penitentiary as abandonment of homestead, see **HOMESTEAD**, 6.

Bringing convict from penitentiary for trial, see **HABEAS CORPUS**, 1.
 Competency as witnesses, see **WITNESSES**, 3 b (3).
 Conviction of crime as disqualification for jury service, see **JURY**, 2.
 Conviction of crime as disqualification of voters, see **ELECTIONS**, 5.
 Conviction of crime as ground for divorce, see **DIVORCE**, 2 d.
 Convict laborers as servants of contractor, see **MASTER AND SERVANT**, 1 a.
 Discharge of convict on habeas corpus, see **HABEAS CORPUS**.
 Disqualification to practice law, see **ATTORNEYS AT LAW**, 2 a.
 Homicide by life convict, see **HOMICIDE**, 1.
 Imprisonment as affecting settlement rights of pauper, see **POOR AND POOR LAWS**.
 Power of governor to order discharge of prisoner, see **STATES**, 2 a.
 Punishment of convicts, see **CRIMINAL LAW**, 7.
 Right to alimony during imprisonment in penitentiary, see **ALIMONY AND SUIT MONEY**, 1.
 Right to speedy trial of convict imprisoned for another offense, see **CRIMINAL LAW**, 6 c (1).
 Suspension of civil rights, see **CRIMINAL LAW**, 7 b (6) (c).
 Testimony of prisoner confined in foreign state, see **DEPOSITIONS**, 2.
 Validity of deed executed by convict, see **DEEDS**, 2 e.
 Validity of statute providing for parole system, see **STATUTES**, 3 b.

Power to let out contract for labor of convicts.—The board of public lands and buildings in Nebraska is vested with the general management and control of the penitentiary and may, in its discretion, let out by contract the labor of any or all the convicts. *State ex rel. Davis v. Mortensen* (Neb.), 5-291.

Validity of contract for hiring of convict labor.—A written contract for the hiring of convict labor is not valid under the Nebraska statute unless it is executed by the warden of the penitentiary and approved by the governor and the board of public lands and buildings. *State ex rel. Davis v. Mortensen* (Neb.), 5-291.

Subhiring of convicts.—The statute laws of Florida do not indicate a public policy with reference to the subhiring of convicts, but give the board of state institutions and county commissioners a very extensive discretion in all matters relating to the hiring of convicts; and under this system the practice of subhiring has prevailed for several years without objection, if not with their express assent, and under conditions which seem most amply to provide for the humane treatment and care of convicts. This practice has been well known to the legislature, and it has not seen fit to prevent it by legislation or to announce a public policy on the subject, variant from that which prevails. Under such circumstances, where the contract and subcontract omit nothing essen-

tial to the humane treatment of the convicts, and the hirer by subletting does not undertake to exempt himself from the responsibility assumed in his contract, and the subhirer binds himself to observe in all respects the terms of the original contract, it cannot be said that the subhiring contract is void as against public policy. *Hall v. O'Neil Turpentine Co.* (Fla.), 16-738.

COPARTNER.

See **PARTNERSHIP**.

COPIES.

Admissibility of copies in evidence, see **EVIDENCE**, 5, 9a.

COPYRIGHTS.

1. **IN GENERAL**, 540.
2. **SUBJECTS OF COPYRIGHT**, 541.
3. **WHO MAY OBTAIN COPYRIGHT**, 541.
4. **NOTICE OF COPYRIGHT**, 542.
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7. **INFRINGEMENT**, 542.
 - a. What constitutes, 542.
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8. **EXPIRATION OF COPYRIGHT**, 543.

1. IN GENERAL.

Protection wholly statutory.—The question as to what matters are protected by the Federal Copyright Act depends solely upon the construction to be placed on the statute, inasmuch as the protection given to copyrights in the United States is wholly statutory. *White-Smith Pub. Co. v. Apollo Co.* (U. S.), 14-628.

The unauthorized use of the literary production of another furnishes no ground for the recovery of damages except through the federal copyright laws. All persons are at liberty to print, publish, and sell the literary production of others, unless they are protected by a compliance with the Act of Congress for that purpose. *State v. State Journal Co.* (Neb.), 13-254.

Purpose of federal copyright law.—The purpose of the copyright law of the United States is not so much the protection of the possession of the visible thing produced as to secure a monopoly for a limited time of the right to publish the production, and the law will be given a fair and reasonable construction with a view to effecting that purpose. *American Tobacco Co. v. Werckmeister* (U. S.), 12-595.

Common-law right of property in picture.—The owner of an unpublished picture which he has failed to register under the copyright statutes may recover damages from one who infringes his common-law right of property in such picture by publish-

ing a printed copy thereof, and the fact that the publisher purchases and publishes such picture without knowing that it is pirated does not relieve him of liability. *Mansell v. Valley Printing Co. (Eng.)*, 15-133.

Unlawful use of uncopyrighted manuscript. — Where the company employed to print and bind the supreme court reports of a state unlawfully uses the uncopyrighted manuscript and other property intrusted to it by the state to print and sell for its own benefit the state reports, the state does not thereby acquire title to the volumes thus unlawfully produced so as to enable it, by injunction, to prevent the publishing company from disposing of the books, or entitle the state to an accounting of the proceeds of the sales thereof. *State v. State Journal Co. (Neb.)*, 13-254.

2. SUBJECTS OF COPYRIGHT.

Law reports. — A salaried reporter of the court may, unless forbidden by statute, secure copyright of the headnotes, statements of cases, title of the volume, synopsis of the arguments, and, in short, such portion of his compilation or authorship as requires the exercise of intellectual thought and skill. But the opinions or decisions of the judges, and the syllabi, if prepared by the court, are not the subject of copyright interest. Nor are the arrangement of reported cases in sequence, and their paging and distribution into volumes, features of such importance as to entitle the reporter to copyright protection of such details. *Banks Law Pub. Co. v. Lawyers' Co-Op. Pub. Co. (U. S.)*, 17-957.

Accessories of dramatic production. — The English acts relating to dramatic copyright contemplate, as the subject of protection under them, something which can be printed and published. Therefore, where a dramatic piece in which there is copyright is, as regards the verbal composition, entirely different in substance from another dramatic piece alleged to constitute an infringement of that copyright, the mere fact that accessorial matters, such as scenic effects, make-up of actors, or stage "business," in the latter piece, as performed, are similar to those employed in the performance of the former will not constitute an infringement of the copyright therein, such matters, taken by themselves, not being the subject of protection under the copyright acts, though where the verbal composition of the pieces is more or less similar such matters may be regarded as throwing light on the question whether there has been an infringement. *Tate v. Fullbrook (Eng.)*, 14-428.

Musical compositions. — The Federal Copyright Act providing that two copies of a book, map, chart, or musical composition shall be delivered at the office of the librarian of Congress, that notice of copyright must be inserted in the several copies of every book and upon some visible portion of every musical composition, and that the infringer of a musical composition shall forfeit every sheet thereof and one dollar for every sheet

of the same found in his possession, shows that Congress intended to deal with the tangible thing, the copies of which are required to be filed, and not with an abstract right of property in ideas or mental conceptions. *White-Smith Pub. Co. v. Apollo Co. (U. S.)*, 14-628.

The amendment to the Federal Copyright Act by the act of Jan. 6, 1897, providing a penalty for any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, does not have the effect of enlarging the meaning of the original sections of the act, as the purpose of such amendment was evidently to put musical compositions on the same footing with dramatic compositions so as to prohibit their public performance. *White-Smith Music Pub. Co. v. Apollo Co. (U. S.)*, 14-628.

Letter unpublished at author's death.

— The right of copyright in a letter unpublished at the author's death is, under the English Copyright Act of 1842, vested in the proprietor of the letter itself, who is either the receiver of the letter or some one claiming under him. *Macmillan v. Dent (Eng.)*, 3-1113.

3. WHO MAY OBTAIN COPYRIGHT.

Assignee before copyright. — Under the copyright laws, an assignee before copyright has the same privilege of subsequently acquiring complete statutory copyright as the original author, inventor, dealer, or proprietor. *Bong v. Alfred S. Campbell Art Co. (U. S.)*, 16-1126.

Under the Federal Copyright Law providing, among other things, that the assigns of the author or proprietor of any book, painting, etc., shall, upon complying with the provisions of the copyright laws, "have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same," the purchaser and transferee of the property right of copyright in a painting for the purpose of making photogravures thereof, the original being returned to the owner, is not a mere licensee, but acquires the exclusive right to reproduce the painting, and although the transfer is made before the copyright of the original, the assignee has the same privilege of subsequently acquiring complete statutory copyright as the original proprietor. *American Tobacco Co. v. Werckmeister (U. S.)*, 12-595.

Citizen or subject of foreign country.

— Under section 13 of the Act of Congress of March 3, 1891, relative to copyrights, a citizen or subject of a foreign country cannot obtain a statutory copyright in the United States, unless the country of which he is a citizen or subject permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, or is a party to an international agreement providing for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto; and it is further essen-

tial that the existence of one or the other of the conditions above mentioned shall have been determined by the President of the United States, by proclamation. *Bong v. Alfred S. Campbell Art Co.* (U. S.), 16-1126.

That portion of said section 13 which provides that the existence of the conditions entitling foreign citizens to copyright shall be determined by the President of the United States by proclamation made, from time to time, as the purposes of the act may require, is not directory merely, but mandatory; and, consequently, the fact that a foreign country is a party to an international agreement providing for reciprocity in copyright, does not entitle its citizens to statutory copyright in the United States, unless the existence of such condition has been determined by the President in the manner prescribed by the statute. *Bong v. Alfred S. Campbell Art Co.* (U. S.), 16-1126.

Assignee of foreign subject. — As a subject of a foreign country which has not the copyright relations with the United States prescribed by section 13 of the Act of March 3, 1891, above mentioned, has no right to obtain a statutory copyright in the United States, an assignment from such foreign subject confers no right in that regard upon the assignee, even though the latter is a citizen or subject of a foreign country which has the prescribed copyright relations with the United States. *Bong v. Alfred S. Campbell Art Co.* (U. S.), 16-1126.

In an action brought by a citizen and subject of the German Empire, under the copyright statutes of the United States, to recover penalties and forfeitures for the infringement of a copyright of a painting, where it is conceded that the original artist, under whom the plaintiff claims as assignee, was a citizen of Peru, as to which country the President has issued no copyright proclamation, a verdict is properly directed for the defendant, the plaintiff's copyright based upon such assignment being invalid. *Bong v. Alfred S. Campbell Art Co.* (U. S.), 16-1126.

4. NOTICE OF COPYRIGHT.

Sufficiency of inscription on copies. — Although the Federal Copyright Law requires, if read literally, the notice of the copyright of "a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo," etc., to be inscribed "upon some visible portion thereof, or of the substance on which the same shall be mounted," it is the object of the statute to require the inscription of the notice of copyright, not upon the original map, photograph, painting, etc., but upon those published copies concerning which the protection of copyright is desired, and hence photographures of an unpublished painting are protected by notice and copyright on such photographures, although the original painting is not inscribed in literal compliance with the terms of the copyright law. *American Tobacco Co. v. Werckmeister* (U. S.), 12-595.

5. PUBLICATION.

What constitutes publication of painting. — Entering a painting, with reservation of copyright, in an art gallery exhibition to which an admission is charged the general public and at which officers are present to enforce a rule that no copying of paintings shall take place, is not a publication within the copyright law. *American Tobacco Co. v. Werckmeister* (U. S.), 12-595.

6. NATURE OF RIGHTS ACQUIRED.

In general. — The filing of the title of a magazine for copyright by the publisher and the insertion of the proper notice is sufficient to secure a copyright of a story published therein and to protect the right to dramatize the same where the publisher is the owner of both the story and the dramatic rights. *Dam v. Kirk La Shelle Co.* (U. S.), 20-1173.

Right of dramatization. — The sale by the author of a story to a magazine publishing company, the delivery of the manuscript, and the acceptance of a sum of money "in full payment for story" without further agreement, constitute in legal effect an absolute sale without reservation, carrying with it as an incident of ownership the exclusive right to dramatize the story when copyrighted under the federal statute (Rev. St., § 4952; 2 Fed. St. Ann. 256) which provides that "authors or their assigns shall have the exclusive rights to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States." *Dam v. Kirk La Shelle Co.* (U. S.), 20-1173.

7. INFRINGEMENT.

a. What constitutes.

Musical copyright. — Under the Federal Copyright Act, the copyright on a musical composition printed in intelligible staff notation is not infringed by the production and sale of perforated rolls not intended to be used or read as ordinary sheet music, but which, when used in connection with a piano and mechanism for which they are adapted, produce the identical musical tones of the copyrighted composition. *White-Smith Music Pub. Co. v. Apollo Co.* (U. S.), 14-628.

The fact that the use of perforated rolls for the production of music enables the manufacturers of them to enjoy the use of copyrighted musical compositions for which they pay no value is a consideration to be addressed to the legislature, and not to the judicial branch of the government. *White-Smith Music Co. v. Apollo Co.* (U. S.), 14-628.

Dramatization of copyrighted story. — A playwright who appropriates the theme or plot of another's story, protected by copyright, as the basis of a play, cannot escape a charge of infringement by adding to or slightly varying the incidents, or by adding to the number and changing the names of the characters. *Dam v. Kirk La Shelle Co.* (U. S.), 20-1173.

b. Remedies.

Common-law action for damages. — The owner of the copyright in a map may maintain a common-law action for damages for its infringement, notwithstanding the provisions of the federal statute imposing a penalty for infringement and providing for relief by injunction. *Walker v. Globe Newspaper Co.* (U. S.), 5-274.

Injunction. — In a suit in equity by a mercantile agency for infringement of its copyrighted book of reference by another agency, and for an injunction, the court will consider the amount and extent of the infringement; and where it appears that the defendant maintains an elaborate and comprehensive system of obtaining information, which produces twenty-five per cent. more names than the complainant's book contains, and six times as many subjects of information concerning the persons named, an injunction restraining the defendant from the use of its book would be unconscionable and will be denied, although the evidence requires a finding that with respect to a few names the defendant has made an improper use of the complainant's book. *Dun v. Lumbermen's Credit Assoc.* (U. S.), 14-501.

Measure of damages. — The owner of the copyright of a story which has been infringed by another by appropriating the story as the basis of a play is entitled to recover as damages all of the profits made by the infringer from the production of such play, there being no other practicable measure of damages. *Dam v. Kirk La Shelle Co.* (U. S.), 20-1173.

8. EXPIRATION OF COPYRIGHT.

General effect upon copyrighted name. — Upon the expiration of the statutory period of copyright, a copyrighted name becomes public property. *G. & C. Merriam Co. v. Ogilvie* (U. S.), 14-796.

Limitations on subsequent use of name. — The right of the public to use a copyrighted name after the expiration of the copyright is subject to the limitation or condition that the right shall be so exercised as not to lead purchasers to believe that they are getting the identical thing produced under the copyright. *G. & C. Merriam Co. v. Ogilvie* (U. S.), 14-796.

One who avails himself of the dedication of a name to the public by the expiration of the copyright thereon must fully identify his production; and must clearly dissociate it from that of the one who has given significance to the name, by sufficiently directing the mind of the public to the fact that, although the name is the same, the article is produced by himself. *G. & C. Merriam Co. v. Ogilvie* (U. S.), 14-796.

The mere use of the producer's name in connection with such copyrighted name is not always sufficient as an unmistakable designation. The name should be accompanied by such indications as will unmistakably inform the public that the article is produced by the one who exercises the public right by appropriating the copyrighted name. *G. & C. Merriam Co. v. Ogilvie* (U. S.), 14-796.

Deceptive use. — Notwithstanding the fact that the name of the competitor appears on the title page and on the back of a dictionary published under such name, the competitor will be enjoined from using in the title page of such dictionary, and in the imprints on the back thereof, words of description calculated to lead ordinary purchasers into the belief that they are purchasing the dictionary published by the owner of the copyrighted name, such conduct on the part of the competitor amounting to unfair competition. *G. & C. Merriam Co. v. Ogilvie* (U. S.), 14-796.

Notwithstanding the fact that the copyright on the name of a dictionary has expired, a competitor of the owner of the copyright will be enjoined from sending out circulars and advertisements which show an intention to deceive purchasers into the belief that a dictionary published by him under such name is the same as the one published by the owner of the copyright. *G. & C. Merriam Co. v. Ogilvie* (U. S.), 14-796.

Remedy for wrongful interference with use. — The owner of the copyrighted name of a dictionary may be enjoined from sending out, after the expiration of the copyright, circulars to the effect that it has the exclusive right to use the name in connection with dictionaries. *G. & C. Merriam Co. v. Ogilvie* (U. S.), 14-796.

CORAM NOBIS.

See APPEAL AND ERROR, 1.

CORONERS.

1. JURISDICTION AND POWERS.

2. FINDING OR VERDICT AS EVIDENCE.

Admissibility at trial of evidence given before coroner, see CRIMINAL LAW, 6 n. (11) (a).

Service on coroner's jury as disqualification for service on grand jury, see GRAND JURY, 2.

1. JURISDICTION AND POWERS.

Jurisdiction as dependent upon locality. — The purpose of a coroner's inquest requires that the coroner of the county either where the crime was committed or where the body was found should have jurisdiction to hold the inquest, and the coroner of either county has such jurisdiction. *Young v. Pulaski County* (Ark.), 4-1161.

The whole purpose of a coroner's inquest being attained when the coroner of the county either where the crime was committed or the body was found holds the inquest, it follows that the coroner of no other county has jurisdiction and no useful purpose would be secured in giving him jurisdiction. *Young v. Pulaski County* (Ark.), 4-1161.

Power to determine whether inquest shall be held. — The Indiana statute requiring the coroner to hold an inquest on dead bodies of persons supposed to have died

by violence or casualty does not confer judicial discretion on the coroner in determining whether an inquest shall be held. *Stults v. Allen County (Ind.)*, 11-1021.

It is not conclusive that an inquest should not be held because there is nothing in the superficial facts affirmatively showing that the person whose dead body is found came to his death by violence or casualty. *Stults v. Allen County (Ind.)*, 11-1021.

Powers with regard to expenses of inquest.—Under the Indiana statutes it is the duty of the coroner to certify the fact of the service of the physician or surgeon who performs the autopsy, and possibly the fees of the witnesses, clerk, etc., but the coroner is not authorized on appeal to wage their contentions for them. *Stults v. Allen County (Ind.)*, 11-1021.

The fact that an inquest has been held may, in view of the presumption of the regularity of official action, create a presumption that the coroner was warranted in holding it, but that question will be inquired into when his claim for allowances against the county is heard. *Stults v. Allen County (Ind.)*, 11-1021.

2. FINDING OR VERDICT AS EVIDENCE.

Finding as to cause of death.—The finding of a justice of the peace sitting as coroner under the provisions of the Texas statutes, as to the cause of death of a deceased person, is not admissible as evidence in a subsequent civil action wherein that fact is in issue. *Boehme v. Sovereign Camp (Tex.)*, 4-1019.

Verdict of death by suicide.—In an action on an accident insurance policy to recover for the death of the insured neither the record of the coroner's inquest nor the verdict of the coroner's jury is admissible as evidence to prove that the insured committed suicide. *Etna Life Ins. Co. v. Milward (Ky.)*, 4-1092.

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1. CLASSIFICATION.

a. Private or public.

Corporation formed for erection of armory.—A corporation organized under a statute authorizing members of the national guard to incorporate for the erection of an armory is a private and not a public corporation, and, save as excepted by statute, has the same powers and is subject to the same liability as other private corporations, and its property is subject to the operation of the mechanics' lien laws. *Arrison v. Company D, North Dakota Nat. Guard (N. Dak.)*, 1-368.

b. Quasi-public.

Definition.—Quasi-public corporations, *i. e.*, those "affected with a public interest," defined. *McCarter v. Firemen's Ins. Co. (N. J.)*, 18-1048.

Fire insurance company.—The business of fire insurance as it is carried on in this state by corporations created, licensed, and regulated by the state, is a business affected with a public interest within the meaning of this rule. *McCarter v. Firemen's Ins. Co. (N. J.)*, 18-1048.

c. Public service.

Definition.—The Virginia constitution provides that the term "public service corporation" shall include "all transportation and transmission companies, all gas, electric light, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public." *Townsend v. Norfolk R., etc., Co. (Va.)*, 8-558.

2. MATTERS RELATING TO CORPORATE EXISTENCE.

a. Organization and incorporation.

Filing articles of association.—Under the Indian Territory general incorporation

law, which provides that before any corporation shall commence business the president and directors thereof shall file with the clerk of the court of appeals a copy of the articles of association, a corporation is not fully organized until such articles are filed with the clerk. *Western Investment Co. v. Davis* (Ind.), 15-1134.

Though for commencing business before filing such certificate the corporation may be called to account by the state, the failure to file the certificate does not affect the legal existence of the corporation. *Western Investment Co. v. Davis* (Ind. Ter.), 15-1134.

Application for charter. — Upon an application to the superior court for the grant of a charter for a private corporation, the law of this state makes no provision for another person to make himself a party to the proceeding for the purpose of resisting or objecting to the grant of the application. But another corporation or association which has acquired a proprietary right in a name may apply to a court having equitable jurisdiction to enjoin the applicants from fraudulently appropriating such name and obtaining a charter under it for similar organization, and copying its insignia, badges, and emblems, to the detriment of the plaintiff. *Creswill v. Grand Lodge* (Ga.), 18-453.

Special act or general law. — A statute providing for the incorporation of supreme, grand, and subordinate lodges of a fraternal order, which provides for the formation of an unlimited number of corporations, including the one corporation which is supreme in the social relations of the order, is valid, and does not violate that provision of the Michigan constitution which requires private corporations to be formed under general laws, and prohibits their creation by special act. *People v. Wilson* (Mich.), 17-628.

Statement of corporate objects in charter. — The purpose for which a company is organized is primarily to be sought in its charter or certificate of incorporation. *Colgate v. United States Leather Co.* (N. J.), 19-1262.

Married woman as incorporator. — Under the Wisconsin statute providing that "three or more adult persons, residents of this state, may form a corporation," the legal existence of a corporation is not affected by the fact that one of its three corporators is a married woman, the statute removing the common-law disabilities of married women leaving them free to become corporators as well as to enter into other contracts. *Good Land Co. v. Cole* (Wis.), 11-806.

b. Period of corporate existence.

Limitation by charter. — Where the charter of a turnpike company prescribes the period of fifty years for the existence of the corporation and the exercise of the privileges conferred, the fact that the charter also provides for "perpetual succession" does not extend the period of corporate existence. *State ex rel. Hines v. Scott County Macadamized Road Co.* (Mo.), 13-656.

Perpetual succession. — It is a general rule of construction that a charter provision that the corporation shall have "perpetual succession" implies only a continuance of succession during the period that the corporation may lawfully exist; but the application of the rule is subject to exceptions. *State v. German Mutual Life Ins. Co.* (Mo.), 19-1210.

c. De facto corporations.

Requisite elements, in general. — In order to create *de facto* corporations, there must be a law under which a corporation may be created, together with the user under the law. *Marshall v. Keach* (Ill.), 10-164.

Final certificate not recorded. — Where there has been an honest attempt of corporators to organize a corporation under the laws of the state, and all the necessary steps have been taken except that the final certificate has not been recorded by the recorder of deeds, and the necessary officers have been elected, and such officers have proceeded to transact business as a corporate body, these facts establish the existence of a corporation *de facto*. *Marshall v. Keach* (Ill.), 10-164.

Unconstitutional statute as basis. — An unconstitutional act of the legislature is not a sufficient basis for a corporation *de facto*. That can exist only in case of a law under which it might have been created *de jure*. *Huber v. Martin* (Wis.), 7-400.

Sufficiency of evidence to establish existence. — Evidence reviewed, and held sufficient to show that a purported corporation is a *de facto* one. *Marshall v. Keach* (Ill.), 10-164.

Inquiry into existence. — The law that corporate existence cannot be inquired into, except by judicial proceedings in the name of the state, does not apply to a pretended but not even a *de facto* corporation. *Huber v. Martin* (Wis.), 7-400.

d. Abandonment of corporate purposes.

What constitutes. — The making of a lease of real estate used by a corporation to carry on its business is not an abandonment by the corporation of its purposes or a change of its business, but is simply a change of method in managing the business. *Starke v. J. M. Guffey Petroleum Co.* (Tex.), 4-1057.

e. Dissolution.

(1) In general.

Change of name. — The mere change of name by a corporation does not operate as the creation of a new corporation, or affect any right which it had under its original name. *Peever Merc. Co. v. State Mut. Fire Assoc.* (S. D.), 19-1236.

Custody of property pending dissolution proceedings. — In proceedings under the statute for the sequestration and winding up of corporate estates and the distribution of their proceeds, the property is in *custodia legis*, for the purpose of being administered according to the statute, at least

from the time of the service of process, if not from the filing of the bill. *Cobb v. Camden Sav. Bank (Me.)*, 20-547.

(2) Grounds.

Concentration of stock in hands of one person.—The fact that all the stock of a corporation is acquired by one person does not work a forfeiture of the corporation's right to exist, so long as the proper and legitimate functions of the corporation are discharged, no matter who the owner of the stock may be. *Commonwealth v. Monongahela Bridge Co. (Pa.)*, 8-1073.

Engaging in unlawful business.—A domestic corporation engaged in an unlawful business may be deprived of its charter and dissolved by proceedings in *quo warranto*. *State ex rel. Prout v. Nebraska Home Co. (Neb.)*, 1-88.

Dissolution by minority stockholders.—Where it appears that the charter purposes of a private business corporation, though solvent in the sense that it owes no debts, cannot be carried out, that the stockholders thereof have not met for five years, that it has no agent or officer in the state, that its income is merely sufficient to pay its expenses, that the property from which such income is derived is gradually deteriorating in value, and that in a short time such income will be insufficient to meet the expenses, a minority stockholders of such corporation may maintain a bill in equity to have the corporate assets sold and the proceeds distributed. *Central Land Co. v. Sullivan (Ala.)*, 15-420.

If it can be said that in such an action it is ever necessary to show a demand on the officers or stockholders of the corporation for a distribution of the assets, such demand is unnecessary where no complaint is made against the managing officers of the corporation in respect to the condition of its affairs. *Central Land Co. v. Sullivan (Ala.)*, 15-420.

(3) Effect.

In general.—The supposed common-law rule that upon the termination of a corporation its debts become extinguished, its realty reverts to the grantors, and its personal property goes to the sovereign, if it ever existed in fact, is wholly obsolete, except as to purely public corporations. *Huber v. Martin (Wis.)*, 7-400.

Continued existence for purpose of settling up affairs.—It is a part of the settled public policy of Illinois that upon the dissolution of a corporation, however effected, the corporation is regarded as still existing for the purpose of settling up its affairs. *Commercial Loan, etc., Co. v. Mallers (Ill.)*, 17-224.

Banking corporations.—The provision of the Illinois statute (Rev. St., c. 32, § 10) which limits the period during which certain corporations shall be deemed to continue in existence for the purpose of settling up their affairs, after expiration of their corporate powers in other respects, to two years, has

no application to banking corporations. A banking corporation may enforce collection of its claims against its debtors, for the purpose of closing up its affairs, until such indebtedness has become barred by the general statute of limitations. *Commercial Loan, etc., Co. v. Mallers (Ill.)*, 17-224.

Effect on pending litigation.—A banking corporation which has commenced an action while still a going concern is entitled to prosecute such action to judgment and to enforce collection of a judgment in its favor by execution, even though it has gone into voluntary liquidation pending the litigation, and an execution issued in its favor under such circumstances cannot be quashed as void. *Commercial Loan, etc., Co. v. Mallers (Ill.)*, 17-224.

Effect on lease.—Where a lease is made to a corporation and payment of the rent during the term is guaranteed by sureties, the dissolution of the corporation without having assigned the lease determines the lease and discharges the liability of the sureties. *Hastings v. Letton (Eng.)*, 13-574.

Effect as to prior attachments.—A bill in equity was filed against a corporation under the provisions of the Revised Statutes, chapter 47, sections 80 and 81, which provides expressly or by reference to other sections that when the stockholders of a corporation vote to dissolve it, a bill therefor may be filed against it by any officer, stockholder, or creditor; that on proceedings had according to the usual course in equity the corporation shall be dissolved and terminated; that the court may appoint receivers, issue injunctions, and pass interlocutory decrees and orders; that the court shall, on dissolving the corporation, appoint one or more trustees; that notwithstanding the appointment of trustees, the court may superintend the collection and distribution of the assets, and may retain the bill for that purpose; and that the debts of the corporation shall be paid in full when the funds are sufficient, and when not, ratably to those creditors who prove their debts. Notice was ordered by the court returnable on a day certain, and served as ordered, and after the return day a decree was made dissolving the corporation and appointing the plaintiffs as trustees and receivers. In the meantime, after the service of notice in the bill, but before the return day, and before the appointment of the receivers, real estate of the corporation was seized on execution by a judgment creditor having an existing valid attachment which antedated the bill in equity, and, after regular proceedings had, was sold on execution sale to the defendant. In an action by the receivers to recover possession of the real estate so sold, it was held that the prior attachment was not dissolved by the filing of the bill in equity and the proceedings thereunder. *Cobb v. Camden Sav. Bank (Me.)*, 20-547.

While attachment liens are not destroyed by proceedings under the statute, Rev. St., chapter 47, sections 80 and 81, the right to enforce them in the usual way is suspended,

and lien creditors must apply to the court in the sequestration proceedings to have their priority of right determined and enforced, either out of the property itself, or out of the proceeds thereof, as may be adjudged. *Cobb v. Camden Savings Bank (Me.)*, 20-547.

f. Consolidation and merger.

Right to consolidate.—Upon an examination of the respective certificates of incorporation of the United States Leather Company and of the Central Leather Company—held, that these two corporations were not “organized for the purpose of carrying on business of the same or a similar nature” within the meaning of the Act of 1893 (P. L. 1893, p. 121), and that the proposed consolidation of the two companies is unauthorized by law and violative of the rights of nonassenting stockholders. *Colgate v. United States Leather Co. (N. J.)*, 19-1262.

The power of corporations to consolidate and merge is not to be implied, and exists only by virtue of plain legislative enactment. *Colgate v. United States Leather Co. (N. J.)*, 19-1262.

It follows that there is no right to consolidate without unanimous consent of stockholders, unless the power to consolidate has been conferred by legislation that may be read into the contract of incorporation. *Colgate v. United States Leather Co. (N. J.)*, 19-1262.

Under P. L. 1893, p. 121, and P. L. 1896, p. 309, § 104, the power to merge two corporations is conferred only where they are organized for the purpose of carrying on business of the same or a similar nature. *Colgate v. United States Leather Co. (N. J.)*, 19-1262.

Effect of consolidation.—Where two corporations are consolidated under a statute providing that on a consolidation all the property belonging to the separate corporations, and all the powers and rights, debts and liabilities, of the former corporations shall be devolved on the consolidated corporation (Code Pub. Gen. Laws Md. 1904, art. 23, § 46) the corporate existence of the former companies terminates, and the consolidated company is a new and separate corporation acquiring its rights by grant from the state, and not by way of transfer from the former corporations. *Diggs v. Fidelity, etc., Co. (Mass.)*, 20-1274.

The acts authorizing consolidation and merger of corporations (P. L. 1893, p. 121; P. L. 1896, p. 309, § 104) neither permit nor contemplate that change of the objects of incorporation is to be accomplished by means of a consolidation agreement. *Colgate v. United States Leather Co. (N. J.)*, 19-1262.

Issuance of bonds by consolidated company.—Where a corporation executes a mortgage to a trustee to secure bonds to be issued on account of property thereafter to be acquired by the corporation on certain conditions, to be performed in part by the directors of the corporation and in part by

an engineer to be selected by it, the corporation's right to obtain from the trustee certification and delivery of the bonds resting in the corporation's discretion, and afterwards it consolidates with another corporation, the consolidated corporation with property from two former companies cannot execute the bonds for newly-acquired property of the consolidated corporation, the mortgage provision contemplating the purchase of property for the original corporation. *Diggs v. Fidelity, etc., Co. (Md.)*, 20-1274.

The holder of bonds previously issued by the former corporation can insist that none of the reserved bonds shall be issued except in conformity with the conditions fixed by the mortgage which in effect constituted a contract between the mortgagor corporation and the bondholders. *Diggs v. Fidelity, etc., Co. (Md.)*, 20-1274.

Where a corporation executes a mortgage to a trustee to secure bonds to be certified and issued in exchange for prior lien bonds assumed by the corporation, the mortgage providing that the trustee shall certify and deliver such new bonds on the corporation's tender of any prior lien bonds, if the corporation executes the bonds called for by the mortgage, and lodges them with the trustee before it ceases to exist through consolidation, the trustee can, without further proceedings, certify and deliver the bonds in exchange for an equal amount of prior lien bonds as authorized by the mortgage, while the mortgage remains in force. *Diggs v. Fidelity, etc., Co. (Md.)*, 20-1274.

3. CONTROL OF CORPORATIONS BY LEGISLATURE AND COURTS.

a. In general.

Visitorial powers.—To protect the public from monopolies and unlawful combinations and unreasonable exactions from corporations enjoying special franchises, the state may exercise a visitorial power over them and may make the power effective and facilitate its exercise by requiring every stock corporation to keep at its principal office or place of business in the state correct books of account of all its business. *Venner v. Chicago City R. Co. (Ill.)*, 20-607.

b. Amendment or repeal of charters.

Power of legislature, in general.—A charter granted to private individuals for the incorporation of a water company is subject to alteration, amendment, or repeal at the pleasure of the general assembly, provided the object of the grant or rights vested thereunder are not defeated or substantially impaired. *Southington v. Southington Water Co. (Conn.)*, 13-411.

Limitations on power.—The power to alter or repeal general laws under which corporations have been organized, reserved by the constitution of Nebraska, is limited by a section of the same constitution which forbids the passage of any law impairing the

obligation of contracts, and does not reserve to the legislature the power to destroy or impair the contracts of third persons with such corporations. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

Appropriation of property. — The legislature may alter or amend the charter of a corporation, but cannot legitimately appropriate its property without the consent of all its members, either to its own use or that of a private party, though such party is a successor corporation, in the absence of some authorization to the contrary in the charter originally. *Huber v. Martin* (Wis.), 7-400.

Rights independent of charter. — A provision in a corporate charter that the charter "shall be subject to the action of any further legislature to amend, alter, or repeal as the public good may require," affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by the corporation directly from the state, including its very existence; but rights and interests acquired by the corporation, not constituting a part of the contract of incorporation, and not so derived directly from the state, stand on a different footing and are not subjected by such provision to legislative control. *Lawrence v. Rutland R. Co.* (Vt.), 13-475.

Charter as contract. — A corporate charter is a contract between the state and the incorporators and is protected by the Federal Constitution, like any other contract, from legislation impairing its obligation. *Lawrence v. Rutland R. Co.* (Vt.), 13-475.

The right of a town to purchase the works of a water company in pursuance of a charter provision that such right shall exist on condition that the town subscribes to the stock of the corporation, becomes a vested right on the fulfilment of the condition and is protected by the constitutional guaranty protecting private property. *Southington v. Southington Water Co.* (Conn.), 13-411.

Amendment before rights have accrued. — After the granting of a charter to a water company and before the full amount of the stock is subscribed or any funds are received or assets acquired, and before the organization of the corporation in accordance with the charter is effected, the legislature has power to alter the charter by authorizing a town to subscribe, with the consent of the incorporators, for a certain number of the shares of the projected corporation, with the option of purchasing the entire works of the company at any time within twenty years by paying to the company the sum actually expended on said works, together with interest, less any dividends which the company may have paid; and where the incorporators avail themselves of the town's proffered subscription to the stock and include it among the organizing members, the privilege of the town to purchase the entire works becomes engrafted on the law of the corporation's existence as effectively as any other expression of the will of the state concerning the corporation's

powers and privileges. *Southington v. Southington Water Co.* (Conn.), 13-411.

Reservation of power of amendment. — The expressly reserved power in the charter of a corporation to alter or amend it is subject to the limitation that it shall not be exercised so as to destroy vested rights or to impair the obligation of contracts. *Venner v. Chicago City R. Co.* (Ill.), 20-607.

Though a charter granted to a corporation by the legislature is a contract within the protection of the Federal Constitution prohibiting the impairment of the obligation of contracts, yet the state possesses reserved rights to pass reasonable laws for the promotion of the general welfare, and a subsequent legislature may subject the corporation to general laws enacted under the police power. *Venner v. Chicago City R. Co.* (Ill.), 20-607.

Anti-monopoly statutes. — The application to domestic corporations of the provisions of a statute forbidding foreign corporations from continuing to do business within the state if they have become, either within or without the state, parties to any trust or combination to regulate prices or production either within the state or elsewhere, does not, as to such domestic corporations, cause it to be repugnant to the contract clause of the Federal Constitution, especially where the power to repeal or amend corporate charters is reserved by the state constitution. *Hammond Packing Co. v. Arkansas* (U. S.), 15-645.

Supervising power of courts. — Under a provision of a state constitution, reserving the power to repeal, alter, or amend corporate charters, and declaring that such power shall be exercised "in such manner, however, that no injustice be done to the corporators," the question whether injustice has been done to the corporators is within the province of the state court finally to decide, and the federal supreme court will not interfere unless such power is exercised in such an arbitrary manner as, irrespective of the contract clause, to deprive the corporators of some other fundamental right within the protection of the Federal Constitution. *Hammond Packing Co. v. Arkansas* (U. S.), 15-645.

c. Regulation of rates for public service.

Power of legislature. — The power to prescribe what the charges shall be for services rendered in the conduct of a business impressed with a public interest is vested in the legislature, and must be exercised by it directly or through some appropriate agency. *Madison v. Madison Gas, etc., Co.* (Wis.), 9-819.

Power of court. — A court cannot prescribe a schedule of rates which a public service corporation may charge for future services, though it may determine whether a charge for services already rendered is reasonable, and may determine the validity of legislation prescribing the rates which may be charged by the corporation. *Madison v. Madison Gas, etc., Co.* (Wis.), 9-819.

Basis of determination. — There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as a sufficient return upon the capital invested in business corporations which are subject to legislative regulation. Such compensation must depend greatly upon circumstances, among them being the amount of risk involved in the business, the locality where such business is conducted, and the rate expected and usually realized upon investments of a somewhat similar nature with regard to the risk attending them. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

As a general rule the value of the property of such a corporation is to be determined as of the time when the inquiry regarding the rate is made, except perhaps when the property has increased in value so enormously as to render a rate permitting a reasonable return upon it unjust to the public. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

d. Requirement of annual report.

Constitutionality of statute requiring. — The Montana statute requiring corporations to make annual reports is a constitutional and appropriate exercise of the sovereign power of the state over corporations, whether domestic or foreign, in the nature of a regulation to protect the citizens of the state, and secure conformity to its internal policy, and is not retrospective and void as to debts of the corporation contracted before the enactment of the statute, the statutory obligation to make the reports required having existed prior to the contracting of the debts in question. *Nelson v. Bank of Fergus County* (U. S.), 13-811.

Applicability to foreign corporations. — The Montana statute providing that "every corporation having a capital stock" shall annually within twenty days from and after the thirty-first day of December make a certain report, and that "if any such corporation shall fail to do so, all the directors of the corporation shall be jointly and severally liable for all debts of the corporation then existing or which may be thereafter contracted until such report shall be made and filed," includes in its express terms foreign as well as domestic corporations, and will be so construed, especially in view of a constitutional prohibition, first effective in 1899, against allowing a foreign corporation to exercise or enjoy any greater rights or privileges than those possessed by domestic corporations, and in view of circumstances sharply directing the legislative mind to the question of including foreign corporations within the statute. *Nelson v. Bank of Fergus County* (U. S.), 13-811.

4. RIGHTS AND POWERS.

a. In general.

Powers as comprehensive as those of individual. — The powers of a corporation in effecting its objects are as broad and com-

prehensive as those of an individual, when not expressly prohibited. *Herrick v. Humphrey Hardware Co.* (Neb.), 11-201.

Changing nature of business. — As between the corporators, the corporate objects expressed in its certificate of incorporation cannot be changed without unanimous consent, unless changed by virtue of some act of legislation which may be read into the contract. *Colgate v. United States Leather Co.* (N. J.), 19-1262.

Action on the part of the corporation to change the nature of its business pursuant to the authority conferred for that purpose by our General Corporation Act is to be exercised, if at all, by direct proceedings taken pursuant to the statute. *Colgate v. United States Leather Co.* (N. J.), 19-1262.

Construction of statute granting franchise. — Statutes granting to corporations franchises which involve the rights of the public are to be construed liberally in favor of the public and strictly against corporations. *State ex rel. Minneapolis v. St. Paul, etc., R. Co.* (Minn.), 8-1047.

Implied powers. — A corporation may exercise not only those powers expressly given it, but such others as are necessary to carry the express powers into effect; but a power that the law will regard as existing by implication must be one that is directly and immediately appropriate to the execution of the powers specially granted, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation. *People ex rel. Healy v. Illinois Central R. Co.* (Ill.), 13-285.

Constitutional guarantees of property rights. — The provision of the constitution of Florida that no person shall be deprived of property without due process of law, and the provisions of the Fourteenth Amendment of the Constitution of the United States as to property rights, extend to the property held and used by corporations, since the beneficial ownership of such property is in natural persons, and the law forbids the doing by indirection that which is forbidden to be directly done. *Seaboard Air Line R. v. Simon* (Fla.), 16-1234.

Corporation formed by consolidation. — A corporation formed by consolidation succeeds to all the rights, privileges, powers, and franchises of the constituent corporations, and becomes liable for all their debts, liabilities, and duties; and consequently, where circumstances existing prior to the consolidation would have entitled one of the constituent corporations to file a bill in equity in the nature of a bill of peace to prevent a multiplicity of actions, such right passes to the consolidated corporation and may be exercised by it. *Southern Steel Co. v. Hopkins* (Ala.), 16-690.

Right to practice law. — The New York statute providing that corporations may be formed "for any lawful business" (Business Corporations Law, § 2) does not authorize corporations to engage in the practice of the law; and therefore a later statute expressly declaring it unlawful for a corporation to

practice law, but excepting from its operation corporations "lawfully engaged in a business authorized by the provisions of any existing statute" (Pen. Law, § 280), does not authorize a continuation of its business by a corporation theretofore organized under the business corporation law for the purpose of practicing law. *Matter of Co-operative Law Co. (N. Y.)*, 19-879.

Right to practice medicine. — While a corporation is a person in a certain sense, and for many purposes is so considered, it is not such a person as can obtain a statutory license to practice medicine. *State Electro-Medical Institute v. State (Neb.)*, 12-673.

Qualified and licensed physicians may form a corporation, and make contracts for the services of its members and other licensed physicians. Making such contracts, and furnishing services of qualified and licensed physicians thereunder is not a violation of the statute forbidding the practice of medicine without a license. *State Electro-Medical Institute v. State (Neb.)*, 12-673.

Power to insure lives of officers. — In the absence of express authority conferred by its charter, a manufacturing corporation has no power to expend its funds in the payment of life insurance premiums on a policy taken out, at its instance and request, by one of its officers, on his own life, and assigned by him to the corporation. Such payment is *ultra vires*, and will be enjoined at the suit of a nonassenting stockholder. *Victor v. Louise Cotton Mills (N. Car.)*, 16-291.

b. Power to acquire stock.

Own stock. — A corporation has power to purchase its own capital stock, provided the purchase is made with no illegitimate or fraudulent purpose, and no rights of creditors suffer thereby. *Gilchrist v. Highfield (Wis.)*, 17-1257.

In an action by minority stockholders to have a purchase of its own stock by the corporation declared void, on the ground that the directors voting such purchase did so for the purpose of depriving the plaintiffs of their just rights in the corporation, a finding by the trial court that no such motive existed, nor any ulterior or illegitimate intent or purpose other than the promotion of the best interests of the corporation according to the best judgment of the defendants, when supported by a preponderance of the evidence, is conclusive upon the appellate court, and precludes any interference by it with the business policy adopted by the majority stockholders. *Gilchrist v. Highfield (Wis.)*, 17-1257.

In the absence of an intention to cancel, the purchase by a corporation of its own stock does not amount to a cancellation thereof. Such purchased stock may remain outstanding as assets of the corporation if treated as such by the corporation. *Pabst v. Goodrich (Wis.)*, 14-824.

Stock of rival corporation. — It is unlawful for a corporation to purchase stock in a rival corporation for the purpose of

controlling the latter and thereby preventing competition and creating a monopoly; and this is so whether the purchase is made by the corporation in its own name or in the name of others as its agents or trustees. *Dunbar v. American Tel., etc., Co. (Ill.)*, 8-57.

It is unlawful for a manufacturing corporation to purchase stock in a rival corporation for the purpose of controlling the latter and thereby preventing competition, though there are others engaged in the same business and therefore the complete monopoly or complete restraint of competition will not necessarily result from the transaction. *Dunbar v. American Tel., etc., Co. (Ill.)*, 8-57.

It is *ultra vires* for a corporation to purchase stock in a rival corporation for the purpose of controlling the latter and preventing competition, though the purchase is made in the name of agents or trustees and the title to the stock purchased is vested in such trustees and not in the purchasing corporation. *Dunbar v. American Tel., etc., Co. (Ill.)*, 8-57.

Injunction to prevent voting. — The minority stockholders of a corporation may maintain a bill to enjoin a rival corporation from voting shares of stock in their corporation which it has purchased for the purpose of preventing competition and creating a monopoly; and the bill may be maintained either on the ground that the contract of purchase is void as being *ultra vires*, or on the ground that the transaction is fraudulent as to the complainants. *Dunbar v. American Tel., etc., Co. (Ill.)*, 8-57.

Allegations of the complainants' bill considered, in a suit by the minority stockholders of a corporation to restrain a rival corporation from acquiring control of the complainants' corporation and held sufficient to show that the purpose and tendency of the defendants' purchase were to suppress competition between the two corporations and to create a monopoly. *Dunbar v. American Tel., etc., Co. (Ill.)*, 8-57.

c. Power to guarantee stock of another corporation.

In general. — The power to guarantee the stock of another corporation is not to be implied from charter authority to hold stock in other corporations. *Greene v. Middlesborough Town, etc., Co. (Ky.)*, 11-888.

A provision in articles of incorporation that the corporation "shall have power to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals," is limited by that part of the articles which defines the business the corporation may engage in and does not confer on the corporation, by implication, the power to guarantee the stock of another corporation. *Greene v. Middlesborough Town, etc., Co. (Ky.)*, 11-888.

Effect of *ultra vires* guaranty. — A corporation, receiving a thing of value in consideration of guaranteeing the stock of another corporation, would have to surrender

such consideration in case its act in guaranteeing the stock proved *ultra vires*, but the passing of the consideration would not make the guaranty valid or binding. *Greene v. Middlesborough Town, etc., Co. (Ky.)*, 11-888.

d. Power to hold and convey real estate.

Validity of *ultra vires* purchase. — A conveyance of real property to a corporation which is incompetent by its charter to hold real estate is not void but only voidable. The sovereign alone can object to such a conveyance, and it is valid until assailed in a direct proceeding instituted for that purpose. *Puget Sound Nat. Bank v. Fisher (Wash.)*, 17-526.

Conveyance by lease. — The term "otherwise convey" contained in a Texas statute providing that a private corporation has power to hold, purchase, sell, mortgage, or otherwise convey such real and personal estates as the purposes of the corporation shall require, empowers the corporation to lease its land. *Starké v. J. M. Guffey Petroleum Co. (Tex.)*, 4-1057.

Conveyance by mortgage. — Where a statute authorizes corporations to mortgage their property and franchises, a mortgage by a corporation of its property, franchises, and rights includes its rights under a contract with a city, and the title to such rights passes to the purchaser at the foreclosure sale under the mortgage, though the franchise of being a corporation does not pass. *Vicksburg v. Vicksburg Waterworks Co. (U. S.)*, 6-253.

e. Lien on stock.

Validity of charter provision. — A provision in the articles of incorporation that a corporation shall have a lien upon the stock of any holder for the amount of his liability to the corporation is valid, and such lien may be enforced against third persons without notice. *Dempster Mfg. Co. v. Downs (Iowa)*, 3-187.

f. *Ultra vires* acts.

Acts profitable to corporation. — It is no defense to an action by a nonassenting stockholder to enjoin threatened *ultra vires* acts on the part of a corporation, that the acts complained of will result in profit to the corporation. *Victor v. Louise Cotton Mills (N. Car.)*, 16-291.

Contracts injurious to public. — If a corporation engaged in a business that is affected with a public interest contracts to enter on a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy, such contract is *ultra vires* such corporation, and may be restrained in equity at the suit of the attorney general without regard to whether or not actual injury has resulted to the public. *McCarte v. Firemen's Ins. Co. (N. J.)*, 18-1048.

Purchase by railroad company of entire output of coal mine. — A permanent

contract by a railroad company to purchase the coal produced by certain mines cannot be held *ultra vires*, where it does not appear that the quantity would be beyond what would be required for its own consumption in operating its road. *McKell v. Chesapeake etc., R. Co. (U. S.)*, 20-1097.

5. DUTIES AND LIABILITIES.

a. In general.

Liability imposed by pre-existing statute. — A street railway company which by its act of incorporation is made "subject to all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force relating to street railway companies" is bound by a pre-existing statute providing for the transportation of school children at half price just as if such statute was included in the act of incorporation, and cannot question the constitutionality of such statute on the ground that it denies the company the equal protection of the laws or deprives it of its property without just compensation and without due process of law. *Interstate Consolidated St. R. Co. v. Massachusetts (U. S.)*, 12-555.

Liability to holder of forged stock certificate. — Where a corporation causes a certificate of stock to be signed, sealed, and left where an employee can forge his signature to and transfer it, a pledgee thereof who has neglected to ascertain the genuineness of the forged signature may not allege negligence on the part of the corporation, as the liability of the company for negligence when the stock is improperly issued only arises when the requisite signature is genuine. In such a case the corporation is not estopped to deny the genuineness of the signature, nor is it estopped by failure to advertise the fact that a certificate not fully executed has disappeared. *Dollar Savings, etc., Co. v. Pittsburg Plate Glass Co. (Pa.)*, 5-248.

Liability on notes signed by officers. — A corporation cannot be held liable on a promissory note signed by its president and treasurer and payable to the order of the former personally, on the theory that it has received the benefit of the money loaned thereon, where the evidence shows that such money was received by the president of the corporation personally, and applied by him to the purchase and improvement of certain land which he afterwards sold to the corporation in pursuance of a pre-existing contract. In such a case the benefit received by the corporation is not sufficiently direct to render it liable. *Monongahela Nat. Bank v. Harmony Land Co. (Pa.)*, 18-727.

Where the president of a corporation obtains money from a bank and gives therefor a note under seal signed by him individually, and pledges, as collateral security for the payment of said note, his individual stock in the corporation, the debt represented by the note is his individual debt and cannot be recovered against the corporation, although the petition in an action to recover the amount of

the note contains general recitals that the money so obtained was for the use and benefit of the corporation, and was so understood at the time, and that the same was placed to the credit of the corporation on the books of the bank. *Andrews Co. v. National Bank* (Ga.), 12-616.

A person who takes a note signed by the president and treasurer of a corporation as such, and payable to the order of the president personally, is put upon inquiry as to the authority of those officers to bind the corporation in that manner. *Monongahela Nat. Bank v. Harmony Land Co.* (Pa.), 18-727.

Liability for debts created before organization. — In order to render a corporation liable for purchases made in good faith by its stockholders before the corporation is fully organized, the credit being given to the corporation, it is not necessary that a ratification of such purchases by the corporation should be by formal vote or resolution after its final organization. *Western Investment Co. v. Davis* (Ind. Ter.), 15-1134.

Liability of corporation acquiring assets of partnership for debts of partnership. — A corporation which lawfully acquires all the property of a partnership does not thereby become responsible for the partnership's debts. *Culberson v. Alabama Construction Co.* (Ga.), 9-507.

b. Liability for acts of officers.

Acts in private capacity. — Where a corporation permits its treasurer to make habitual use of its bank account for the deposit and checking out of his private funds, and the treasurer in the course of time deposits drafts and certificates of deposit made payable to him as guardian, the mere form of the instruments is not sufficient to put the corporation upon inquiry, and it is not liable for the guardian's misapplication of the funds unless it receives them with actual knowledge of his intention to misappropriate, or with knowledge of facts that should put it upon inquiry. *Brookhouse v. Union Publishing Co.* (N. H.), 6-675.

In an action against a corporation to recover money which a third person, guardian of the plaintiff and treasurer of the defendant, withdrew from the plaintiff's account in a savings bank and deposited to the defendant's credit in another bank, the plaintiff is entitled to the relief sought, if the defendant still has possession of the money, or if the defendant received the money from the guardian with notice of the trust and applied it to the payment of his individual indebtedness to it, or if the defendant received the money from the guardian with notice of the trust and aided him in wrongfully diverting it from the plaintiff. *Brookhouse v. Union Publishing Co.* (N. H.), 6-675.

Contracts made by president. — A contract, made for a railroad company by its president, cannot be impeached by the company on the ground of his want of power, where he was also its business manager, and the company, with full knowledge of the contract, performed its part of it for several

years without dissent. *McKell v. Chesapeake etc., R. Co.* (U. S.), 20-1097.

Slander by agent. — A corporation is liable for a slander uttered by its agent within the course and scope of the latter's employment, and under its implied authority. *Hypes v. Southern R. Co.* (S. Car.), 17-620.

c. Criminal liability.

For crimes of agents. — Although there are some crimes involving personal malicious intent which in their nature cannot be committed by corporations, there is also a large class of offenses wherein the crime consists in purposely doing the things prohibited by statute, and in that class of crimes corporations may be held responsible for and charged with the knowledge and purpose of their agents, acting within the authority conferred upon them. *People v. Rochester R., etc., Co.* (N. Y.), 16-837.

For nonfeasance. — A corporation is not, merely because it is a creature of the law without physical existence, immune from indictment and criminal prosecution for nonfeasance in neglecting to perform duties which it owes to the public. *Southern R. Co. v. State* (Ga.), 5-411.

d. Public service corporations.

Obligation to exercise franchise fairly. — There rests upon a public service corporation, so long as it uses its franchise, a duty to render to the public at a reasonable rate the services for which it was created. *Salt River Valley Canal Co. v. Nelssen* (Ariz.), 16-796.

Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto. The incorporated company may therefore voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom; but in such case the municipality has no right to prevent the incorporated company from removing its property, nor to take possession of and make use of the same, nor to grant the right to use the same to another company, without due process of law. *East Ohio Gas Co. v. Akron* (Ohio), 18-332.

So long as a gas company continues to exercise any of its franchises within the contracting municipality, it may be compelled to exercise its franchise therein fairly and without discrimination. *East Ohio Gas Co. v. Akron* (Ohio), 18-332.

Transfer of liabilities by sale or lease. — A corporation charged with a duty to the public cannot, by sale or otherwise, dispose of its property or franchises so as to relieve itself from liability for acts done or omitted, without legislative sanction expressly exempting it from liability. *Georgia R., etc., Co. v. Haas* (Ga.), 9-677.

A corporation cannot relieve itself of a public duty imposed upon it by its charter by leasing its property and franchises under a

bare legislative authority to lease. *Ryerson v. Morris Canal, etc., Co. (N. J.), 2-359.*

Liability for injury from lawful act. — A public service corporation is not liable for an injury resulting from a lawful act which it does without negligence, where the act is done in the performance of a duty which the corporation owes to the public and which it must perform, and is not done in the performance of a duty which is not of a public nature and which is merely incidental to duties of a public character. *Townsend v. Norfolk R., etc., Co. (Va.), 8-558.*

In order for a public service corporation to escape liability for injuries resulting to others from an act done by it without negligence, it is not sufficient that the act is one which the corporation has legislative authority to do, but the act must be one which the corporation is required to perform—a duty it owes and which has been imposed upon it by the legislative act granting the charter under which it exists—or at least it must appear that the particular act complained of and immunity from its consequences were within the contemplation of the legislature. *Townsend v. Norfolk R., etc., Co. (Va.), 8-558.*

6. PROMOTERS.

a. In general.

Definition. — One who uses his influence to induce others to take stock in a corporation, actively promotes its organization, and advises and participates in the purchase of the property for which the company is organized, is a promoter. *Telegraph v. Loetscher (Iowa), 4-667.*

Relation to stockholders. — Although a promoter of a proposed corporation is not strictly the agent or trustee of the corporation before its creation, the principles of the law of principal and agent and of trustee and beneficiary have been extended to meet such cases, and such a promoter is held accountable to the corporation as if the relation of principal and agent or of trustee and *cestui que trust* actually existed. His acts are carefully scrutinized, and he is precluded from taking a secret advantage of other stockholders. *Jordan v. Annex Corporation (Va.), 17-267.*

Power to bind corporation by contracts. — In the absence of ratification or adoption after its organization or of a charter or statutory provision imposing liability, a corporation is not liable for services performed for it before its organization under a contract made by its promoters, although the contract may have been made on its behalf with the understanding that it should be bound. *Tuttle v. Tuttle Co. (Me.), 8-260.*

Evidence reviewed, in an action on a promissory note given by a corporation, and held to show that the act of the corporation in executing the note, ostensibly for other purposes, did not amount to a ratification or adoption of a contract made by its promoters. *Tuttle v. Tuttle Co. (Me.), 8-260.*

b. Liability to account for secret profits.

Bonus received on purchase of property. — Where a corporation has been formed for the purchase of certain property, the corporation may recover from the promoter a secret bonus paid by the owner to the promoter for his influence in organizing the corporation and effecting the sale; and in such a case purposely withholding the transaction from subscribers to stock constitutes fraudulent concealment and takes the case out of the statute of limitations. *Telegraph v. Loetscher (Iowa), 4-667.*

The five promoters of a company, who were the only shareholders, as shareholders and directors, assented to the purchase of property from one of them for the company for \$5,000, and each of the other four received from the vendor a check for \$1,000, which was applied in payment of the liability of the four to the company for stock subscribed. The exact nature of the agreement did not appear from the evidence, but it was clear that each of the four received \$1,000 from the vendor, and that that fact was not disclosed to the shareholders who had been or were thereafter invited to take stock in the company. It was held, in an action against the five original shareholders and the company, brought by two persons who afterwards became shareholders; that the four had received a secret profit for which they must account to the company. As the conduct of the four was fraudulent, a class action was maintainable; and the right to compel the defendants to account for the advantage so received could not be lost by any delay short of the appropriate statutory limitation. It was held, also, that the judgment should direct that the money be paid into court, and that the plaintiffs should have a lien upon it for their costs, as between solicitor and client, properly incurred, on the principle of salvage, in creating the fund for the company. [See notes, 4 Ann. Cas. 669; 17 Ann. Cas. 269.] *Bennett v. Havelock Electric Light, etc., Co. (Can.), 18-354.*

Fraud as affecting contracts. — Where a promoter of a corporation, acting in its behalf, leases real estate in reality for a nominal sum, but, by collusion with the lessor, causes the rent specified in the lease to be fixed at a large amount, and appropriates such amount to his own use as a promoter's fee, without the knowledge or consent of the subscribers to the capital stock of the corporation, he becomes liable to the stockholders or the corporation for the money which he has so appropriated; but where the fraud is not discovered until the term of the lease has partly expired, and other circumstances have intervened which render it impossible to place the parties *in status quo*, there can be no rescission of the lease, or of subscriptions to the capital stock of the corporation, because of the fraud. *Jordan v. Annex Corporation (Va.), 17-267.*

Right to share in assets as creditor. — While a corporation is entitled to recover from a promoter the amount of profits which the latter has made out of a secret agreement

in fraud of the corporation, there is no rule of law or equity which deprives the promoter as a creditor of the corporation for money actually advanced by him in carrying on its business, from sharing, along with other creditors, in the assets of the corporation, including the amount of such secret profits which he has been compelled to restore to it. *Jordan v. Annex Corporation* (Vt.), 17-267.

7. OFFICERS AND AGENTS.

a. Who are officers.

General agent. — The term "general agent," as applied to one representing a corporation, does not necessarily import that the person so designated is an officer of a corporation. *Vardeman v. Penn. Mut. L. Ins. Co.* (Ga.), 5-221.

b. Powers and liabilities in general.

Power to execute commercial paper. — There is no presumption that the president and secretary of a corporation have authority to execute a commercial paper for it. *Gould v. W. J. Gould & Co.* (Mich.), 2-519.

Power of agent to contract. — In an action by a corporation to enforce the specific performance of a contract, the defendant cannot contend that the contract was made in behalf of the corporation by an agent who was not authorized to contract because not an officer or director, where it appears that the agent's actions have been ratified by the corporation and the corporation has at all times been ready and willing to perform the contract and it does not appear that the defendant has ever demanded or been refused performance. *Western Timber Co. v. Kalama River Lumber Co.* (Wash.), 7-667.

Power of president to mortgage corporate property. — A mortgage of corporate property given by the president of the corporation is binding on it, though not formally authorized by the directors, where the president, with the knowledge of the directors, has exercised entire control over the affairs of the corporation from the time of its organization, borrowing money for its use and disposing of its property as in his judgment occasion might require. *Buchwald Transfer Co. v. Hurst* (Md.), 19-619.

Estoppel to deny authority. — A purchaser of the property of a corporation with knowledge of the existence of a mortgage thereon has no more right to contest the mortgage on the ground that it was executed without competent authority than the corporation itself would have had. *Buchwald Transfer Co. v. Hurst* (Md.), 19-619.

Criminal liability for acts of corporation. — In the absence of a statute to the contrary, an officer of a corporation cannot be punished criminally for the corporation's unlawful act or default, unless he participates therein as an aider, abettor, or accessory, even though the corporation's offense consists of the violation of a statute which imposes imprisonment as a penalty. *Rex v. Hays* (Ont.), 8-380.

Liability for unlawful transfer of property. — In a suit by a stockholder against the officers of a corporation to impress a trust on corporate property unlawfully transferred to another corporation, and for an accounting, it is proper for the trial court in rendering a decree for the complainant to allow the defendants the amount lost by the new corporation in operating in good faith some of the property unlawfully transferred. *McCourt v. Singers-Bigger* (U. S.), 7-287.

Liability of stockholders or agents of corporation. — Where purchases are made in good faith by stockholders of a corporation in its behalf before it is fully organized, and the credit is given to the corporation, such stockholders are not liable individually in the absence of a statute imposing such liability. *Western Investment Co. v. Davis* (Ind. Ter.), 15-1134.

c. Compensation for services.

Services not incident to office. — Where the president and director of a corporation performs valuable services as general manager which he is not required to perform as president and director, he is entitled to compensation therefor. *Gumaer v. Cripple Creek Tunnel, etc., Co.* (Colo.), 13-781.

Reimbursement for expenditures. — Notes executed by the president and secretary of a corporation, without direct authorization by the board of directors, for money loaned to the company by the president and disbursed by him for the benefit of the corporation with the knowledge of the members of the corporation, are evidence of the indebtedness of the corporation for the money so loaned, and when ratified by the board of directors will support a judgment against the corporation. *Gumaer v. Cripple Creek Tunnel, etc., Co.* (Colo.), 13-781.

In a suit by a stockholder against the officers of a corporation to impress a trust on corporate property unlawfully transferred to another corporation, and for an accounting, it is proper for the trial court in rendering a decree for the complainant to allow the complainant from the fund recovered, attorneys' fees, and other expenses paid by him in prosecuting the suit, and to disallow similar fees and expenses paid by the defendants in defending the suit in the name of the old corporation. *McCourt v. Singers-Bigger* (U. S.), 7-287.

Recovery of interest. — In an action by the president of a bank to recover compensation for services rendered as president, an instruction as to the interest on the amounts found due the plaintiff for services was held erroneous. *Lowe v. Ring* (Wis.), 3-731.

Power of officer to vote himself compensation. — The president of a corporation cannot sustain, as against a minority of the board of directors, and as against stockholders who challenge the action, his claim for an increase of salary the right to which, if any right exists, was secured by his own vote as a member of the board of directors

that allowed the increase. *Schaffhauser v. Arnholt, etc., Brewing Co. (Pa.)*, 11-772.

An increase of the salary of one of two officers of a corporation, voted by a board of trustees consisting of himself and two others entirely subservient to his will, in violation of an agreement between the two officers fixing their salaries, is fraudulent and illegal. *Boothe v. Summit Coal Mining Co. (Wash.)*, 19-1255.

Right to salary where corporation is insolvent. — A director and stockholder of a corporation who is elected president and treasurer thereof at a fixed salary is charged with notice of the insolvent condition of the corporation and cannot recover out of the assets of the corporation in the hands of a receiver appointed before the expiration of his term of office, his salary for the unexpired portion of his term. *Williamson Co. Banking, etc., Co. v. Roberts-Buford Co. (Tenn.)*, 12-579.

Where officer is also a director. — The president of a corporation cannot sue upon an implied contract to enforce a claim for services as an officer when he is a stockholder or director. *Lowe v. Ring (Wis.)*, 3-731.

Increase of salary procured by fraud. — Where the president of a corporation, after unlawfully despoiting it by transferring its assets to a new corporation, managed, controlled, and practically owned by himself, procures the new corporation to increase his salary substantially, he cannot make such increase a charge against the funds of the old corporation in a suit brought by a stockholder for an accounting. *McCourt v. Singers-Bigger (U. S.)*, 7-287.

Allowance in stockholder's action for accounting. — In a suit by a stockholder against the officers of a corporation to impress a trust on corporate property unlawfully transferred to another corporation, and for an accounting, it is proper for the trial court in rendering a decree for the complainant to allow the defendant officers reasonable salaries paid them by the old corporation for services actually rendered, though no resolution was formally adopted fixing such salaries, and though the officers' predecessors served without compensation. *McCourt v. Singers-Bigger (U. S.)*, 7-287.

Payment out of "profits." — A balance remaining in the hands of the liquidator of a corporation after payment of debts and the return of the subscribed capital to the shareholders is "profits" within the meaning of an agreement for services to be rendered to the corporation at a fixed salary which was not to be drawn "except only out of profits (if any) arising from the business of the company which may from time to time be available for such purpose, but such salary shall nevertheless be cumulative, and accordingly any arrears thereof shall be payable out of any succeeding profits as aforesaid." *In re Spanish Prospecting Co. (Eng.)*, 20-677.

d. Notice to, as notice to corporation.

Notice to agent. — A corporation is not charged with the knowledge of its agent when the latter is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to such an act, especially where the guilty officer is not the only one through whom the corporation is capable of acting in relation to the matter. *Brookhouse v. Union Publishing Co. (N. H.)*, 6-675.

e. Directors.

(1) In general.

Fiduciary relation to stockholders. — A trustee cannot make a profit for himself without the full knowledge of all his *cestuis que trust*, and so the directors of a company, when it is intended to sell stock, stand in a fiduciary relation not only to those who are members at the time but to all who may come in afterwards. *Bennett v. Havelock Electric Light, etc., Co. (Can.)*, 18-354.

A director or managing officer of a corporation having knowledge of the condition of its affairs must inform a stockholder not actively engaged in the management of the true condition of the corporation before he can rightfully purchase his stock. *Stewart v. Harris (Kan.)*, 2-873.

Whatever may be the technical relation between the directors of a corporation and the corporation itself, its creditors, and the public, the directors occupy a strictly fiduciary relationship towards the stockholders and are accountable to them on principles governing that relationship. *McCourt v. Singers-Bigger (U. S.)*, 7-287.

The managing officers of a corporation are not only trustees of the corporate entity and property, but are also in many respects trustees for the corporate shareholders. *Stewart v. Harris (Kan.)*, 2-873.

(2) Rights and liabilities.

Right to examine books and papers. — Each member of the board of directors of a private corporation is clothed by law with equal rights and powers, and each has a right, at all reasonable times, to make an investigation of the property and funds, books, correspondence, and papers of his corporation, which are in the possession of its agent, or general manager, and to make memoranda thereof for his own information as such director. *State ex rel. Keller v. Grymes (W. Va.)*, 17-833.

The right conferred by general law on an individual director to make such investigation is not abrogated by section 2276 of the code of 1906 of West Virginia. *State ex rel. Keller v. Grymes (W. Va.)*, 17-833.

Statutory liability for debts. — The statutory liability of the directors of a street railway company "for all debts and contracts made by the company" does not extend to a judgment recovered in an action for a tort committed by the company. *Savage v. Shaw (Mass.)*, 12-806.

Liability for failure to file report. —

Under the Montana statute requiring corporations to make annual reports the directors of a foreign corporation cannot escape liability on the ground that the statute operates against the corporation only and cannot be invoked to make the individual director responsible for the indirect consequences of a violation of law by his corporation. *Nelson v. Bank of Fergus County* (U. S.), 13-811.

Liability for improper declaration of dividend. —

In an action by the receiver of a national bank against the bank's directors to hold them liable for their negligent or wrongful acts, where it appears that the creditors have been paid in full, the receiver should not be permitted to recover in behalf of the stockholders for an improper declaration of a dividend, as the dividend was paid to the stockholders themselves. *Emerson v. Gaither* (Md.), 7-1114.

Liability of estate of deceased director. —

In a suit by the receiver of a national bank to recover for the negligent or wrongful acts of the bank's directors, it is improper to join as defendants persons who are simply described in the bill as "distributees under the will" of a named deceased director, where the bill does not allege that the decedent left any estate, or if he did, that those named as distributees received anything from it. *Emerson v. Gaither* (Md.), 7-1114.

Liability for obtaining renewal of corporate lease in own name. —

Where a director of a corporation perpetrates a fraud on a stockholder by securing in his own name a renewal of a lease held by the corporation, the fact that the stockholder's agent, who is also a director, secretly consents to the fraud does not estop the stockholder from asserting his right to have the lease held in trust for the corporation. *McCourt v. Singers-Bigger* (U. S.), 7-287.

(3) Meetings.

Notice. — The legality of a regular meeting of the board of directors of a corporation is not affected by the fact that a member is given no notice of the meeting, the members being bound to take notice of a regular meeting. *Gumaer v. Cripple Creek Tunnel, etc., Co.* (Colo.), 13-781.

Majority. — Where the board of directors of a corporation consists of five members, and the by-laws require four to constitute a quorum, a majority of the quorum, being a majority of the board, can legally do any act which the entire board would be authorized to do. *Gumaer v. Cripple Creek Tunnel, etc., Co.* (Colo.), 13-781.

8. STOCK AND STOCKHOLDERS.**a. Issuance of stock.****(1) In general.****Issuance before incorporation. —**

Where certificates of stock in a proposed corporation are issued in contemplation of incorporation, the issue of stock may, after incorporation, be adopted by the corporation,

and upon such adoption the holders will become stockholders without the formal issuance of new certificates. *Thorpe v. Pennock Mercantile Co.* (Minn.), 9-229.

Issuance without payment of par value. —

An agreement between a corporation organized under the New Jersey General Corporation Act of 1875, and its stockholders, to the effect that corporate stock shall be issued to the stockholders without receipt by the company of money or property equivalent in value to the par value of the stock, is void because contrary to the spirit and policy of the act. *Easton Nat. Bank v. American Brick, etc., Co.* (N. J.), 10-84.

Nature and effect of certificate. —

A certificate of stock in a corporation is generally recognized as merely representative of property, and occupies much the same status as a chose in action. *Com. v. Peebles* (Ky.), 20-724.

Liability on subscriptions. —

In an action on a stock subscription note, parol evidence is not admissible to show that the subscription was conditional and that the condition has not been performed. *Collins v. Southern Brick Co.* (Ark.), 19-882.

Liability for assessments. —

Where the capital stock of a corporation and the number of shares are fixed by the act or certificate of incorporation, no assessment can be lawfully made on the share of any subscriber, until the whole number of shares have been taken; and this rule applies alike to subscriptions made before and after the corporation is chartered. *Morgan v. Landstreet* (Md.), 16-1247.

For the purpose of determining whether the capital stock of a corporation has been fully subscribed, so as to render individual subscribers liable on their subscriptions, only unconditional subscriptions, payable in cash, can be counted. *Morgan v. Landstreet* (Md.), 16-1247.

While the benefit of the rule which exempts subscribers to the capital stock of a corporation from liability on their subscriptions until the stock has been fully subscribed, may be waived by a subscriber, the only acts which will constitute such a waiver are those which constitute a part of the business for which the corporation is formed, and which evince a willingness on the part of the subscriber to enter upon that business with the stock only partly subscribed. The mere act of a subscriber in consenting to be made a director of the corporation does not amount to such a waiver, where he never qualifies as a director, and never attends any stockholders' or directors' meeting, and takes no part in the business of the corporation. *Morgan v. Landstreet* (Md.), 16-1247.

In an action against a subscriber to the capital stock of a corporation, to recover the amount of his subscription, evidence examined and held to show that the capital stock of the corporation had never been fully subscribed, and that the defendant had not performed any act which estopped him from setting up that defense, and, consequently, that the direction of a verdict in his favor

was proper. *Morgan v. Longstreet* (Md.), 16-1247.

Rescission of subscription. — After a corporation has become insolvent and its affairs are being adjusted for the benefit of its creditors, a subscriber to its capital stock cannot, on the ground of fraud, either rescind his subscription or maintain a defense to his obligation thereunder unless he acts with promptness and due diligence both in ascertaining the fraud and in taking steps to repudiate his obligation. The question whether such subscriber has acted with proper diligence is usually one for determination by the jury. *Chamberlain v. Trogden* (N. Car.), 16-177.

Where, in an action against a subscriber to the stock of a corporation to recover the amount of his subscription, it appears that the defendant is fifty-three years of age, and a banker and man of affairs residing in the vicinity of the place of business of the corporation; that he knew the secretary and the treasurer of the corporation, and knew when he subscribed that the corporation had given indications of weakness, and had for a time been in a receiver's hands; that a cursory examination of the corporate books would have disclosed that but one-sixth of the stock issued had been paid for; that a large amount of the corporate indebtedness was evidenced by real estate mortgage registered in the county; and that he not only failed to exercise ordinary business prudence in ascertaining the condition of the corporation, but when informed that the corporation was insolvent, that it could continue business only by means of a reorganization, and unless ten thousand dollars was raised the corporation would have to go into bankruptcy, he declined to give a proxy to vote his stock, stating that he would keep the stock and vote it himself if occasion arose—there is no error to the subscriber's prejudice in submitting to the jury the question of his laches. *Chamberlain v. Trogden* (N. Car.), 16-177.

A subscription to the capital stock of a proposed business corporation does not become binding until the corporation has been organized and the subscription accepted, and, until then, the subscriber has a right to revoke his subscription. *Planters', etc., Packet Co. v. Webb* (Ala.), 16-529.

Whether the action of a subscriber to the capital stock of a proposed corporation in giving notice to another subscriber that he is "out of the enterprise," and directing that name to be erased from the subscription list, constitutes a valid withdrawal of his subscription, without notice to all of the subscribers, depends upon the authority of the person to whom the notice is given to accept the same on behalf of the proposed corporation. And even if such notice constitutes a valid withdrawal of the subscription, it may be nullified by the subsequent conduct of the subscriber in recognizing the subscription as still binding. *Planters', etc., Packet Co. v. Webb* (Ala.), 16-529.

A mere change in the name of a proposed corporation, pending the proceedings for its

organization, does not nullify previous subscriptions to its capital stock. *Planters', etc., Packet Co. v. Webb* (Ala.), 16-529.

In an action by a corporation to recover the amount of a subscription to its capital stock, where the defendant contends that he withdrew his subscription, before the corporation was organized, by giving notice to another subscriber that he was "out of the enterprise," and directing his name to be erased from the subscription list, instructions given at the defendant's request, which assume that the notice so given was sufficient, and which ignore evidence in the record tending to show that the defendant afterwards recognized the subscription as binding, and which proceed upon the theory that a change in the corporate name, pending the organization of the corporation, nullified the subscription, are erroneous. *Planters', etc., Packet Co. v. Webb* (Ala.), 16-529.

In such an action, a declaration by the defendant, in answer to an inquiry whether he expected to attend a meeting for the formation of the corporation, that he was not going to the meeting, and that he was "out of it," is not admissible in evidence in his behalf. *Planters', etc., Packet Co. v. Webb* (Ala.), 16-529.

(2) New shares.

A stockholder has an inherent right to a proportionate share of new stock issued for money only, and not to purchase property for the purposes of the corporation or to effect a consolidation; and while he can waive that right, he cannot be deprived of it without his consent, except where the stock is issued at a fixed price not less than par and he is given the right to take at that price in proportion to his holding, or in some other equitable way that will enable him to protect his interests by acting on his own judgment and using his own resources. *Stokes v. Continental Trust Co.* (N. Y.), 9-738.

Where a stockholder attends a meeting of his corporation called for the purpose of voting upon a proposed increase of the capital stock and the acceptance of an offer by a third person to purchase all of the new stock, and at such meeting the stockholder protests against the proposed sale of his proportionate share of the stock and demands the right to subscribe for his proportion at par, and offers to pay for the same immediately, but his demand is refused, and thereafter a resolution is passed directing a sale of the stock to the third person at a fixed price, the same resolution fixing the price and directing the sale, and the stockholder votes against the resolution and does not acquiesce in the sale, he does not waive his right to his proportion of the new stock by the fact that after the passage of the resolution he fails to offer to take his share at the price fixed in the resolution. *Stokes v. Continental Trust Co.* (N. Y.), 9-738.

In an action by a stockholder against his corporation to recover damages for the wrongful sale of his proportion of the issue of new stock to a third person, where it appears

that the sale was made at a fixed price which was below the market value on the day of the sale, the measure of damages is the difference between the price at which the stock was sold to the third person and the market value on the day of the sale. *Stokes v. Continental Trust Co. (N. Y.), 9-738.*

Power to increase stock. — The power to increase the capital stock of a corporation can be exercised by the stockholders only at a meeting called to consider that question, and an agreement to take part of the increased stock in advance of the making of the increase is not binding unless ratified after the increase is actually made. *Wolf v. Chicago Sign Printing Co. (Ill.), 13-369*

b. Conveyances of stock.

(1) In general.

Effect of bankruptcy. — A trustee in bankruptcy acquires the title to shares of stock which the bankrupt has merely "deposited" as collateral security, as a written transfer is essential to the validity of a pledge of corporate stock; and the trustee's title relates back to the commencement of the bankruptcy proceedings. *French v. White (Vt.), 6-479.*

Option to resell. — A person who purchases corporate stock from a corporation under an agreement giving him an option to resell the stock to the corporation within a specified time at the price paid therefor, does not make a conditional purchase of the stock, but becomes the absolute and unconditional owner thereof. *McIntyre v. E. Bement's Sons (Mich.), 10-143.*

Validity of by-law limiting right to sell stock. — A statute which expressly authorizes a corporation formed under it to adopt by-laws regulating the issuance and transference of shares in its capital stock and aiding in the promotion of its business gives validity to a by-law which requires a stockholder who desires to sell and transfer his stock, before doing so, to notify the directors of such desire and to give them a reasonable time to sell the stock to classes of persons designated in the by-laws, because of the belief that their occupations would render them efficient promoters of the business of the corporation. *Nicholson v. Franklin Brewing Co. (Ohio), 19-699.*

Equities against transferor. — A purchaser of shares of stock acquires only the rights that his vendor had, and if the vendor was precluded from maintaining a stockholder's suit in respect to particular transactions, the purchaser is also precluded from suing in respect thereto. *Babcock v. Farwell (Ill.), 19-74.*

(2) Implied warranty.

There is no implied warranty on the part of a seller of certificates of stock that the corporation issuing them is a corporation *de jure*, but it is sufficient if the corporation is a *de facto* one. *Marshall v. Keach (Ill.), 10-164.*

In a contract to exchange land for stock in

a corporation, the fact that the letters "inc." are placed in parentheses after the name of the corporation in the contract does not amount to a warranty that the stock is that of a corporation *de jure*. *Marshall v. Keach (Ill.), 10-164.*

(3) Rescission.

In a bill to rescind a sale of the shares of stock on the ground of fraud, the complainant must allege that he promptly disaffirmed the sale on discovering the alleged fraud, and must further allege either that he offered to refund the purchase price or that he has some sufficient legal excuse for his failure to do so. *Dunbar v. American Tel. & C. Co. (Ill.), 8-57.*

A bill to set aside a contract for the sale of shares of stock on the ground of misconduct on the part of the complainants' attorney must offer to place the purchaser of the stock *in statu quo*. *Dunbar v. American Tel. & C. Co. (Ill.), 8-57.*

(4) Breach of contract.

On the trial of an action by a purchaser to recover damages for breach of a contract for the sale of corporate stock, where the plaintiff insists and the defendant denies that the payment was made for the delivery of stock, it is error to admit in evidence a letter written by the plaintiff to the defendant which does not establish the alleged demand, but simply discloses the self-serving declaration on the part of the plaintiff that such demand had previously been made and the defendant had refused to comply therewith. *Hightower v. Ansley (Ga.), 7-927.*

In an action by a purchaser to recover damages for breach of a contract for the sale of corporate stock, evidence tending to show a subsequent recognition of the contract by the holder of the stock, including a written calculation made by him as to the amount due by the purchaser under a contract of like effect made with another stockholder, is admissible to show upon what terms the parties understood the stock was to be sold. *Hightower v. Ansley (Ga.), 7-927.*

In an action by a purchaser to recover damages for breach of a contract for the sale of corporate stock, proof of the consideration moving to the holder of the stock which induced him to agree to sell it at the stipulated price is admissible, though the evidence on this point should properly be so restricted as to eliminate all unnecessary details. *Hightower v. Ansley (Ga.), 7-927.*

c. Transfer of certificates.

Motive as affecting rights to transfer. — Where the articles of a corporation contain no clause authorizing directors to reject a transferee, a shareholder may, up to the last moment before liquidation, and for the express purpose of escaping liability, transfer his partly-paid shares to a transferee, even though he is a pauper, and may compel the directors to register that trans-

fer, provided it is an out and out transfer reserving to the transferrer no beneficial right to the shares, direct or indirect. Whether the transfer is of that character is a question of fact. *In re Discoverers Finance Corporation* (Eng.), 18-337.

Right to compel transfer. — A suit cannot be maintained against the corporation to compel it to register stock which a holder has attempted to transfer in violation of such by-law. *Nicholson v. Franklin Brewing Co.* (Ohio), 19-699.

Sufficiency of demand for transfer. — Where the assignee of shares of stock presents the stock to the secretary of the corporation and demands a transfer of the stock on the books of the corporation, and on being refused, and referred to the general manager of the corporation, presents the stock to him and demands that it be transferred, and is refused, a proper and legal demand for the transfer of the stock is made, although the general manager is, at the time of the demand, on the street in front of his office, he making no objection to the time and place of presentation and demand, but absolutely refusing to make the transfer. *Dooley v. Gladiator Consol. Gold Mines, etc., Co.* (Ia.), 13-297.

Refusal to transfer on books as conversion. — The assignee of stock in a corporation may at his election treat the wrongful refusal of the corporation to register the transfer of the stock as a conversion thereof, and sue for the recovery of its value. *Dooley v. Gladiator Consol. Gold Mines, etc., Co.* (Ia.), 13-297.

In such an action the plaintiff is not required to show any depreciation in the value of the stock after the making of the demand for the transfer, but may recover the full value of his stock at the time of the demand for the transfer with interest to the date of trial. *Dooley v. Gladiator Consol. Gold Mines, etc., Co.* (Ia.), 13-297.

Title to stock. — On the refusal of a corporation to transfer stock to a purchaser thereof from a stockholder, the fact that the agent of the stockholder agrees, at the request of the purchaser of the stock, not to remit the purchase price to his principal pending the settlement of the controversy as to the transfer, does not affect the purchaser's title to the stock. *Pease v. Chicago Crayon Co.* (Ill.), 14-263.

Rights of transferee. — A person holding stock of a corporation cannot be heard to say that the one from whom the same stock was acquired bought the stock illegally from the corporation, and at a smaller price than the corporation was authorized to sell it, as he cannot partake of the fruits of a transaction and then say it was tainted. *Gumaer v. Cripple Creek Tunnel, etc., Co.* (Colo.), 13-781.

d. Persons who may become stockholders.

A married woman is not forbidden by the constitution, or the statutes of Florida to hold stock in a national bank. *Christopher v. Norvell* (U. S.), 5-740.

e. Rights and powers of stockholders.

(1) In general.

Effect of insolvency. — A stockholder who holds the promise of a corporation to buy his stock at his option cannot exercise the option and enforce the promise after the corporation has become in fact insolvent. *McIntyre v. E. Bement's Sons* (Mich.), 10-143.

Rights of holder of preferred stock on winding up corporation. — The New Jersey General Corporation Act of 1896 (P. L. 1896, p. 277) authorizes the creation of two or more kinds of stock, of such classes, with such designations, preferences, and voting powers, or restrictions or qualification thereof, as shall be stated or expressed in the certificate of incorporation. Where a corporation organized under that act provides in its certificate for the creation of preferred stock, "the holder thereof to receive and the company to pay a fixed yearly dividend of six per cent., before any dividend shall be set apart or paid on the general stock," upon the winding up of the corporation the preferred stockholders are entitled only to the preference set forth in the certificate of incorporation and are not to be paid on account of the par value of their shares in preference to the common stockholders. *Lloyd v. Pennsylvania Elec. Vehicle Co.* (N. J.), 20-119.

Action against corporation. — Evidence reviewed in a suit by a stockholder against the officers of a corporation to impress a trust on corporate property unlawfully transferred to another corporation, and for an accounting, and held to show that the trial court, in rendering a decree for an accounting, properly refused to allow interest on the amount of the profits recovered. *McCourt v. Singers-Bigger* (U. S.), 7-287.

Right to sue corporation. — A stockholder cannot sue for the benefit of the corporation or of other stockholders to set aside corporate transactions to which he has assented, because the theory of a stockholder's action is that the stockholder has been injured in respect to his stock by the wrong done to the corporation, and a complainant cannot maintain a bill and obtain relief unless, he himself has sustained a wrong. *Babcock v. Farwell* (Ill.), 19-74.

Acquiescence in acts complained of. — A stockholder cannot maintain an action against his corporation for equitable relief against his corporation's *ultra vires* but not illegal acts, where, with the knowledge of their character, he has accepted pecuniary benefits under such acts either before or since the commencement of his action. *Wormser v. Metropolitan St. R. Co.* (N. Y.), 6-123.

Rights and duties of majority stockholder. — The holder of a majority of the stock of a corporation stands in a fiduciary relation to the holders of the minority of the stock, because he has a community of interest with them in the same property, and because they can act, and contract in relation to the corporate property only through

him. *Wheeler v. Abilene Nat. Bank Bldg. Co.* (U. S.), 14-917.

The power of a single holder of a majority of the stock of a corporation devolves on him the correlative duty to the holders of the minority of the stock to exercise good faith, care, and diligence to make the corporate property produce the largest possible amount, to protect the interests of the minority stockholders, and to secure and deliver to them their just proportion of the income and of the proceeds of the property. *Wheeler v. Abilene Nat. Bank Bldg. Co.* (U. S.), 14-917.

A sale of the corporate property by a single holder of the majority of the stock, by the use of the meetings of the board of directors and the meetings of the stockholders in legal form, for its fair value, but for smaller amount than he could have obtained for it from another, is avoidable at the election of the minority stockholders. *Wheeler v. Abilene Nat. Bank Bldg. Co.* (U. S.), 14-917.

Such a sale is voidable, not void; and a court of equity may condition its decree of avoidance by a requirement that the complainant shall bid and deposit an amount equal to the amount paid at the sale and the expenses of a master's sale, to be applied in payment for the property in case no one bids more, or in case the depositor is the highest bidder. *Wheeler v. Abilene Nat. Bank Bldg. Co.* (U. S.), 14-917.

Where after an offer by a minority stockholder to the majority stockholder of thirty-five hundred dollars for the corporate property and a notice to the secretary of the corporation that he desires to bid for the corporate property, such property is, by means of the regular action of the meeting of the directors and of the meeting of the stockholders, at which the majority stockholder's stock is voted in favor of a sale, sold for twenty-five hundred dollars to such majority stockholder, the latter being the president of the corporation, its creditor, and a member of its board of directors, and the other four members of the board being qualified merely by his transfer of one share to each, the sale is, notwithstanding the fact twenty-five hundred dollars is the fair value of such corporate property, voidable at the election of the minority stockholders. *Wheeler v. Abilene Nat. Bank Bldg. Co.* (U. S.), 14-917.

(2) Voting.

A provision in articles of incorporation that the voting power shall be vested exclusively in the common stock and that preferred stockholders shall have no right to vote is not violative of any rule of the common law or of public policy or of any provision of the constitution or statutes of Missouri. *State v. Swanger* (Mo.), 4-563.

Stock voting agreements. — An agreement between two factions of the shareholders of a railroad company incorporated by the secretary of state, to the effect that one of such factions, owning half of the corporate stock, shall have the right indefinitely

to name a majority of the directors of the company, and thus manage and control its affairs, is against public policy and, therefore, void. *Morel v. Hoge* (Ga.), 14-935.

(3) Inspection of books.

Common-law right. — A stockholder's right of inspection is a common-law right, and unless restrained by statute or the corporation's charter will not be denied when sought for a proper purpose. *Harkness v. Guthrie* (Utah), 1-129.

Constitutionality of statute. — A statute requiring corporations to keep correct books of account in the state and to permit their inspection by stockholders does not deprive a corporation previously organized by special law of any vested rights, nor does it impair the obligation of a contract, though the act of incorporation contains no declaration that the corporation shall be subject to subsequent laws. *Venner v. Chicago City R. Co.* (Ill.), 20-607.

Motive as affecting right to inspection. — The common-law right of a stockholder to inspect the books of a corporation will be enforced only where he asks for it in good faith and for reasons connected with his rights as a stockholder; but where the right of inspection is conferred by statute absolute in terms, it cannot be denied on the ground of improper motive, because a clear legal right created by statute cannot be defeated by showing an improper motive. *Venner v. Chicago City R. Co.* (Ill.), 20-607.

Where a court is appealed to for the enforcement of the common-law right of a stockholder to inspect the books of the corporation, sound discretion will be exercised to determine whether the petitioner is acting for an honest purpose not adverse to the interests of the corporation, and the court will consider both the interests of the petitioner and the effect the inspection will have upon the interests of the corporation. *Varney v. Baker* (Mass.), 10-989.

In the absence of statute a stockholder in a national bank has a right to inspect the books of a bank, provided the inspection is made in good faith, at a proper time and place, for legitimate purposes; and such right is not taken away or abridged by any provision of the federal statutes. *Guthrie v. Harkness* (U. S.), 4-433.

Right to assistance of experts. — There is nothing in the Massachusetts statutes which enlarges or restricts the common-law right of a stockholder of a corporation to inspect the books of the corporation and to have the assistance of an expert or other person to make transcripts from such books for subsequent use. *Varney v. Baker* (Mass.), 10-989.

Mandamus to enforce rights. — At common law a stockholder acting in good faith for the purpose of advancing the interests of the corporation and protecting his rights as the owner of the stock is entitled to inspect the books of the corporation, and may enforce his right by mandamus. *Varney v. Baker* (Mass.), 10-989.

Mandamus lies to enforce the statutory right of a stockholder to inspect the books of the corporation. *Venner v. Chicago City R. Co.* (Ill.), 20-607.

Mandamus and not injunction is the proper remedy of a stockholder to enforce his right to inspect the books of the corporation. *Brown v. Crystal Ice Co.* (Tenn.), 19-308.

Application of general law to incorporation under special act. — A corporation created by special act authorizing its directors to adopt rules for the government of the corporation not inconsistent with the laws of the state, is subject to the General Corporation Act of Illinois (Hurd's Rev. St. 1909, c. 32, § 13) requiring every stock corporation to keep correct books of account and giving every stockholder in such corporation the right to examine the books, though the act of incorporation contains no declaration that the corporation shall be subject to laws subsequently enacted. *Venner v. Chicago City R. Co.* (Ill.), 20-607.

Rule applicable to national banks. — A stockholder of a national bank has the same right of inspection of the books as is possessed by a stockholder of other corporations, such right not being a visitatorial power within the prohibition of a federal statute. *Harkness v. Guthrie* (Utah), 1-129.

The provision of the federal statutes that no national bank shall be subject to any visitatorial powers except as authorized by such statutes, does not deprive a stockholder of a national bank of the common-law right to inspect the association's books. *Guthrie v. Harkness* (U. S.), 4-433.

A state court has jurisdiction to enforce such legal right as the stockholders of a national bank may have to inspect the books of the bank. *Guthrie v. Harkness* (U. S.), 4-433.

f. Lien of corporation on shares.

A national bank has no equitable lien on its stock as against stockholders indebted to it, even though its articles of association or by-laws profess to give it a lien, and therefore upon dissolution it has no equitable lien upon an indebted stockholder's distributive share of the corporate assets. *Bridges v. National Bank* (N. Y.), 7-285.

A corporation has no lien on the shares of its stockholders for debts due from them to the company, unless such lien is provided for by statute or by the charter or by-laws of the corporation. *Herrick v. Humphrey Hardware Co.* (Neb.), 11-201.

g. Liabilities of stockholders.

(1) Validity of statutes imposing liability.

Impairment of obligation of contracts. — Where the constitution of a state provides that the stockholders of a corporation shall be liable individually for its debts, and the statutes of the state give the corporation's creditors remedies for the enforcement of such liability, a statute repealing one of such statutes and substituting a different

remedy is unconstitutional in so far as it affects prior contracts and accrued rights, as it impairs the obligations of such contracts by lessening their value and tending to postpone their enforcement. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

Due process of law. — A state statute increasing the implied contractual obligations of pre-existing stockholders by increasing their statutory liability for corporate debts works a deprivation of their property without due process of law, and therefore an order of court imposing such increased liability is not entitled to obligatory enforcement in another state, though its validity has been upheld by the court of last resort of the state passing the statute. *Converse v. Aetna Nat. Bank* (Conn.), 7-75.

Change of remedial provisions. — Where a stockholder acquires his stock subject to a statutory liability for the corporation's debts, the amount of such liability cannot be increased by subsequent legislation, though the mode of enforcing the liability can be varied within reasonable limits. *Converse v. Aetna Nat. Bank* (Conn.), 7-75.

Effect of statute as to existing stockholders. — The Minnesota statute regulating the additional liability of stockholders to the creditors of a corporation, which adds to the liability for the corporate debts liability to assessment for the future expenses of any receivership of the corporation, is invalid in so far as it applies to stockholders who acquired their stock under a prior statute which did not render them liable to assessment for such future expenses of a receivership. *Converse v. Aetna Nat. Bank* (Conn.), 7-75.

Where a statute regulating the liability of stockholders for corporate debts is invalid as to pre-existing stockholders in that it provides for the future expenses of a receivership in addition to the double liability imposed by the statute in force at the time they acquired their stock, an order making such additional assessment is invalid though the amount assessed is much less than the stockholders' double liability. *Converse v. Aetna Nat. Bank* (Conn.), 7-75.

Effect of foreign judgment. — Where, under a statute increasing the stockholders' liability for corporate debts, a proceeding is instituted to enforce such increased liability, and an order is entered imposing the liability against a nonresident stockholder who is not served with process and who does not appear, and who acquired his stock prior to the passage of the statute, the courts of the stockholder's residence will not, in an action to enforce the order, consider that the stockholder is conclusively bound by the order, but will recognize his right to set up the defense that the order is void in that it is based on a statute which is invalid as enlarging his contractual obligations as a stockholder; and this is so though the validity of the order has been affirmed by the court of last resort of the state whose statute is in question. *Converse v. Aetna Nat. Bank* (Conn.), 7-75.

(2) Persons liable.

(a) In general.

Sale of stock to evade liability. — The receiver of a national bank may enforce a stock assessment against a former stockholder who sold his stock prior to the failure of the bank with knowledge of its insolvency and with the intent to evade his double liability, unless such stockholder sets up the defense and proves that the purchaser was financially responsible to such an extent that the creditors of the bank were not damaged by the change of ownership. *McDonald v. Dewey* (U. S.), 6-419.

Effect as to subsequent creditors. — The stockholder of a national bank who has fraudulently sold his stock to evade his double liability is not liable to creditors who become such after the transfer has been duly recorded, though he is liable to creditors who become such after the sale but before the recording of the transfer. *McDonald v. Dewey* (U. S.), 6-419.

Where a constitutional provision imposing an additional liability on stockholders excepts the stockholders of corporations organized for the purpose of carrying on any kind of manufacturing or mechanical business, the exception does not extend to the stockholders of a corporation organized not only for manufacturing but also for the purpose of buying up the shares of stock of an existing corporation. *Converse v. Ætna Nat. Bank* (Conn.), 7-75.

Liability of transferrer of stock. — A shareholder and director in a corporation who, in perfect good faith and under circumstances free from any suspicion of fraud or a desire to escape liability, sells his stock and does everything connected with the transfer that he honestly believes is necessary to make it effective, and that a prudent business man should do, and who requests the officers in charge of the corporate books to do everything that is necessary to perfect the transfer, and is informed by them that there is nothing else to be done, is relieved from future liability as a shareholder, notwithstanding the fact that the transfer is not registered on the corporate books. *Bracken v. Nicol* (Ky.), 14-896.

(b) Purchasers below par.

One who purchases stock from a corporation at less than its par value is liable to the creditors of the corporation for the difference between the amount paid by him and the par value of the stock held by him; and no agreement between him and the corporation will avail to relieve him from such liability. *Vaughan v. Alabama Nat. Bank* (Ala.), 5-665.

(c) Married women.

In general. — Under the Married Woman's Act of the District of Columbia, a wife may own shares of stock in a joint-stock company organized and carrying on business in the District of Columbia and thereby ren-

der herself liable to a creditor of the company on its becoming insolvent. *Norwood v. Francis* (D. C.), 4-865.

Liability under national banking act. — A married woman who has acquired stock in a national bank during coverture holds it subject to the liability imposed by the National Banking Act, and a personal judgment may be rendered against her in an action at law to recover the amount due under an assessment against stockholders made by the controller of the currency, though by the laws of the state of her residence she is incapable of making a contract that would subject her to personal liability. *Christopher v. Norvell* (U. S.), 5-740.

(d) Foreign corporations.

Where a foreign corporation becomes a shareholder in a domestic corporation, it renders itself liable to perform such contractual obligations as are attached by the laws of the domestic state to the ownership of the stock. *Converse v. Ætna Nat. Bank* (Conn.), 7-75.

(e) Transferees.

A provision in a charter granted prior to the Georgia act of 1893 to the promoters of a banking enterprise, relating to the liability of the stockholders, held not to apply to the transferees of the stock. *Reed v. Dejarnette* (Ga.), 3-1117.

(f) Pledges.

In order that the pledgee of bank stock may escape the statutory liability of bank stockholders, the fact that the stock is held as a pledge must appear on the books of the company. *Adams v. Clark* (Colo.), 10-774.

(3) Nature of liability.

Implied contract. — A stockholder of a corporation, by his subscription for stock or acceptance of it, agrees with the corporation and its creditors that he will perform the obligations and discharge the duties imposed on a stockholder by the constitution, the statutes, and the law then in force, and his liability to creditors springs from that contract. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

The superadded statutory liability of the stockholders of a banking corporation is a contractual obligation, and is to be enforced as such. *Adams v. Clark* (Colo.), 10-774.

Liability in nature of suretyship. — The contractual obligation which a stockholder impliedly assumes under a statute making him liable for the corporation's debts is that of a surety, and is due, not to the corporation, but only to its creditors or to such representatives of their interests as the law may create. *Converse v. Ætna Nat. Bank* (Conn.), 7-75.

The federal statute imposing liability on the stockholders of national banks does not make the stockholder liable to the creditor as surety for the debts of the corporation, but merely imposes a liability on him as sec-

ondary to those debts. The liability is the consequence of the breach by the corporation of its contract to pay and is collateral and statutory. *McClaine v. Rankin* (U. S.), 3-500.

Conditional liability. — The liability imposed upon the stockholders of a national bank by the United States statute is conditional. *McClaine v. Rankin* (U. S.), 3-500.

Divisibility of cause of action. — A contract of stockholders to pay the debts of the corporation is the basis of their double liability, and an action to enforce such liability is indivisible. The cause of action between the same parties is the same whether it is on one or several shares of stock, and it may not be split. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

The right of a creditor having various claims against a corporation to exact payment from a stockholder is not such a single, indivisible demand that by placing one claim in judgment against the stockholder he is precluded from proceeding against him on others. *Manley v. Park* (Kan.), 1-832.

Infringement of patent. — Damages awarded for the infringement of a patent are not a debt within the meaning of the Mississippi statute (Code 1906, §§ 909, 923, 924) making stockholders and directors liable under certain circumstances for debts contracted by the corporation. *Avery & Son v. McClure* (Miss.), 19-134.

Discharge of corporation in bankruptcy. — The discharge of a corporation in bankruptcy is a sufficient excuse for non-compliance by a creditor with section 55 of the New York stock corporation law which provides that no action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation and an execution thereon has been returned unsatisfied in whole or in part; and consequently, where the complaint in an action brought by a creditor of a corporation to enforce the personal liability of stockholders under section 54 of the statute shows that the corporation has been discharged in bankruptcy, and that the plaintiff has proved his claim and received a dividend thereon in the bankruptcy proceeding, it is not demurrable for failure to allege that the plaintiff has exhausted his remedy by judgment and execution against the corporation. *Firestone Tire, etc., Co. v. Agnew* (N. Y.), 16-1150.

The purpose of the statutory provision above mentioned is to protect stockholders from an action by creditors of the corporation to recover the balance unpaid upon their claims, until such claims have been liquidated by judgment and so much thereof collected from the corporation as can be realized by execution. This purpose is as fully effected by a bankruptcy proceeding in a federal court, wherein all the property of the corporation is converted into money and applied upon the claims of creditors, as it could be by an action against the corporation in a state court; and the stockholders, having had the substance of the protection afforded by the

statute, cannot complain that the form was lacking. *Firestone Tire, etc., Co. v. Agnew* (N. Y.), 16-1150.

Where a corporation has been duly discharged in bankruptcy, the prosecution of an action against it on a debt covered by the discharge would be futile, since the judgment in such an action would be subject to cancellation by the court under section 1268 of the New York Code of Civil Procedure, and execution could not be lawfully issued thereon and returned unsatisfied. The courts will not require that useless and unwarranted action be taken. *Firestone Tire, etc., Co. v. Agnew* (N. Y.), 16-1150.

(4) Extent of liability.

Maximum liability. — When the maximum liability imposed by statute on bank stockholders is double the amount of the par value of the stock, interest is not allowable in addition thereto. *Adams v. Clark* (Colo.), 10-774.

Termination of liability. — Whether the articles do or do not contain a clause authorizing the directors to refuse registration, the transferrer cannot escape liability where he has obtained the advantage of executing and registering his transfer on an opportunity obtained by him fraudulently or in breach of some duty which he owed the corporation. *In re Discoverers Finance Corporation* (Eng.), 18-337.

Where the articles contain a clause empowering the directors to reject a transferee whom they do not approve, the transferrer cannot escape liability if he has actively or passively induced the directors to pass and register a transfer (even though it is an out and out transfer) which, but for his conduct, they would have refused to register. Here again the question is one of fact. *In re Discoverers Finance Corporation* (Eng.), 18-337.

(5) Persons entitled to enforce.

Judgment creditors. — The fact that a judgment creditor of a corporation has made a profit by the purchase of the corporation's property at an execution sale under his judgment does not affect the equity of his bill to enforce the statutory liability of the stockholders. *Vaughan v. Alabama Nat. Bank* (Ala.), 5-665.

Right of stockholder to contribution. — A stockholder of a corporation who has paid a judgment against it under a liability imposed on him by the statute of the corporation's domicile may compel contribution by other stockholders who are under the same liability, and enforce his right in the state of the corporation's domicile or in any other state. *Putnam v. Misochi* (Mass.), 4-733.

Estoppel of stockholder to assert claim as creditor. — A stockholder who participated actively in a transaction that resulted in the improper issuance of stock as "issued for property purchased," and who himself received a part of such stock, is not

estopped from participating as a creditor in proceedings taken to enforce the liability of delinquent stockholders by the circumstance that their stock certificates were marked "full paid" and "issued for property purchased," since the stockholders knew the fact to be otherwise. *Easton Nat. Bank v. American Brick, etc., Co.* (N. J.), 10-84.

One who participates as a stockholder and officer in an improper issuance of stock certificates marked "full paid" and "issued for property purchased," is not debarred by operation of the maxim *in pari delicto potior est conditio defendentis* from enforcing against the stockholders any just claims he may have as a creditor of the company. The agreement for improper issuance of the stock being absolutely void on grounds of public policy, his rights as a creditor remain unimpaired. *Easton Nat. Bank v. American Brick, etc., Co.* (N. J.), 10-84.

Under the New Jersey General Corporation Act of 1875, a creditor's knowledge that the stock was improperly issued as "full paid" and as "issued for property purchased," when the fact was otherwise, is not sufficient to debar him from relief against the recipients of the stock. *Easton Nat. Bank v. American Brick, etc., Co.* (N. J.), 10-84.

(6) Defenses.

One who has purchased stock from a corporation at less than its par value is estopped to set up, as a defense to an action by a creditor to enforce his liability, that the transaction was illegal. *Vaughan v. Alabama Nat. Bank* (Ala.), 5-665.

A plea interposed by the defendants in a suit by a creditor corporation to enforce the liability of the stockholders of a debtor corporation, held sufficient to raise an equity in favor of the defendants on the ground that the defendants have the right to insist on the application of the corporate assets to the indebtedness. *Vaughan v. Alabama Nat. Bank* (Ala.), 5-665.

(7) Jurisdiction to enforce.

Foreign stockholders. — Where a person acquires stock in a corporation after the passage of a statute imposing a double liability on stockholders, the contract between him and the corporation may possibly imply that, though he is a citizen of a foreign state, the corporation shall fully represent him in any receivership proceeding to ascertain the amount of the corporation's debts, and that he shall be conclusively bound by any order entered in such proceeding; but that implication does not extend so far as to render a nonresident stockholder conclusively bound by an order authorized by a statute passed after his acquisition of the stock, which is entered in a proceeding in which he is not served and in which he does not appear, and which fixes on him a liability as a stockholder in addition to the liability imposed by the statute at the time he acquired his stock. *Converse v. Aetna Nat. Bank* (Conn.), 7-75.

Whether, after a decree has been rendered

in the courts of Colorado establishing the liability of the stockholders in the home of the corporation, a subsequent proceeding may be maintained upon such decree against a nonresident stockholder in a jurisdiction where personal service can be had upon him, is not determined; but where in proceedings instituted in Colorado, a nonresident stockholder is not made a party, and neither the corporation nor the assignee is made a party, those proceedings determine nothing as to the liability of such stockholder in a suit brought against him in his home jurisdiction. *Clark v. Knowles* (Mass.), 2-26.

Under a Colorado statute providing that stockholders in certain kinds of corporations shall be held individually responsible for the debts of such corporations in double the amount of the par value of the stock owned by them respectively, a bill in equity cannot be maintained in the Massachusetts courts by the creditors of an insolvent Colorado bank against an individual stockholder to determine and enforce such liability, as the bank, its assignee, and the remaining stockholders are necessary parties to such a proceeding, and, as to them, the Massachusetts courts have no jurisdiction. *Clark v. Knowles* (Mass.), 2-26.

Jurisdiction in equity. — Equity has jurisdiction of a bill filed by the assignees of an insolvent corporation to enforce, for the benefit of creditors, unpaid stock subscriptions, where the defendant stockholders are numerous; and the jurisdiction is not ousted by the fact that no accounting is asked. *Cook v. Carpenter* (Pa.), 4-723.

Under the Alabama statute which provides that after obtaining judgment and having a return of "no property found," the creditor of a corporation may proceed against the corporation's stockholders, the equitable remedy of the creditor does not accrue until the insolvency of the corporation. *Vaughan v. Alabama Nat. Bank* (Ala.), 5-665.

(8) Pleading.

The complaint in a proceeding to enforce the statutory liability of bank stockholders considered, and held sufficient. *Adams v. Clark* (Colo.), 10-774.

h. Evidence.

The books and records of a private corporation are not competent evidence against third persons, in the absence of proof of their knowledge and assent to them, to establish their relation of stockholders to the corporation or to prove other contracts between them and it. But admissions of a party against his interest, inscribed upon the books of the corporation and signed by him, are as competent and persuasive evidence against him as though they were written elsewhere. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

The stock ledger of an insolvent bank held to be admissible to prove who were the stockholders. *Adams v. Clark* (Colo.), 10-774.

In an action to enforce stockholders' liability, which is based on proceedings in a court

of a foreign state, where the record of the foreign court recites that the corporation appeared and was heard pursuant to due service of process, the full faith and credit clause of the Federal Constitution precludes the defendant from introducing evidence to contradict such recital. *Converse v. Ætna Nat. Bank* (Conn.), 7-75.

In an action on an order of court making a *pro rata* assessment against stockholders for their corporation's debts, the assessment will be regarded as an entirety and, it appearing that the assessment includes "a very considerable sum" for which the defendants are not legally liable, a demurrer should be sustained if it does not appear how much of the assessment represents the defendants' legal liability; but if the demurrer is overruled and the defendants do not offer to waive the objection that the assessment is an entirety and to submit to judgment for the amount properly assessable against them, evidence offered by them and tending to show the amount of their legal liability is irrelevant. *Converse v. Ætna Nat. Bank* (Conn.), 7-75.

9. DIVIDENDS.

a. In general.

A stockholder in a corporation cannot recover from the corporation profits alleged to have accrued on his stock where he does not allege that any dividend has been declared by the corporation, especially where it appears that the plaintiff sold his stock prior to bringing suit and that no dividends had been declared prior to the sale. *Corgan v. George F. Lee Coal Co.* (Pa.), 11-838.

b. Stock dividends.

Distinction between stock and cash dividends. — A stock dividend consists of the issuance and distribution among shareholders of new shares of stock, the result being an increase in the number of shares and the conversion of surplus assets into strict capital, while the underlying idea of a cash dividend is the distribution to shareholders of a portion of the profits or surplus assets of the corporation, such distribution ordinarily, but not necessarily, being in the form of cash. *Green v. Bissell* (Conn.), 9-287.

Dividend not creating new shares. — Where a stockholder transfers his stock to the corporation in payment of a debt, and the corporation distributes the stock among other shareholders, the distribution must be treated as a cash and not as a stock dividend, notwithstanding the fact that the distribution is designated "stock dividend" in the vote of the corporation authorizing it, as the declaration of a dividend does not involve the creation of new shares of stock. *Green v. Bissell* (Conn.), 9-287.

c. Cumulative dividends.

Dividends on preferred stock. — In the absence of a statutory or contractual provision to the contrary, dividends on the pre-

ferred stock of a corporation are cumulative. *Fidelity Trust Co. v. Lehigh Valley R. Co.* (Pa.), 7-613.

Dividends on preferred stock are not rendered noncumulative by the fact that the statute under which the stock is issued provides that preferred stockholders are to be paid from the profits a specified dividend per annum before the holders of other stock are permitted to participate in the profits, as such provision does not have the effect of making the right of preferred stockholders to dividends conditional upon the earning of sufficient profits each year to discharge their claim. *Fidelity Trust Co. v. Lehigh Valley R. Co.* (Pa.), 7-613.

Where, pursuant to authority conferred by its charter, a corporation issues preferred stock, certificates for which provide that dividends on preferred stock shall be cumulative and in case of nonpayment shall bear interest from the date when payable, there is created a valid contract between the corporation and the preferred stockholders which is binding upon all other stockholders. *Roberts v. Roberts-Wicks Co.* (N. Y.), 6-213.

Payment of arrearages. — Where the capital stock of a corporation has been reduced in the manner provided by law, the holdings of the stockholders having been reduced proportionately, the holders of cumulative preferred stock upon which dividends were in arrears at the time of reduction are entitled to be paid the total amount of such arrears upon the whole number of shares held by them before the reduction, together with interest thereon, before any dividend shall be paid to holders of common stock. *Roberts v. Roberts-Wicks Co.* (N. Y.), 6-213.

Where a corporation, the capital of which has become impaired, creates a surplus by reducing its capital stock, the holders of cumulative preferred stock are not entitled to have such surplus applied to the payment of arrears of dividends on their stock. *Roberts v. Roberts-Wicks Co.* (N. Y.), 6-213.

Where the dividends on cumulative preferred stock are in arrears, the holders of the stock are entitled to be paid the full amount of arrearages without deduction of extra dividends paid them in the past in common with the common stockholders, unless the contract limits the preferred stockholders to the dividends for which they are given preference. *Fidelity Trust Co. v. Lehigh Valley R. Co.* (Pa.), 7-613.

10. ACTIONS.

a. Power to sue or be sued.

Joinder of officers as parties. — A corporation may sue in its own name without designating its president or any of its other officers in the petition. *New Orleans Terminal Co. v. Teller* (La.), 2-127.

Collateral attack on franchises. — It is sufficient for a corporation setting up a franchise as a defense to an action to show possession of the franchise, and whether the same were acquired or is held rightfully is to be determined only in a direct proceeding to

oust the corporation or in a proceeding to which the one who claims a better title is a party. *Bronson v. Albion Tel. Co.* (Neb.), 2-639.

Mandamus to compel performance of contracts. — Mandamus does not lie to compel a private corporation to perform its contracts with an individual. *State ex rel. Burg v. Milwaukee Medical College* (Wis.), 8-407.

Mandamus does not lie to compel an incorporated medical college to issue a diploma of graduation to one of its students. *Burg v. Milwaukee Medical College* (Wis.), 8-407.

Injunction against agent. — Where the managing agent of a corporation at the expiration of his term refuses to surrender possession and threatens to continue to act as such agent, a preliminary mandatory injunction may be issued against him without notice, and as an incident thereto the court may appoint some person to take charge of the property until final hearing to prevent threatened mismanagement of the corporate affairs. *Magpie Gold Min. Co. v. Sherman* (S. D.), 20-595.

Injunction at the suit of a corporation will lie against its managing agent who refuses to surrender the possession of the corporate property and threatens to continue to act as agent after the expiration of his term and to divert corporate funds and property and to incur debts on behalf of the corporation which may involve it in serious litigation. *Magpie Gold Min. Co. v. Sherman* (S. D.), 20-595.

The rule that a court of equity will not remove an officer of a corporation does not apply where the corporation is suing to restrain its vice-president, appointed managing agent by the president, from interfering with its business as such agent and from incurring debts in its behalf, where it is not sought to deprive him of his office of vice-president or to interfere with his interests as a stockholder. *Magpie Gold Min. Co. v. Sherman* (S. D.), 20-595.

b. Jurisdiction of courts of equity.

Action by receiver against directors. — A court of equity has jurisdiction of a suit by the receiver of a corporation against the corporation's directors to hold them liable for their acts of negligence or other acts in violation of statutory provisions. *Emerson v. Gaither* (Md.), 7-1114.

Action to enjoin ultra vires acts. — For the purpose of redressing a private wrong, a private person may maintain a suit in equity against a corporation to enjoin acts by it in excess and abuse of its corporate franchises and privileges. *Madison v. Madison Gas, etc., Co.* (Wis.), 9-819.

Suit by creditors after dissolution. — The New York statute providing that a creditor of a corporation may sue its officers to compel them to account for the money or property which they have lost or wasted by the violation of their duties, does not authorize an action by the creditors against the

treasurer of a dissolved corporation to enforce his promise to pay all the debts of the corporation in case he should be allowed to acquire its property at the receiver's sale for less than its real value; but the creditors may obtain relief by a suit in equity against the treasurer to impress a trust in their favor on the property purchased by him, and in such a suit it is not necessary to attack the receiver's sale as fraudulent or to seek to have it set aside. *Lillenthal v. Betz* (N. Y.), 7-41.

c. Determination of title to office.

Quo warranto. — The proper remedy to determine the question of title to an office in a private corporation, where such is the sole or main question involved, is by the common-law and statutory remedy of *quo warranto*, not by a bill in equity. *Hayes v. Burns* (D. C.), 4-704.

d. Process.

Description of defendant as corporation. — A summons setting forth the full corporate name of the defendant corporation, without reciting that it is a corporation, is sufficient. *Snyder v. Philadelphia Co.* (W. Va.), 1-237.

e. Pleading.

Averment of corporate existence. — The title of an action and the allegations of a petition held to import that the defendant was a corporation. Also held that it was not necessary even as against a special demurrer to allege the corporate existence of the defendant. *Georgia Co-operative F. Assoc. v. Borchardt* (Ga.), 3-472.

Bill by stockholders to compel distribution of assets. — A bill in equity by a minority stockholder praying for a distribution of the assets of the corporation and to have two-thirds of its stock declared to be fictitious and void, is not multifarious. *Central Land Co. v. Sullivan* (Ala.), 15-420.

f. Evidence.

Proof of corporate existence. — Where a defendant which is sued as a corporation has denied its corporate existence, the insufficiency of the plaintiff's proof of the existence of such corporation is immaterial where the defendant has in the same action supplied such proof by filing in court a copy of its charter. *Federal Betterment Co. v. Reeves* (Kan.), 15-796.

In an action by a corporation, the original charter of the corporation duly certified is the highest evidence of the incorporation, and where such charter recites a change in the name of the corporation the defendant cannot avail itself of any alleged irregularity in complying with the law relative to changing the names of corporations, such irregularity being available only in a direct proceeding to annul the charter instituted on behalf of the state. *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.* (S. Car.), 11-780.

Former adjudication as to corporate existence. — In a *quo warranto* proceeding to forfeit the franchises of a corporation, where it is contended that the defendant is estopped from alleging its corporate existence by reason of its answer in another suit brought against it by the commonwealth for the collection of taxes, and it appears that the only thing adjudicated in the tax suit was the fact that the corporation was not liable for any tax upon its capital stock at the time settlement was made, the record in the tax suit is admissible in evidence, but is not conclusive on the defendant. *Commonwealth v. Monongahela Bridge Co. (Pa.)*, 8-1073.

Promise to pay officer's salary. — Evidence held insufficient to show an express contract by the corporation to pay a salary to the president. *Lowe v. Ring (Wis.)*, 3-731.

Intention of officer in performing wrongful act. — In an action against a corporation to recover money which a third person, guardian of the plaintiff and treasurer of the defendant, withdrew from the plaintiff's account in a savings bank and deposited to the defendant's credit in another bank, evidence that the guardian checked the money out for his private purpose immediately after depositing it to the defendant's credit, and that in so doing he followed the usual course of his dealings with his private funds, is competent as bearing on the question of the intention with which he withdrew the plaintiff's money from the savings bank. *Brookhouse v. Union Publishing Co. (N. H.)*, 6-675.

Participation in wrongful acts of officer. — In an action against a corporation to recover money which a third person, guardian of the plaintiff and treasurer of the defendant, withdrew from the plaintiff's account in a savings bank and deposited to the defendant's credit in another bank, evidence reviewed and held to show that the defendant did not receive the money from the guardian with notice of the trust and did not aid him in wrongfully diverting it from the plaintiff. *Brookhouse v. Union Publishing Co. (N. H.)*, 6-675.

Liability for wrongful acts of officer. — In an action against a corporation to recover money which a third person, guardian of the plaintiff and treasurer of the defendant, withdrew from the plaintiff's account in a savings bank and deposited to the defendant's credit in another bank, evidence considered and held to show that the defendant had not the possession of the money at the time the action was brought, and to show further that the money was not converted to the defendant's use by payment of the guardian's individual indebtedness to it. *Brookhouse v. Union Publishing Co. (N. H.)*, 6-675.

11. CRIMINAL PROSECUTIONS.

Necessity for indictment. — Corporations may be proceeded against for petty offenses in an inferior court without indictment,

the same as individuals. *Commonwealth v. New York Central, etc., R. Co. (Mass.)*, 19-529.

12. INSOLVENCY AND RECEIVERSHIP.

Jurisdiction. — Save in certain classes of suits in equity which constitute well-recognized exceptions, the jurisdiction of courts of equity does not warrant the appointment of a receiver to take charge of and administer the property and business of a corporation in an independent action where that is the main object and purpose of the suit and the sole and only relief asked for. *Vila v. Grand Island Electric Light, etc., Co. (Neb.)*, 4-59.

Unless expressly authorized by statute, a court has no jurisdiction to appoint a receiver of corporate property upon grounds which would not be sufficient were the owner a natural person. *Vila v. Grand Island Electric Light, etc., Co. (Neb.)*, 4-59.

In the absence of statutory authority, courts of equity do not possess jurisdiction over corporate bodies to the extent of, on the application of private parties, appointing a receiver, sequestrating the property and business and selling the same through the instrumentality of the receiver, and thereby winding up and indirectly dissolving the corporation. *Vila v. Grand Island Electric Light, etc., Co. (Neb.)*, 4-59.

Petition held to be insufficient to authorize a court to appoint a receiver of the property of a corporation and order a sale thereof. *Vila v. Grand Island Electric Light, etc., Co. (Neb.)*, 4-59.

Jurisdiction to appoint a receiver of corporate property cannot be conferred by the mere consent of the corporation where neither equitable nor statutory grounds exist and where other parties whose rights are affected have not been notified; nor is a stockholder concluded by any such order. *Vila v. Grand Island Electric Light, etc., Co. (Neb.)*, 4-59.

It is a sufficient ground for the appointment of a receiver of a corporation, though it is solvent and prosperous, that two stockholders, between whom the stock is equally divided in ownership, are irreconcilably hostile to each other; that one stockholder, by means of a subservient board of trustees, has taken possession of the corporation and all of its business affairs, excluding the other from any participation; and that a new board of trustees cannot be elected. *Boothe v. Summit Coal Mining Co. (Wash.)*, 19-1255.

Parties. — In a suit by creditors of a dissolved corporation to impress a trust in their favor on the corporation's property, a discharged receiver of the corporation is not a necessary party, either plaintiff or defendant. *Lilienthal v. Betz (N. Y.)*, 7-41.

Preference of creditors by insolvent corporation. — In view of the fact that the assets of an insolvent corporation are a trust fund for the benefit of all its creditors, an insolvent corporation may not lawfully prefer some of its creditors over others. This rule applies even though the assets of such a corporation are transferred to a third party

for the purpose of enabling him to create a preference by giving a chattel mortgage to one of the corporation's creditors. *Furber v. Williams-Flower Co.* (S. Dak.), 15-1216.

The fact that when such mortgage was executed such creditor had no knowledge of the character of the transfer and of the exact condition of the corporation is immaterial. *Furber v. Williams-Flower Co.* (S. Dak.), 15-1216.

Misconduct of officers as ground for receivership. — A corporation will not be placed in the hands of a receiver for the misconduct of its officers or directors, unless such action is necessary to preserve the property or rights of creditors or stockholders. The mere misconduct of officers is not sufficient ground for the appointment of a receiver, since a court of equity may forbid the misconduct or remove the officer. *Secord v. Wheeler Gold Mining Co.* (Wash.), 17-914.

Assuming, without deciding, that the acts of the directors of a corporation in voting a salary to the president of the company for his services as manager of its business, in approving a claim made by the president against the company for traveling expenses, in removing the books and papers of the corporation from its main office to another state, in failing to report as a liability of the corporation a *bona fide* claim against it held by the wife of its president, and in failing to comply with the demands of certain stockholders for information and for copies of the by-laws, are wrongful, still they do not amount to such misconduct as to justify the appointment of a receiver, where the corporation is neither insolvent nor in immediate danger of insolvency. *Secord v. Wheeler Gold Mining Co.* (Wash.), 17-914.

Title to property. — The receiver of an insolvent, nongoing corporation takes the property of the corporation for the creditors, subject to such equities, liens, or incumbrances, whether created by operation of law or by act of the corporation, as exist against the property at the time of his appointment. *Ardmore Nat. Bank v. Briggs Mach., etc., Co.* (Okla.), 16-133.

Where after the filing of a bill in equity to dissolve a corporation, and service of notice thereof, but before the return day and before the appointment of receivers, real estate of the corporation was seized on an execution, by a judgment creditor having an existing valid attachment which antedated the bill in equity, and after regular proceedings was sold on execution sale to the defendant, it was held that the title to the demanded premises, by relation back, vested in the receivers, in legal effect, prior to the seizure on the execution. *Cobb v. Camden Sav. Bank* (Me.), 20-547.

Priority of claims of employers. — Where a private corporation has become insolvent and gone into the hands of a receiver, the wages due the laborers for services performed for the corporation before the appointment of the receiver and necessary to continue the business and preserve the property of the corporation are entitled to pref-

erence in payment over the claims of other creditors, and a court of equity will so order on petition of the laborers. *La Hote v. Boyet* (Miss.), 3-705.

Priority of lien claimants. — Where after the appointment of a receiver to take charge of the assets of an insolvent nongoing corporation, a vendor of machinery to the corporation files a plea of intervention alleging that it is the holder of promissory notes under which the title to such machinery is reserved to the vendor and that such reservation notes are liens on the machinery, and praying for their foreclosure and for general relief, the vendor may, notwithstanding the fact that such reservation notes were not filed as chattel mortgages, afterwards amend its plea of intervention by asserting title to and the right of possession of the machinery as against one who claims to have a lien thereon subsequent in time to the reservation notes, where such lien, if it attached at all, was created after the machinery came into the receiver's hands. *Ardmore Nat. Bank v. Briggs Mach., etc., Co.* (Okla.), 16-133.

A receiver's title and right to possession of the property of an insolvent, nongoing corporation vests from the date of the original order of appointment, although the proceedings may not be perfected until a later date. The receiver's title and right to possession during the interval between such original order and the time of perfecting his appointment are superior to those of a judgment creditor who levies upon the property under his judgment during such interval. *Ardmore Nat. Bank v. Briggs Mach., etc., Co.* (Okla.), 16-133.

13. FOREIGN CORPORATIONS.

a. Status and powers generally.

Subjection to laws of state. — A foreign corporation coming into a state is subject to the rules and regulations provided by the laws of the state. *Dunbar v. American Tel., etc., Co.* (Ill.), 8-57.

Residence of corporations. — The residence of a corporation is in the state of its creation, although it may carry on business in another state. *Squire & Co. v. Portland* (Me.), 20-603.

b. Rights in respect to real estate.

Right to take by devise. — By comity, a foreign corporation may acquire and hold property by devise provided its charter permits it so to do, and no prohibition is found in the laws or public policy of the domestic state. *Iglehart v. Iglehart* (D. C.), 6-732.

Under a statute permitting cemetery companies to take and hold real and personal property for the purpose of using the income for the care of cemetery lots, monuments, etc., comity requires that a foreign corporation which is clothed with similar power by the law of its sovereignty shall be permitted to take and hold devises and bequests made to it for that purpose. *Iglehart v. Iglehart* (D. C.), 6-732.

c. Statutory regulation.

(1) Restrictions on right to do business.

Power to impose, in general. — A state has power to prescribe the terms and conditions upon which foreign corporations may do business therein, and may require compliance with such terms and conditions as a condition precedent to their invoking the jurisdiction of its courts. *International Trust Co. v. A. Leschen, etc., Co. (Colo.)*, 14-861.

Interference with interstate commerce. — In exercising such power the state may not place any restrictions or impose any burdens upon interstate commerce. *International Trust Co. v. A. Leschen, etc., Co. (Colo.)*, 14-861.

The prohibition of the Federal Constitution against interference with interstate commerce precludes a state statute prescribing the terms upon which foreign corporations may do business within the state from depriving a foreign corporation of the right to sue on a promissory note made payable within the state, but given in payment for goods shipped from another state. *Kirven v. Virginia-Carolina Chemical Co. (U. S.)*, 7-219.

Statute forbidding trust or combination. — A statute which forbids foreign corporations from continuing to do business within the state if such corporations have become, either within or outside of the state, parties to any trust or combination to regulate prices or production either within the state or elsewhere, does not exert an extra-territorial power, and is constitutional. *Hammond Packing Co. v. Arkansas (U. S.)*, 15-645.

(2) Imposition of additional franchise tax or license fee.

Equal protection of the laws. — When a foreign corporation has come into a state in compliance with its laws, and has therein acquired property of a fixed and permanent character, upon which it has paid all taxes levied by the state, it cannot afterwards be subjected to a new and additional franchise tax for the privilege of doing business within the state, which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged. Such a tax is unconstitutional as denying the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution, and its imposition cannot be justified as an exercise of the right of classification of the subjects of taxation. *Southern R. Co. v. Greene (U. S.)*, 17-1247.

Judged by the above principles, the Alabama statute of 1907, imposing a franchise tax on foreign corporations authorized to do business in the state, must be held unconstitutional. *Southern R. Co. v. Greene (U. S.)*, 17-1247.

Discrimination against foreign corporations. — A statute subjecting a foreign corporation to all the liabilities of a domestic

corporation of like character means that the foreign corporation shall not be subjected to any greater liabilities than are imposed upon the domestic corporation. *American Smelting, etc., Co. v. Colorado (U. S.)*, 9-978.

Under a statute providing that a foreign corporation which has acquired the right to do business within the state by compliance with the conditions prescribed by statute shall not be subjected to any greater liabilities than are imposed upon domestic corporations of like character, the admission to do business within the state of a foreign corporation which has complied with the statutory requirements constitutes a contract between the state and the corporation for the period during which the latter is admitted, and therefore a subsequent statute imposing on the foreign corporation during such period a higher license fee than that imposed on domestic corporations of like character is void, as impairing the obligation of the contract, notwithstanding the fact that the legislature has power to alter, amend, or annul the charters of corporations. *American Smelting, etc., Co. v. Colorado (U. S.)*, 9-978.

(3) Statute requiring appointment of representative to accept service of process.

Constitutionality. — The West Virginia statute requiring every foreign corporation doing business in the state and every non-resident domestic corporation to appoint the state auditor its attorney in fact to accept service of process and notice, and to pay the auditor a yearly fee for acting as such attorney, is not unconstitutional. *State v. St. Mary's, etc., Petroleum Co. (W. Va.)*, 6-38.

Shipping goods into state to fill orders. — A state statute requiring foreign corporations to file certificates and pay certain fees as a condition precedent to their right to sue in the courts of the state is not operative as to foreign corporations which send goods into the state pursuant to orders obtained through traveling salesmen. *R. M. Davis Photo Stock Co. v. Photo Jewelry Mfg. Co. (Colo.)*, 19-540.

(4) Statute requiring copies of articles of incorporation to be filed.

Validity. — A statute providing that no foreign corporation doing business in the state shall maintain an action in any court thereof without first filing certain statements with the secretary of state is not violative of the commerce clause of the Federal Constitution, even when applied to corporations engaged solely in interstate commerce. *John Deere Plow Co. v. Wyland (Kan.)*, 2-304.

A state statute that requires foreign corporations to file with the secretary of state certified copies of their articles of incorporation and to pay a fee of twenty-five dollars, the same as is required of domestic corporations, is not unreasonable or objectionable as discriminating between foreign and domestic corporations. *Western Union Tel. Co. v. State (Ark.)*, 12-82.

The Arkansas statute requiring every for-

foreign corporation doing business in the state to file with the secretary of state a copy of its charter or articles of incorporation, and to pay a fee equal to that required of domestic corporations, under penalty of a fine, was intended only to impose terms upon the right of a foreign corporation to carry on intrastate business, and as so construed is a valid statute. *Western Union Tel. Co. v. State (Ark.)*, 12-82.

Corporation already in state. — The state has the same right to impose the terms of such statute on a foreign corporation already in the state as it has to impose them on a corporation which comes into the state after the enactment of the statute, the state constitution expressly reserving to the state the right to alter the charter rights of corporations, either domestic or foreign, doing business in the state. *Western Union Tel. Co. v. State (Ark.)*, 12-82.

The requirement of the Alabama constitution of 1901 that no foreign corporation shall do business in the state except upon filing with the secretary of state a certified copy of its articles of incorporation, applies to corporations which had complied with all the requirements of the prior constitution, and were doing business in the state when the constitution of 1901 was adopted, and as so applied is not retroactive in its operation. *Armour Packing Co. v. Vinegar Bend Lumber Co. (Ala.)*, 13-951.

Inasmuch as the right of foreign corporations to do business in a state rests upon comity, and not upon any contractual relation, it is competent for the framers of a state constitution to impose upon foreign corporations doing business in the state at the date of the adoption of such constitution the additional requirement of "filing with the secretary of state a certified copy of its articles of incorporation." *Armour Packing Co. v. Vinegar Bend Lumber Co. (Ala.)*, 13-951.

(5) What constitutes doing business.

Institution and prosecution of suit. — The institution and prosecution of an action by a foreign corporation is not "doing business" within the meaning of the Arkansas statute prescribing the terms upon which foreign corporations may do business in the state. *Alley v. Bowen-Merrill Co. (Ark.)*, 6-127.

It does not constitute the doing of insurance business within the state for the trustee of a foreign mutual insurance company, which has been dissolved, to bring suit against members of the company to collect assessments imposed by the judgment of the court of last resort of the state by which the company was chartered, where the judgment is one entitled to recognition under the full faith and credit clause of the Federal Constitution. *Swing v. Brister (Miss.)*, 6-740.

Selling farm machinery through agent. — In a proceeding where the defense is that the plaintiff cannot maintain the action because it is a foreign corporation doing business within the state, and has not ob-

tained a certificate of the secretary of state showing that the statements required by statute have been made, it is held that the business of selling farm machinery through an agent is the doing of business within the state within the meaning of the statute. *D. M. Osborne & Co. v. Shilling (Kan.)*, 11-319.

Single sale of goods. — An isolated commercial transaction by a foreign corporation, such as a single sale of goods, does not constitute a doing of business within the state within the meaning of a prohibitory statute. *Kirven v. Virginia-Carolina Chemical Co. (U. S.)*, 7-219.

When a single transaction by a foreign corporation constitutes the doing of business within the state under a statute making certain requirements of foreign corporations doing business in the state. *John Deere Plow Co. v. Wyland (Kan.)*, 2-304.

Orders taken by traveling salesman. — A contract made in Colorado, pursuant to an order taken by a traveling salesman of a Missouri corporation, for the delivery of goods by such corporation to a railroad in Missouri for transportation to Colorado, is an interstate commerce transaction, and such corporation is not engaged in doing business within the intendment of the Colorado statutes prescribing conditions on which foreign corporations may do business within the state, and has the right to invoke the aid of the Colorado courts in the collection of the indebtedness accruing to it by reason of such transaction. *International Trust Co. v. A. Leschen, etc., Co. (Colo.)*, 14-861.

It is not "doing business" in the state for a foreign corporation having no office or place of business in the state to take orders for goods through traveling salesmen sent into the state. *Saxony Mills v. Wagner (Miss.)*, 19-199.

Solicitation of orders by resident agents. — Foreign corporations maintaining resident agents in a state through whom orders for the purchase of goods are solicited and to whom the goods are sent for delivery to the buyers are not exempt from the requirements of the statute as to doing business within the state. *John Deere Plow Co. v. Wyland (Kan.)*, 2-304.

Dealings with customers obtained by solicitor. — A corporation which, by means of solicitors, obtains orders for its commodities from persons in other states, does business in such other states, though the orders are accepted by the corporation at its home office and the commodities are sent therefrom direct to the customers. *International Textbook Co. v. Pigg (U. S.)*, 18-1103.

Soliciting contracts for transportation of goods. — Within the meaning of a statute prescribing the manner in which process shall be served upon foreign corporations doing business in a state, it is not "doing business" for a foreign railroad corporation to maintain in the state agents whose sole duty is to solicit contracts for the transportation of goods to begin and continue entirely out of the state. *Berger v. Pennsylvania R. Co. (R. I.)*, 8-941.

Contract to supply schools with text books. — The negotiations of a foreign corporation with the state school text-book commission, resulting in a contract to supply the schools with text books, does not constitute doing business within the state within the meaning of the Kansas statute. *State v. American Book Co. (Kan.)*, 2-56.

Correspondence school soliciting pupils. — The details of soliciting pupils and imparting instruction by a foreign corporation conducting a correspondence school in the state of its domicile, and the delivery, bailment, and return of books, are within the prohibition against the transaction of business in Wisconsin by foreign corporations before complying with the domestic statutes relating to such corporations. *International Textbook Co. v. Peterson (Wis.)*, 14-965.

Adjusting claims for fire insurance. — Where a foreign insurance company attempts to revoke its irrevocable appointment of a resident agent for the service of process and in good faith ceases to do business within the state, the power of attorney is not kept alive by the fact that on several occasions thereafter the company sends agents into the state for the purpose of adjusting claims arising out of policies issued to residents of the state prior to its withdrawal therefrom, or out of policies issued to nonresidents who have since become residents of the state, as such acts do not constitute the doing of business. *Hunter v. Mutual Reserve Life Ins. Co. (N. Y.)*, 6-291.

(6) Effect of noncompliance with statutes.

Contracts void. — Where a statute prescribing the terms upon which foreign corporations may do business within the state fixes a penalty for its violation, and in addition thereto forbids a noncomplying corporation to maintain any action in the courts of the state, a contract made within the state by a noncomplying corporation is void, and the corporation can maintain no action thereon even after it has qualified itself to do business. *United States Lead Co. v. J. W. Reedy Elevator Mfg. Co. (Ill.)*, 6-637.

Under the Missouri statute prescribing the terms and conditions upon which foreign corporations may do business within the state, a contract entered into by a foreign corporation, before complying with the statute, is void, just as if the statute had in terms declared it void, and such a contract cannot be enforced in the courts of the state, although the corporation before bringing suit on the contract has complied with the statute. *Tri-State Amusement Co. v. Forest Park, etc., Co. (Mo.)*, 4-808.

A bilateral contract containing an express undertaking affecting the "personal liability" of a foreign corporation which has not complied with the provisions of the Wisconsin statutes relating to foreign corporations, is unenforceable by such corporation. *International Textbook Co. v. Peterson (Wis.)*, 14-965.

The provision of the Alabama constitution

of 1901 that no foreign corporation shall do business in the state except upon filing with the secretary of state a certified copy of its articles of incorporation is prohibitory and needs no legislation to make it effective, and the executory contracts of a foreign corporation failing to comply with such provision are void and unenforceable, although the prohibitory clause provides no penalty for its violation, and omits to declare that contracts entered into by the corporation in violation thereof shall be void. *Armour Packing Co. v. Vinegar Bend Lumber Co. (Ala.)*, 13-951.

Right of enforcement suspended pending compliance. — The statute prohibiting a foreign corporation from doing business within the state until it has complied with certain requirements does not render a contract made within the state by a noncomplying corporation wholly void, but merely suspends the right of the corporation to enforce the contract until after it has complied with the statutory requirements. *Kirven v. Virginia-Carolina Chemical Co. (U. S.)*, 7-219.

Under the Arkansas statute forbidding foreign corporations to contract within the state or to sue on contracts made within the state until they have complied with the terms prescribed by the statute, a contract made within the state by a noncomplying corporation is not void, but may be enforced in the courts of the state upon the corporation's compliance with the statute, even though such compliance does not take place until after the bringing of the suit. *Woolfort v. Dixie Cotton Oil Co. (Ark.)*, 7-217.

The Massachusetts statute providing that "no action shall be maintained or recovery had in any of the courts of this commonwealth by any . . . foreign corporation so long as it fails to comply with the requirements" of the laws prescribing the conditions upon which such a corporation may transact business in the state, does not avoid the contracts of foreign corporations made before compliance with the state laws, but merely suspends as to foreign corporations the privilege of the courts during the period of noncompliance; and when in an action by a noncomplying foreign corporation, the fact of noncompliance is seasonably pleaded in abatement, the statute operates merely to stay the proceedings until the temporary disability of the plaintiff is removed, which can be done at any time after, as well as before, resort to the courts. *National Fertilizer Co. v. Fall River, etc., Bank (Mass.)*, 13-510.

Under the Colorado statute prohibiting the prosecution or defense of actions of foreign corporations until they shall have complied with the requirements of the statute, compliance therewith by a foreign corporation subsequent to the commencement by it of an action renders enforceable a contract theretofore unenforceable by reason of noncompliance. *International Trust Co. v. A. Leschen, etc., Co. (Colo.)*, 14-861.

Contracts made with a foreign corporation before it has obtained permission to do business in the state according to statute are

not for that reason invalid or subject to cancellation at the suit of one of the contracting parties. *State v. American Book Co.* (Kan.), 2-56.

After a foreign corporation has complied with the law and received permission to do business in the state, it cannot be enjoined by the state from performing contracts made before such permission was obtained. *State v. American Book Co.* (Kan.), 2-56.

Property rights not forfeited. — The failure of a foreign corporation doing business in a state to comply with qualifying statutes does not deprive it of the liability of one who injures or destroys property which it owns to pay for the legal injury he inflicts, nor of its right to maintain an action upon that liability in the federal courts. *Johnson v. St. Louis* (U. S.), 18-949.

Contract enforceable against corporation. — Under the Wisconsin statute contracts of a foreign corporation which has not acquired the right to do business in the state "shall be held void on its behalf . . . but shall be enforceable against it." *Allen v. Milwaukee* (Wis.), 8-392.

Contract made in foreign state valid. — Notwithstanding the Missouri statute prescribing the terms and conditions upon which foreign corporations may do business within the state, contracts entered into by a foreign corporation in the state of its domicile, with citizens of Missouri, if valid according to the laws of the state of its domicile, and not prohibited by the laws of Missouri, are valid contracts and will be enforced in the latter state as a matter of comity, and such corporation is not required to comply with the statute in order to maintain actions on such contracts. *Tri-State Amusement Co. v. Forest Park, etc., Co.* (Mo.), 4-808.

Evidence considered, in an action by a foreign corporation on a contract with a resident, and held to show that the contract was not made within the state. *Kirven v. Virginia-Carolina Chemical Co.* (U. S.), 7-219.

d. Actions by and against foreign corporations.

(1) Right to sue.

Where corporation has complied with statute. — Under the Michigan statute providing that foreign corporations authorized to do business in the state "shall enjoy all the rights and privileges, and shall be subject to all the restrictions, requirements, and liabilities of corporations of like character, incorporated" under the laws of the state, foreign corporations complying with the provisions of the statute acquire the same rights to prosecute and defend actions in the courts of the state and to enforce their contracts and use the remedies authorized by law as are possessed by domestic corporations. *Stack v. Detour Lumber, etc., Co.* (Mich.), 14-112.

Where corporation has not complied with statute. — Under the Michigan statute providing that a foreign corporation cannot maintain an action founded upon an act

done by it without lawful authority, a foreign mutual insurance company which has not acquired the right to do business within the state, and which therefore cannot lawfully insure property within the state, cannot maintain an action on a contract made in a foreign state for the insurance of property within the domestic state, whether or not the contract is valid as between the parties. *Swing v. Cameron* (Mich.), 9-332.

Estoppel to plead noncompliance with statute. — In an action by a foreign corporation on a contract entered into by it, the fact that the defendants knew that the plaintiff was a foreign corporation at the time the contract in question was made does not estop them to plead noncompliance with the statute regulating foreign corporations. Nor will the fact that the defendants have set up a counterclaim in the answer, asking for the damages resulting from the breach of the contract by plaintiff, operate as a waiver of their right to ask for an abatement of the action. *D. M. Osborne & Co. v. Shilling* (Kan.), 11-319.

Abatement of suit pending compliance. — The regulation of foreign corporations under the statutes devolves upon the state, and a private individual cannot interfere except where the corporation fails to file its annual statement, and then only to the extent of abating a suit against him until the statement shall have been filed. *State v. American Book Co.* (Kan.), 2-56.

Action on contract made in foreign state. — The Mississippi statute, prescribing the conditions under which foreign insurance companies may do business within the state and imposing a penalty for its violation, does not preclude a noncomplying company from instituting and maintaining an action in the courts of the state against a citizen of the state to collect premiums due under a valid contract made in a foreign state. *Swing v. Brister* (Mass.), 6-740.

Right to sue in federal court. — The Missouri statutes, which forbid unqualified foreign corporations doing business in that state from maintaining suits in the courts of the state, do not affect their right to maintain suits in the national courts, because the jurisdiction of the latter may not be revoked, annulled, or impaired by any act or law of a state. *Johnson v. St. Louis* (U. S.), 18-949.

(2) Liability to be sued.

By nonresident plaintiff. — The liability of a foreign corporation to a suit within the state irrespective of the residence of the plaintiff. *Reeves v. Southern R. Co.* (Ga.), 2-207.

After attempted withdrawal from state. — Service of process on a state officer appointed by a foreign insurance company by an irrevocable power of attorney as its attorney for the service of process gives the courts of the state jurisdiction to render personal judgment against the company in an action on a policy issued to a resident of the state while the company was doing business there, though the action is brought after

the company has ceased to do business in the state and has attempted to revoke the appointment. *Hunter v. Mutual Reserve Life Ins. Co.* (N. Y.), 6-291.

Where a foreign insurance company has revoked its appointment of a resident agent for the service of process and has in good faith ceased to do business within the state, the revocation is effectual to prevent the courts of the state from acquiring by service on such agent jurisdiction to render a personal judgment against the company in an action brought by a resident on claims arising from a policy issued in another state to a resident of such other state, where the claim has been assigned to the plaintiff since the revocation of the power of attorney, though the power is by its terms irrevocable. *Hunter v. Mutual Reserve Life Ins. Co.* (N. Y.), 6-291.

Controversies relating to internal management. — The rule that the courts of one state will not take jurisdiction of controversies relating merely to the internal management of the affairs of a corporation organized under the laws of another state, rests more on the want of power to enforce a decree than on jurisdiction to make it; and therefore the rule is not applicable in any case where the corporation and all persons necessary to a complete decree are before the court, is where stockholders sue resident directors to compel them to restore corporate property misappropriated by them. *Babcock v. Farwell* (Ill.), 19-74.

(3) Service of process.

After revocation of appointment of agent. — A state officer appointed by a foreign insurance company by irrevocable power of attorney as its attorney for the service of process is authorized to receive service of process after the company has announced its withdrawal from the state and has given notice that it revokes the appointment, where the company, notwithstanding such announcement and notice, has continued to do business in the state. *Hunter v. Mutual Reserve Life Ins. Co.* (N. Y.), 6-291.

Power to revoke appointment of agent. — A state statute requiring every foreign insurance company, before it shall be admitted to do business in the state, to file in the office of the insurance commissioner "an instrument appointing him and his successor its true and lawful attorney, upon whom all lawful process in any action against it may be served," and further providing that "the authority thereof shall continue in force irrevocable as long as any liability of the company remains outstanding in this state," places no limitation upon the power of the company to revoke the power of attorney as respects a nonresident of the state suing on a contract of another state. *Williams v. Mutual Reserve Fund Life Assoc.* (N. Car.), 13-51.

Exclusiveness of statutory method. — When a foreign corporation conducts a regular business in Louisiana at a permanent place of business, a service of process made

at such place of business upon its agents in connection with a matter growing out of such business is good, if the same service would be good as against a domestic corporation. A statute requiring surety companies of other states and foreign countries to appoint an agent upon whom service of process may be made, and a statute authorizing service to be made upon the secretary of state, do not provide an exclusive, but an additional, mode of service. *Curtis v. Jordan* (La.), 5-950.

Service on traveling salesman. — A traveling salesman of a foreign corporation is not an "agent" of the corporation within the meaning of the Mississippi statute (Laws 1894, c. 61) providing that process against a corporation may be served on its agent. *Saxony Mills v. Wagner* (Miss.), 19-199.

(4) Complaint.

Necessity of alleging compliance with statute. — Under the Idaho constitution and statute requiring foreign corporations to designate an agent upon whom process may be served, and to file in the county in which its principal place of business in the state is located, a certified copy of its articles of incorporation, a complaint in an action by a foreign corporation failing to allege compliance with such provisions is defective and demurrable, but the defect, unless taken advantage of by demurrer or answer, is waived and cannot be raised for the first time on appeal. *Valley Lumber, etc., Co. v. Driessel* (Ida.), 13-63.

(5) Plea or answer.

Necessity of pleading noncompliance with statute. — In an action by a foreign corporation, the defense that the plaintiff has not been granted authority to carry on business within the state is not raised by an answer of general denial, but must be specially pleaded. *Leonard v. American Steel, etc., Co.* (Kan.), 9-491.

A foreign corporation doing business within the state will be presumed to have complied with the domestic statutes, and in an action brought by such corporation, where its failure to comply with the statute does not appear upon the face of the complaint, the defendant must affirmatively plead such failure in order that it be available to him as a defense. *Lehigh Valley Coal Co. v. Gilmore* (Minn.), 2-1004.

In an action by a foreign mutual insurance company on a contract made in a foreign state for the insurance of property within the domestic state, the defendant may, under the general issue and without special notice, set up the defense that the local law prohibits the plaintiff from maintaining the action, notwithstanding the fact that the contract is valid as between the parties. *Swing v. Cameron* (Mich.), 9-332.

Sufficiency of plea of noncompliance. — The ground of defense averring generally that the plaintiff is a foreign corporation doing business in the state without having complied with the statute, is defective in not

specifying the particulars of the failure to comply with the statute, and is properly rejected. *Worrell, etc., v. Kinnear Mfg. Co. (Va.)*, 2-997.

(6) Production of documents.

Books in foreign state. — A corporation, though chartered in another state, which is doing business in the state and has complied with a local statute requiring a foreign corporation doing business in the state to procure a certificate of registration from the secretary of state and file with that official a copy of its charter, is so subject to the laws of the state that it may be compelled under a local statute to produce books and papers not then actually in the state, but which have been removed to another state where the corporation is also doing business. *In re Consolidated Rendering Co. (Vt.)*, 11-1069.

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See CEMETERIES; DEAD BODY.

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COSTS.

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Part of fine imposed, see FINES, 1 c.
Review of orders relating to costs, see APPEAL AND ERROR, 4 h.

1. POWER TO AWARD.

In habeas corpus proceeding. — In an application for discharge upon habeas corpus of a person convicted of violating an Ontario statute, the high court of justice has, under the Ontario Judicature Act, power to award costs, such power not being interfered with by section 191 of the act. *Rex v. Leach (Can.)*, 14-580.

Necessity of statutory authority. — The allowance of costs is a matter dependent wholly on the statute, and where there is no statute authorizing it no costs can be allowed. *Schmelzel v. Board of County Com'rs (Idaho)*, 17-1226.

Costs in equity. — In equity costs are in the discretion of the chancellor, and in the absence of a clear abuse of discretion his decree as to costs will not be disturbed on appeal. *Matheson v. Rogers (S. Car.)*, 19-1066.

2. WHO ENTITLED TO COSTS.

Prevailing party. — Under the Utah statutes, in an action to recover personal property, a court has no discretion to apportion the costs, but must allow them as a matter of course to the prevailing party. *Freed Furniture, etc., Co. v. Sorensen (Utah)*, 3-634.

To whom costs properly allowed as the prevailing party, under the Utah statutes, in an action to recover personal property. *Freed Furniture, etc., Co. v. Sorensen (Utah)*, 3-634.

Plaintiff successful in part. — Where in an action to recover personal property the plaintiff recovers a part only of the chattels sued for, a direction, not prejudicial to the defendant, that each party pay his own costs, is not reversible error. *Freed Furniture, etc., Co. v. Sorensen* (Utah), 3-634.

Apportionment between parties. — In a suit in equity involving the title to personal property, wherein the court appoints a receiver to sell the property, where there are three defendants, one of whom claims four-fifths of the property, the other two claiming one-fifth jointly and the court decrees that the plaintiff is entitled to the property and that the three defendants shall pay the ordinary costs, reserving judgment as to the extraordinary costs, a subsequent decree awarding all the extraordinary costs against the defendant claiming four-fifths of the property will not be disturbed on appeal, in the absence of a showing that the two decrees, when taken together, require such defendant to pay more than four-fifths of the total costs. *Nutter v. Brown* (W. Va.), 6-94.

3. WHO LIABLE FOR COSTS.

The state. — Costs cannot be awarded against the state in civil actions, in the absence of express statutory authority. *State v. Williams* (Md.), 4-970.

A state is never liable for costs, unless it is made so by statute. *Deneen v. Unverzagt* (Ill.), 8-396.

State officers. — The dismissal of a bill brought by the state officers in their official capacity should be without costs, as costs are not taxable against the state. *State Board of Health v. St. Johnsbury* (Vt.), 18-496.

State commission. — A provision in a state constitution that the state shall never be made a party defendant in any court of law or equity does not operate to prevent the taxation under a statute of costs against a state commission upon its abandonment of eminent domain proceedings. *Deneen v. Unverzagt* (Ill.), 8-396.

Under the Illinois statutes, where an eminent domain proceeding brought by a state commission is abandoned by it, the court may tax costs against the commission. *Deneen v. Unverzagt* (Ill.), 8-396.

4. COSTS ON APPEAL.

Where judgment is reversed. — The securing, on appeal, of a reversal and a new trial for the erroneous refusal of the trial judge to grant requested instructions is not a "recovery" within the meaning of a statute providing that costs shall be allowed to the plaintiff as of course upon a recovery. *Williams v. Hughes* (N. Car.), 4-77.

Costs of trial court. — A statute providing that if an appellant recovers judgment in the appellate court he shall be allowed the costs of that court and such costs as he should have recovered in the trial court does not entitle an appellant who secures a re-

versal for error and a new trial, but not a judgment on the merits, to the costs of the new trial. *Williams v. Hughes* (N. Car.), 4-77.

Where the unsuccessful party to an action, after securing a reversal and a new trial on appeal, is successful on the new trial, the costs of the first trial as well as of the second one should be taxed against the opposing party. *Westfall v. Wait* (Ind.), 6-788.

Where the unsuccessful party to an action after securing a reversal for error and a new trial on appeal, and having the costs of the appellate court taxed against the appellee, is unsuccessful on the new trial, the costs of the trial court on the first trial as well as on the second should be taxed against him. *Williams v. Hughes* (N. Car.), 4-77.

Matters not properly in transcript. — Where a case was dismissed on demurrer, and the bill of exceptions to such ruling did not specify the answers of the defendants, and they were not directed to be sent to this court, but were voluntarily included by the clerk of the trial court in the transcript of the record, the cost taxed will not include the making of the transcript of such answers. *Riley v. Wrightsville, etc., R. Co.* (Ga.), 18-208.

5. COSTS OUT OF FUND.

On interpleader. — On an interpleader respecting a sum of money in the hands of the plaintiff, occasioned by the fault of one defendant, costs out of the fund should be decreed to the plaintiff, and the defendant who is not in fault is entitled to a decree against the other defendant for the costs so taken out of the fund as well as for his own costs. *Swiger v. Hayman* (W. Va.), 3-1030.

6. MOTION COSTS.

West Virginia statute. — The West Virginia statute empowering the court to give or withhold, in its discretion, costs on any motion, other than a motion for a judgment for money, authorizes judgment for costs incident to a motion to dismiss for want of jurisdiction, but not for costs of the suit. *Bice v. Boothsville Telephone Co.* (W. Va.), 13-1046.

7. EXTRA ALLOWANCE.

When proper. — An extra allowance is properly made to the successful defendant in an action to recover a penalty of more than one million dollars, in spite of a stipulation reducing the amount claimed to a small sum before the trial. *State v. Bootman* (N. Y.), 2-226.

8. WHAT RECOVERABLE AS COSTS.

Compensation of receiver. — In a suit in equity involving the title to personal property, where a receiver has been appointed to take charge of and sell the property, it is proper to award as costs to the successful party the sums retained from the fund by the receiver for his compensation and at-

torney's fees, notwithstanding an irregularity in the appointment of the receiver, where the irregularity has been waived by the unsuccessful parties. *Nutter v. Brown* (W. Va.), 6-94.

Attorney's fees. — The Oklahoma statute providing for the recovery by the plaintiff, in an action for personal services rendered by a laborer, clerk, servant, nurse or other person, of an attorney's fee not to exceed fifteen dollars, to be fixed by the court, is in conflict with the Fourteenth Amendment to the Constitution of the United States, in that it denies to the defendant the equal protection of the laws, and is, therefore, void. *Chicago, etc., R. Co. v. Mashore* (Okla.), 17-277.

The Florida statute providing for the payment of the costs and charges, including attorney's fees, arising from a suit for partition, does not authorize the allowance of attorney's fees to a complainant who, though an attorney at law, conducts the proceedings in person and is not represented by an attorney. *Girtman v. Starbuck* (Fla.), 5-833.

Expense of procuring replevin bond. — The premium paid to a surety company for a replevin bond is not taxable as a disbursement "necessarily incurred in the action" within the California statute (Code Civ. Proc., § 1033), because both the right to take possession of the property on giving bond, and the right to give the bond of a surety company are mere privileges and not necessities. *Williams v. Atchison, etc., R. Co.* (Cal.), 19-1260.

Witness fees. — The mileage of a witness who attends personally under a subpoena may be taxed as costs, though he resides at such a distance from the place of the trial that his deposition could have been taken. *Parsons Band Cutter, etc., Co. v. Seiscoc* (Iowa), 6-1015.

The party in whose favor a judgment is recovered is entitled to have costs taxed for the mileage of witnesses who reside in an adjoining county and more than thirty miles from the place of trial, and who have attended the trial in response to a subpoena or on request of the party producing the witnesses. *Anderson v. Ferguson-Bach Sheep Co.* (Idaho), 10-395.

The fees and mileage of attending witnesses, subpoenaed in good faith but not called, are taxable as costs. *Parsons Band Cutter, etc., Co. v. Seiscoc* (Iowa), 6-1015.

The Indiana statute providing that "if any party summon more than three witnesses to prove the same fact, he shall pay the costs occasioned by the additional number of witnesses" does not apply to lay witnesses in a will contest who detail the facts and circumstances within their personal knowledge upon which they base an opinion as to the testator's mental condition, where the facts and circumstances detailed by the several witnesses are not the same. *Westfall v. Wait* (Ind.), 6-788.

Fees distinguished from costs. — The terms "fees" and "costs" are often used

interchangeably, as having the same application; but accurately speaking the term "fees" is applicable to the items chargeable by law between the officer and the party whom he serves, while the term "costs" has reference to the expenses of litigation as between litigants. *Bohart v. Anderson* (Okla.), 20-142.

9. TAXATION AND ALLOWANCE.

Mandamus to compel. — Under the Missouri statutes, if the state auditor refuses to audit, adjust, and settle costs in criminal causes which have been properly taxed and certified by the trial judge and prosecuting attorney, the supreme court will compel him to perform his duty in that regard. *State ex rel. Suter v. Wilder* (Mo.), 7-158.

Certification in criminal case. — Under the Missouri statutes the certificate of the trial judge and prosecuting attorney as to the taxation of costs in criminal causes is not conclusive upon the state auditor. *State ex rel. Suter v. Wilder* (Mo.), 7-158.

Where actions are consolidated. — Under the Montana statute providing for the consolidation of actions, when the order of consolidation is made, the court should determine what costs, if any, should be charged to either party in the original suits, as all the costs in the consolidated suit accrue only after consolidation. *Handley v. Sprinkle* (Mont.), 3-531.

10. SECURITY FOR COSTS.

Waiver of right to. — Under the Utah statute, the defendant in an action by a non-resident plaintiff waives the right to demand that the plaintiff shall give security for costs, where, with knowledge of the plaintiff's non-residence, he files an answer on the merits without making any demand for security, especially where he does not make demand until the day the cause is called for trial, and, after making demand, he proceeds with the trial without excepting to the action of the court ordering the trial to proceed. *Sciutti v. Union Pacific Coal Co.*, 8-942.

11. REMEDIES FOR NONPAYMENT.

Stay of proceedings. — The failure of a petition to allege that the costs in prior proceedings wherein the plaintiff was nonsuited have been paid is not fatal, since if such costs have not been paid the defendant has an adequate remedy by a motion to stay the proceedings until such payment is made. *Wetmore v. Crouch* (Mo.), 3-94.

COTENANTS.

See JOINT TENANTS AND TENANTS IN COMMON.

COTTON GIN.

Cotton gin as nuisance, see NUISANCE, 1 b.
Prohibiting erection of cotton gins in city, see MUNICIPAL CORPORATIONS, 4 d (3).

COUNCIL.

See MUNICIPAL CORPORATIONS, 12.
Control by city council of streets, see
STREETS AND HIGHWAYS, 3.

COUNSEL.

See ATTORNEYS AT LAW.
Arguments of counsel, in criminal cases, see
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COUNSEL FEES.

See ATTORNEYS' FEES.

COUNTERCLAIM.

See SET-OFF AND COUNTERCLAIM.

COUNTERFEITING.

Contract to purchase counterfeit money, see
CONTRACTS, 4 i.

Evidence. — In a prosecution for counterfeiting, evidence is competent to show that the defendant's wife bought a supply of bond paper of a certain brand, where there is other evidence connecting the defendant with the transaction. *Thompson v. United States* (U. S.), 7-62.

In a prosecution for counterfeiting it is competent, for the purpose of showing motive, to permit a witness, with whom it is alleged that the defendant co-operated in producing the spurious money, to testify that the defendant said that he was an abortionist, that he was liable to be detected and arrested, and that he wanted the spurious money in question to use as bail in an emergency. *Thompson v. United States* (U. S.), 7-62.

In a prosecution for counterfeiting bank notes, where a witness identifies a spurious note as the one passed to her by a person whose name she did not at the time know but has since learned and whom she identifies as a person in court, the error, if any, in permitting her to state the name of such person is harmless to the defendant, if there is no issue or dispute as to the name testified to and it is in fact the name of the person who passed the note. *Thompson v. United States* (U. S.), 7-62.

Whether certain paper is bond paper.

— In a prosecution for counterfeiting, a witness called to identify the paper of one of the spurious notes as bond paper of a certain brand, who does not undertake to testify as an expert, may identify it by certain marks. *Thompson v. United States* (U. S.), 7-62.

COUNTIES.

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Competency of taxpayer as juror in action against county, see JURY, 5 c.

Compromise between county and delinquent taxpayer, see COMPROMISE AND SETTLEMENT.

Effect of judgment as creating lien against county property, see JUDGMENTS, 5 b.

Liability for witness fees in criminal proceedings, see WITNESSES, 1 d (2).

Liability of city for injuries caused by improvements made by county, see STREETS AND HIGHWAYS, 4.

Liability of county to garnishment, see GARNISHMENT, 2.

Limitation of action on railroad aid bonds, see LIMITATION OF ACTIONS, 3.

Location of boundary line, see BOUNDARIES, 4.

Power of legislature to appoint county officers, see PUBLIC OFFICERS, 3 a (1).

Power to offer reward for arrest of criminals, see REWARDS.

Retrospective laws as applicable to county, see CONSTITUTIONAL LAW, 14.

Right of county holding claim for taxes to enjoin waste, see WASTE.

Right of county to enjoin nuisance, see NUISANCE, 6 b (2).

Right to plead statute of limitations, see LIMITATION OF ACTIONS, 6 a (1).

Special limitation of actions against counties for personal injuries, see LIMITATION OF ACTIONS, 3.

Validity of conveyance of county property executed by county clerk, see DEEDS, 2 f.

Venue of prosecution as affected by division of county after admission of crime, see VENUE, 2 b.

1. CREATION.

Constitutionality of statute. — The Mississippi statute creating a new county out of the territory of two old counties is not rendered unconstitutional by the fact that certain justices of the peace and members of the board of supervisors of the old counties are taken out of the county for which they were elected and placed in a different county; nor is the statute unconstitutional as depriving the old counties of legal boards of supervisors, or as violating the prohibition of the state constitution against special or local legislation. *Conner v. Gray* (Miss.), 9-120.

Apportionment of debts by subsequent legislation. — Where territory is

detached from a debtor county and attached to another county without apportionment of the debt, such apportionment may be made by a subsequent act of the legislature. *Cullinan County v. Blount County (Ala.)*, 18-322.

2. POWERS.

To make ordinances. — A state or territorial legislature may delegate to county boards of supervisors power to make ordinances relating to certain matters of local concern, in the same manner that it may delegate such power to ordinary municipal corporations. *Territory ex rel. Oahu v. Whitney (Hawaii)*, 7-737.

Under a statute authorizing the board of supervisors of a county to enact ordinances, an ordinance actually passed by the board is not invalidated by the fact that its enacting clause is invalid as purporting to show the passage of the ordinance by the people of the county instead of by the board. *Territory ex rel. Oahu v. Whitney (Hawaii)*, 7-737.

Conflict between ordinance and statute. — A county ordinance, regulating the erection of awnings within certain limits, enacted under the delegated power of the county to make local police, sanitary, and other regulations not in conflict with the laws of the territory of Hawaii, is void where the subject of the ordinance is covered by a territorial statute. *Territory v. McCandless (Hawaii)*, 13-795.

To contract for search for omitted property. — A county has no power to enter into a contract with a private individual to search for omitted and unassessed taxable property. *Stevens v. Henry County (Ill.)*, 4-136.

Appropriation of money. — Under the Indiana statute authorizing county councils to appropriate money by ordinance, an attempted appropriation by a mere motion, resolution, or order is ineffectual and invalid. *State ex rel. Davis v. Board of Com'rs (Ind.)*, 6-468.

Employment of third person to perform duties of officer. — A contract with a county for the performance by a third person of duties which are imposed by law on a public officer is void as against public policy. *State v. Goldthwait (Ind.)*, 19-737.

3. LIABILITIES.

No liability in absence of statute. — A county being a creature of statute, it cannot incur liability except under authority conferred expressly by statute or arising by clear implication from some other statutory power expressly given. *National Bank v. Duval County (Fla.)*, 3-457.

Appropriation as condition precedent. — Although a judgment may be rendered against a county on a valid claim in advance of an appropriation made for the payment thereof, still the cause of action must not be founded upon any contract or order of the court made since the taking effect of the county reform law, *Board*

of Commissioners *v. McGregor (Ind.)*, 17-333.

The necessity of an appropriation to pay a debt to become due from a county under a contract is not dispensed with by the fact that the contract provides for the payment of a percentage on an indeterminate amount. Appropriations are not required to be exact as to the amount needed, but are to be based on estimates made according to the best judgment of the proper officers. *State v. Goldthait (Ind.)*, 19-737.

No liability in excess of appropriation. — Under the Indiana statute, a contract made for a county by its board of commissioners is void if it involves the payment of money in excess of the amount which has been appropriated by the county council for the purpose of the obligation attempted to be incurred. *State ex rel. Davis v. Board of Com'rs (Ind.)*, 6-468.

Maintenance of militia. — The militia being an arm of the state government, a particular county cannot be required to impose taxes for its maintenance. *State ex rel. Milton v. Dickenson (Fla.)*, 1-122.

The statute requiring the board of county commissioners to provide an armory for the militia is unconstitutional. *State ex rel. Milton v. Dickenson (Fla.)*, 1-122.

Interest on county warrants. — In the absence of statute or a valid agreement therefor, county warrants do not bear interest even after demand and refusal to pay them for want of funds. *National Bank v. Duval County (Fla.)*, 3-457.

The commissioners of a county have no power to enter into an agreement whereby the latter undertakes to cash outstanding warrants and the commissioners agree to pay the bank interest on the sum so used, and the county is not liable to pay interest under such an agreement. *National Bank v. Duval County (Fla.)*, 3-457.

Orders issued to fictitious persons. — A bank which purchases nonnegotiable orders or drafts upon a county treasurer payable to fictitious persons and by them apparently assigned to it, acquires no greater right to them than its assignors had, and by collecting the amount of the orders from the county becomes liable to the county for the money so received. *National Surety Co. v. State Savings Bank (U. S.)*, 13-421.

Void contracts. — The taxpayers of a county may enjoin the county board of commissioners from making a contract which will be void as involving the payment of money not appropriated for the purpose in the manner prescribed by law. *State ex rel. Davis v. Board of Commissioners (Ind.)*, 6-468.

A private citizen and taxpayer may enjoin the enforcement of a void contract made by the county in which he resides, which, if carried out, would affect the rights of the taxpayers generally. *Stevens v. Henry County (Ill.)*, 4-136.

Regulation by legislature. — Section 27 of the county reform law (Acts 1899, p. 343, 5944 Burns 1908), which provides that

no court shall have power to bind a county by any contract or agreement, or in any other way, except by judgment, to any extent beyond the amount of money at the time already appropriated by ordinance for the support of such court, and for the purpose for which such obligation is attempted to be incurred, does not invade the inherent powers of courts, but provides reasonable limitations upon the exercise of an implied discretionary authority by submitting to a representative body of voters and taxpayers the question of determining to what extent, if any, the state shall be aided in prosecuting criminal offenses occurring within their county. The right of the legislature to impose restrictions upon the amount of money which may be expended for the employment of counsel to aid prosecuting attorneys, or to defend criminal paupers, can hardly be questioned. *Board of Commissioners v. McGregor (Ind.)*, 17-333.

Railroad aid bonds. — That county railroad aid bonds, due in thirty years, give the county the option to pay at the expiration of ten years, does not affect the right of a holder four years after the expiration of the thirty-year period to collect his continuing interest, where no notice of the election of the county to exercise its option is brought home to the holder of the bonds. *Berkey v. Board of Com'rs (Colo.)*, 20-1109.

4. ACTIONS AGAINST COUNTIES.

Venue. — The Alabama statute (Loc. Acts 1907, p. 290) authorizing B. county to sue C. county "in any of the courts of this state" for half the cost of building a bridge over a stream between the two counties was not intended to change the rule that suits against a county must be brought in the courts of the defendant county. *Cullinan County v. Blount County (Ala.)*, 18-322.

Allegation that appropriation has been made. — In an action by an attorney against a county to recover for services rendered by the plaintiff in the prosecution of a criminal action, pursuant to an appointment or designation by the circuit court, a complaint which fails to allege that an appropriation had been made by the county council for the employment of counsel to assist in the prosecution of criminal causes, and remained unexpended at the time of such appointment or designation, is fatally defective. *Board of Com'rs v. McGregor (Ind.)*, 17-333.

Laches as a defense. — The defense of laches will not avail to defeat a suit by the taxpayers of a county to enjoin the county board of commissioners from making a void contract where the suit has been brought in time to prevent harm to innocent persons and has been prosecuted with diligence. *State ex rel. Davis v. Board of Com'rs (Ind.)*, 6-468.

Recovery measured by appropriation. — In such an action, the plaintiff's recovery cannot exceed the unexpended balance on hand at the time when the designation or appointment is made. *Board of Com'rs v. McGregor (Ind.)*, 17-333.

Restraining payment of warrants. — A court has no jurisdiction to entertain an

action by taxpayers to restrain the payment of county warrants which have been transferred by the original holder to unknown persons who are not made parties to the action. *State ex rel. Reed v. Gormley (Wash.)*, 5-856.

5. COUNTY COMMISSIONERS.

a. Powers.

To compromise and settle claim. —

Under the Oregon statutes a board of county commissioners has power to effect a valid compromise and settlement with an owner of property which has been sold to the county for taxes, whereby the certificates issued to the county are relinquished to the owner. *Multnomah County v. Dekum (Oregon)*, 16-933.

With relation to court house. — Under a statute making it the duty of the board of commissioners of every county to cause a court house to be erected and furnished when such duty has not already been performed, and to keep such court house in repair, the determination of the question whether the public interests demand that a particular county court house shall be repaired or replaced by a new one is in the discretion of the county commissioners, and the courts cannot interfere with the exercise of such discretion unless it is clearly shown that the commissioners are acting fraudulently or corruptly or in violation of their duty as public officers. *Kraus v. Lehman (Ind.)*, 15-849.

Source of contractual powers. —

County commissioners have no contractual powers implied from the nature of their office, but only such as may be conferred on them by statute; and this principle is not affected by the fact that county boards are by statute made corporations. *State v. Goldthait (Ind.)*, 19-737.

b. Validity of meetings and proceedings.

Adjournment of meeting. — Where an entry made by the county auditor showing that it was ordered by the board of county commissioners that it should meet in special session on a certain day and that it then adjourned "until court in course," is subsequently corrected by a *nunc pro tunc* entry that the board adjourned to meet on the day specified in regular instead of special session the *nunc pro tunc* entry must be regarded as though it had been made at the proper time. *Kraus v. Lehman (Ind.)*, 15-849.

Continuance of session of board. —

Under a statute which authorizes a particular session of the board of county commissioners to continue until the end of a certain month if it is absolutely required by the necessary business of the session, the question whether such business requires the continuance of the term until the end of the month is to be determined by the board. *Kraus v. Lehman (Ind.)*, 15-849.

Validity of contracts made at adjourned meeting. — In the absence of a statute to the contrary, a board of county commissioners has power at its regular session to adjourn from day to day or to adjourn to meet on a subsequent day in the

same term until the business before it is completed. Contracts made at such an adjourned meeting are as valid as though they had been made at the meeting or session of which it is a continuation. *Kraus v. Lehman* (Ind.), 15-849.

Contract extending beyond term of office. — Under the Montana statute authorizing the board of commissioners of a county to contract for county printing for a term not exceeding two years, a board of commissioners has power to enter into a two years' contract for such printing although the contract extends beyond the term of office of the contracting board and into the term of their successors. *Picket Publishing Co. v. County Commissioners* (Mont.), 12-986.

A contract for public printing entered into by a board of county commissioners in pursuance of statutory authority is not contrary to public policy because the contract extends into the term of and binds the succeeding board, nor on the ground that the power to make such a contract is liable to abuse. *Picket Publishing Co. v. County Commissioners* (Mont.), 12-986.

Repeal of appropriation ordinance. — An appropriation made by an ordinance of the county council at a regular session cannot be repealed by a resolution of the council at a subsequent special session. *Kraus v. Lehman* (Ind.), 15-849.

Effect of invalid appropriation. — The invalidity of an additional appropriation for a particular purpose made at a special session of the county council does not affect the validity of a contract for that purpose made by the board of county commissioners for the amount of an appropriation made by the council at its regular session. *Kraus v. Lehman* (Ind.), 15-849.

Failure to comply with statute. — The failure to comply with the provisions of an unconstitutional statute is not a defense to the claim of an architect with whom the commissioners of a county have contracted for the preparation of plans and specifications for the erection of a new court house. *Kraus v. Lehman* (Ind.), 15-849.

6. COUNTY SEAT.

Withdrawal of names from petition. — Under the provision of the South Dakota constitution that whenever a majority of the legal voters of a county shall petition the board of county commissioners to change the location of the county seat the board shall submit the question to the voters at the next general election, the signers of such a petition have the right to withdraw their names before final action has been taken thereon, and withdrawn names cannot be counted to make up the requisite number of votes. *State ex rel. Andrews v. Boyden* (S. Dak.), 15-1122.

COUNTING VOTES.

See ELECTIONS, 7 e.

COUNTS.

See INDICTMENTS AND INFORMATIONS; PLEADING.

COUNTY JUDGE.

See JUDGES.

COUPLING CARS.

Liability for defective car coupler, see MASTER AND SERVANT, 3 c (1).
Statutory requirement of automatic couplers, see MASTER AND SERVANT, 3 e (2).

COUPONS.

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1. ORGANIZATION.

De facto courts. — A court organized under color of law is a *de facto* court, and its judge and clerk are *de facto* officers, even though the proceedings for its organization are in some respects irregular. *State v. Bailey* (Minn.), 16-338.

2. JURISDICTION AND POWERS.

a. In general.

Elements of jurisdiction. — Where a court has, by legal services or voluntary appearance, acquired jurisdiction over the parties to an action, and the cause of action is of a kind triable in such court, the court has jurisdiction of the subject of the action and has power to render any rightful judgment therein. *Crutcher v. Block* (Okla.), 14-1029.

Jurisdiction of subject-matter. — Jurisdiction of the subject-matter is conferred by law, and cannot be conferred by the consent of the parties. *Cizek v. Cizek* (Neb.), 5-464.

Amount in controversy. — In an action for breach of an entire contract, where the amount in controversy is sufficiently large to confer jurisdiction upon the court, jurisdiction is not lost by the fact that recovery is sought on several separate bills of exchange,

no one of which is for an amount sufficiently large to be within the jurisdiction of the court. *St. Louis Southwestern R. Co. v. James* (Ark.), 8-611.

Jurisdiction over nonresidents. — Errors and defects in the proceedings taken to obtain jurisdiction of nonresidents which tend to mislead and prejudice such nonresidents, are fatal to the jurisdiction of the court. *D'Autremont v. Anderson Iron Co.* (Minn.), 15-114.

Cause of action arising in foreign jurisdiction. — When a court may refuse to take jurisdiction of an action based on an action arising in a foreign jurisdiction. *Logan v. Bank of Scotland* (Eng.), 3-1148.

Controversies between members of associations. — The general rule is that the complaining member of an organization should exhaust the remedies provided by the laws of the organization before applying to the courts; but where those laws provide no remedy, and the organization provides none, but meets the demands thereof with futile correspondence and vexatious and unnecessary delays, it becomes a question for the courts to determine whether the member has done all within his organization that could reasonably be expected of him. *Schneider v. Local Union* (La.), 7-868.

Defects in pleading as affecting jurisdiction. — A court which has jurisdiction of the subject-matter and of the parties is not deprived of jurisdiction to entertain suit by the fact that the complaint is demurrable. *O'Brien v. People* (Ill.), 3-966.

Objections to jurisdiction. — After a final judgment of conviction in a criminal case, the jurisdiction of the court cannot be questioned by an inquiry into the manner in which the accused was brought before it. *Rigor v. State* (Md.), 4-719.

Where it is sought to prohibit the trial of an action on the ground that the court has no jurisdiction thereof, and that the petitioner, if compelled to go to trial, would be subjected to unnecessary costs and expenses, it is not a sufficient answer to the latter allegation that the petitioner would have a remedy by appeal, when much the greater part of the expenses, such as witnesses' fees, etc., could not be recovered as legal costs. *Ophir Silver Min. Co. v. Superior Court* (Cal.), 3-340.

Inherent powers of constitutional courts. — The circuit courts of Wisconsin are created by the constitution and do not depend solely upon statute for their powers. Independent of statute, such constitutional courts have inherent power to make such rules and orders as may be necessary properly to perform their functions. *Stevenson v. Milwaukee County* (Wis.), 17-901.

Power to appoint attorney for indigent defendant. — The appointment by courts of attorneys to defend indigent persons accused of crime, who are without counsel, and without the means of employing legal assistance, is not, properly speaking, the exercise of a fundamental right or power inherent in the court, but such authority is

implied from the jurisdiction and powers expressly conferred, and functions and duties imposed, and the general statutes and policy of the state providing for the necessities of the poor, which reasonably include a fair opportunity to protect their rights as litigants in courts of justice. As the power to make such appointment emanates directly or indirectly from the legislature, it follows that its exercise is subject to the regulation and control of that department. *Board of Commissioners v. McGregor* (Ind.), 17-333.

Power to appoint attendants. — When it seems necessary to the judge of a circuit court that an attendant upon the court, in addition to the sheriff and his deputies, should be appointed, it is his right to make the appointment, for such time as the necessity exists. The statute requiring the sheriff to attend upon the circuit court during its session and file a list of his deputies, not exceeding three, does not deprive the court of power to appoint such additional attendants in cases of necessity. Whether the necessity exists, must be determined by the judge of the court in which the appointment is made. *Stevenson v. Milwaukee County* (Wis.), 17-901.

The fees payable to additional attendants appointed by the circuit court in cases of necessity are the same as the *per diem* allowed deputy sheriffs for the time expended during the sessions of the court, and can be recovered only in the manner provided by the statutes, namely, by certification in the same manner as fees of jurors are paid. *Stevenson v. Milwaukee County* (Wis.), 17-901.

Power of courts to amend records. — District courts in Oklahoma have the power, while a case is pending and before final judgment, to correct and amend the record or any order or proceeding had in such cases, to conform to the facts, by a *nunc pro tunc* order, and are not confined to any one class of evidence, but may proceed on satisfactory evidence. *Clark v. Bank* (Okla.), 2-219.

Constitutionality of statute conferring discretionary powers. — A statute providing that a court of equity may empower a married woman to convey her real estate by separate deed is unconstitutional as depriving the husband of property without due process of law, the exercise of the power conferred upon the court being left to its arbitrary and unregulated will. *Hubbard v. Hubbard* (Vt.), 2-315.

b. Federal courts.

(1) In general.

Duty to assume jurisdiction. — Where the parties are citizens of different states or where a question is involved which by law brings the case within the jurisdiction of a federal court, it is the duty of such court, when properly appealed to, to assume jurisdiction, and the right of the plaintiff to choose such court cannot be properly denied. *Willeox v. Consolidated Gas Co.* (U. S.), 15-1034.

Presumption as to jurisdiction. — While the jurisdiction of the national courts is limited, their judgments, unlike those of inferior courts, possess every attribute of finality and estoppel appertaining to judgments of courts of general jurisdiction, and the absence from their records of all appearance of jurisdictional facts is immaterial. *In re First National Bank* (U. S.), 11-355.

Exclusive jurisdiction. — A federal court having first obtained jurisdiction to enjoin the enforcement of a state statute fixing freight and passenger rates and alleged to be unconstitutional because fixing the rates so low as to operate as a taking of property without due process of law, should be permitted to examine and determine the controlling question of the sufficiency of the rates established and render a conclusive judgment to the exclusion of all other courts. *In re Young* (U. S.), 14-764.

Enforcement of rights under state statutes. — Rights created and remedies provided by state statutes may be enforced and administered in the federal courts either at law, in equity, or in admiralty, as the nature of the rights and remedies may require, where the citizenship of the parties and the amounts involved bring the actions within the provisions of the Constitution and the Acts of Congress. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

Conclusiveness of adjudications. — The rule laid down by the supreme court of the United States, that, at common law, a court has no power to compel the plaintiff in an action for personal injuries to submit to a physical examination before trial, is binding upon an inferior federal court, notwithstanding a decision to the contrary by the highest court of the state in which the action is pending. *Chicago, etc., R. Co. v. Kendall* (U. S.), 16-560.

The decisions of the courts of a state as to matters of practice relating to the powers of courts, or regarding general common-law rules of evidence, are not binding upon the federal courts sitting in such state, but in cases of conflict between such decisions and decisions of the supreme court of the United States, the inferior federal courts must follow the rule laid down by the latter. *Chicago, etc., R. Co. v. Kendall* (U. S.), 16-560.

Following federal supreme court in construction of state statute. — In a case where an inferior court of the United States is not bound to follow the construction of a state statute adopted by the highest court of the state, it is clearly bound to follow the construction of such statute adopted by the supreme court of the United States, whether such construction accords with that of the state court or not. *Adelbert College v. Wabash R. Co.* (U. S.), 17-1204.

Construction of federal statutes binding on state courts. — The decisions of the United States supreme court construing the federal statutes are binding upon the state courts. *McLucas v. St. Joseph, etc., R. Co.* (Neb.), 2-715.

Following state courts in construction of state statutes. — The construction of the constitution and the statutes of a state by the highest judicial tribunal of the state is decisive in the federal courts, in the absence of any question of general or commercial law or of right under the Federal Constitution, and their interpretation by the courts of other states is immaterial. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

In the construction of the constitution and statutes of a state, the national courts uniformly follow the interpretation announced by the highest judicial tribunal of the state, where no question of general or commercial law or of right under the Constitution of the United States or the Acts of Congress is involved. *Johnson v. St. Louis* (U. S.), 18-949.

The character and extent of the powers and liabilities of the political or municipal corporations of a state are questions of construction of state constitutions and statutes, upon which the decisions of the highest judicial tribunal of the state which creates them are generally controlling in the national courts, and when that court has decided one of these questions the decisions of the courts of other states and of the federal courts in the construction of the constitutions or statutes of other states are immaterial. *Johnson v. St. Louis* (U. S.), 18-949.

In passing upon the constitutionality of a state statute, the supreme court of the United States will follow the decisions of the state court of last resort as to the purpose and scope of the statute, and will only determine whether the statute as so construed is in conflict with the Federal Constitution. *Northwestern National Life Ins. Co. v. Riggs* (U. S.), 7-1104.

The federal courts will adopt the construction placed on a state statute by its highest court, but will not be governed by a construction placed on the statute by one or more opinions of members of the state court not concurred in by the majority of the court. *San Jose-Los Gatos, etc., R. Co. v. San Jose R. Co.* (U. S.), 13-571.

As a general rule, subject to certain exceptions the courts of the United States will accept and apply the settled construction by the highest court of the state, of a state constitution or statute. *Adelbert College v. Wabash R. Co.* (U. S.), 17-1204.

The general rule above stated implies that the state decision which is to foreclose the independent judgment of a court of the United States must have been a decision based alone upon the statute construed, for, if extraneous conditions were involved, the judicial mind was not applied to the precise question, and the decision, though persuasive, has not the obligatory effect of a clear case of statutory construction. Thus where the highest court of a state has decided that certain creditors of a railroad company, which has been formed by consolidation, have a lien upon the company's property by virtue of the statute authorizing the consolidation and

also by virtue of the consolidation agreement between the constituent companies, such decision is not conclusive as to the existence of a lien under the statute, when that question subsequently arises in a court of the United States. *Adelbert College v. Wabash R. Co.* (U. S.), 17-1204.

A well-settled exception to the general rule that the courts of the United States, in construing a state statute, will follow the construction adopted by the highest court of the state, exists where the construction in question was not adopted until after rights involved in the action in the federal court had accrued. In such a case the federal court, although it will lean toward an agreement with the state court, is not absolutely constrained to accept and follow the latter's construction of the statute. Thus in an action in a federal court between the holders of convertible equipment bonds issued by a railroad company and a purchaser of the company's property under mortgage foreclosure, where the claim is advanced that under a state statute the holders of the convertible bonds had a lien prior to that of the foreclosed mortgage, the federal court is not bound to follow a decision of the highest court of the state sustaining that claim, if it appears that such decision was not rendered until after the rights of the mortgagees under the foreclosed mortgage had accrued. *Adelbert College v. Wabash R. Co.* (U. S.), 17-1204.

(2) Violation of federal statutes.

Place of completion of offense. — A federal court has jurisdiction of a prosecution against a United States senator for having agreed to receive compensation for services in a matter before a government department in which the government is interested, in violation of the federal statutes, where it appears that the agreement was completed at a place within the territorial jurisdiction of the court by the sending of a telegram and the mailing of a letter of acceptance, notwithstanding the fact that the defendant was without the territorial jurisdiction of the court at the time the acceptance was sent to him, as the offense was committed at the place where the agreement was completed. *Burton v. United States* (U. S.), 6-362.

(3) Diverse citizenship.

Citizenship of real party in interest.

— The original beneficial owner of a promissory note may sue thereon in a circuit court of the United States, though the original but nominal payee, by reason of his citizenship, could not sue in such a court. *Kirven v. Virginia-Carolina Chemical Co.* (U. S.), 7-219.

Action by trustee. — A citizen of one state, who holds the title to property in trust for others, may maintain an action for damage to it against a citizen of another state in the proper federal court, without regard to the citizenship of his *cestui que trust*. *Johnson v. St. Louis* (U. S.), 18-949.

Action by president of joint stock company. — The president of a joint stock company, the American News Company, empowered by the statute of New York, under which it was organized, to sue in its behalf, may maintain an action for injury to its property in a national court in the state of Missouri. *Johnson v. St. Louis* (U. S.), 18-949.

(4) Constitutional questions.

Violation of fourteenth amendment.

— A bill containing a plain averment that a certain municipal ordinance authorizing the seizure and destruction of food without notice or opportunity for hearing violates the Fourteenth Amendment to the Federal Constitution, presents a constitutional question over which a federal circuit court has jurisdiction. *North American Cold Storage Co. v. Chicago* (U. S.), 15-276.

A state board of equalization acting under the constitution and laws of the state, whose assessments for taxation are conclusive, represents and acts for the state, and the question whether the carrying out of an assessment for taxation made by such board will violate the provisions of the Fourteenth Amendment of the Constitution of the United States by taking the property of the taxpayer without due process of law or by the denial of due process of law is a federal question of which the United States courts have jurisdiction. *Raymond v. Chicago Union Traction Co.* (U. S.), 12-757.

Constitutionality of state statutes, in general. — A federal circuit court has jurisdiction over a case which involves the constitutionality, with reference to the Federal Constitution, of a state statute. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Validity of statute fixing rates.

The question whether an act of a state legislature and orders of the state railroad commission, fixing freight and passenger rates, make the rates so low as to be confiscatory and in violation of the provision of the Federal Constitution against taking property without due process of law, is a federal question arising under the Constitution of the United States, and therefore one of which the federal circuit court has jurisdiction. *Ex p. Young* (U. S.), 14-764.

Validity of assessment system.

— The assessment of a tax is an action of a judicial nature requiring for the legal exercise of the power such opportunity to appear and be heard as the circumstances of the case require, and the supreme court of the United States, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining whether a system of assessment for taxation affords the due process of law guaranteed by the constitution. *Central of Georgia R. Co. v. Wright* (U. S.), 12-463.

Unlawful discrimination in assessments. — Where a state board of equalization having jurisdiction under the laws of the state to make assessments for taxation, assesses the franchises and other property of

certain corporations at a different rate and by a different method from that employed by the board for other corporations of the same class, resulting in an enormous disparity and discrimination between the various assessments upon corporations, the action of the board, although ignoring a provision of the state constitution that taxes shall be levied so that each person shall pay a tax in proportion to the value of his property, is nevertheless the action of the state, against which the federal courts will give relief under the Fourteenth Amendment of the Constitution of the United States. *Raymond v. Chicago Union Traction Co.* (U. S.), 12-757.

Compliance with state statute. — The question as to whether a notice issued from a state court requiring a corporation to produce certain books and papers before the grand jury is broader than the statute authorizes is not of a federal nature, but is one upon which the decision of the state court is final. *Consolidated Rendering Co. v. Vermont* (U. S.), 12-658.

(5) Amount in controversy.

How determined in injunction suit. — A federal court has jurisdiction of the amount involved in a suit brought by a foreign railroad corporation to enjoin ticket brokers from dealing in the unused portions of nontransferable reduced rate railroad tickets where it appears that many thousands of such tickets are issued annually, that they are dealt in by the defendants on a large scale to the detriment of the revenues of the complainant, and that the necessary steps to prevent the wrongful use of such tickets would involve much cost and risk of mistakes and consequent actions for damages. Moreover, the jurisdictional amount is to be tested not only by the immediate pecuniary damages resulting from the acts complained of, but by the value of the business to be protected and the rights of property to be enforced. *Bitterman v. Louisville, etc., R. Co.* (U. S.), 12-693.

In a suit by several landowners for an injunction against an alleged nuisance caused by smelters, the test of jurisdiction is not the amount of damage actually sustained by each complainant, but is the value of the object sought by the bill, which is to compel the defendants to cease operating their smelters or to use their appliances so as to protect the complainants from the injuries complained of. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

Aggregation of separate claims. — Where a suit is brought in a federal circuit court by several nonresident plaintiffs against resident defendants to enjoin interference with water rights, and it appears that the right of each complainant is separate and distinct from the rights of the others, the several rights cannot be aggregated for the purpose of determining whether the jurisdictional amount is involved in the suit, but the court can take jurisdiction only as to such of the complainants as have individual

demands exceeding \$2,000 each, exclusive of interest and costs. *Eaton v. Hoge* (U. S.), 5-487.

c. State courts.

(1) In general.

Action against foreign state. — The courts of a state have no jurisdiction to proceed with a suit against the sovereign of another state or country, and hence a suit in tort in a state court against the property of a railway of Canada that is not a corporation in which any private individual has an interest, but is the property of the British Crown and is owned by the King of England in the right of his Dominion of Canada, is properly dismissed. *Mason v. Intercolonial Ry.* (Mass.), 14-574.

Crimes committed on federal military reservation. — The Fort Missoula military reservation in Montana did not pass to the state by Act of Congress of Feb. 22, 1889, granting to the state certain sections of each township in the state not otherwise disposed of, upon one of which sections the reservation in question is situated; and the state courts have no jurisdiction over a homicide committed on this reservation. *State v. Teilly* (Mont.), 3-824.

Comity between state and federal courts. — Inasmuch as a municipal corporation represents its citizens in litigation in respect to matters as to which all citizens and taxpayers have a common and similar interest, a state court will not entertain a bill filed by private citizens and taxpayers to restrain a water company from violating city ordinances regulating rates and service, where it appears that a federal court has already competently acquired jurisdiction of a suit between the water company and the city involving the very same questions sought to be litigated by the private citizens. *Griffith v. Vicksburg Waterworks Co.* (Miss.), 8-1130.

Amount in controversy. — The Arkansas circuit courts do not have original jurisdiction of an action on a note, the principal of which does not exceed one hundred dollars, although sued on with another note of which such courts do have jurisdiction. *Skillern v. Baker* (Ark.), 12-243.

Constitutional question. — The question whether a person accused of crime has been deprived of the right to a speedy trial, arising on an application by such person for his discharge from further prosecution on the ground that he has not been brought to trial within the time required by law, is a constitutional question, which may be reserved by order of the district court for the decision of the supreme court, under the Wyoming statutes, since the right to a speedy trial is a right guaranteed to the accused by the state constitution. The statutes which guarantee the same right are merely supplementary to the constitution, and the fact that it may be necessary to consider such statutes in determining the question reserved does not make such question any the less a constitutional one. *State v. Keefe* (Wyo.), 17-162.

Estoppel to deny jurisdiction. — A litigant, having been sued in the circuit court of the United States as a resident of Illinois, and having obtained the benefit of an exception to the effect that he has his domicile in Louisiana, cannot be heard, when sued at such domicile, to plead to the jurisdiction of the state court on the ground that he is domiciled in Illinois. *Caldwell v. Morris* (La.), 14-1043.

Corporation courts. — Under the amendment of the Texas constitution adopted in 1891, authorizing the legislature "to establish such other courts as it may deem necessary," the legislature is given plenary power to establish such courts as the public needs in its judgment require. Whether the courts thus established shall be called, or shall be determined to be, state courts or corporation courts is immaterial. Within the limits of their granted authority they may try offenses against state or municipal laws or both. *Ex p. Abrams* (Tex.), 18-45.

Criminal jurisdiction of city courts. — The "final jurisdiction" contemplated by a statute which provides that no city court "shall have final jurisdiction of any prosecution for crime, the punishment for which may be imprisonment in the state prison," is jurisdiction to render judgments of acquittal or conviction as distinguished from power to bind over to the superior court. *State v. Fox* (Conn.), 19-682.

The Connecticut statute (Gen. St., § 1446) which provides that no city court shall have final jurisdiction of any criminal case the punishment for which may be imprisonment in the state prison limits the jurisdiction of such courts to cases in which the maximum punishment is within their jurisdiction, and repeals an earlier statute authorizing city courts to hear and determine cases in which the punishment might exceed the maximum that they could impose, unless, in the opinion of the judge, the case was so aggravated as to require a greater punishment than he could inflict in event the defendant was to be bound over to the superior court. *State v. Fox* (Conn.), 19-682.

Chicago municipal court. — By virtue of the provisions of the Illinois Municipal Court Act, the jurisdiction of a justice of the peace in a cause continued by him on Nov. 30 "to the municipal court of Chicago," ceases with the expiration of the day preceding the first Monday of December, and where the justice in continuing such cause makes an order setting the hearing for Dec. 14, the order of continuance is, in effect, an order continuing the cause until such time as it will be transferred to the municipal court by operation of law, to wit, the first Monday in December, and the order setting the cause for a hearing on Dec. 14 is a nullity and does not defeat the jurisdiction of the municipal court. *Williams v. Gottschalk* (Ill.), 12-376.

District magistrates in Hawaii. — A district magistrate has jurisdiction of a prosecution for a violation of an ordinance passed by the county board of supervisors by

virtue of authority conferred upon it by the legislature of Hawaii. Territory *ex rel. Oahu v. Whitney* (Hawaii), 7-737.

Civil district court of Louisiana. — The civil district court of Louisiana has jurisdiction of a complaint if it relates to a personal right—the right to be left alone. *Schulman v. Whitaker* (La.), 8-1174.

Original jurisdiction of Washington superior courts. — Where a superior court sustains a demurrer to the complaint in a criminal prosecution brought from a justice's court, it may direct the filing of an information against the accused, as it has jurisdiction to proceed *de novo*. *State v. Bringgold* (Wash.), 5-716.

(2) Probate courts.

Construction of will. — Where the construction of a will is necessary to the administration of the estate of a deceased person, the probate court possesses exclusive original jurisdiction. *Appleby v. Watkins* (Minn.), 5-471.

Jurisdiction of a county court in Nebraska to construe a will where a title to real property is involved. *Youngson v. Bond* (Neb.), 5-191.

Where a suit in equity is to be regarded as part of the proceedings for the settlement of an estate of a deceased person, it must, in Nebraska, be brought in the county court, which has exclusive jurisdiction of such matters. Hence a suit by an administrator with the will annexed for construction of the will in order to enable him to administer the estate properly is not maintainable in the first instance in the district court. *Youngson v. Bond* (Neb.), 5-191.

Determination of title to real estate. — A probate court is without jurisdiction to try and determine the title to real estate. *Best v. Gralapp* (Neb.), 5-491.

A probate court has no jurisdiction to hear and determine a contest between a decedent's estate and a stranger as to the title to property. *Canon v. Old Reliable Gold Mining Co.* (N. Mex.), 6-874.

3. PLACE OF HOLDING.

Place other than county seat. — The district courts of Minnesota have no authority or jurisdiction to convene for the trial of actions or proceedings involving issues of fact at any place in the county other than the county seat, except by the consent of the parties, or except where expressly so authorized by statute. *Bell v. Jarvis* (Minn.), 8-938.

It is reversible error for a district court to try a contested election proceeding at a city which is not the county seat, where the contestee objects to the trial at such place; and the contestee does not waive his objection by subsequently taking part in the proceedings. *Bell v. Jarvis* (Minn.), 8-938.

4. TIME OF OPENING.

Alabama statutes. — The Alabama statute (Acts 1888-89, p. 64) which authorizes

the opening of courts in the fifth judicial circuit at 10 o'clock A. M., was not repealed by the statute of 1890 (Acts 1890, p. 68) which amended section 750 of the code so far as said section applied to certain counties in the state. *Letcher v. State* (Ala.), 17-716.

5. TERMS.

Special or extra terms. — A special or extra term provided by law for the circuit courts in Florida is a term other than and distinct from the regular spring and fall terms of these courts. The order of a circuit judge calling such term, but designating it as an adjourned term, is not vitiated by the misnomer, nor is the term held in pursuance of the order thereby rendered illegal. *Peeples v. State* (Fla.), 4-870.

An order made at a regular term of the Florida circuit court that a special term of the court in that county be held in the week following that fixed for the convening of the court in the next county is not illegal as ordering a term of court to be held in one county at a time fixed by law for holding court in another. *Peeples v. State* (Fla.), 4-870.

Under the Nebraska statute the judge of a district court may, if he deems it necessary, call a special term for the transaction of the business of the court. *Russell v. State* (Neb.), 15-222.

Adjournment of regular term. — The judge of a district court has power for sufficient reason to adjourn a regular term of court to a future time or without day, and this may be done by an order to that effect sent to the clerk of the court before the time fixed for holding the regular term. *Russell v. State* (Neb.), 15-222.

6. RULES.

Power of court to disregard. — The rule of a court making the execution and filing of an undertaking a condition precedent to the issuance of a restraining order is binding on the judge issuing such an order and he has no right to waive the requirement. *Drew v. Hogan* (D. C.), 6-589.

Adoption of federal equity rules by state court. — As provided by the Florida statute, in the absence of provisions of the law or rules of practice of Florida, the rules of practice in the federal courts of equity, as prescribed by the United States supreme court, shall be rules of practice in the courts of the states when exercising equity jurisdiction, and when the rules of practice so directed by the supreme court do not apply, the practice of the courts shall be regulated by the practice of the high courts of chancery of England. *Long v. Anderson* (Fla.), 5-846.

Conflict with statutes. — A valid statute of the state cannot be rendered nugatory or materially modified by a rule by one of the courts of the state, and if a rule sought to be enforced by any of the courts is found to be in conflict with such statute, the rule

will be disregarded. *Van Ingen v. Berger* (Ohio), 19-799.

Validity of oral rules. — Rules of court, in order to be operative, must be published in some permanent form. There cannot be such a thing as an oral rule of court. *McDonald v. State* (Ind.), 19-763.

7. DECISIONS.

a. In general.

What constitutes a decision. — A "finding" by the court in a cause tried without a jury is a "decision" within the meaning of the statute providing that it shall be ground for a new trial that a verdict or decision is not sustained by sufficient evidence or is contrary to law. *Parkison v. Thompson* (Ind.), 3-677.

Form under Wisconsin statute. — In Wisconsin a trial judge's findings of fact and conclusions of law should be confined strictly to performance of the duty imposed by the statute. Such findings should cover singly, and in concise language, the pleaded facts without any addition by way of argument or recital of evidence. *Fanning v. Murphy* (Wis.), 5-435.

Necessity of statutory findings. — It is not reversible error for a trial court to refuse to make the findings of fact provided for by the Indian Territory statute. *In re Taylor* (Ind. Ter.), 5-226.

Gratuitous findings. — If, in an action to restrain the commissioner of insurance from revoking a license to do business in the state, issued to a foreign life insurance company, the trial court, besides affirming the decision of the commissioner, also finds as a conclusion of law that the issuance of policies on account of which the license was revoked was unlawful, such finding is gratuitous as it affects policyholders not parties to the action. *Equitable Life Assur. Soc. v. Host* (Wis.), 4-413.

Memorandum of decision. — Where a justice of the supreme judicial court of Massachusetts tries a suit in equity in the exercise of original jurisdiction, it is within his discretion to file voluntarily a "memorandum of decision," which, on appeal, will be considered to be a part of the record and to have the same effect as a finding of facts filed at the request of the appellant. *Cohen v. Nagle* (Mass.), 5-553.

Effect of unreported decision. — The fact that a decision is omitted from the official reports of a state, for whatever reason, permits the court of another state or territory to disregard it. *Franklin v. Trickey* (Ariz.), 11-1105.

Construction. — All judicial opinions are to be considered in the light of the facts to which they apply, as a transition from an authorized to an unauthorized act is oftentimes by easy and imperceptible gradations, so that in the enunciation of a principle the eye must always be kept on the precise facts upon which the principle is to operate. *Townsend v. Norfolk R., etc., Co.* (Va.), 8-558.

b. Requests to find.

Obligation to answer. — Under the Pennsylvania statute providing that a trial court in finding the facts shall state "separately and distinctly the facts found, the answers to any points submitted in writing by counsel, and the conclusions of law," no further answer to requests for findings is required than the statement of the facts found by the court, and it is not necessary that the court shall answer specifically upon the record all the requests submitted by counsel. *Commonwealth v. Monongahela Bridge Co.* (Pa.), 8-1073.

Effect of refusal. — The refusal of a trial court to make a requested finding of fact is not equivalent to an affirmative finding to the contrary, unless the intention of the court to be so understood is clearly apparent. *Morehouse v. Brooklyn Heights R. Co.* (N. Y.), 7-377.

8. COURT OFFICERS.

Stenographers. — Under the Wyoming statute creating the office of court stenographer and requiring that such stenographer shall remain in attendance during the trial of causes and take full stenographic notes of all testimony or admissions made by either side, of objections to the introduction of testimony, and of rulings and exceptions, and shall preserve and furnish a transcript of such notes to any person having an interest therein, on payment of the legal fees, which transcript, when certified by the clerk of the court, shall be *prima facie* evidence of the matters set forth, such stenographer is an officer of the court in duty bound to perform the duties of the office with fidelity and without unnecessary delay, and litigants and their counsel are entitled to rely with confidence on their ability to obtain from that officer any part of the proceedings required to be taken down by him. *Richardson v. State* (Wyo.), 12-1048.

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COVENANTS.

1. IN GENERAL.

2. COVENANTS BY GRANTEE.

3. COVENANTS RUNNING WITH THE LAND.

4. CONSTRUCTION.

5. WHAT CONSTITUTES BREACH.

6. ACTIONS ON COVENANTS.

See DEEDS, 4.

Covenants against assignment or subletting by tenant, see *LANDLORD AND TENANT*, 3 c.

Enforcement of negative covenants, see *INJUNCTIONS*, 2 c.

Estoppel of grantor to plead statute of limitations in action for breach of warranty, see *LIMITATION OF ACTIONS*, 8.

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Termination of lease by breach of covenant, see *LANDLORD AND TENANT*, 3 g.

1. IN GENERAL.

Implied covenant on conveyance by map. — Where the owner of a tract of land lays it out into blocks and lots upon a map, and on the map designates certain portions of the land to be used as streets, and then conveys lots by reference to the map, he becomes bound by an implied covenant not to use the portion so devoted to the common advantage otherwise than in the manner indicated; and a threatened violation, by him or his assigns, of such implied covenant, entitles the grantee to relief in equity by way of injunction. *Herold v. Columbia Investment, etc., Co.* (N. J.), 16-580.

A person who has purchased lots by reference to a map is not entitled to an injunction restraining his grantor from subdividing other lots shown on the map, or from selling lots of smaller dimensions than those indicated thereon, in the absence of any express agreement or covenant that the land embraced in the map shall not be sold in lots smaller in area than those shown thereon. No such covenant is implied from the mere making of the map and sale of lots by reference thereto. *Herold v. Columbia Investment, etc., Co.* (N. J.), 16-580.

Covenant against charge for use of pier. — Where an easement or right of way over a strip of land on the ocean front is conveyed to a city by a deed which contains a clear restriction against placing any building or structure upon the ocean side of the lands conveyed, with a proviso reserving to the grantors the right to build a pier of a certain kind and length on which the owners shall not permit the sale of any commodities "and be confined to charging only an entrance fee," such covenant to charge only an entrance fee is binding upon the successors in title of the grantor who have erected a pier of the kind specified, and is violated by imposing a charge upon visitors, after they have entered the pier, for the hire and use of roller skates and for checking garments, in addition to an entrance fee. *Atlantic City v. Associated Realities Corp.* (N. J.), 17-743.

Application to property not conveyed. — Covenants of title do not apply to

land not included in the conveyance. *White v. Stewart* (Ga.), 15-1198.

2. COVENANTS BY GRANTEE.

Effect of acceptance of deed poll. — The acceptance of a deed poll binds the grantee to the performance of covenants contained therein. *Sexauer v. Wilson* (Ia.), 15-54.

The acceptance of a deed poll does not have the effect of binding the grantee as a covenantor. *Dawson v. Western Maryland R. Co.* (Md.), 15-678.

3. COVENANTS RUNNING WITH THE LAND.

Covenant against sale of liquor. — An agreement by an owner of land with an adjoining owner that for the period of ten years he will not sell or permit to be sold upon the premises any intoxicating liquor is not a covenant running with the land. *Sjblom v. Mark* (Minn.), 14-125.

Such an agreement, although executed by the owner on behalf of his heirs, executors, and assigns, is merely the personal covenant of the owner, and is not a conveyance, or entitled to registration, within the meaning of the Minnesota Recording Act, and the record thereof does not constitute constructive notice to a subsequent purchaser, who takes the legal title by a conveyance which is silent as to the covenant. *Sjblom v. Mark* (Minn.), 14-125.

Where such a covenant is not contained in a deed or indenture in the chain of title, subsequent purchasers and assigns are not bound thereby, unless they have such knowledge or notice thereof as to imply that the burden was assumed as a part of the consideration. *Sjblom v. Mark* (Minn.), 14-125.

Grantee's covenant as to things not in esse. — A grantee's covenant which relates to things not *in esse*, and which cannot be construed as a covenant with the grantor and his assigns or by the grantee for himself and his assigns, is not a covenant running with the land. *Dawson v. Western Maryland R. Co.* (Md.), 15-678.

Assumption of mortgage by grantee. — A provision in a deed whereby the grantee assumes and agrees to pay an existing mortgage does not create a covenant which runs with the land, although such provision is inserted in connection with the covenants of seizin and against incumbrances. *Clement v. Willett* (Minn.), 15-1053.

4. CONSTRUCTION.

Conveyance subject to mortgage. — A statement in a deed that the property conveyed is subject to a mortgage qualifies the estate granted. Consequently a subsequent absolute covenant of warranty applies merely to the equity of redemption. *Miller v. De Graffenried* (Colo.), 15-981.

A statement in such deed that the mortgage has been assumed by a third person is at most an additional means of identification thereof, and the grantor thereof does not by

his subsequent covenant of warranty guarantee that such third person will pay the mortgage upon maturity. *Miller v. De Graffenried* (Colo.), 15-981.

Deed conveying right, title and interest. — If a deed purports to convey the right, title, and interest of the grantor in and to certain described realty, instead of conveying the realty itself, the covenants in the deed will be limited to the right or interest which the grantor has in the property. *White v. Stewart* (Ga.), 15-1198.

5. WHAT CONSTITUTES BREACH.

Decree of court establishing paramount title. — A covenantee is evicted so as to authorize him to maintain an action for breach of a covenant of warranty where he is compelled to purchase the paramount title which has been established by the decree of a court of competent jurisdiction and ordered to be sold at public auction. *Morgan v. Haley* (Va.), 13-204.

6. ACTIONS ON COVENANTS.

Remedy in equity. — In a suit in equity by a person who has purchased lots by reference to a map, to enjoin his grantor, or the latter's assigns, from altering the location or width of streets shown on the map, the fact that the proof does not show clearly that the threatened alteration or narrowing of the streets would greatly depreciate the value of plaintiff's property does not disentitle him to equitable relief, since his only remedy at law would be by a multiplicity of actions for damages, and such remedy is plainly inadequate. *Herold v. Columbia Invest., etc., Co.* (N. J.), 16-580.

Allegation of eviction. — In an action on a general warranty of title to land against the claims of all persons, an eviction or equivalent disturbance by an outstanding paramount title must be alleged. *White v. Stewart* (Ga.), 15-1198.

Conclusiveness of eviction proceedings against covenantee. — In order that eviction proceedings against the covenantee shall be conclusive on the covenantor when the latter is sued for breach of his covenant of warranty, the covenantor must not only have had distinct and unequivocal notice of the suit, but must have been requested to appear and defend it. *Morgan v. Haley* (Va.), 13-204.

Measure of damages. — A purchaser evicted from land bought under a covenant of good title is entitled to recover against the purchaser only the purchase price paid, with interest from the date of eviction and the costs expended in defending the action of eviction, and cannot recover his counsel fees as a part of such costs. *Morgan v. Haley* (Va.), 13-204.

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1. GENERAL PRINCIPLES AND DEFINITIONS.

Common-law and statutory offenses.

— Under the Indiana statute providing that the punishment of all crimes must be "fixed by statute of this state and not otherwise" no common-law crimes, punishable as such, exist in that state. *Sopher v. State* (Ind.), 14-27.

Classification of crimes. — All criminal offenses known to the law are comprehended in the two classes of felonies and misdemeanor. There is not a third class consisting of nuisances either statutory or at common law. *Commonwealth v. New York Central, etc., R. Co.* (Mass.), 19-529.

Intent as element of statutory offense. — Where the offense charged is the violation of a statute, the only intent necessary is an intent to do the prohibited thing. *Knight, etc., Co. v. Miller* (Ind.), 18-1146.

The intent with which an otherwise lawful act is done may be looked to for the purpose of determining whether there is a dangerous probability that such act, if unchecked, will result in an unlawful act, where the latter act is of such a nature that the law forbidding it is directed against the dangerous probability as well as against the completed whole. *O'Brien v. People* (Ill.), 3-966.

Intent as element of common-law offense. — At common law, an evil intent and an unlawful act must concur to constitute a crime, and it is necessary ordinarily to allege and prove a guilty intent. *Com. v. Mixer* (Mass.), 20-1152.

Ignorance as defense. — Where a statute commands that an act shall be done or omitted to be done which, in the absence of such statute, might be done or omitted without culpability, ignorance of the fact or condition contemplated by the statute does not excuse its violation. *State v. Gilmore* (Vt.), 13-321.

What constitutes attempt to commit crime. — If all that a person intends to do will, if done, constitute no crime, it cannot be a crime for him to attempt to do with the same purpose part of the thing intended. *People v. Jaffe* (N. Y.), 7-348.

Necessity of overt act in attempt to commit crime. — Under the Oregon statute prescribing the punishment for an attempt to commit any crime, to constitute an attempt there must be something more than a mere intention to commit the offense and preparation for its commission. Some overt act must be done towards its commission which falls short of the completed crime. *State v. Taylor* (Oregon), 8-627.

Meaning of word "criminals." — "Criminals" is a word of broad significance, and includes those who have committed the most trifling infractions of the penal statute, as well as those guilty of the most heinous offenses. *Creeden v. Boston, etc., Railroad* (Mass.), 9-1121.

Meaning of word "motive." — In the sense of the criminal law, motive may be defined as "that which leads or tempts the mind to indulge in a criminal act." *Thompson v. United States* (U. S.), 7-62.

Meaning of words "now held in custody." — As used in an order for a special term of court for the trial of a person accused of crime, the words "now held in custody, charged with a capital offense," necessarily mean that the accused is confined in jail. *Beard v. State* (Ark.), 9-409.

2. CRIMINAL STATUTES.

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Application of criminal statutes to Indians, see INDIANS.

Special laws for punishment of offenses, see BANKS AND BANKING, 7.

Uniform operation of criminal statutes, see GAME AND GAME LAWS, 3 a (2).

Power of legislature to enact. — It is within the exclusive power of the legislature to declare what acts shall constitute a crime, to define the same, and to provide such punishment therefor as may be deemed appropriate. *State v. Shevlin-Carpenter Co.* (Minn.), 9-634.

The legislature, in the exercise of the police power, may prohibit under penalty the performance of a specific act. The doing of the prohibited act constitutes a crime, and the moral turpitude or purity of the motive by which the act is prompted, and the knowledge or ignorance of its criminal character, are immaterial on the issue of guilt. *Com. v. Mixer* (Mass.), 20-1152.

Classification of offense as felony or misdemeanor. — In a criminal statute it is not necessary to specify that the act prohibited is a misdemeanor or a felony, as the punishment affixed determines that fact. *State v. Lewis* (N. Car.), 9-604.

Test of constitutionality. — The test of the constitutionality of an act creating a crime and providing penalties for the punishment thereof is not what the effect of the statute, mercifully and discreetly administered, will be, but what the statute empowers those in authority to do. *State v. Williams* (N. Car.), 14-562.

Time to question constitutionality. — Where a case involves the punishment of a defendant for a crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings. *Commonwealth v. Hana* (Mass.), 11-514.

b. Construction.

Title of statute making certain acts of trespass criminal, see STATUTES, 3 b.

Title of statute providing for defenses in criminal cases, see STATUTES, 3 b.

Title of statute regulating punishment of death, see STATUTES, 3 b.

In general. — The general rule is that criminal statutes must be strictly construed to avoid the creation of penalties by construc-

tion, but such reasonable view must be taken of a statute as will effectuate the manifest intent and purpose of the lawmakers. *Groff v. State* (Ind.), 17-133.

As a general rule, criminal statutes are to be strictly construed, and nothing can be added thereto by intendment. *Rohlf v. Kase-meier* (Ia.), 17-750.

Statute imposing both civil and criminal liability. — The Minnesota statute declaring certain acts of trespass upon state lands to be a crime, imposing a penalty therefor, and fixing the measure of damages to be recovered in a civil action, must be construed as imposing upon a casual or involuntary trespasser criminal punishment and also double damages for his wrongful acts; and as so construed the statute is constitutional. *State v. Shevlin-Carpenter Co.* (Minn.), 9-634.

Penalty for second conviction. — As used in a criminal statute imposing more severe punishment "in case of a second or any subsequent conviction of the same person during any year," the words "during any year" do not mean the calendar year, but mean the ensuing year from the date of the first conviction, and therefore a second conviction within three hundred and sixty-five days after the first conviction is within the statute. *Paetz v. State* (Wis.), 9-767.

Statute prescribing punishment for common-law offense. — A statute prescribing a penalty for a common-law offense, without cutting off the common-law prosecution and punishment either expressly or by implication is construed as intending a cumulative remedy only. *State v. Hildreth* (Vt.), 18-661.

c. Amendment or repeal.

Effect upon pending prosecutions. — By force of a statute in Ohio, the repeal or amendment of a criminal statute in no manner affects pending prosecutions, or causes of prosecution existing at the time of such amendment or repeal, unless it is otherwise expressly provided in an amending or repealing act. *State v. Lawrence* (Ohio), 6-888.

Repeal after final judgment. — The repeal of a criminal statute after a final judgment in a criminal prosecution does not vacate or invalidate the judgment. *In re Kline* (Ohio), 1-219.

Where a defendant is convicted of selling intoxicating liquors in violation of the provisions of a valid city ordinance, and has been duly sentenced therefor, the subsequent repeal of such ordinance does not relieve him from such sentence. *Wichita v. Murphy* (Kan.), 16-468.

3. ARREST.

Validity of warrant. — In a prosecution for an offense committed in violation of a statute amended by a subsequent statute, where it appears that a section of the amending statute is void and that the corresponding section of the original statute has not been repealed, either expressly or by implication, the warrant is rendered void by the

fact that it recites that the offense was committed in violation of the original statute as amended, particularly if it appears that some of the sections of the amending statute are valid, and that the reference in the warrant to the amending statute merely specifies the number of the chapter and does not specify any particular section thereof. *People ex rel. Farrington v. Mensching* (N. Y.), 10-101.

Discretion of magistrate as to issuance of warrant. — Where an application for a warrant is made to a magistrate, he must determine for himself whether an offense has been committed, and if he finds that it has, he may issue the warrant whether the prosecuting attorney assents or dissents, and therefore it is improper for a magistrate to determine simply that it is the duty of the prosecuting attorney to make the investigation, and that he will not interfere with the duties or doings of that officer. *State v. Yakey* (Wash.), 9-1071.

Taking prisoner to prosecuting attorney's office after arrest. — It is improper for the state's counsel to have one who is under arrest brought from the place of arrest to the counsel's office unless the person desires a conference. *State v. Thavandt* (Mo.), 20-1122.

4. PRELIMINARY EXAMINATION.

Right to file information after preliminary examination, see INDICTMENTS AND INFORMATIONS, 2.

Right to examination. — Under the Missouri statute providing that "no prosecuting or civil attorney of this state shall file any information charging any person or persons with any capital offense until such person or persons shall first have been accorded the right to a preliminary examination before some justice of the peace in the county where the offense is alleged to have been committed," an information is not subject to quashal because a person jointly charged with the defendant with the commission of the crime is a fugitive from justice, and therefore has never had any preliminary examination. *State v. Jeffries* (Mo.), 14-524.

Under such statute it is not required that in the preliminary examination preceding the filing of the information all the witnesses for the state shall be examined, and hence no error is committed in refusing to quash an information on the ground that at the preliminary examination the defendant was committed without the examination of all the witnesses who were summoned for the state. *State v. Jeffries* (Mo.), 14-524.

Sufficiency of affidavit. — An affidavit charging a person with a crime need not show that the statements contained in it are made upon the affiant's knowledge, but it is sufficient if made upon information and belief. *Rose v. State* (Ind.), 17-228.

Powers of magistrate. — The act creating the court of Topeka (Laws 1899, c. 129) confers upon the judge of that court the power and jurisdiction of a justice of the

peace in preliminary examinations of persons accused of felony. *State v. Pigg* (Kan.), 18-521.

Under the California statutes there is a distinction between the methods of prosecuting charges of felony and those amounting only to ordinary misdemeanors. In cases of felony the magistrate may examine as many witnesses as he sees fit before issuing the warrant, while in cases of simple misdemeanors he is limited to the complaint itself as a basis for his action in signing a warrant of arrest. In cases of the latter nature, a complaint on information and belief forms a sufficient basis for the issuance of a warrant. *Ex parte Blake* (Cal.), 18-815.

Amendment of charge. — It is competent for an examining court to change the charge against a person accused of crime who has been held to reappear and answer at a later day, though he has been released upon bail. *Commonwealth v. Jones* (Ky.), 4-1192.

Right of state to introduce evidence. — The purpose of a preliminary examination is threefold: (1) To inquire concerning the commission of crime and the connection of the accused with it, in order that he may be informed of the nature and character of the crime charged against him, and, if there be probable cause for believing him guilty, that the state may take the necessary steps to bring him to trial; (2) to perpetuate testimony; (3) to determine the amount of bail which will probably secure the attendance of the accused to answer the charge. The right of the state to introduce evidence at a preliminary examination cannot be defeated by the accused waiving an examination. *State v. Pigg* (Kan.), 18-521.

Signature of certificate by clerk. — Where the clerk of a city court has failed to sign the certificate attached to the transcript of a preliminary examination held before the judge of such court it is proper for the district court to permit the certificate to be amended by having the clerk attach his signature. *State v. Pigg* (Kan.), 18-521.

5. JEOPARDY.

a. In general.

Application of fifth amendment to United States constitution to states. — The fifth amendment of the Constitution of the United States, including the statement, "nor shall any person be subjected for the same offense to be twice put in jeopardy of life and limb, . . . nor be deprived of life, liberty, or property, without due process of law," is a limitation upon the power of the federal government, and not upon the individual states. *Brantley v. State* (Ga.), 16-1203.

Validity of statute providing for punishment of crime and civil action for penalty. — The Minnesota statute declaring certain acts of trespass upon state lands to be criminal offenses, imposing a penalty therefor, and providing for the recovery of double or treble damages from the trespasser, does not violate the provision of the state constitution that no person shall be

twice put in jeopardy of punishment for the same offense, as that provision applies only to criminal prosecutions, and the damages imposed by the statute, though in the nature of a penalty, are recoverable by the state in a civil action. *State v. Shevlin-Carpenter Co.* (Minn.), 9-634.

Repeal of statutes. — Military order No. 58 relating to criminal procedure in the Philippine Islands, as amended by the act of the Philippine Commission No. 194, in so far as it undertakes to permit an appeal by the government after acquittal in criminal actions, was repealed by the Act of Congress of July 1, 1902, providing for the administration of the affairs of civil government in the Philippine Islands and declaring that no person for the same offense shall be twice put in jeopardy of punishment. *Kepner v. United States* (U. S.), 1-655.

b. What constitutes.

In general. — A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and the jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. *Allen v. State* (Fla.), 10-1085.

Acquittal in court without jurisdiction to hear and determine. — An acquittal in a court not having jurisdiction to hear and determine the charge against the defendant is not a bar to a subsequent prosecution in a court which has jurisdiction of the offense. *State v. Fox* (Conn.), 19-682.

Discharge by magistrate on preliminary examination. — The discharge of a defendant by a magistrate on a preliminary examination is not such an adjudication in the defendant's favor as will bar a subsequent prosecution for the offense. *People v. Dillon* (N. Y.), 18-552.

Second trial after verdict for defendant and appeal by state. — The Act of Congress of 1902, relating to civil government of the Philippine Islands, prohibits an appeal by the government in criminal actions from a verdict for the defendant, as a second trial even in an appellate court constitutes a second jeopardy. *Kepner v. United States* (U. S.), 1-655.

New trial after judgment of conviction as jeopardy. — When a defendant has been tried and convicted of an offense, and a new trial has been granted him, and he is placed on trial on the same indictment again, a plea of former jeopardy, based upon the first conviction, does not present a defense in the case. *Johnson v. State* (Okla.), 18-300.

Trial for higher offense after reversal of conviction of lower offense. — Where a person convicted of assault by a trial court in the Philippine Islands under a complaint charging him with murder appeals to the supreme court of the islands, the action of such supreme court in reversing the judgment of the trial court and convicting

the appellant of murder in the second degree does not violate the guaranty of the Act of Congress that no person accused of crime in the Philippine Islands shall be put twice in jeopardy of punishment for the same offense. *Trono v. United States* (U. S.), 4-773.

Trial for higher offense after new trial granted from conviction of lower offense. — Where a person convicted of manslaughter under an indictment for murder is granted a new trial on his own motion, he may be tried again for murder under the same indictment. *State v. Gillis* (S. Car.), 6-993.

Where a person who has been indicted for murder and convicted of voluntary manslaughter, voluntarily seeks and obtains a new trial, he is subject to another trial generally for the offense charged in the indictment, and upon such trial he cannot successfully interpose a plea of former acquittal of the crime of murder, or former jeopardy in trial generally. *Brantley v. State* (Ga.), 16-1203.

Whatever may be the rule in jurisdictions where the matter is not regulated by constitution or statute, the rule above stated is in accord with the constitution of Georgia, which provides that "no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial." The term "new trial," as used in the constitution, means a new trial generally. *Brantley v. State* (Ga.), 16-1203.

If one has been indicted for murder and convicted of manslaughter, and, under a provision of the state constitution to the effect that if a new trial is granted to a convicted person on his own motion it shall be another trial generally for the offense charged in the indictment, moves for a new trial and obtains it, thus voluntarily causing the verdict to be set aside, the clause of the Fourteenth Amendment of the Constitution of the United States prohibiting any state from depriving a person of life, liberty, or property without due process of law or denying to any person the equal protection of the laws, does not prevent him from being again tried for murder. *Brantley v. State* (Ga.), 16-1203.

Trial for several offenses in same information after reversal of conviction of one offense. — On the reversal of a conviction for one offense under an information charging the commission of several offenses, the implied acquittal of the other offenses, arising from the conviction for one offense, falls. *State v. Pinnfetti* (Vt.), 9-127.

Dismissal of indictment after arraignment and plea. — The extradition of a person, and his arraignment and plea in the extraditing state to an indictment which is afterwards dismissed by the state's attorney for want of sufficient evidence or for other adequate reasons, does not put the accused in jeopardy so as to make his second extradition for the same offense unlawful under the Constitution and laws of the United States. *Bassing v. Cady* (U. S.), 13-905.

Acquittal of defendant on legal charges and unwarranted conviction on another charge as bar to new trial after reversal. — Where the jury, under an indictment charging larceny and embezzlement, has found the defendant not guilty of embezzlement or of aiding or abetting in the commission of embezzlement, but guilty of the crime of larceny, of which he could not be legally convicted under the evidence, the cause cannot be remanded for a trial on the charge of embezzlement. *State v. Casey* (Mo.), 13-878.

Discharge of jury for insufficient legal reason. — The power of a court to discharge a jury who have been sworn in chief before a verdict should be exercised only in case of manifest, urgent, or absolute necessity. If the jury are discharged for a reason legally insufficient and without absolute necessity for it, and without the defendant's consent, the discharge is equivalent to an acquittal, and may be pleaded as a bar to any further trial or to any subsequent indictment. *Allen v. State* (Fla.), 10-1085.

Entry of nolle prosequi after part of jury sworn. — A plea of former jeopardy is not supported by a showing that a former trial was entered upon, that at that time four jurors were sworn to try the cause, and that thereupon a *nolle prosequi* was entered by the state's attorney. *O'Donnell v. People* (Ill.), 8-123.

Mistrial. — Mistrials should not be lightly granted, but are not limited to cases of physical necessity and may be ordered where necessary to secure a fair trial. *Oliveros v. State* (Ga.), 1-114.

A mistrial cannot be declared in a criminal case, after the jury is charged with the case, for an error of law committed by the judge, without the consent of the accused. *Oliveros v. State* (Ga.), 1-114.

Where a court declares a mistrial over the protest of the accused in a criminal case for an error committed by the court, the accused may plead former jeopardy upon the new trial. *Oliveros v. State* (Ga.), 1-114.

Disagreement by jury. — The court does not, after a disagreement of the jury in a criminal case, lose jurisdiction to proceed with a second trial because the record of prior proceedings contains facts sufficient to establish former jeopardy. *State v. White* (Kan.), 6-132.

The well-established rule that where, after a reasonable time has been allowed, a verdict has not been agreed upon, and there is no probability of an agreement, the trial court may discharge the jury without prejudicing a future prosecution, has been embodied in the Wyoming constitution and statutes. *Hovey v. Sheffner* (Wyo.), 15-318.

Acquittal by court-martial as bar to prosecution in civil court. — Under the Sixty-second Article of War of the United States a general court-martial has, in time of peace, jurisdiction to try a person in the military service for any offense, not capital, which the civil law declares to be a crime, and under the provision of the Federal Constitution prohibiting double jeopardy for the

same offense a person who has been tried and acquitted of a crime by a court-martial, having jurisdiction, and deriving its authority from the United States, cannot be tried for the same acts by a civil court of the United States, although the offense is charged by a different name. *Grafton v. United States* (U. S.), 11-640.

A civil court cannot disregard the judgment of a general court-martial against an accused soldier, if such court-martial had jurisdiction to try the offense set forth in the charge and specifications, although the civil court, if it had first taken hold of the case, might have tried the same offense or even one of higher grade arising out of the same facts. *Grafton v. United States* (U. S.), 11-640.

Identity of offenses. — In a prosecution against a United States senator for having received compensation from a corporation in a proceeding before a government department in which the United States is interested, in violation of a federal statute, the defendant cannot plead in bar his acquittal in a prior prosecution for having received compensation from an individual though such individual was described in the former indictment as an officer and employee of the corporation, where it does not appear plainly as a matter of law upon the face of the record that the two offenses are identical. *Burton v. United States* (U. S.), 6-362.

Acquittal upon an indictment charging the defendant with the fraudulent appropriation of a certain amount of money in his custody, on a certain day, is a bar to a prosecution on a second indictment in all respects like the first except charging the appropriation of a slightly different amount and on a different day. *State v. Dewees* (S. Car.), 11-991.

Test in determining identity. — On a plea of former acquittal, in determining whether the two indictments charge the same offense, the test is whether the evidence necessary to support the second indictment would have been sufficient to procure a conviction upon the first indictment. *State v. Dewees* (S. Car.), 11-991.

Question of law or fact. — Where, in a criminal prosecution, the state's response to a plea of former acquittal amounts to a traverse of the facts alleged in the plea, a special issue is raised which it is proper to submit to the jury. But a demurrer to a plea of former acquittal, being an admission of the facts alleged in the plea, raises only an issue of law triable by the court. *State v. Dewees* (S. Car.), 11-991.

Conviction of assault as bar to prosecution for murder after death of person assaulted. — A conviction for felonious assault while the victim of the assault is still living is no bar to a prosecution for murder after the victim's death. *Commonwealth v. Ramunno* (Pa.), 12-818.

c. Waiver of immunity.

Right to waive. — The immunity from second jeopardy granted by the constitution to one who is accused of crime is a personal

privilege which he may waive. *State v. White* (Kan.), 6-132.

What constitutes waiver. — If a person about to be placed in jeopardy a second time does not, in some legal form, insist upon his constitutional privilege before entering upon a trial of the merits, the privilege is waived. *State v. White* (Kan.), 6-132.

The silence of the defendant on trial for crime, or his failure to object or protest against the illegal discharge of the jury before a verdict, does not constitute a consent to such discharge, or a waiver of the constitutional inhibition against a second jeopardy for the same offense. *Allen v. State* (Fla.), 10-1085.

Estoppel to allege indictment valid and jeopardy by obtaining dismissal as invalid. — Where the accused has secured the quashing of an indictment he is estopped to assert, when he is subsequently indicted for the same offense, that the former indictment was valid, and that the proceedings thereunder amounted to former jeopardy, which constitutes a bar to further prosecution. *Carroll v. State* (Tex.), 14-426.

d. Burden of proof of identity of offenses.

In general. — Where the defendant in a criminal prosecution pleads a former conviction for the same offense, the burden is on him not only to prove by record the former conviction, but also to establish the identity of the parties and of the offenses. *State v. Pianfetti* (Vt.), 9-127.

Prosecution for offenses capable of repetition. — In a prosecution for offenses which from their nature are capable of repetition, such as a prosecution charging several illegal sales of intoxicating liquors, each separate act being a distinct and substantive offense, where the defendant pleads a former conviction, the record of the former conviction does not make out a *prima facie* case of identity of offenses, and no presumption of identity arises from the fact that evidence sufficient to convict under one prosecution would warrant conviction under the other, but the defendant must show affirmatively by proof outside the record that the offenses are one and the same. *State v. Pianfetti* (Vt.), 9-127.

In a prosecution for several illegal sales of intoxicating liquors, where the defendant, after pleading former conviction, merely introduces the record of such conviction and offers no evidence of the identity of the offenses, it is not erroneous for the trial court to direct a verdict against the defendant on the issue raised by his plea. *State v. Pianfetti* (Vt.), 9-127.

e. Pleading.

Necessity of pleading former jeopardy. — Ordinarily former jeopardy must be pleaded in bar of further prosecution, and such plea must be interposed upon arraignment before pleading to the merits. If, however, upon a second trial of the same action

it be claimed that the accused was put in jeopardy by the first proceeding, and the record itself discloses all the facts, they need not be pleaded anew, or proved *aliunde*. Upon the question's being raised the court will take cognizance of such facts from the record, and determine their proper legal effect as if upon demurrer to a plea reciting them. *State v. White* (Kan.), 6-132.

Sufficiency of plea of jeopardy. — A plea of former acquittal is sufficient which shows on its face that the second indictment is based on the same single criminal act which was the basis of the indictment upon which the defendant was acquitted. *State v. Klugherz* (Minn.), 1-307.

In a criminal prosecution there is no error in overruling a plea in bar on the ground of former acquittal, where it is not averred that the defendant was tried in the former proceeding upon the present charge or any offense included therein, and found not guilty. *Price v. United States* (U. S.), 13-483.

Striking insufficient plea from record. — When a plea of former jeopardy does not state facts which constitute a defense, it is not error for the trial court to refuse to direct the jury to find a special verdict on such plea, but it should be stricken from the record of the case. *Johnson v. State* (Okla.), 18-300.

Allowing defendant to plead over after overruling plea of former jeopardy. — In a criminal prosecution, where the issue raised by the defendant's plea of a former conviction is decided against him, he should be allowed to plead over, whether the prosecution is for a felony or for a misdemeanor. *State v. Pianfetti* (Vt.), 9-127.

6. TRIAL.

a. Jurisdiction of courts.

Criminal jurisdiction of justices of the peace, see JUSTICES OF THE PEACE.

Criminal jurisdiction of municipal or city courts, see COURTS, 2 c (1).

Crime committed on federal territory. — Where a criminal offense is committed within the boundaries of land conveyed to the United States government, the federal courts have jurisdiction of a prosecution therefor to the exclusion of the state courts. *Baker v. State* (Tex.), 11-751.

Defendant unlawfully brought within jurisdiction. — A court having before it a person charged with a crime committed within its jurisdiction is not deprived of jurisdiction by the fact that the defendant has been forcibly and unlawfully brought from a foreign jurisdiction. *Ex p. Davis* (Tex.), 14-522.

Original jurisdiction of superior court. — The Connecticut statute (Gen. St., § 1480) authorizing an original information in the superior court in any case in which an inferior court may, at its discretion, punish the defendant or bind him over for trial, merely enables the state's attorney to file an original information in the superior court in

the class of cases mentioned, and does not apply to cases in which the inferior courts formerly had discretionary power to punish or bind over, but which were afterwards committed to the exclusive jurisdiction of the superior courts. *State v. Fox* (Conn.), 19-682.

b. Place of trial.

Offenses against United States. — There is no principle of constitutional law which entitles one guilty of an offense against the United States to be tried in the place of his residence. The right secured by article III, § 2, of, and the sixth amendment to, the Constitution is the right of trial in the district where the crime is committed. *Haas v. Henkel* (U. S.), 17-1112.

Election between indictments in different districts. — Where federal grand juries in different districts have found indictments against the same person for the same offense against the United States, it is the duty of the prosecuting officer of the United States to determine in which district the offense was most probably committed and bring the offender to trial there. Thus, if the place of the formation of an alleged conspiracy is doubtful, and there are some facts pointing to one district and some to another, and indictments have been returned in each, it is the plain duty of the prosecution to take steps to bring the case to trial in the district to which the facts more strongly point. *Haas v. Henkel* (U. S.), 17-1112.

Where an offense against the United States is committed by the same person or persons in more than one district, as where it is initiated in one district and consummated in another, it is cognizable in either district, but if the offender is indicted in more than one district, there must be an election by the prosecuting attorney as to where he shall be tried, and if the election requires the arrest of the accused in a district other than that in which the trial is to be had, removal proceedings must be instituted. *Haas v. Henkel* (U. S.), 17-1112.

Under the statute providing that one may be indicted for homicide in either the county where the blow was inflicted or the county where the death occurred, the entire transaction may be averred as having taken place in the county where the indictment is found, and such indictment will be sustained by proof that either the act was committed or its effect occurred in such county. *Coleman v. State* (Miss.), 1-406.

Under the statutory provision that where an offense is committed partly in one county and partly in another, the jurisdiction to punish shall be in that county which shall first begin the prosecution, a defendant who has been indicted for murder in the county where the death occurred cannot subsequently be indicted in the county where the blow was struck, though the first indictment has been dismissed and there is no contest between the courts of the two counties as to the jurisdiction. *Coleman v. State* (Miss.), 1-406.

Under the Kentucky statute where a person is arrested in one county under a war-

rant charging him with shooting another in such county with intent to kill, and the accused is admitted to bail and subsequently the person shot dies in another county, whereupon the accused is arrested in the latter county on a charge of homicide and committed without bail, and thereafter the accused is indicted for homicide in the former county, but is not indicted in the latter county, the courts of the former county have exclusive jurisdiction to try the accused for homicide. *Commonwealth v. Jones* (Ky.), 4-1192.

Removal proceedings. — Where a person has been indicted in two districts for an offense against the United States, and a proceeding is brought in one of such districts to arrest and remove him to the other district for trial, the duty of the United States commissioner before whom the proceeding is brought is limited to the determination of the single question whether a *prima facie* case is made that the accused has committed an offense against the United States indictable and triable in the district to which a removal is sought. There is no discretion reposed by the statute when such a case is made out, but the duty of the commissioner to detain the accused, and of the judge of the district to issue the warrant for his removal is mandatory. *Haas v. Henkel* (U. S.), 17-1112.

Where a person has been indicted in more than one district for an offense against the United States, and a proceeding is brought in one district to procure his removal to another district for trial, the introduction of the indictment found in the district to which a removal is sought makes out a *prima facie* case on the part of the prosecution, and such *prima facie* case is not overcome by the introduction of the indictment found in the district where the application is made. *Haas v. Henkel* (U. S.), 17-1112.

The fact that a person who has been indicted in more than one district for a crime against the United States, has given bail in one district does not prevent his removal to another district for trial, if a proper case for removal is made out in other respects. In such a case the sureties on the bail bond are exonerated by act of the law. *Haas v. Henkel* (U. S.), 17-1112.

If unreasonable delay should result from continuances due to an election by the prosecution to try a person accused of crime against the United States in another district, the accused might be entitled to relief on habeas corpus, but such a possibility affords no legal reason for denying an application to remove the accused to another district for trial. *Haas v. Henkel* (U. S.), 17-1112.

c. General rights of accused with regard to trial.

(1) Speedy trial.

Right to speedy trial, see also CONSTITUTIONAL LAW, 11.

What constitutes. — A speedy trial within the meaning of the constitutional provis-

ion, is a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays. Any delay caused by the operation of rules of law does not work prejudice to the constitutional right of the accused in that regard. *State v. Keefe* (Wyo.), 17-161.

Under Kansas statute. — The terms of court which intervene pending an appeal by the state in a criminal action are not to be counted in determining whether a person under indictment and held to bail is entitled to be discharged under the Kansas statute because not brought to trial before the end of the third term of court after indictment found or information filed. *State v. Campbell* (Kan.), 9-1203.

Under Wyoming statute. — The legislature of Wyoming has determined by statute (Rev. St. 1899, §§ 5282, 5283, 5284) what, in certain cases at least, is to be regarded as a speedy trial within the meaning of the constitutional requirement in that state. As to a defendant indicted or charged by information and committed to prison it is in effect declared that a speedy trial means a trial before the end of the second term of court after indictment found or information filed, unless the delay shall happen on the prisoner's application, and that as to a defendant out on bail it means a trial before the end of the third term of court, unless the delay happens on his application, or for want of time to try the case; and unless in either case upon an application of a defendant for discharge the court is satisfied, notwithstanding the lapse of such terms that there is material evidence for the state not then obtainable, but which the prosecution has made reasonable exertions to obtain, and that there is just ground for believing the same obtainable at the succeeding term, in which event the court is authorized to grant a continuance and remand or admit the defendant to bail. *State v. Keefe* (Wyo.), 17-161.

Accidental delays. — Although the Wyoming statute determines what is to be regarded generally as a speedy trial within the meaning of the constitution, it is doubtless true that the discharge of the accused in a given case may be prevented by certain accidents or unforeseen circumstances not specifically mentioned in the statute, such as the illness of the judge, or any other occurrence which renders the holding of a term of court impossible. Where there have been legislative enactments reasonably adapted to secure a speedy trial, the constitutional guaranty cannot operate to discharge the accused, because of the failure to foresee and provide specifically for every contingency which may occasion delay. *State v. Keefe* (Wyo.), 17-161.

Right of convict imprisoned for another offense. — Upon an application for the discharge of a person accused of crime, on the ground of delay in prosecution, where it appears that the information against the accused has been pending for more than four years without being brought to trial, it is no defense for the state to show that, for al-

most the whole of the period in question, the accused has been confined in the state penitentiary under conviction for another offense. The constitutional provision guaranteeing a speedy trial to persons accused of crime, and the statute requiring persons under indictment to be brought to trial, except in certain contingencies, within two terms of the court after the finding of the indictment, both apply to a person confined in the state penitentiary for another offense, as fully as to any other person accused of crime. *State v. Keefe* (Wyo.), 17-161.

Assuming, without deciding, that the court cannot order the production before it, for trial, of a person who is imprisoned in the state penitentiary for another offense, still, where two indictments for separate offenses are contemporaneous, there is nothing to prevent the state from bringing the accused to trial on both indictments before he is sentenced to imprisonment under either, and where it fails to pursue that course, the consequent delay in bringing the second indictment to trial must be attributed to its own action rather than to any fault of the accused. *State v. Keefe* (Wyo.), 17-161.

Delay of four years. — A delay of four years in bringing an indictment or information to trial, constitutes a violation of the constitutional right of the accused to a speedy trial, in the absence of any valid excuse for such delay. *State v. Keefe* (Wyo.), 17-161.

Waiver of right. — The constitutional right to a speedy trial in criminal cases may be waived, as by consent to continuances; or the privilege of insisting upon the right may be lost for a time, as where the accused escapes from prison or becomes a fugitive from justice. *State v. Keefe* (Wyo.), 17-161.

(2) Public trial.

What constitutes violation of right.

— An order made by the Ohio court of common pleas during the trial of an indictment for felony, to the effect that in view of the testimony expected to be given by the witnesses next to be called the court will continue the trial, during the taking of the testimony of the witnesses likely to give immoral or obscene testimony, in a small court room, and that the sheriff shall admit no one to such room except the jury, the defendant's counsel, members of the bar, newspaper men, and one other person, a witness for the defendant, exceeds the power of the court in the premises, and its enforcement is a denial to the defendant of his constitutional right to a public trial. *State v. Hensley* (Ohio), 9-108.

Under the Oregon constitution (art. 1, § 11), declaring that, "in all criminal prosecutions the accused shall have the right to public trial," it is error for the court, in a prosecution for assault with intent to rape, to exclude from the court room all persons, except the defendant, the attorneys engaged in the trial, the jury and officers of the court, and the witnesses while on the stand. *State v. Osborne* (Ore.), 20-627.

Presumption that order of exclusion was enforced. — In the absence of a showing to the contrary, it is presumed that an order excluding the public from the court room during a criminal trial was enforced. *State v. Osborne* (Ore.), 20-627.

Presumption of prejudice. — The error of excluding the public from the court room during a criminal trial is, in the absence of a showing to the contrary, presumed to have prejudiced defendant. *State v. Osborne* (Ore.), 20-627.

(3) Time to prepare for trial.

North Dakota statute. — Under the North Dakota statute, the right of the defendant in a criminal case to one day's time for preparation for trial, after the plea is entered, is absolute if requested in time. *State v. Chase* (N. Dak.), 17-520.

When request for time should be made. — The statute giving the defendant in a criminal case one day's time to prepare for trial after plea, does not prescribe when the request for time shall be made, but a reasonable construction thereof is that the request should ordinarily be made immediately after plea, and before any other step preliminary to the trial is taken. *State v. Chase* (N. Dak.), 17-520.

A judgment of conviction in a criminal case will not be reversed because of the action of the trial court in denying the defendant's request for one day's time in which to prepare for trial, where it appears that the request was not made until after the plea had been entered and the trial called and four jurors called into the box. *State v. Chase* (N. Dak.), 17-520.

Whether a request for time to prepare for trial is made in time may depend in some cases upon special circumstances, and in such cases the action of the trial court is entitled to great weight, and will not be disturbed on appeal, except in case of manifest abuse of discretion. *State v. Chase* (N. Dak.), 17-520.

Waiver. — The statutory right of the defendant in a criminal case to one day's time in which to prepare for trial is waived where the request therefor is not made in time. *State v. Chase* (N. Dak.), 17-520.

(4) Right to be present during trial.

Presumption on appeal. — Under the Missouri statute where the record on appeal in a criminal cause shows that the defendant was present at the impaneling of the jury, it will be presumed, in the absence of all evidence to the contrary, that he was present during the whole trial. *State v. Temple* (Mo.), 5-954.

An entry in the record of a criminal case that the defendant demurred to the state's evidence at the close thereof shows his presence in the court at such time, from which it will be presumed, in the absence of evidence to the contrary, that he was present during the whole trial. *State v. Brock* (Mo.), 2-768.

Presence at view by jury. — A view by the jury of the scene of the crime on motion of the defendant's counsel, taken without the presence of the accused or his counsel, is not prejudicial or in violation of any constitutional right of the accused, where no witness attends or testifies at the taking of the view and the jurors are previously instructed not to talk among themselves or with any other person on any subject connected with the trial of the case. *Elias v. Territory (Ariz.)*, 11-1153.

(5) Right to be free from shackles.

When not violated. — A conviction for an assault with intent to kill will not be reversed on the ground that the sheriff placed handcuffs on the defendant for the purpose of conducting him to and from the court house and jail, where it appears that the handcuffs were removed during the conduct of the trial and where the sheriff's affidavit shows that the defendant was known to be a desperate and dangerous criminal; and this is so though the jurors, or some of them, saw the defendant in the handcuffs. *State v. Temple (Mo.)*, 5-954.

(6) Right to confront witnesses.

What constitutes denial of right. — The defendant in a criminal prosecution is directly denied the right of being confronted with the witnesses against him, and is deprived of a full opportunity to defend himself, where the court permits the prosecuting attorney to furnish a paper to a witness for the prosecution and allows the witness to testify from and by that paper without having previously exhibited it to the defendant on his demand. *Morris v. United States (U. S.)*, 9-558.

Testimony of absent witness on former trial. — Where a witness against the defendant in a criminal case is beyond the reach of process, the testimony given by him at a former trial may be introduced, the accused having previously had opportunity to confront the witness. *State v. Nelson (Kan.)*, 1-468.

Witness ill beyond hope of recovery. — Notwithstanding the constitutional right of the accused in a criminal prosecution "to meet the witnesses face to face," it is competent to prove on the trial of a criminal prosecution the testimony given on the preliminary examination by a state's witness who is critically ill with no hope of recovery or of ever being able to appear as a witness in the case. *Spencer v. State (Wis.)*, 13-969.

Proof by testimony of examining magistrate. — The testimony of the examining magistrate as to what an absent witness's testimony was on the preliminary examination is not open to the objection that the magistrate does not give the testimony from his recollection and that his minutes of the testimony are read in evidence, where the magistrate is put on the stand and testifies that he took down the testimony fully and accurately, which is incorporated in the

return, and that by using the return he can state what the witness testified to, and then proceeds to state what the witness's testimony was, using the return to refresh his recollection. *Spencer v. State (Wis.)*, 13-969.

Qualification of right. — The constitutional right of a person accused of crime to be confronted with the witnesses against him (Const. Mont., art. 3, § 16) is qualified by the provision (section 17) for taking and using depositions in criminal cases. *State v. Vanella (Mont.)*, 20-398.

Burden of proof of denial of right. — The right of the defendant in a criminal case to be present at the taking of a deposition to be used against him is merely a personal privilege, and the burden is on him to show that the privilege was denied him before he can complain. The officer taking the deposition is not required to note his presence or absence. *State v. Vanella (Mont.)*, 20-398.

Waiver by stipulation. — The constitutional right of a person accused of crime to be confronted with the witnesses against him (Const. Mont., art. 3, § 16) is a personal privilege and is waived where a deposition is taken by stipulation instead of following the mode prescribed by law, and is used without objection. *State v. Vanella (Mont.)*, 20-398.

(7) Right to cross-examine witnesses.

Existence of right. — The provision of the Alabama constitution (art. 1, § 6) that the accused in a criminal prosecution has the right "to be confronted by the witnesses against him," imports the privilege on his part of cross-examining the opposing witnesses. *Wray v. State (Ala.)*, 16-362.

What constitutes denial of right. — A constitutional requirement that the accused in a criminal case shall have the right to cross-examine the witnesses against him, is not satisfied by a mere formal proffer of an opportunity for such cross-examination, where the surrounding circumstances are such that the accused cannot effectively avail himself of the right. *Wray v. State (Ala.)*, 16-362.

On the trial of a criminal case, where the physical condition of a witness called and examined by the state is such, by reason of extreme illness, as to make it probable that a cross-examination would result in his death, the defendant is justified in refraining from any attempt at cross-examination, even though an opportunity therefor is formally proffered by the trial judge, and under such circumstances the denial of a motion by the defendant to strike out material testimony elicited from the witness on direct examination, constitutes reversible error. *Wray v. State (Ala.)*, 16-362.

d. Continuance.

(1) In general.

Discretion of trial court. — The granting or refusal of a continuance in a criminal

prosecution rests in the sound discretion of the trial court, and a ruling of that court will not be reversed by the appellate court except for the most cogent reasons. *State v. Phillips* (S. Dak.), 5-760.

There is no rule of law or practice that when a bill of indictment is found at one term the trial cannot be had until the next term, but the granting or refusal of a continuance is a matter within the discretion of the trial judge, and the exercise of that discretion will not be reviewed, except upon a showing of gross abuse. *State v. Sultan* (N. Car.), 9-310.

Right of accomplice who has turned state's evidence. — An accomplice in a criminal case who has testified fully and truthfully as a witness for the state concerning the whole matter charged, under an agreement or understanding with the prosecuting officer, approved by or known to the court, that he shall be immune from further prosecution, has an equitable right to a continuance of the cause pending an application to the executive for a pardon, in case the state's attorney fails or refuses to enter a *nolle prosequi*; but such agreement for immunity cannot be pleaded in bar of the prosecution where the state's attorney refuses to recognize it. *Lowe v. State* (Md.), 18-744.

When properly refused. — It is proper to refuse a motion for a continuance in a criminal cause, made by the defendant upon a *nolle prosequi* of the indictment and the procurement of a new indictment by the prosecuting attorney, where the purpose of the prosecuting attorney is to procure a more specific charge in the indictment on the same facts relied on for a conviction under the former indictment, and the defendant is not thereby taken by surprise or required to make additional proof. *O'Donnell v. People* (Ill.), 8-123.

Effect of absence of accused on adjourned day. — Where after the introduction of the evidence in a prosecution for the illegal sale of intoxicating liquor, the case is, in the presence of the accused and his counsel, adjourned to another day, the absence of the accused and his counsel on the adjourned day does not deprive the magistrate of the power to receive evidence of the prior conviction of the accused and to convict him as of a second offense. *Rex v. Leach* (Can.), 14-580.

Review of discretion on appeal. — An application for a postponement or a continuance is addressed to the sound judicial discretion of the trial court, and the ruling of such court either granting or denying such application will not be disturbed by an appellate court, unless an abuse of this discretion is clearly shown; but where such an abuse is manifest, especially in a criminal case, it is the duty of an appellate court to interfere, in the furtherance of justice. *Clinton v. State* (Fla.), 12-150.

When an application for a continuance is based on the ground of want of time in which to prepare for trial, and it appears that the indictment against the defendant has been

pending for six or seven weeks during which time the defendant has been represented by counsel, the application is addressed to the sound discretion of the court, and his action is not subject to review, in the absence of a showing of abuse of this discretion. *Johnson v. State* (Okla.), 18-300.

The denial of the defendant's motion for continuance in a murder case held to have been in abuse of discretion in view of the facts shown by the moving affidavit. *Allen v. Com.* (Ky.), 20-884.

(2) On account of absence of witnesses.

Discretion of court. — The postponement of a criminal trial to enable the defendant to procure the testimony of an absent witness is wholly in the discretion of the trial court, under a statute which provides that "if the court or judge to whom the application is made is satisfied of the truth of the facts stated and that the examination of the witness is necessary to the attainment of justice, an order must be made that a commission be issued to take his testimony, and the court or judge may insert in the order a direction that the trial be stayed for a specified time . . . ; or the case may be continued." *State v. Pirkey* (S. D.), 18-192.

When properly refused in general. — The refusal of a continuance to procure the testimony of an absent witness as to a certain transaction is a proper exercise of discretion, where the opposing affidavits show that no such person as the one named in the application was present at the transaction in question. *State v. Pirkey* (S. D.), 18-192.

Witness not subpoenaed. — In a criminal prosecution it is within the discretion of the trial court to deny the defendant's motion for continuance based on the nonattendance of material witnesses who have promised to attend but whose attendance the defendant has not taken diligent steps to secure by a subpoena. *State v. Phillips* (S. D.), 5-760.

Testimony not material. — A conviction for crime will not be reversed for the trial court's refusal to grant the defendant's application for continuance based on the absence of a material witness, where there is no probability that the appearance and testimony of such witness would have had any effect on the result of the trial. *State v. Temple* (Mo.), 5-954.

Testimony available in form of affidavit. — In a criminal prosecution it is not error to refuse to grant a continuance on the ground of the absence of a witness, where the affidavit of the accused as to what the absent witness will testify to is admitted as a deposition. *Hopkins v. Commonwealth* (Ky.), 4-957.

Improbability of obtaining presence of witness. — There is no abuse of discretion in refusing a defendant's motion for a continuance on the ground of the absence of two witnesses, where the affidavit presented in support of the motion does not show any probability of securing the attendance of one of such witnesses at any future

time to which the cause might be continued, and does not show due diligence on the part of the defendant in attempting to secure the attendance of the other, especially where the cause has already been continued once on account of the absence of such witnesses and it is very questionable whether their testimony would materially aid the defense. *Elias v. Territory* (Ariz.), 11-1153.

Laches in procuring attendance. — In a criminal prosecution wherein there have been five continuances and three forfeitures of the appearance bond, the defendant's application for a continuance on the ground of the absence of witnesses is not entitled to serious consideration by the court where it does not appear that the defendant was diligent in summoning all of his witnesses. *Williams v. State* (Miss.), 15-1026.

Sufficiency of papers on application. — When an application for a continuance fails to give the names of absent witnesses, or to state the facts that defendant expects to be able to prove if a continuance is granted him, it is fatally defective. *Johnson v. State* (Okla.), 18-300.

e. Separate trials.

Where one defendant has confessed. — Where it rests within the sound discretion of the trial court to grant or refuse an application for the separate trial of two persons accused of crime, it seems that where the confession of one of such persons is to be used, the prisoners should be tried separately. *Rex v. Martin* (Ont.), 4-912.

f. Election between counts.

Prosecution by affidavit and information. — A prosecution by affidavit and information may be upon more than one count. *Knox v. State* (Ind.), 3-539.

Discretion of trial court. — A request to require the prosecuting attorney to elect upon which count of an indictment or an affidavit and information he will rely for a conviction is addressed to the discretion of the trial court, and the appellate court will not reverse the ruling in the absence of the abuse of discretion. *Knox v. State* (Ind.), 3-539.

The trial of a defendant on several counts at the same time is discretionary with the court under the Ontario statute (Crim. Code, §§ 856, 857) which provides that any number of counts for any offenses whatever may be joined in the same indictment, and that each count may be treated as a separate indictment, but that "if the court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately." *Rex v. Hughes* (Can.), 19-534.

Under the Colorado statute where the different counts of an information against several defendants relate to the same crime and charge that it was committed by the defendants either as principals or accessories, a motion to require the state to elect upon which count it will rely for conviction is

addressed to the discretion of the trial court, whose decision will not be interfered with on review in the absence of a clear showing of an abuse of discretion. *Tuttle v. People* (Colo.), 3-513.

When not required. — Where several counts of an indictment, or of an affidavit and information, are founded upon the same essential facts and arise from one transaction, the doctrine of election does not apply. *Knox v. State* (Ind.), 3-539.

g. Necessity for formal accusation.

In general. — There can be no conviction or punishment of crime without a formal and sufficient accusation, and in the absence thereof a court acquires no jurisdiction, and if it assumes jurisdiction, the trial and conviction are a nullity. *In re Waterman* (Nev.), 13-926.

Trial of petty offense. — The constitutional declaration that no person shall be deprived of liberty without due process of law does not contemplate that a petty offender who may be tried summarily without a jury shall be furnished with a formal accusation or a written statement of the charge preferred against him; it is sufficient that he be given timely information of the nature of the charge and be afforded full opportunity to present a defense. *Pearson v. Wimbish* (Ga.), 4-501.

h. Arraignment.

In prosecution for misdemeanor. — In a prosecution for a misdemeanor the failure to arraign the defendant is not an omission which will entitle him to a new trial or require a reversal. *State v. Forner* (Kan.), 12-703.

i. Counsel.

Special counsel for state. — There is no error in a criminal prosecution in permitting special counsel to assist the prosecuting attorney, in the absence of any showing that such counsel was guilty of misconduct prejudicial to the defendant. *State v. O'Brien* (Mont.), 10-1006.

Right of crown counsel to reply. — Under the Canada criminal code providing that the right of reply in a criminal trial shall always be allowed to the attorney general or solicitor general or counsel acting on behalf of both or either of them, the crown, represented by counsel, acting on the instructions of the attorney general, has the right of reply though no witnesses have been examined for the defense. *Rex v. Martin* (Ont.), 4-912.

Right to require defendant's counsel to outline defense. — Under the Washington statute relating to jury trials which provides that the plaintiff must briefly state his cause of action and the evidence by which he expects to sustain it, and that the defendant may, in like manner, state the defense and the evidence he expects to offer in support thereof, and that it shall be optional with the defendant whether he states his case be-

fore or after the close of the plaintiff's testimony, the court, on the trial of a criminal case, may properly require a statement of the defense to be made to the jury at the close of the evidence on behalf of the state. *State v. King* (Wash.), 16-322.

In a prosecution for the alleged commission of a crime, the defendant may waive his opening statement to the jury, but if the court compels counsel, over their objection, to make that statement, the error is without prejudice unless the defendant suffers some disadvantage thereby. *Pumphrey v. State* (Neb.), 18-979.

Improper limitation of time to address jury as violation of constitutional rights. — The constitutional right of a person accused of crime to appear and defend in person and by counsel includes the right to address the jury on the questions of fact which the issues present for determination, and this rule is violated where the trial court limits the time for argument to a period which is too short to allow a full and fair discussion of the facts of the case. *State v. Mayo* (Wash.), 7-881.

Effect of improper limitation. — The power of the court to restrict the argument of counsel for the accused in a criminal case is limited to such control as is calculated to prevent the abuse of the constitutional right to be heard, and where the time limited prevents a full and fair discussion of the case before a jury a new trial will be granted. *State v. Rogoway* (Ore.), 2-431.

j. Pleas.

(1) In general.

Right to plead guilty. — In a criminal prosecution the defendant has a right to plead guilty; and the effect of such a plea is to authorize the imposition of the sentence prescribed by law upon a verdict of guilty of the crime sufficiently charged in the indictment or information. *Pope v. State* (Fla.), 16-972.

Necessity that plea be voluntary. — A plea of guilty should be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance. *Pope v. State* (Fla.), 16-972.

Effect where indictment is defective. — The effect of a plea of guilty amounts only to an admission of record of the truth of whatever is sufficiently charged in the indictment and does not prevent the defendant from taking advantage by writ of error of defects apparent of record. *State v. Kelley* (Mo.), 12-681.

Explanation of effect to accused. — Under the Illinois statute providing that in a criminal prosecution a plea of guilty can be entered only after the defendant has been fully advised by the court of his rights and of the consequences of entering the plea, a mere inquiry by the court of the defendant whether he understands that if he pleads guilty the court will sentence him to the

penitentiary, is not a sufficient explanation to the defendant of his rights and of the consequences of the plea. *Krolage v. People* (Ill.), 8-235.

Plea that name of foreman of grand jury not signed to indictment. — Although a plea alleging that the name of the foreman of the grand jury was printed instead of being signed on the indictment is demurrable, the question of the sufficiency of the plea should be presented in accordance with the rules of pleading, and the court should not of its own motion overrule such plea. *Coburn v. State* (Ala.), 15-249.

(2) Right to withdraw plea of guilty.

When permission should be granted.

— The withdrawal of a plea of guilty should not be denied in any criminal prosecution, where it is evident that the ends of justice will be subserved by permitting the substitution of the plea of not guilty. *Krolage v. People* (Ill.), 8-235.

When permission is properly refused.

— Where a defendant has deliberately pleaded guilty to a criminal charge under circumstances that should reasonably have prompted him and his counsel to be prepared to meet the charge, and no motion is made for leave to withdraw the plea of guilty until after the state witnesses have been discharged, and there is no direct allegation or proof that the plea was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances that put the defendant at a disadvantage in protecting his rights, the discretion of the trial court is not shown to have been abused in refusing permission to withdraw the plea of guilty. *Pope v. State* (Fla.), 16-972.

Plea entered unadvisedly. — A defendant should be permitted to withdraw a plea of guilty given unadvisedly when application therefor is duly made in good faith and sustained by proofs, and a proper offer is made to go to trial on a plea of not guilty. *Pope v. State* (Fla.), 16-972.

The defendant in a criminal prosecution should be permitted to withdraw his plea of guilty when unadvisedly given, where any reasonable ground is offered for going to the jury; and while this is a matter within the discretion of the court, the discretion is a judicial one which should always be exercised in favor of innocence and liberty. *Krolage v. People* (Ill.), 8-235.

Discretion of court to refuse permission. — Under the Illinois statute the defendant in any criminal prosecution may enter a plea of guilty, and if the plea is understandingly made the trial court may, in the exercise of sound legal discretion, refuse permission to withdraw it. *Krolage v. People* (Ill.), 8-235.

Review of discretion on appeal. — While the trial court may exercise discretion in permitting or refusing to permit a plea of guilty to be withdrawn for the purpose of pleading not guilty, yet such discretion is subject to review by an appellate court. *Pope v. State* (Fla.), 16-972.

The law favors trials on the merits; and if the discretion of the trial court is abused in denying leave to withdraw a plea of guilty and to go to trial on the merits, the appellate court may interfere. *Pope v. State* (Fla.), 16-972.

k. Change of judges.

Right to change judges after commencement of trial. — Under the Arkansas constitution (art. 7, § 22), authorizing a temporary exchange of circuits by the circuit judges, and the statute (Kirb. Dig., § 1322) providing that on such an exchange each judge shall have the same powers and authority as the other had, it is proper for a judge after commencing a criminal trial to exchange circuits with another judge, where the one vacates the bench and the other immediately occupies it and presides during the remainder of the trial. *York v. State* (Ark.), 18-344.

l. Discharge of jury.

For misconduct of spectator. — The misconduct of a spectator, in open court, during the progress of a murder trial, furnishes no ground for the discharge of the jury, unless it be of such a nature as to have necessarily influenced the verdict of conviction. *State v. Wimby* (La.), 12-643.

m. Reception of evidence.

(1) Order of proof.

Discretion of court. — Questions as to the order of proof are addressed to the sound discretion of the trial court, and a party cannot complain of a supposed abuse of discretion unless by an appropriate motion he invokes a further ruling by the court. *State v. Smith* (Iowa), 6-1023.

The rule that the order of proof rests in the discretion of the court, and that such discretion is not subject to review unless it appears to have been abused, applies to criminal as well as civil cases, and a judgment of conviction in a criminal case will not be reversed because of the admission in rebuttal of evidence which should have been offered in chief. *Jaynes v. People* (Colo.), 16-787.

Whether rebutting evidence on the part of the prosecution ought to be admitted at a criminal trial after the close of the evidence for the defense is a matter in the discretion of the judge at the trial. *Rex v. Crippen* (Eng.), 20-653.

(2) Exclusion of jury upon argument as to admissibility of evidence.

In a criminal case, the refusal to exclude the jurors during counsel's argument over the admissibility of admissions alleged to have been made by the accused is not an abuse of the trial court's discretion, where the evidence to which they listen is simply evidence of facts deemed by the judge sufficient to show that the statements, if any, were not freely made, and no evidence is admitted that the prisoner had made any confession, and

his statements are excluded — especially where the judge states that the jurors are to decide the case on the testimony as it comes from the witnesses on the stand, and not on what counsel may say, and tells them in the strongest terms that the preliminary evidence that he is hearing has no bearing on the question they have to decide. *Holt v. U. S.* (U. S.), 20-1138.

(3) Placing witnesses under the rule.

Penalty for disobedience. — The constitutional right of a person accused of crime to be confronted with his accusers and witnesses is not infringed by an order of the trial court that the witnesses for the prosecution and the defendant shall be sworn and sent out of the court room before being examined; and where the witnesses have been placed under the rule on motion of the defendant, the defendant, if he disobeys the rule and permits one of his witnesses to remain in the court room, cannot complain that the court refuses to permit the witness to testify, especially if he fails to show that the excluded testimony would be useful to him. *State v. Hodge* (N. Car.), 9-361.

A judgment of conviction of murder in the first degree sustained as against an objection to the trial court's action in refusing to allow to testify a witness who disobeyed a rule of the court excluding witnesses from the court room. *State v. Hodge* (N. Car.), 9-361.

Right to permit examination of witness violating rule. — The action of a court in permitting a witness to testify when he had remained in the court room while the other witnesses were giving testimony, held not an abuse of discretion. *State v. Welch* (Mo.), 4-681.

(4) Calling all witnesses indorsed on indictment.

Obligation of state to call. — In a criminal action the state is not obliged to place upon the stand every witness whose name is indorsed upon the indictment. *State v. Campbell* (Kan.), 9-1203.

Comment on failure to call. — A state is not required to call all persons whose names are indorsed upon an indictment as having testified before the grand jury. If such a witness is not called by the state, he may be called by the defendant, and the failure of either party to call the witness may, in the discretion of the court, be commented upon by either counsel before the jury. *State v. Sheltrey* (Minn.), 10-245.

(5) Calling witness not indorsed on indictment.

Right to examine. — It is not error to permit the state to examine a witness whose name is not indorsed on the indictment. *State v. Henderson* (Mo.), 15-930.

(6) Calling eyewitnesses.

Discretion of court to require all eyewitnesses to be called. — It is within

the discretion of the trial court in a criminal action to refuse to require the prosecution to call all the eyewitnesses to the commission of the alleged crime, and the trial court's ruling will not be reversed unless it abuses such discretion. *Dillon v. State* (Wis.), 16-913.

(7) Scope of direct examination.

Matters not testified to before grand jury. — Where a witness has testified before the grand jury, and minutes of his testimony are properly presented and filed, he may on the trial be examined as to all matters within his knowledge bearing on the defendant's guilt or innocence. *State v. Perkins* (Iowa), 20-1217.

(8) Scope of cross-examination.

Collateral evidence to show motive. — In a criminal prosecution it is not erroneous to permit the government to cross-examine the defendant about matters concerning his business, and to read to the jury certain of the defendant's acknowledged business advertisements and certain of his letters, where the evidence, though it concerns matters collateral to the offense charged, is introduced for the purpose of supplementing the testimony, previously introduced by the government, tending to show that the nature of the defendant's business furnished him a motive for committing the offense with which he is charged, and the jury are charged in proper terms that they can consider the evidence for no other purpose. *Thompson v. United States* (U. S.), 7-62.

Harmless admission of irrelevant evidence. — In a criminal prosecution it is harmless error to permit the government to cross-examine the defendant as to letters of recommendation given by him to a person with whom he is alleged to have co-operated in committing the offense, and to permit it to introduce the letters themselves, though the evidence is irrelevant, where the letters have no real substance as contradictory matter. *Thompson v. United States* (U. S.), 7-62.

Exclusion of hearsay evidence. — In a criminal prosecution it is not error for the court to refuse to admit in evidence on cross-examination of the state's witness letters written by such witness to the accused which contain no statements not already admitted by the witness and are mere hearsay evidence as to a conspiracy by third persons against the accused. *State v. Royce* (Wash.), 3-351.

Previous declaration of witness as to belief in defendant's guilt. — In a criminal prosecution, where the father of the defendant is a witness, it is erroneous to question him on cross-examination as to a previous declaration tending to prove his belief in the guilt of the defendant; but where the witness unqualifiedly denies having made such a remark, and there is no subsequent effort on the part of the prosecution to prove that it was made, the error is without prejudice. *State v. Matheson* (Iowa), 8-430.

Cross-examination of accused. — It is not error to require a defendant on trial for murder to state, while testifying in his own behalf, that he married the main witness for the state on the day before the trial began. *Moore v. State* (Tex.), 2-878.

(9) Exceptions and objections.

Waiver by failure to interpose. — While the defendant in a criminal prosecution has a right to insist that only competent evidence shall be introduced against him, he may waive the right, and he does waive it by failing to interpose a proper and timely objection. *O'Donnell v. People* (Ill.), 8-123.

(10) Reading and signing of testimony.

Trial before police magistrate. — On a trial before a police magistrate for selling intoxicating liquor without a license contrary to the Ontario Liquor License Act, the testimony can be taken down in shorthand, and it is not essential that the transcript of such testimony should be read to and signed by the witnesses, the provisions of the statute being merely directory. *Rex v. Leach* (Can.), 14-580.

(11) Permitting opposing counsel to examine papers.

Right of court to order submission of statement of witness to defendant's counsel. — Where a person conducts a private interview with one who afterwards is called and examined as a witness before the grand jury, which finds an indictment against the defendant concerning some matters disclosed in said interview, which interview is stenographically taken, written out, and subsequently delivered to the prosecuting attorney for his use, and on the trial the person interviewed is called, and testifies for the state in support of the indictment, it is error for the court, on request of the defendant, to order the prosecuting attorney to deliver the transcript of said interview to the defendant or his counsel, or to order the prosecuting attorney to allow either of them an inspection of the same. *State v. Rhoads* (Ohio), 18-415.

(12) Allowing attendant for witness on stand.

In a prosecution for statutory rape, where the prosecuting witness, a little girl eight years of age, is attended by a woman friend, who is permitted by the court to sit upon the witness stand in close proximity to the prosecuting witness while her testimony is being given, and the court admonishes such woman that she is not permitted to make suggestions to the witness, and the record does not show any disregard of such admonition by the court, there is no error. *Evers v. State* (Neb.), 19-96.

n. Admissibility and sufficiency of evidence.

(1) In general.

See also ABORTION; ARSON, 4; BIGAMY, 4; BURGLARY, 4; CONSPIRACY, 1 f; EMBEZZLEMENT, 4; FRAUD, 4; GUILTY PLEA, 4; HOMICIDE, 4; JURY, 4; PERJURY, 4; RECEIVING STOLEN PROPERTY, 4; SUFFICIENCY OF EVIDENCE, 4; TRIAL, 4; WITNESS, 4.

ZLEMENT, 5; FALSE PRETENSES AND CHEATS, 6; FORGERY, 4; GAME AND GAME LAWS, 4; GAMING AND GAMING HOUSES, 6; HOMICIDE, 6 a (1); INCEST, 4; INTOXICATING LIQUORS, 6 g; LARCENY, 6 a; PERJURY, 7; RAPE, 2 d; RECEIVING STOLEN PROPERTY, 3; ROBBERY, 2 b.

Account books in evidence, see ABORTION.

Admissibility of evidence before grand jury, see GRAND JURY, 5 d.

Circumstantial evidence, see ARSON, 4.

Corroboration of accomplice testimony, see ACCESSORIES AND OTHER PARTICIPANTS IN CRIME; ACCOMPLICES.

Prosecution for killing dogs, see ANIMALS, 3 c.

Prosecutions for practicing medicine without license, see PHYSICIANS AND SURGEONS, 3 b.

Participation in offenses, see ACCESSORIES AND OTHER PARTICIPANTS IN CRIME.

Presumption of intent to kill, see ASSAULT AND BATTERY, 1 f.

Shadowing by detectives as evidence, see DETECTIVES.

Weight and sufficiency of evidence before grand jury, see GRAND JURY, 5 a.

Weight and sufficiency of evidence in assault and battery case, see ASSAULT AND BATTERY, 1 f.

Admissibility in general. — Any legal evidence from which the jury may legitimately deduce guilt or innocence is admissible, if, when taken with other evidence in the case, its relevancy appears. *Thompson v. State* (Fla.), 19-116.

Sufficiency of evidence to support conviction. — Where there is testimony from which the jury might legally have inferred all the essential elements of the crime charged, and it does not appear that the jury were influenced by considerations other than the evidence, a verdict of guilty will not be disturbed. *Thompson v. State* (Fla.), 19-116.

Circumstantial evidence may be a thoroughly satisfactory basis for conviction of the highest crimes. *Com. v. Richmond* (Mass.), 20-1260.

Admissibility of X-ray photograph. — After proof has been made that it was taken by a competent person, a radiograph of a human body is admissible in evidence to show that at the time it was taken there was in the body a hard substance in the shape of a bullet; and this is so though there is no evidence that the object represented in the radiograph was a bullet, and though there is no evidence that when the radiograph was taken the bullet, if such it was, occupied the same position in the body that it did when it first lodged there. *State v. Matheson* (Iowa), 8-430.

Books. — Where in the prosecution for conspiracy the defendant testifies that the fact that he received sums of money from one of his alleged co-conspirators was known to the corporation by which the defendant was employed, and that the president thereof checked as approved the entries of such

amounts in a book in the defendant's possession, the defendant may, in corroboration of his testimony, introduce such book in evidence. *Crawford v. United States* (U. S.), 15-392.

Books compiled from memoranda. — Where a book of accounts is made up from orders for goods or other temporary memoranda and constitutes the first complete and permanent record of the business, it is admissible in evidence, when verified by the oath of the person making the entries that they are correct and were made at or near the times of the transactions. *State v. Stephenson* (Kan.), 2-841.

The fact that entries of orders for goods or other memoranda constituting the first complete and permanent record of the business are recorded in a book called a "ledger" does not make them other than original, nor is it necessary that the bookkeeper should have made the sales or billed out the goods sold, to make the entries admissible in evidence. *State v. Stephenson* (Kan.), 2-841.

If the sales made be regularly reported to the bookkeeper, and from such reports or from orders or other memoranda of the salesmen, the entries be correctly and contemporaneously made by him, they may be received in evidence when duly verified by him. *State v. Stephenson* (Kan.), 2-841.

Letters. — Though a witness for the state in a criminal prosecution admits having written certain letters to a third person, the defendant is not entitled to introduce such letters as original evidence of the facts recited in them. *State v. Bringgold* (Wash.), 5-716.

Explanation of letters written by defendant. — Where a letter written by a witness to the defendant in a criminal prosecution, accusing him of abstracting copies of letters from the copy book of the witness, the letter having merely an indirect bearing on the issue, is admitted in evidence, the defendant is entitled to introduce a reply, explaining his reason for taking the copies, written by his counsel at his direction immediately after the accusation was made, and upon the refusal of the court to admit such reply, he is entitled to have the letter of accusation stricken from the record, notwithstanding his failure to object to its admission because of a belief that the reply would likewise be introduced by the prosecution. *Crawford v. United States* (U. S.), 15-392.

Intent of accused in abstracting documents. — In such case the defendant is entitled to testify whether he took the letters from the copy book with the intention of suppressing or destroying them or of preserving and presenting them at the trial. *Crawford v. United States* (U. S.), 15-392.

Compulsory production of documents by defendant. — The Indiana statute (Burns' Ann. St. 1908, § 59) providing that no person in any criminal prosecution shall be compelled to testify against himself, secures a person against an involuntary production of his papers in response to any process of the court addressed to him in the

character of a witness, as well as against the giving of compulsory evidence, where the using of such documentary evidence and testimony may tend to incriminate him. *State v. Pence* (Ind.), 20-1180.

Statements made out of hearing of accused. — Where statements made by a third person have a material bearing upon the guilt of a defendant accused of crime, and are of such a character as to call for a reply by him, they are not admissible in evidence against him, unless they are made in his hearing; but this rule does not apply to immaterial statements or statements which call for no reply. *State v. Chase* (N. Dak.), 17-520.

To render declarations or evidence competent as part of the *res gestæ*, they must be so closely related to the principal fact as to show that they are spoken under the influence of the principal fact, and not in narration of it. If sufficient time intervenes between an act and the declaration concerning it to afford an opportunity for reflection, the declarations are inadmissible. *State v. Murphy* (N. Dak.), 16-1133.

Declarations of a party to a contract, as to the terms of the contract, are not admissible as evidence as a part of the *res gestæ* when made after the contract is completed, and not in the presence of the parties, although made very soon after the parties have separated. *State v. Murphy* (N. Dak.), 16-1133.

Declarations of wife in presence of husband. — The declarations of a wife made in the presence of her husband are admissible against the husband in a criminal case, though a wife is not competent to testify against her husband. *State v. Record* (N. Car.), 19-527.

Evidence wrongfully obtained by violation of rights of accused. — Testimony that an accused person put on a blouse, and that it fitted him, is not made inadmissible on the question whether it belonged to him, by the protection against self-incrimination afforded by U. S. Const., Fifth Amendment, since, even assuming that such evidence was improperly obtained, it is still competent. *Holt v. U. S.* (U. S.), 20-1138.

The constitutional prohibition of unreasonable searches and seizures is intended to prevent such as are made through governmental agencies, and has no bearing upon the unauthorized acts of private persons or of petty officers of the law. Evidence obtained by searches or seizures made by such persons or officers is admissible. *Cohn v. State* (Tenn.), 15-1201.

Although a deputy sheriff who makes a hole in the wall for the purpose of spying upon the inmates of a building wherein intoxicating liquors and cigarette papers are sold illegally, commits an unlawful act which subjects him to punishment, evidence thus procured by him will, if relevant to the issues, not be rejected by the court. *Cohn v. State* (Tenn.), 15-1201.

Admission of shoes to identify tracks. — The constitutional right of an ac-

cused person not to be compelled to give evidence against himself is not violated by the introduction in evidence of his shoes for the purpose of identifying tracks, supposed to be his, near the scene of the crime. *State v. Jeffries* (Mo.), 14-524.

Where the shoes of a person accused of crime are taken from him with or without his consent by the arresting officer and compared with footprints leading from the scene of the crime, the admission of testimony by the officer concerning his comparison of the shoes with the footprints, and the admission of the shoes themselves in evidence, do not constitute a violation of the constitutional provision that "no person shall be compelled to testify against himself in a criminal proceeding," or of the constitutional guaranty that "the people shall be secure in their persons, papers, homes, and effects from unreasonable searches and seizures." *State v. Fuller* (Mont.), 9-648.

Agreement between state and accomplice. — In a criminal prosecution, a statement alleged to have been made by the government's attorney to the court in regard to favorable consideration of the sentence to be imposed upon an accomplice who was to be a witness for the government cannot be given in evidence after the witness has testified, where it is not claimed that he knew of the suggestion to the court. *Thompson v. United States* (U. S.), 7-62.

Deed in condemnation proceedings, official maps, and books of titles to show title in federal government. — The deeds and condemnation proceedings under which the United States claims title to a military reservation, the scene of a crime, and the official maps in the engineer's department, made from original surveys under the authority of the war department, and a book showing titles to the reservation, compiled under the same authority, are admissible in evidence to show that the premises in question were within the exclusive jurisdiction of the United States. *Holt v. U. S.* (U. S.), 20-1138.

Establishment of death of witness to render former testimony admissible. — Proof of the return of an officer on a subpoena that a witness is dead, the same not being authorized or required by law, and the oral evidence of witnesses that they have been informed of his death, are insufficient to establish the death of the witness so as to render competent on the trial his testimony taken and transcribed at the preliminary examination. *Driggers v. U. S.* (Okla.), 17-66.

Identification of justice's record. — The testimony of a stranger is not admissible for the purpose of identifying a justice's record of a conviction for crime which is offered in evidence for the purpose of showing the disqualification of a witness, where no reason is shown why the justice who rendered the judgment, or his successor in office, is not present to identify the record. *Junior v. State* (Ark.), 6-499.

Burden of proof of alibi. — In a criminal prosecution, where the defendant at-

tempts to prove an alibi, it is erroneous for the court to instruct the jury that the defendant has the burden of establishing the alibi "by a preponderance of evidence, that is, by the greater and superior evidence," as the burden is on the prosecution to prove that the defendant was present at the time and place the crime was committed, and this burden never shifts. *Glover v. United States* (U. S.), 8-1184.

Exclusion of immaterial evidence. — In a criminal prosecution it is not erroneous for the trial court to exclude evidence relating to immaterial matters which have nothing to do with any facts upon which the jury are required to pass. *State v. Bringgold* (Wash.), 5-716.

Motion to strike out hearsay evidence. — Where, in a criminal prosecution, the evidence elicited by the government from its witness is competent, and the only part of the witness's testimony that is incompetent is hearsay evidence given in response to questions propounded by the defendant's counsel on cross-examination, a motion by the defendant to "strike out all of the testimony of the witness, on the ground that it is purely hearsay," is properly denied. *Thompson v. United States* (D. C.), 12-1004.

Motion to strike out where no objection made. — A motion to strike out evidence is properly denied where a part of it has been received without objection, though another part has been properly objected to. *State v. Pirkey* (S. D.), 18-192.

Reading minutes of testimony to jury. — On the trial of a criminal case it is not erroneous for the court, at the request of the jury after they have retired, to have them brought into court and to permit the entire testimony of one witness and parts of the testimony of other witnesses to be read from the stenographer's notes, such notes being, by statute, a part of the record of the case. *State v. Perkins* (Iowa), 20-1217.

(2) Identity of accused.

Identification by voice. — The testimony of a witness identifying an accused person solely from having heard his voice, is the statement of a conclusion reached directly and primarily from the sense of hearing, and is admissible as direct and positive proof, the probative value of which is for the jury. *Mack v. State* (Fla.), 14-78.

The identity of a person accused of crime may be established by a witness who recognized his voice. *State v. Vanella* (Mont.), 20-398.

It is competent for a witness in testifying as to the identity of the accused to state that he "thinks" the voice he heard was the voice of the accused. The uncertainty of the testimony goes only to its weight and not to its competency. *State v. Vanella* (Mont.), 20-398.

By blood stains. — In a criminal prosecution the single fact that a stain upon the defendant's shirt sleeve is blood, such blood not being shown to be human blood, and it

appearing that the stain may have been there for six months or a year, is too remote and of no probative force in establishing the identity of the defendant as the guilty person. *State v. Alton* (Minn.), 15-806.

(3) Character or reputation.

Character evidence in homicide cases, see **HOMICIDE**, 6 a (2).

Previous good character of defendant. — In a criminal prosecution, evidence of the previous good character of the defendant is always admissible, but it should be confined to the trait of character at issue. *State v. Moyer* (W. Va.), 6-344.

Defendant never before arrested. — In a criminal prosecution the testimony of the accused that he has never before been arrested for or accused of crime is inadmissible for the purpose of showing that he is of good character. *State v. Marfaudille* (Wash.), 15-584.

Reputation for honesty. — Where a witness for the accused has testified that in his dealings with the accused he had "found him honest and reliable" and that he had never heard his reputation discussed or referred to, the accused is not aggrieved by a ruling excluding a question relating to his "reputation for honesty in that community." *State v. Lambert* (Me.), 15-1055.

A ruling allowing a witness for the accused to state that he had "found him honest and reliable" is more favorable to the accused than that to which he is entitled. *State v. Lambert* (Me.), 15-1055.

Specific instances of honest dealing. — The reputation of the accused for honesty is not regularly provable by testimony based on the personal knowledge of a witness derived from specific instances in his dealings with the accused. *State v. Lambert* (Me.), 15-1055.

Competency of character witness. — It is not indispensable that a witness to the reputation of the accused should have resided in the same community with the accused. *State v. Lambert* (Me.), 15-1055.

The competency of a witness to testify to the good reputation for truth of the accused, who has testified in his own behalf, is not affected by the fact that the witness has never heard the truthfulness and veracity of the accused discussed; but the exclusion of such testimony is not cause for reversal, where there is practically no dispute as to the vital facts of the case. *Spencer v. State* (Wis.), 13-969.

(4) Conduct of accused.

Flight, concealment, and assumption of false name. — The facts of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt and thus of guilt itself. But it is for the jury to determine what weight and value should be given to such evidence. *State v. Lambert* (Me.), 15-1055.

Flight of accused. — Evidence of the flight of an accused after giving bail is admissible in evidence, though another charge against him was pending at the time of his flight. Whether the flight was from one charge or the other, and the weight to be given to the evidence, are for the jury. *State v. Hetland* (Iowa), 18-899.

The flight of an accused person may be taken into consideration by the jury as a circumstance in connection with the other evidence in determining whether the accused is guilty of the crime charged. *State v. Osborne* (Ore.), 20-627.

The presumption of guilt arising from the flight of an accused person is one of fact, and not of law; and the question whether the circumstance tends to show a guilty intent is for the jury. *State v. Osborne* (Ore.), 20-627.

Absence of attempt to escape as evidence. — The fact that a person accused of crime and placed under arrest made no attempt to escape cannot be proved by him in his own behalf. *Lingerfelt v. State* (Ga.), 5-310.

Assumption of false name. — In a criminal prosecution, where the defendant is charged in the indictment under an alias and is arraigned under the alias as well as under his real name, the fact that he enters a general plea of not guilty does not deprive the government of the right to prove that he assumed a false name as alleged in the indictment. *Thompson v. United States* (U. S.), 7-62.

Silence under accusation. — The rule that the silence of a person under accusation of crime is admissible in evidence against such person in a prosecution for the crime, has no application unless the statement is addressed to the person accused in such a manner as to call for a denial or reply from him. Thus, in a criminal prosecution for housebreaking and stealing, evidence that the defendant and three or four other persons not suspected of having any connection with the offense were seated in a room while a search for the goods was going on in the vicinity and another person entered the room and remarked, without addressing any one in particular, "unless we change the goods they will find them," and that the defendant remained silent, is admissible. *Eaton v. Commonwealth* (Ky.), 12-874.

Accused armed when arrested. — Evidence to the effect that when an accused was arrested, shortly after being informed that his accomplice was under arrest, he had a loaded revolver in his overcoat pocket, is within the above rule. *State v. Lambert* (Me.), 15-1055.

Former plea of guilty. — On the trial in a superior court of an information for a criminal offense where the defendant pleads not guilty, it is competent to prove that he pleaded guilty to the complaint for the same offense filed against him in the justice's court. *State v. Bringgold* (Wash.), 5-716.

In a criminal prosecution where a witness for the prosecution testifies that the defend-

ant admitted his guilt when the complaint was read to him on his preliminary examination, it is proper to admit such complaint in evidence to explain the witness's testimony, after it has been identified by him. *State v. Bringgold* (Wash.), 5-716.

(5) Evidence of prior conviction.

Admissibility. — In a criminal prosecution under a statute imposing a more severe punishment for a second offense than for the first, where the indictment fails to allege the defendant's conviction for a prior offense, evidence showing his prior conviction is inadmissible for any purpose, and error in admitting such evidence when offered by the prosecution is not cured by the fact that the defendant, on his subsequent cross-examination, testifies over objection to his prior conviction. *Paetz v. State* (Wis.), 9-767.

In a criminal prosecution it is erroneous for the prosecutor to ask a witness, before the defendant has testified, whether the defendant has been previously confined in the penitentiary; but the error is cured where the defendant subsequently testifies that he has been in the penitentiary. *State v. James* (Mo.), 5-1007.

Sufficiency. — In a prosecution before a police magistrate for selling intoxicating liquor without a license contrary to the Ontario License Act, a certificate of the conviction of a person of the same name as the accused is some evidence of a prior conviction of the accused, the weight of the evidence as to identity of the accused with the person named in the certificate being for the determination of the magistrate. *Rex v. Leach* (Can.), 14-580.

In a criminal prosecution, where it is sought to impose the increased punishment provided by statute for persons formerly convicted of crime, the introduction in evidence of a record showing the previous conviction of a person bearing the same name as the defendant is not of itself sufficient to establish identity of person. *State v. Smith* (Iowa), 6-1023.

(6) Proof of other crimes.

Proof of other prosecutions in abortion cases, see ABORTION.

Admissibility in general. — The general rule is that evidence is not admissible which shows, or tends to show, that the accused in a criminal case has committed a crime wholly independent of the offense for which he is on trial. To this rule, however, there are exceptions, as where the evidence of another offense tends to prove some element of the one charged, or the motive for committing the acts which it is claimed constitute the offense for which the accused is on trial, or where such independent offenses, in connection with the one for which he is being tried, are committed by the accused for some particular purpose which he intended to accomplish. *Jaynes v. People* (Colo.), 16-787.

While it is not competent for the state, in making out its case in chief, to introduce evidence of other and prior crimes, for the purpose of supporting the charge made in the indictment, or of reflecting on the character of the accused, yet the commission of a prior crime may be shown for the purpose of furnishing a motive for the commission of the crime charged in the indictment, provided such prior crime is so related to the latter as to have a logical connection therewith, and reasonably to disclose a motive for its commission. *State v. Dickerson* (Ohio), 11-1181.

Evidence offered for another purpose. — In a criminal case evidence which is relevant to the issue is not rendered inadmissible by reason of the fact that it tends to prove the defendant guilty of a crime other than the one charged in the indictment. *People v. Rogers* (N. Y.), 13-177.

Statement of purpose for which offered. — On the trial of a criminal case, where evidence is offered tending to prove that the accused has committed a crime other than that for which he is on trial, good practice requires that the district attorney should state the purpose for which the evidence is offered, and, if it is admissible for that purpose, the trial judge, when requested by the defendant, should instruct the jury as to the purpose for which they may consider it. *Jaynes v. People* (Colo.), 16-787.

Curing erroneous admission by striking out. — In a criminal prosecution, the introduction of evidence relating to an independent crime does not necessarily constitute reversible error where the court, as soon as it develops that the evidence relates to a different crime, strikes it out and instructs the jury to disregard it. *State v. Whitman* (Minn.), 14-309.

(7) Opinion evidence.

Opinion evidence in murder cases, see HOMICIDE, 6 a (1).

Admissibility in general. — The opinion of a witness has no place in a judicial investigation unless he possess, with regard to the particular subject of inquiry, a knowledge not acquired by ordinary persons. *State v. Maioni* (N. J.), 20-204.

Admissibility where facts and circumstances susceptible of clear proof. — The opinion of a witness is not admissible in evidence when all the facts and circumstances are capable of being clearly detailed and described so that the jurors may be able to form correct conclusions therefrom. *McCray v. State* (Ga.), 20-101.

Opinion as to meaning of language used in conversation. — It is not permissible for a witness who testifies to a conversation between himself and another to state to whom such other person referred when, in such conversation, he used the pronoun "them," the opinion of the witness on this question not being competent evidence. *McCray v. State* (Ga.), 20-101.

Opinion on matters of science not related to proven facts. — Questions call-

ing for the opinions of experts, on mere abstract matters of science, not predicated on or related to the facts established by the proofs in the cause, are incompetent. *State v. Maioni* (N. J.), 20-204.

Similarity of foot-prints. — It is improper to allow a witness to give his opinion as to the similarity of tracks found at the place of the crime and the tracks shown to have been made by the accused, where he merely made a casual observation of the tracks without measurements of any kind and where there was no peculiarity in the tracks. *Parker v. State* (Tex.), 3-893.

Experience in similar case. — A physician regularly graduated in medicine and surgery, and duly licensed to practice his profession, is competent to testify as an expert to the effect a certain described wound would have on the reasoning faculties of the person receiving it, although the witness has had no experience in exactly such a case or actual knowledge of the wound in question. *State v. Megorden* (Ore.), 14-130.

Necessity of hypothetical question. — Where witnesses who have examined a wound describe it to the jury, they may, without the propounding of a hypothetical question, give their opinions, based on what they have described, as to the mental condition produced by the wound in the person wounded. *State v. Megorden* (Ore.), 14-130.

(8) Experiments.

Experiments in evidence in arson cases, see ARSON, 4.

Admissibility in general. — Evidence of an experiment whereby to test the truth of testimony that a certain thing occurred is not admissible where the conditions attending the alleged occurrence and the experiment are not shown to be similar. *Spires v. State* (Fla.), 7-214.

Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court. *Spires v. State* (Fla.), 7-214.

Conduct of experiments in court. — It is within the judicial discretion of a trial court to permit experiments relevant to the issue to be made before the jury during a trial, or to refuse to permit them, such court having first to determine whether or not such similarity of circumstances and conditions has been made to appear as to render said evidence competent; and an appellate court should decline to interfere with the ruling, unless an abuse of this judicial discretion is made to appear clearly. *Spires v. State* (Fla.), 7-214.

The making of experiments by or in the presence of the jury is not favored by the courts. Evidence of this kind should be received with caution, and should be admitted only where it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. *Spires v. State* (Fla.), 7-214.

(9) Handwriting.

Admissibility of evidence relating to handwriting. — Where the genuineness of a writing is in question in a criminal case, other writings admitted or proved to be genuine may be received and submitted to the jury for the purpose of comparison, although not otherwise material to the issue. *State v. Kent* (Vt.), 20-1334.

The rule of evidence requiring the production of the best evidence obtainable is not violated by permitting the genuineness of a signature to an unattested instrument to be proved by a witness who is familiar with the handwriting of the person by whom it purports to have been made, without introducing the testimony of such person, though he may be easily accessible at the time such proof of the signature is offered. *McCray v. State* (Ga.), 20-101.

To show that an inscription on a door, "July. 22. 1908" below which was "E. Kent," done in capitals similar to print, was carved by the defendant in a criminal case, writings, as shown in the defendant's letters and memorandum books proved to be his, done in ordinary writing, and containing dates in which the punctuation is exactly similar to the inscription, such as the period after the month and the day and no period after the year, are admissible as showing his habit in that regard. *State v. Kent* (Vt.), 20-1334.

(10) Bloodhound evidence.

Admissibility of bloodhound evidence in general. — Where it is shown that a particular dog had been successfully trained to follow the track of human beings, evidence that such dog was placed on the track of a person at the place of the homicide and followed the track to the home of the accused is admissible. *Parker v. State* (Tex.), 3-893.

It is proper to admit evidence of the fact that certain specifically described tracks were trailed from the place of the crime to the home of the accused. *Parker v. State* (Tex.), 3-893.

In a prosecution for homicide, where there is evidence tending to show that the defendant was in the vicinity of the crime about the time it was committed, and that he left the scene in company with a third person and went near the house of the third person on the way to his own home, which was not far away, it is competent to prove that dogs trained to track human beings took up the trail at the scene of the crime and followed it to or near the house of the third person. *Richardson v. State* (Ala.), 8-108.

Where, in a prosecution for burglary, a witness testifies that he owned two bloodhounds trained to trail human beings, that one of the dogs had had four years' training and the other some experience also, and that these dogs had trailed sixty or seventy persons in the last four years, the testimony of the witness in reference to the trailing of the defendant by these dogs is admissible. *Hargrove v. State* (Ala.), 10-1126.

Laying foundation for evidence. —

In order that evidence of the conduct of bloodhounds in trailing or following the tracks of one accused of crime may be competent, it is necessary that a preliminary foundation should be laid therefor, by showing by one or more witnesses having personal knowledge of the facts, that the particular dog used had been trained and tested in trailing human beings, and by experience had been found reliable in such cases, and that the dog so trained and tested was, in the instance involved, laid on the trail, whether it was visible or invisible, at a point where the circumstances tended to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him. *State v. Dickerson* (Ohio), 11-1181.

Testimony as to reliability of dog. —

One who has had experience in the use of a particular bloodhound in tracking human beings may testify that the dog is reliable, and when placed on a certain track will not leave it until he has reached its destination. *Parker v. State* (Tex.), 3-893.

In a criminal prosecution, where it is proposed to introduce evidence to show that dogs trained to track human beings were put on a trail at the scene of the crime and that after taking the trail they went thence to a point where the defendant is shown to have been after the commission of the crime, it is proper to permit a witness who is familiar with dogs and accustomed to handling them to testify as to their skill in the tracking of men, and as to the length of time after the making of tracks within which dogs will take up and follow a trail. *Richardson v. State* (Ala.), 8-108.

A witness in a criminal prosecution, who has testified as to putting dogs on a trail which tended to connect the defendant with the crime, cannot give his opinion as to the cause which induced the dogs to abandon the trail so that he had to call them back and put them on the track again. *Richardson v. State* (Ala.), 8-108.

Impeachment of evidence. — In a criminal prosecution, where bloodhound evidence has been admitted tending to connect the defendant with the commission of the crime, the defendant should have the fullest opportunity by cross-examination to inquire into the breeding and testing of the dogs, and into all the circumstances and details of the hunt, in order that he may lead the jury to believe, if he can, either that the dogs were unreliable or unskilled, or that they so acted on the trail as to deprive the evidence of incriminating value. *Richardson v. State* (Ala.), 8-108.

(11) Confessions, admissions and declarations.

(a) Admissibility in general.

Admissions by accused, see ABOETION.

Complaints by woman as part of *res gestæ* in prosecution for incest, see INCEST, 4 b.

Declaration of accused as corroboration of prosecutrix in rape case, see RAPE, 2 c (2).

Declarations of deceased in murder cases, see HOMICIDE, 6 a (3).

Dying declarations, see HOMICIDE; INCEST, 4 b.

Under Canada criminal code. — Admissibility in general of confessions or statements of the accused under the Canada criminal code. *Rex v. Martin* (Ont.), 4-912.

Under New York criminal code. — In the provision of the New York code of criminal procedure permitting the introduction in evidence of confessions "whether in the course of judicial proceedings or to a private person," the words "private person" mean any person not engaged in the conduct of a judicial proceeding, and a confession made to public officers having the defendant in custody under a warrant of arrest is admissible. *People v. Rogers* (N. Y.), 15-177.

Admissibility and effect of admissions. — In a criminal case, the prosecution may prove by the testimony of witnesses a conversation between the defendant and another person, and it may prove the statements against his interest made by the defendant as well as by the other person to the defendant. But it is for the jury to say from the entire conversation whether the statements made by the defendant were admissions against his interest. *Loudenback v. Territory* (Okla.), 14-988.

Proof of corpus delicti. — On a trial under an indictment for murder, when the proof of death is direct and positive, if the circumstances shown are such as to leave no room for doubt that the deceased was murdered, any extrajudicial confession by the prisoner if otherwise competent is admissible to establish his connection with the crime. *State v. Knapp* (Ohio), 1-819.

A confession by the defendant that he committed the abortion charged is not admissible until the *corpus delicti* has been proved by showing, by evidence other than the confession, the existence of all the elements of the offenses as defined by the statute. *State v. Wells* (Utah), 19-631.

Statements before grand jury. — Statements and declarations by the defendant in a criminal action in denial of guilt while a witness before a grand jury are not confessions within the rule requiring them first to be shown to have been made voluntarily before they are competent evidence against him, though the defendant's appearance before the grand jury was in obedience to a subpoena. *State v. Campbell* (Kan.), 9-1203.

Evidence before coroner. — Where persons held in custody on a charge of murder are taken before a coroner's jury summoned to hold an inquest on the body of the deceased, and without being informed that they are compelled to testify, are sworn and examined as witnesses, on the motion of the coroner or the jury in regard to the homicide

and their connection with it, confessions or inculpatory statements elicited on their examination are not admissible against them on a subsequent trial under an indictment charging them with the murder. *Adams v. State* (Ga.), 12-158.

Admissions at preliminary examination. — Admissions made at the preliminary examination of the defendant are not admissible on the trial of the defendant for the offense charged. *State v. Butler* (N. C.), 19-402.

Confession of other offenses. — On the trial of one indicted under the Ohio statute for carnally knowing and abusing a female person under sixteen years of age with her consent, confessions or admissions of the accused of acts of intercourse with the prosecutrix more than two years after the time of the alleged commission of the offense for which he is being tried, and after the prosecutrix had attained the age of sixteen years, are not competent to be given in evidence against him as tending to prove the crime charged in the indictment. *State v. Lawrence* (Ohio), 6-888.

Admissions not amounting to confession. — Voluntary statements of fact made by the defendant in a criminal action which do not tend to establish his guilt, but which are exculpatory in their nature, are competent evidence against him as admissions of a party. *State v. Campbell* (Kan.), 9-1203.

Substance of conversation. — In a criminal case, where it is shown that the defendant has confessed the commission of the crime charged, it is not error for the trial court to permit witnesses who were present at the time when the confession was made, but who do not recollect the exact words used at that time, to give the substance of the conversation which took place between the defendant and others present. *State v. Berberick* (Mont.), 16-1077.

Undenied accusations. — To admit in evidence, in a criminal prosecution, as an implied confession of guilt, undenied inculpatory statements uttered in the presence of the accused when he was under arrest, and when it appears that he did not, and did not intend to, commit himself on the subject, is reversible error. *Merriweather v. Com.* (Ky.), 4-1039.

Silence as preliminary examination. — A statement made by a witness on a preliminary examination tending to show that the defendant is guilty of the crime with which he is charged, does not call for a denial by the defendant within the rule as to admissions by silence. *Maloney v. State* (Ark.), 18-480.

Attempt to compromise. — Admissions made by a person accused of crime in the course of an attempt to compromise the criminal charge are admissible in evidence against him on the trial. The rule excluding evidence of offers to compromise a civil liability has no application to such admissions. *State v. Richmond* (Iowa), 16-457.

(b) Voluntary or induced.

(aa) In general.

Confession to superior officer in prosecution for theft of letter, see *POST OFFICE*.

Question for court. — Where the confession of the defendant in a criminal action is offered in evidence it is for the trial court to determine whether the confession was voluntarily made and is therefore admissible, and such determination will not be interfered with on appeal unless there is clear error. *State v. Rogoway* (Oregon), 2-431.

It is the duty of the court to determine whether or not an alleged confession by an accused person was voluntary or involuntary, and it is error to permit the introduction of the evidence upon that question before the jury. *Harrold v. Oklahoma* (U. S.), 17-868.

Confession obtained by persistent questioning. — Where it appears from the uncontradicted testimony that although the accused was questioned persistently by the officers who had him in custody, he was not threatened and no other compulsion was exercised over him in order to obtain a confession from him, it is not error to refuse to charge that the jury must be satisfied that the confession "has not been procured by inquisitorial compulsion or other improper means." *People v. Rogers* (N. Y.), 15-177.

Confession obtained by artifice or deception. — A voluntary confession, uninfluenced by threats or promises, is generally not rendered inadmissible by reason of the fact that it was obtained by artifice or deception. *Rex v. White* (Can.), 15-272.

Voluntary confessions made by a prisoner, in custody on the charge of assault with intent to kill, in reference to the key of the victim's house and in reference to the club which the prisoner said he had used in making the assault, and admissions of guilt made by the prisoner during conversations with his father and his codefendants, are not rendered inadmissible by reason of the fact that such confessions and admissions were the result of a false statement made by a police officer to the defendant that his codefendant had "done some talking" about the matter. *Rex v. White* (Can.), 15-272.

Duress exercised upon accomplice. — In a criminal prosecution it is no ground for excluding a confession which the trial court has found to have been made voluntarily by the defendant, that duress was used to extort confessions from the defendant's accomplices, where no effort is made to show that such duress was exercised in the presence or with the knowledge of the defendant, or that the accomplices were cognizant of any duress upon the defendant. *State v. Ruck* (Mo.), 5-976.

(bb) Confessions to police officers.

In general. — Statements made to a police officer by the accused when made freely and voluntarily and not through any inducement held out by the officer are admis-

sible in evidence against the accused. *Hammons v. State* (Ark.), 3-912.

In a criminal prosecution, statements made by the accused to police officers before being charged with any crime and not resulting from threats or inducements are admissible in evidence. *State v. Royce* (Wash.), 3-351.

Statements voluntarily made to officers by a defendant after her arrest and after a caution are admissible in evidence. *Com. v. Richmond* (Mass.), 20-1260.

Statements made by a person while in custody as to the circumstances attending the killing of an officer while the officer was attempting to make the arrest are admissible in evidence on the trial of an indictment for killing the officer as confessions, when the prisoner was, at the time, being kindly treated, was perfectly sound in mind, and no inducements were offered or threats made. *State v. Horner* (N. Car.), 4-841.

In a prosecution for the larceny of a horse and buggy, testimony by the sheriff and a witness to the effect that the defendant at the time of his arrest and after his confinement in jail made statements admitting that he took the rig into his possession and drove it away, is admissible where the evidence as to the circumstances existing at the time the statements were made discloses nothing in the nature of any promise that it would be for the benefit of the prisoner to make the statements or that the statements, if made at all, were made otherwise than voluntarily. *Stoddard v. State* (Wis.), 13-1211.

Statutory warning. — To render admissible in evidence statements made by an accused to an officer, while under arrest, not only must the statutory warning be given but the statements must be freely and voluntarily made. *Parker v. State* (Tex.), 3-893.

Confession in presence of third person. — It is within the discretion of a trial court to admit in evidence a confession made to an officer in the presence of a third person, where the evidence shows that the officer offered no reward or inducement and made no threat to procure the confession, and there is no evidence as to any act done by the third person wrongfully to induce or procure the making of the confession. *Richardson v. State* (Ala.), 8-108.

(cc) Preliminary proof as to admissibility.

Necessity. — Where a paper alleged to be a written confession by the defendant in a criminal prosecution is offered against him, and he objects to its admission and offers to prove at that stage of the trial that the paper was procured from him by such threats or promises or under such other circumstances as, if established, would render it inadmissible, it is error to admit the paper without first receiving and considering the evidence thus offered against its admissibility. *People v. Rogers* (N. Y.), 15-177.

But where, before a confession is admitted, evidence is introduced by the prosecution tending to show that the confession was made voluntarily, and although the defendant objects to the admissibility of such confession,

he fails to offer to prove that it was improperly obtained before the objection to the admissibility of the confession is passed upon, it cannot be said that he is deprived of his right to introduce evidence against the admissibility of such confession. *People v. Rogers* (N. Y.), 15-177.

Right of defendant to contradict preliminary proof. — On an objection by the defendant to evidence of a confession made by him, the state must introduce some evidence tending to show that the confession was voluntary, and before the court determines whether that fact is established *prima facie* by the evidence given, the defendant must be allowed an opportunity of cross-examining the witnesses who testify in regard thereto; but the defendant is not entitled as a matter of right to offer evidence to contradict the preliminary proof offered by the prosecution. *State v. Wells* (Utah), 19-631.

Duty of court. — The ultimate question of the voluntariness of a confession is for the jury, but before evidence of the confession is given to the jury over the defendant's objection, the court must determine that there is sufficient evidence to show *prima facie* that it was voluntary. *State v. Wells* (Utah), 19-631.

Sufficiency. — In a criminal prosecution where the trial court, after excluding the jury from the court room, hears evidence to ascertain whether a confession made by the defendant is admissible, the mere fact that the defendant testifies that he made his confession through fear and under duress is not, of itself, sufficient to overcome the *prima facie* case and the testimony of the officer to whom the confession was made that it was made voluntarily. *State v. Ruck* (Mo.), 5-976.

(c) Rebuttal or impeachment.

Right to rebut. — A confession in a criminal case, unless it is an admission by plea, is merely evidence which may be rebutted the same as any other evidence; and consequently in a prosecution for poisoning a horse, where there is evidence on behalf of the people that the defendant has confessed the commission of the crime, and has stated that he procured the poison from a certain mercantile establishment, but the making of the confession is denied by the defendant, it is error to exclude evidence, offered in his behalf, to prove that the establishment in question did not keep the poison mentioned in the alleged confession. *Jaynes v. People* (Colo.), 16-787.

Impeachment by proof of insanity. — In a criminal case, where it is shown that the defendant has confessed the commission of the crime charged, he has the right to show that at the time of making the confession he was of unsound mind, and the exclusion of evidence offered by him for that purpose constitutes reversible error. *State v. Berberick* (Mont.), 16-1077.

In such a case it is permissible for witnesses who have been acquainted with the

defendant for some time to testify whether, in their opinion, the defendant was weak-minded at the time when they knew him, that being a matter to be considered by the jury in determining what weight should be given to his confession, and the exclusion of evidence offered by the defendant upon that point constitutes error. *State v. Berberick* (Mont.), 16-1077.

In such a case it is not error for the trial court to permit an officer who has had the custody of the defendant for some months prior to the trial, to testify that, in his opinion, the defendant is sane. *State v. Berberick* (Mont.), 16-1077.

Proof of coercion or improper inducements. — In such a case, evidence as to the circumstances attending a confession made by the defendant, examined and held insufficient to show that such confession was procured by coercion or improper inducements. *State v. Berberick* (Mont.), 16-1077.

(d) Corroboration.

When unnecessary. — The rule that a confession by the defendant in a criminal case, unless made in open court, does not warrant a conviction, in the absence of other proof that the crime has been committed, does not apply to a confession made by the defendant on his preliminary examination before the examining magistrate. Such a confession is a judicial confession, or confession in open court, within the meaning of the law which holds such confessions alone to be sufficient to warrant a conviction. *Skaggs v. State* (Ark.), 16-622.

Sufficiency. — On an indictment for accepting a bribe while serving as a juror, the extra-judicial confessions of the defendant are sufficiently corroborated to warrant a conviction where the fair import of the confessions is that the bribe was given to the defendant for the purpose of having him render a verdict against the validity of the will which was being contested, and there is independent evidence tending to show that the defendant was a juror in the case, that the person alleged to have given the bribe was employed in behalf of the contestants of the will to look up witnesses and jurors, and to assist otherwise in the preparation of the case, and that the verdict was against the will and in favor of the contestants, though such independent evidence is wholly insufficient of itself to warrant a conviction. *Commonwealth v. Killion* (Mass.), 10-911.

Instructions. — On the trial of a criminal case, where the jury have been instructed that a verdict of guilty cannot properly be rendered upon the confession of the defendant unless corroborated by other evidence, a further instruction that they are to treat and consider any confession proven to have been made by the defendant precisely as other testimony, and to act upon it as the truth if they believe it to be true, does not present reversible error as authorizing a conviction upon the uncorroborated confession of the defendant. *Jaynes v. People* (Colo.), 16-787.

(e) Whole or part of confession.

Confession of two crimes. — Where two crimes are referred to in the same confession, the entire confession is admissible although the defendant is charged with having committed only one of the crimes, and evidence corroborative of the statements contained in the confession is admissible not only as to the commission of the crime for which the defendant is being tried, but as to the commission of the other crime, if such evidence tends in some degree to show that he committed the crime for which he is being tried. *People v. Rogers* (N. Y.), 15-177.

When part is admissible. — In a prosecution against a Chinaman for murder, the fact that a witness who testifies as to a confession made by the defendant did not understand everything which the defendant said to him does not render incompetent what he did understand, where the court warns the jury as to the caution to be exercised respecting evidence of this character. *State v. Lu Sing* (Mont.), 9-344.

(f) Of defendant against self and co-defendant.

Limitation as evidence. — Upon the trial of two persons for a crime, a statement or confession of one which tends to incriminate the other is properly admitted in evidence when the jury are cautioned that it is evidence only against the defendant who made it. *Rex v. Martin* (Ont.), 4-912.

Admissibility against codefendant. — The appellant and another person were arrested on a charge of burglary. The appellant's fellow prisoner thereupon made a voluntary statement to a police officer, confessing his guilt and implicating the appellant in that and other burglaries, and the statement was taken down in writing and signed by him. Subsequently the two prisoners were placed together at the police station, and after being duly cautioned they were charged with the burglary. A police officer then read over the above-mentioned statement to both prisoners, and the appellant denied the truth of the whole of it. At the trial the appellant's fellow prisoner pleaded guilty to the indictment, and the trial proceeded against the appellant. The prosecution tendered in evidence the statement which had been read over in the appellant's presence, when it was objected that such a statement could only be admissible as evidence against the appellant if there had been an admission by him of the truth of the whole or some part of it, and that, as he had denied its truth, it was not admissible. The statement was admitted, and the appellant was found guilty. It was held that, notwithstanding the appellant's denial of the truth of the allegations contained therein, the statement was admissible against him. *Rex v. Thompson* (Eng.), 18-272.

(g) Weight and sufficiency.

Question for jury. — In order for an extra-judicial confession to be admissible

against the party making it, it must have been freely and voluntarily made. When so made it should stand like any other declaration made by a party to a cause, leaving the jury to judge from all the circumstances, including the nature of the offense, how much if any weight shall be given to it. *Commonwealth v. Killion* (Mass.), 10-911.

Instruction. — An instruction is proper which tells the jury, in substance, that they are to treat the confession alleged to have been made by the defendant precisely as they would any other testimony in the case; that they are not bound to believe as true the statements contained therein, but may give to them such weight as they find proper in view of all the other facts and circumstances appearing on the trial; and that, in determining the weight to be given to the confession, they may take into consideration all the circumstances under which the same was made, including the age, mental condition, intelligence, lack of intelligence, character, disposition, and experience of the defendant, the fact that he was under arrest at the time when the confession is alleged to have been made, the statements, threats, or promises, if any, made to him at the time, and all the other attending circumstances. *State v. Berberick* (Mont.), 16-1077.

(h) Permitting written confession in jury room.

Written confession under oath. — It is not error for the court to permit the jury to have in their possession during their deliberations a written confession of the accused under oath in which he admits the crime charged against him and the commission of other crimes. *State v. Knapp* (Ohio), 1-819.

o. Comments by court.

Right to comment on evidence. — It is a settled rule of criminal law in this state that a trial judge may express to the jury his own views with respect to the value of the testimony and the inferences to be drawn from it. *State v. Bertchey* (N. J.), 18-931.

In a criminal prosecution wherein the defendant excepted to an alleged expression of opinion by the trial judge upon issues of fact, in contravention of the Maine statute, held that a careful examination of all of the exceptions relating to the comments of the trial judge upon the testimony and the conduct and appearance of witnesses, and the language of the instructions in the charge to the jury, fails to disclose any exceptionable violation of the statute. *State v. Lambert* (Me.), 15-1055.

Comment on facts. — In a criminal trial a remark by the court, in requiring the defense to make a preliminary statement of its case to the jury, that "the nature of the case is such that I think the jury ought to know how you intend to meet the state's case," is not such a comment upon the facts as, standing alone, will justify a reversal of a judgment of conviction. *State v. King* (Wash.), 16-322.

What constitutes comment on guilt of accused. — A trial judge does not indicate his views as to the defendant's guilt or as to any fact in issue, by stating, in reply to a question by a juror as to the necessity of certain questions on the cross-examination of the prosecuting witness, that the court cannot rule on testimony that is not objected to. *State v. Aker* (Wash.), 18-972.

Disparaging defense in ruling on instruction. — On a criminal trial, where there is some evidence in support of the defense of an alibi, it is reversible error for the trial court, in answer to a request by the defendant's counsel for a charge upon that subject, to indulge in remarks which may be interpreted as disparaging such defense, or which are based upon the assumption that the jury already knows the effect of the proof upon that point. *State v. King* (Wash.), 16-322.

Ruling on admissibility of evidence. — In a criminal prosecution, a casual remark by the trial judge, in ruling on the evidence offered by the defendant, that the evidence is admitted for "what it is worth," is not erroneous as an expression of opinion as to the weight of the evidence. *State v. Fuller* (Mont.), 9-648.

Commenting on nonproduction of documents by defendant. — It is reversible error for the judge in a criminal case to comment adversely on the failure of the defendant to produce documents in his possession, such remarks being in derogation of the defendant's right to furnish no evidence in aid of the prosecution. *Hibbard v. U. S.* (U. S.), 18-1040.

Manner of making comments as reversible on appeal. — Remarks harmless in themselves, made by the judge on the trial of a criminal case, are not assignable as error on the ground that the emphasis and manner with which they were made prejudiced the defendant with the jury. Judges are presumed to have poise and dignity, and fairness in both mind and manner. *State v. Driggers* (S. C.), 19-1166.

p. Arguments and conduct of counsel.

See HOMICIDE, 11.

Intemperate language of counsel, see ELECTIONS, 9.

Misconduct of prosecuting attorney, see RAPE, 2 g.

Discretion of court as to comments on evidence. — The latitude to be allowed to counsel in a criminal case in commenting on the evidence and the conduct of the defendant, and drawing inferences from the evidence, is a matter resting largely in the discretion of the trial court. *State v. Pirkey* (S. D.), 18-192.

Right of counsel to refresh recollection of evidence by reading from official notes. — In an argument to the jury, an attorney may refresh his recollection of the evidence by reading from the notes of the

official reporter. *State v. Perkins* (Iowa), 20-1217.

Making charge against defendant not warranted by evidence. — It is improper for the prosecuting attorney in his closing argument to charge inferentially that the defendant had caused certain of the state's witnesses to be posted as common drunkards, where there is no evidence that the defendant was responsible for such posting. *People v. Mix* (Mich.), 12-393.

Reference to evidence as undisputed. — In a criminal prosecution where certain evidence against the defendant is uncontradicted, a reference by the prosecuting attorney to the evidence as "undenied" and "undisputed" is not open to the objection that it is a comment on the defendant's failure to testify. *State v. Ruck* (Mo.), 5-976.

Manner of defendant in testifying. — In a prosecution for murder it is permissible for the state's attorney to comment on the manner of the defendant in testifying, and to remark as follows: "He laughed in a sneering way when I asked him what is the first thing he did when he came to town, and he said: 'I guess the first thing we did was to hunt up a saloon.'" *State v. Jeffries* (Mo.), 14-524.

Failure of accused to testify. — The rule that the attention of the court should be at once called to an improper argument addressed to the jury, and that the subject must be adequately covered in the charge, with such emphasis as will correct any erroneous effect, applies to unwarranted arguments by a district attorney respecting the failure of the accused to take the stand in her own behalf. *Com. v. Richmond* (Mass.), 20-1269.

In a homicide case, where the district attorney comments on the fact that every one, so far as known, save the defendant, who had been in such relation to the premises where the deceased was found as to have had an opportunity to commit the crime, has testified, but on the defendant's objection immediately disclaims intent to urge any inference from the defendant's failure to testify, and the court plainly instructs that the defendant's refusal to testify cannot create any presumption against her, and cannot prejudice her, her rights are amply protected. *Com. v. Richmond* (Mass.), 20-1269.

q. Instructions.

(1) In general.

Instructions as to criminal responsibility of insane persons, see INSANITY, 7 b.

Instructions in particular prosecutions, see ACCOMPLICES; ASSAULT AND BATTERY; BURGLARY, 4; CONSPIRACY, 1 g; FALSE PRETENSES AND CHEATS, 8; HOMICIDE, 3 d, 8; INCEST, 5; INTOXICATING LIQUORS, 6 h; LARCENY, 6 b; RAPE, 2 e; RECEIVING STOLEN PROPERTY, 4; ROBBERY, 2 c.

Written instructions. — Under the Washington statute requiring the judge to

charge the jury in writing when requested, but providing that whenever the stenographic report of a charge is taken it shall be considered a charge in writing within the meaning of the statute, the stenographer must be an official one or at least one under the direction and control of the court, it being insufficient if the charge is taken down by a private stenographer employed by one of the parties to report the case. *State v. Mayo* (Wash.), 7-881.

General affirmative charge in defendant's favor. — Where the evidence in a criminal case affords an inference of the defendant's guilt, a general affirmative charge in favor of the defendant is properly refused. *Hargrove v. State* (Ala.), 10-1126.

Date of commission of offense. — On a criminal trial, where the time of the commission of the offense is definitely fixed by the evidence on behalf of the state, and the defense is an *alibi*, it is reversible error for the trial court to instruct the jury that the exact date of the commission of the offense is immaterial providing it was committed within three years before the filing of the information. *State v. King* (Wash.), 16-322.

Use of word "crime" instead of "alleged crime." — An instruction which refers to "the crime," instead of employing the phrase "the alleged crime" or its equivalent, is not misleading as assuming that a crime has been committed. *State v. Vanella* (Mont.), 20-398.

Assuming guilt of defendant. — It is error for the court to assume the guilt of an accused from the evidence and so charge the jury. *Potts v. State* (Tex.), 2-827.

Hypothesis as to proof of facts. — Instead of charging that if the jury "believe the evidence," the better formula is to charge, where the evidence permits, that if the jury are "satisfied that the facts are as testified," or, in criminal cases, that they are so satisfied "beyond reasonable doubt." *State v. Starnes* (N. C.), 19-448.

Singling out facts. — In the trial of a criminal case, the defendant cannot insist that the court shall single out a certain class of facts or evidence for particular comment. *State v. Quigley* (R. I.), 3-920.

Incorrect statement of law applicable to theory of defense. — It is not error to refuse an instruction which is not a correct statement of the law applicable to the theory of the defense. *Stevens v. State* (Neb.), 19-121.

Refusal of instruction not warranted by evidence. — In a criminal prosecution it is not erroneous to refuse the defendant's request for instructions which are not warranted by the evidence. *State v. Bringgold* (Wash.), 5-716.

Instructions on any subject should not be given in the absence of evidence on which to base them. *State v. Campbell* (Mo.), 14-403.

Refusal of instruction couched in technical language. — A court is not bound to give and ought not to give an instruction even though it may state the law correctly, which is not couched in language

sufficiently untechnical to be comprehended by the average juror, for by so doing the jury is confused rather than instructed. *State v. Osborne* (Ore.), 20-627.

Use of latin words. — The use of the Latin words *per se* in an instruction in a criminal trial is not error, such words being of universal use in the English language, and being used in the particular instruction complained of in such a way that they might be discarded from the instruction without affecting its correctness. *Schwartz v. State* (Tex.), 11-620.

Instruction as to right of jury to determine law. — Under the Illinois statute making the jury judges of the law as well as of the facts in criminal cases, an instruction that if the jury can say upon their oaths that they know the law better than the court does, they have the right to do so, but that before assuming so solemn a responsibility they should be sure that they are not acting from caprice or prejudice, but from a deep and confident conviction that the court is wrong and that they are right, and that before saying this upon their oaths it is their duty to reflect whether, from their habits of thought, their study and experience, they are better qualified to judge of the law than the court, is correct. *People v. Campbell* (Ill.), 14-186.

Refusal of obscure and involved instructions. — Obscure and involved requested instructions are properly refused, especially where any matters of importance contained therein are covered by other instructions. *State v. Megorden* (Ore.), 14-130.

Cautionary instructions. — No error is committed in refusing, in a prosecution for murder, cautionary instructions as to the duty of the jury to keep their judgment in suspense until every fact is carefully examined, and not to consider the feelings or desires of the community regarding the case in arriving at a verdict, where there is nothing in the record to show want of care on the part of the jury or that the community had any feeling or desire for any particular verdict. *State v. Megorden* (Ore.), 14-130.

Weight of evidence of particular persons. — An instruction in a criminal case in which police officers have testified for the people, that the fact that a witness is a policeman or detective or engaged in any other lawful business does not render such witness incompetent to testify or furnish ground for arbitrarily rejecting such testimony is improper as calling special attention to the testimony of a particular witness, but is not necessarily prejudicial so as to require a reversal. *People v. Campbell* (Ill.), 14-186.

Instruction as to the credit to be given to the testimony of defendants in a criminal case, considered and approved. *People v. Campbell* (Ill.), 14-186.

Effect of failure of accused to deny particular testimony. — If the defendant in a criminal case is a witness in his own behalf, it is error to instruct the jury that

"if the defendant by his own testimony has not denied in any way any material fact proved in the case within his personal knowledge, such testimony or material fact proved, if not denied by the defendant, is admitted by the defendant to be true." *Russell v. State* (Neb.), 15-222.

Incorporation of sayings of law writers. — While not always calling for a reversal of a judgment, the incorporation into instructions of sayings of law writers, not containing statements of legal principles, is not to be approved. *Hamblin v. State* (Neb.), 16-569.

Instruction partly inapplicable. — Where the first sentence of a requested instruction is inapplicable to the facts of the case, the refusal of the entire instruction is proper. *State v. Megorden* (Ore.), 14-130.

Defendant's flight. — In a criminal prosecution it is not erroneous to instruct the jury that the fact of the defendant's flight after the commission of the alleged offense is a circumstance *prima facie* indicative of guilt. *State v. Matheson* (Iowa), 8-430.

An instruction upon the question of the flight of the defendant to avoid arrest for the crime with which he is charged should not be given unless warranted by the evidence. *State v. Brock* (Mo.), 2-768.

Construction of instructions with reference to evidence. — Instructions must be construed with reference to the evidence introduced. *State v. Wilhite* (Iowa), 11-180.

Harmless error in defining degrees of crime. — Where one is on trial for a crime which is divided into degrees, and the court commits error in instructing the jury upon the law applicable to the higher degree of such crime, but properly instructs the jury as to the lower degree, and the jury return a verdict of guilty of the lower degree, the defendant cannot complain. One can complain only of errors which have affected his rights. *Louderback v. Territory* (Okla.), 14-988.

(2) Reasonable doubt.

Proper instructions as to reasonable doubt. — An instruction as to reasonable doubt, which, after defining such doubt as an actual doubt which a juror is conscious of after reviewing in his mind the entire case, giving consideration to all the testimony, and one which he believes would cause a reasonable man in any matter of like importance to hesitate to act, denies the notion that any mere possibility is sufficient ground for such a doubt, and adds that, in the performance of jury service, jurors should decide controversies as they would any important question in their own affairs, is good as against a general exception. *Holt v. U. S.* (U. S.), 20-1138.

An instruction on the question of reasonable doubt in a criminal prosecution which states that "a doubt to justify an acquittal must be a substantial doubt founded on the evidence" is not bad as requiring "the doubt to be consistent with the evidence." *State v. Temple* (Mo.), 5-954.

An instruction which tells the jury clearly that they cannot convict unless they believe beyond a reasonable doubt that the act charged was committed by the defendant is sufficient, though the subject of reasonable doubt is not mentioned in connection with some of the findings necessary to a conviction. *State v. Hetland* (Iowa), 18-899.

The question of "moral certainty" of the guilt of an accused person is fully covered by the following instruction: "The law does not require demonstration, however; that is, it does not require such a degree of proof as, excluding the possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind. This is called satisfactory evidence, and it is the only evidence which will justify a verdict of guilty." *State v. Megorden* (Ore.), 14-130.

It is not error to include in an instruction defining the term "reasonable doubt" the statement that it is a doubt for which there is some good reason arising out of the evidence or lack of evidence—a doubt for which the jury are able to find a reason in the evidence or lack of evidence. *State v. Wolley* (Kan.), 12-412.

In a prosecution for murder an instruction that "if it should appear to you from all the evidence in this case beyond a reasonable doubt that the defendant has committed a crime which is included in the crime charged in the indictment, and there should still remain in your minds a reasonable doubt as to which degree he is guilty of, then, in that case, the defendant is entitled to the reasonable doubt as to the higher crime or to the highest degree, and you can only return a verdict of guilty of the degree of the crime so included in the indictment as to which there is no reasonable doubt," fully covers the question of reasonable doubt of guilt of murder in the first degree. *State v. Megorden* (Ore.), 14-130.

An instruction in a criminal case on the question of reasonable doubt, that the doubt must be real, not chimerical or fanciful, and "not a doubt which is sought for, but one which arises naturally from the case, and which is not a doubt produced by undue sensibilities on the part of the jurors as to the consequences of their verdict," is not erroneous as cutting off the right of the jury to search the evidence to determine whether there is a reasonable doubt of guilt, where the jury is also told that a reasonable doubt may arise from the evidence actually offered or from a lack of evidence, and that they must acquit the defendant if there is any reasonable hypothesis consistent with his innocence. *People v. Buettner* (Ill.), 13-235.

An instruction on the subject of reasonable doubt considered and held to be not erroneous, though perhaps less intelligible than the phrase defined. *Edwards v. State* (Neb.), 5-312.

Improper instructions as to reasonable doubt. — An instruction in a criminal case is improper which is calculated to

lead a juror to infer that the mere entertaining of a reasonable doubt as to the guilt of the accused after a careful weighing of the evidence and full consultation, amounts to a limitation upon the right of the juror to join in a verdict of guilty; for fuller deliberation and consultation might clear away his doubts and render it proper for him to concur in the conclusion of his associates. *Knapp v. State* (Ind.), 11-604.

An instruction in a criminal prosecution that "whilst it is the duty of the state to establish, beyond the purview of all reasonable doubt, the guilt of the defendant of the crime charged in the indictment it is not incumbent on the defendant to prove his innocence, and though the testimony on behalf of the defendant falls short of proving his innocence, and although you may disbelieve all the evidence offered in behalf of the defendant, yet if at the close of the case the evidence offered leaves a reasonable doubt in the minds of the jury, they are bound to acquit the defendant even if they believe he himself, or any or all of the witnesses introduced in his behalf, have sworn falsely," is erroneous both as a comment on the evidence and as partaking of the nature of an argument and would constitute reversible error except for a request by the defendant for a similar instruction. *State v. Campbell* (Mo.), 14-403.

In a prosecution for murder, an instruction that "if, after a consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror, so entertaining such doubt, not to vote for a verdict of guilty nor to be influenced to so vote, for the single reason that a majority of the jury should be in favor of a verdict of guilty," may be refused in the discretion of the trial judge where the jury have been given general instructions covering their duties, and if the requested instruction is given it should be modified so as to point out to the individual juror his duty to consult with his fellows and consider their views to the end that each may aid in arriving at the truth. *State v. Hennessy* (Nev.), 13-1122.

Refusal of proper instruction. — On the trial of an indictment for assault with intent to murder, it is reversible error for the trial court to refuse to instruct the jury, at the defendant's request, that if, after considering all the evidence in the case, they have a reasonable doubt of the guilt of the defendant, they must give the benefit of the doubt to the defendant and return a verdict of not guilty; nor is such error cured by the giving of an instruction, that if any member of the jury has a reasonable doubt of the guilt of the defendant, the jury should not return a verdict of guilty. *Letcher v. State* (Ala.), 17-716.

In a prosecution for homicide, the refusal of a requested instruction specially directed to the proposition that each juror is entitled to exercise his own individual judgment, and that before a conviction can be had the evi-

dence must convince each individual juror of the defendant's guilt beyond a reasonable doubt, is error which is not cured by an instruction directed to the proposition that the defendant must be acquitted if the entire jury entertains a reasonable doubt as to his guilt. *Bell v. State* (Miss.), 11-431.

Curing error in incorrect charge. — In a criminal action an instruction that the reasonable doubt that would entitle the defendant to an acquittal "must be such a doubt as the juror is able to give a reason for" is not cause for reversal, especially where qualified by a correct instruction on reasonable doubt. *State v. Grant* (S. Dak.), 11-1017.

(3) Presumption of innocence.

Duty to give instruction. — The defendant in a criminal prosecution is entitled in every instance to an instruction on the presumption of his innocence, and while the court need not give such an instruction in the language of the request therefor, it should give it in such form as will correctly inform the jury as to the law pertaining to the presumption. *State v. Mayo* (Wash.), 7-881.

Proper instructions as to presumption of innocence. — The jury is correctly instructed as to the presumption of innocence where the court states that a criminal prosecution begins with the presumption that the defendant, although accused, is innocent, and that to overcome this legal presumption the evidence must be clear and convincing, and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty. *Holt v. U. S.* (U. S.), 20-1138.

An instruction in which the jury are told that the presumption of innocence continues until the material allegations of the information are established by the evidence "to the exclusion of all reasonable doubt," is entirely accurate. *Edwards v. State* (Neb.), 5-312.

Where a court after stating the rule of law as to the presumption of innocence adds that in doubtful cases such presumption is sufficient to turn the scale in favor of the prisoner, and also states that the prisoner is entitled to an acquittal unless the jury find him to be guilty beyond a reasonable doubt, such an instruction is neither erroneous nor misleading. *State v. Knapp* (Ohio), 1-819.

No error is committed in refusing an instruction requested by an accused that "the law presumes the defendant to be innocent of any offense, and the presumption follows him in the trial of this case until the contrary is shown beyond a reasonable doubt," where the following instruction is given: "The defendant in any case is presumed to be innocent until the contrary is proven. In case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to be acquitted." *State v. Megorden* (Ore.), 14-130.

(4) Failure of defendant to testify.

Right of defendant to complain of giving instruction. — Where the defend-

ant in a criminal prosecution fails to testify, it is entirely proper for the trial court to instruct the jury that such failure cannot be used to the defendant's prejudice, and the defendant cannot complain of giving such an instruction. *State v. Fuller* (Mont.), 9-648.

In the Ohio statute which makes an accused person a competent witness on the trial of an indictment at his own request, but not otherwise, the provision "but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, or any comment be made upon, such neglect or refusal," is intended to give full effect to his immunity from all obligations to furnish evidence against himself because of his silence, and the reference thereto which is forbidden, is such as would suggest or encourage an inference of that character. *Tate v. State* (Ohio), 10-949.

It is not error for the trial court to read a statute to the jury, providing that the fact that the defendant did not become a witness in his own behalf shall not be considered by the court and jury in arriving at the verdict. *State v. Wisniewski* (N. Dak.), 3-907.

Refusal of proper instruction. — In a criminal prosecution it is erroneous for the trial court to refuse the defendant's request for an instruction that though there is a statute permitting him to testify in his own behalf, the statute expressly provides that his failure to testify shall not create any presumption against him. *People v. Provost* (Mich.), 8-277.

Harmless error in giving instruction. — Upon the trial of an indictment an instruction to the jury that the failure of the accused to testify does not relieve the state from the obligation to produce evidence which will establish guilt beyond a reasonable doubt is not an error for which a judgment following a verdict of guilty should be reversed. *Tate v. State* (Ohio), 10-949.

(5) Motive.

Correcting erroneous request to instruct. — On a request to charge in a criminal case, where the evidence fails to show any motive to commit the crime on the part of the accused, that this is a circumstance "in favor of his innocence," the court may strike out the words quoted and insert the words "which you should consider." *State v. Vanella* (Mont.), 20-398.

(6) Consideration of character evidence.

Correct instruction. — The jury in a criminal case are not precluded from considering evidence of the defendant's character on the issue of guilt or innocence by an instruction that if they are satisfied with the defendant's guilt, evidence of good character is of no importance, where the court, in reply to an exception to the instruction, says: "In that connection, I told them [the jury] that they were to consider the evidence of good character in arriving at a conclusion as to whether he was guilty or not." *People v. Gilbert* (N. Y.), 20-769.

(7) Confessions.

Confessions as bearing on sanity. — A statement by the court in its charge to the jury that sane men who are innocent as a rule do not make confessions of crime, the defense of insanity and confessions by persons of sound and unsound mind being the subject of the instructions to the jury, is not prejudicial to the defendant. *State v. Knapp* (Ohio), 1-819.

Confession relating to other crimes. — where a prisoner has made a written confession admitting the crime charged against him and other crimes, and the whole of the confession is offered by the state and objected to by the defendant, it is proper to allow the whole confession to go to the jury when the court instructs them at the time that they should disregard any portion thereof which does not relate to the crime charged and that they should not permit the statements thereof to prejudice them against the defendant. *State v. Knapp* (Ohio), 1-819.

Where making of confession is not proved. — In a criminal prosecution it is reversible error to instruct the jury as to their right to convict the defendant upon his confession, where there is absolutely no evidence even tending to prove that he has ever made a confession. *State v. Smith* (Iowa), 6-1023.

(8) Matters already covered by instructions.

Proper to refuse repetition. — In a criminal case, it is proper to refuse requested instructions, where they are covered by the charge to the extent that they are sound in law and necessary to the decision of the case. *Com. v. Richmond* (Mass.), 20-1260.

The trial court need not give a requested instruction which it has already given in its charge. *Holt v. U. S.* (U. S.), 20-1138.

It is not error on the part of the court to refuse an instruction tendered by the defendant in a criminal prosecution, when the substance of everything in the proposed instruction which the defendant is entitled to have submitted to the jury is given by the court in an instruction upon its own motion. *Evers v. State* (Neb.), 19-96.

It is not error to refuse an instruction asked for by the accused, if another instruction embracing the same points of law, free from objections and not in any manner prejudicial to the accused, has been given on behalf of the state. It is not necessary that the same instruction should be twice given. *State v. Medley* (W. Va.), 18-761.

Requests for instructions as to the presumption of innocence and the doctrine of reasonable doubt are properly refused when covered by instructions already given. *Com. v. Sinclair* (Mass.), 11-217.

It is not error to refuse a requested instruction, embodying a correct statement of law, if the court gives an instruction covering the point and fundamentally correct though unhappily phrased. *Knapp v. State* (Ind.), 11-604.

Requested instructions already included in

the charge of the court so far as they are proper, need not be given. *Elias v. Territory* (Ariz.), 11-1153.

Special requests for instructions which are covered by instructions already given are properly refused. *Tones v. State* (Tex.), 13-455.

The refusal to give requested instructions covered by the general charge is not error. *State v. Megorden* (Ore.), 14-130.

Where the court's instructions correctly and fully cover every phase of the case to which the testimony is applicable, it is not error to refuse requested instructions. *State v. Campbell* (Mo.), 14-403.

The refusal to give instructions requested does not, even though they state the law correctly, constitute reversible error if they are substantially covered by the instructions given. *State v. Jackson* (S. Dak.), 16-87.

It is not error for the court to refuse an instruction which is substantially embodied in those given. *Jaynes v. People* (Colo.), 16-787.

In a criminal prosecution it is not erroneous to refuse to give an instruction every essential idea of which is embraced in the instruction given. *State v. Wilson* (Wash.), 7-418.

It is not erroneous to refuse an instruction which, though abstractedly correct as far as it goes, is incomplete in its statement of the law, especially where the jury have already been fully and properly instructed on the point. *Peterson v. Seattle* (Wash.), 5-735.

Repetition of instructions as error. — The giving of lengthy and repetitious instructions is not ground for reversal, but the practice of giving such instructions is disapproved. *People v. Buettner* (Ill.), 13-235.

r. Verdict.

(1) General verdict.

When proper to direct. — In a criminal prosecution, where it is sought to impose the increased punishment provided by statute for persons formerly convicted of crime, if proper proof of former convictions is made, the court should instruct the jury to render a general verdict as to the instant offense and a special verdict as to the former convictions; but if proof as to former convictions of the instant defendant fails for want of identification, the court should merely instruct the jury to render a general verdict as to the offense named in the indictment. *State v. Smith* (Iowa), 6-1023.

Where indictment is defective in part. — Where an indictment contains several counts, some of which only are defective, a conviction based on a general verdict will not be disturbed. *Manning v. State* (Tex.), 3-867.

(2) Special verdict.

Special verdict as acquittal, see also RIOR.

When equivalent to acquittal. — Nothing can be added to a special verdict by inference, and when it omits to set forth any

fact essential to constitute the crime charged, it amounts to an acquittal. *State v. Stephanus* (Ore.), 17-1146.

Duty of court to submit form. — The Wisconsin statute providing that on the trial of a special issue of insanity interposed by the defendant charged with a crime, if the jury shall find the defendant insane they shall also find him guilty, does not prescribe the form of verdict, and a refusal by the court to submit a form of verdict on the question of insanity held not error in view of the instructions given the jury. *Steward v. State* (Wis.), 4-389.

(3) Direction of verdict.

Verdict of not guilty. — In a criminal prosecution, the trial court is justified in granting the defendant's request for a directed verdict of not guilty, where there is not sufficient evidence of guilt to go to the jury. *Glover v. United States* (U. S.), 8-1184.

Verdict of guilty. — Where the defendant in any criminal prosecution pleads not guilty, the trial court, no matter how conclusive the evidence may be, cannot instruct the jury to return a verdict of guilty, as the defendant cannot be deprived of his absolute constitutional right to have the question of his guilt or innocence determined by the jury without coercion by the court. *State v. Koch* (Mont.), 8-804.

(4) Conviction of lesser degree of offense.

Conviction of assault with dangerous weapon under indictment for assault with intent to kill, see ASSAULT AND BATTERY, 1 l.

When proper. — The New York statute (Pen. Law, § 610) providing that on the trial of an indictment, the prisoner may be convicted of a lesser degree of the crime charged, applies only where the facts will justify a conviction for the lower degree. *People v. Schleiman* (N. Y.), 18-588.

Lesser offense barred by statute of limitations. — Where on a prosecution for a felony the accused is found guilty of a lesser offense, included in the felony and constituting a part thereof, the conviction cannot stand if such lesser offense is barred by the statute of limitations, even though the felony is not barred. *Letcher v. State* (Ala.), 17-716.

Conviction of larceny under indictment for robbery and larceny. — A conviction under an indictment for robbery and larceny from the person is not justified by a sealed verdict finding the defendant guilty of larceny only, such verdict being a nullity. *Koch v. State* (Wis.), 5-389.

(5) Presence of accused at rendition.

Waiver of right. — Where, in a prosecution for larceny, the jury retire to deliberate on their verdict at nine o'clock in the forenoon, and at about 4.30 o'clock in the afternoon of the same day announce to the

judge that they have agreed on a verdict, and the judge thereupon orders the courthouse bell to be rung, according to custom, to notify counsel and the accused of the agreement, and directs deputies to find and notify them to appear in court, the accused, who is out on bail and has gone to a place about two miles distant so that he cannot be found, waives the right to be present at the rendition of the verdict, which the court receives in his absence, and over the objection of his attorney, about half an hour after the agreement. *Stoddard v. State* (Wis.), 13-1211.

(6) Coercing verdict.

What constitutes. — The verdict must be free, and the presiding judge must not attempt to coerce the jury to agree on a particular verdict or on any verdict. Urging a jury to an agreement contrary to the individual opinion and judgment of one juror may be coercion. *People v. Faber* (N. Y.), 20-879.

Improper caution to jury. — While each juror must discuss and consider the opinions of others in reaching a verdict, he must decide the case on his own opinion of the evidence and on his own judgment, and a charge that a juror must join with his co-jurors and make, in some respects, their opinion his own, is reversible error. *People v. Faber* (N. Y.), 20-879.

Proper caution to jury. — The court may urge on the attention of the jury the importance of an agreement, and the jurors may be requested not to take a position that is beyond further consideration, reasoning, and argument, and may be properly warned against stubbornness, as it is the duty of jurors to keep their minds open to every reasonable argument that may be presented by their cojurors, so that they may reach a verdict answering the consciences of the individual jurors. *People v. Faber* (N. Y.), 20-879.

(7) Impeachment of verdict.

By individual juror. — A verdict cannot be impeached by the affidavit of a juror as to any matter inhering in the verdict, such as the effect of a colloquy between the court and a juror, or threats by the other jurors against the affiant if he persisted in voting for acquittal. *State v. Aker* (Wash.), 18-972.

Affidavits of jurors may not be received for the purpose of impeaching a verdict rendered by them, where the facts stated by the affidavits are such as inhere in the verdict, such as that the jury misunderstood or did not rightfully comprehend the instructions of the court. *Hamblin v. State* (Neb.), 16-569.

Verdict arrived at by chance. — A verdict in a criminal case, assessing the punishment of the defendant at a certain number of years' imprisonment, will not be set aside upon proof that each member of the jury wrote down the number of years which he thought proper, and that the several numbers thus written down were added up and the sum divided by twelve, when there is no proof that the jurors agreed beforehand to

be bound by the result thus obtained, and when, in fact, the number of years finally determined upon was slightly different from such result, the jury having taken several votes after going through the process of addition and division. In order to vitiate a verdict determined by lot, the proof must show that the jury, before drawing lots, agreed to be bound by the result. *Cravens v. State* (Tex.), 16-907.

(8) Sufficiency and validity of verdict.

See LARCENY, 6 c; RAPE, 2 f.

Form of verdict on finding of insanity of defendant, see INSANITY, 7 f.

Form in general. — In a criminal prosecution the trial court should not submit to the jury a form of verdict of guilty without prefacing the form with a direction to use it if they find the defendant guilty; but the submission of a form without such direction is not open to the objection that it is calculated to mislead the jury into the belief that it is a direction to find the defendant guilty, where the court gives proper instructions as to the evidence necessary to establish the offense and as to reasonable doubt and the presumption of innocence, and, at the request of the defendant, submits a form of verdict with the direction that the jury shall use it if they find the defendant not guilty. *State v. Davis* (Mo.), 5-1000.

Written verdict. — A written verdict may be received in a capital case. *Brewer v. State* (Fla.), 12-79.

Presumption in favor of verdict. — While verdicts in criminal cases should be certain, and impart a definite meaning, free from ambiguity, yet any words that convey, beyond a reasonable doubt, the meaning and intention of the jury are sufficient; and all fair intendments will be made to sustain them. If the intention of the jury is thereon clearly manifested, had spelling or faulty grammar should not vitiate them. *Morris v. State* (Fla.), 14-285.

Leaving age of defendant blank. — In a criminal prosecution it is not erroneous to instruct the jury that if they cannot determine the defendant's age from his appearance or from other evidence, it will not harm the verdict to leave the age blank. *Beuchert v. State* (Ind.), 6-914.

Verdict rendered after jury sent back subsequent to polling jury. — Where, upon the polling of the jury in a criminal prosecution, one of the jurors dissents from the verdict of guilty announced by the foreman, the jury may be sent back for further deliberation, and a subsequent unanimous verdict of guilty will be valid. *Rex v. Burdell* (Ont.), 6-454.

Amendment of sealed verdict. — In a criminal prosecution it is erroneous for the trial court to instruct or permit the jury to amend orally a sealed verdict which they have rendered, and which is a nullity and is insufficient to support a conviction, where it appears that the jurors had dispersed between the time of the finding and sealing of

the verdict and the time of its rendition in open court. *Koch v. State* (Wis.), 5-389.

(9) Reception of verdict.

By clerk in absence of judge. — As a judge is an essential constituent of a court, there can be no court in the absence of a judge or judges. Consequently a verdict in a criminal case which is received by the clerk in the judge's absence is not returned to the court as required by the South Dakota statutes. *State v. Jackson* (S. Dak.), 16-87.

Authority to receive a verdict, which is a judicial act, cannot be delegated by the judge to the clerk of the court, and a verdict received by the clerk in the judge's absence is void even though authority to receive it has been delegated pursuant to a stipulation of counsel. *State v. Jackson* (S. Dak.), 16-87.

7. SENTENCE AND PUNISHMENT.

a. Validity and construction of statutes.

(1) Validity.

Habitual criminal statute. — The habitual criminal statute of Washington (Laws 1903, p. 125) providing for increased punishment of prior convictions, is constitutional. It is not *ex post facto*, it does not deny the right of trial by jury, nor does it put the offender twice in jeopardy. *State v. Le Pitre* (Wash.), 18-922.

Hard labor for violation of municipal ordinance. — To punish an offender against the peace and good order of a municipality by confining him at hard labor under municipal control is not obnoxious to the constitutional inhibition against "involuntary servitude save as a punishment for crime after legal conviction thereof." *Pearson v. Wimbish* (Ga.), 4-501.

Confinement with chain gang of county for violation of municipal ordinance. — A provision in a municipal charter authorizing punishment for offenses against the ordinances of the city by the confinement of the offender in the county chain gang is unconstitutional, and a sentence of one charged with an infraction of a municipal ordinance to confinement for three months in the county chain gang along with violators of the law of the state, upon conviction by the recorder alone and without a trial by jury, is in violation of the constitution which declares that no person shall be deprived of life, liberty, or property except by due process of law. *Pearson v. Wimbish* (Ga.), 4-501.

Indeterminate sentences. — The statute providing for the imposition of indeterminate sentences on persons convicted of certain felonies and authorizing their release is constitutional. *State v. Stephenson* (Kan.), 2-841.

Special punishment for delinquent children. — The Pennsylvania statute defining the power of courts in reference to delinquent children is not unconstitutional as providing for different punishments for the same offense by a classification of individuals. *Commonwealth v. Fisher* (Pa.), 5-92.

Different punishment for different persons for same offense. — The California statute providing for the incorporation of an association for lending money on personal property, and regulating the rate of interest to be charged for loans on personal property, contravenes the provision of the state constitution requiring all laws of a general nature to have a uniform operation, in that it permits the imposition of different degrees of punishment for violations committed by the officers or employees of the corporations authorized by the statute and for similar violations committed by other persons or corporations. *Ex parte Sohneke* (Cal.), 7-475.

Confinement on bread and water diet. — A statute providing that a defendant, upon conviction of abandonment and failure to support his wife, shall be punished by not exceeding one year's imprisonment in the state prison, or in the county jail not more than six months nor less than fifteen days, ten days of which imprisonment in the county jail may, in the discretion of the court, be upon a diet of bread and water only, is not, as regards the bread-and-water clause, invalid as prescribing a cruel and unusual punishment; and in any event a defendant sentenced to state prison cannot claim that the statute is void because of the alternative punishment. *Spencer v. State* (Wis.), 13-969.

Commutation for good behavior. — A statute conferring upon commissioners of a workhouse authority to deduct arbitrarily, for good conduct, a portion of the time for which any person has been sentenced to imprisonment in such a workhouse, or a portion of the fine imposed, is unconstitutional and void as a delegation of legislative authority. *Fite v. State* (Tenn.), 4-1108.

Cruel and unusual punishment. — The prohibition against cruel and unusual punishment in the bill of rights of the Philippine Islands is violated by a statute (Pen. Code, § 56) which provides that a public official who falsifies a public and official document shall, though no fraud is intended or committed, be imprisoned not less than twelve nor more than twenty years at "hard and painful labor;" that he shall always carry a chain at the ankle hanging from the wrist; that he shall receive no assistance from without the prison; that he shall be perpetually disfranchised and deprived of the rights of parental authority, guardianship, participation in the family council, marital authority, etc.; and that he shall be subject to police surveillance for life. *Weems v. United States* (U. S.), 19-705.

Parole of prisoners. — The Illinois Parole Act is not an encroachment on the executive powers of the governor by reason of the provision that the state board of pardons may make an order for the discharge of the prisoner to take effect on the approval of the governor. This merely gives the board power to make a recommendation to the governor. *People v. Joyce* (Ill.), 20-472.

The Illinois Parole Act does not authorize

the board of pardons to change or alter a sentence of imprisonment, and therefore does not confer on it judicial power. *People v. Joyce* (Ill.), 20-472.

Change of penalty after conviction as *ex post facto*. — A statute changing the punishment for murder held to be not *ex post facto* and therefore unconstitutional when applied to a person convicted before its enactment. *Rooney v. North Dakota* (U. S.), 3-76.

Removal of scale of credits after commission of crime as *ex post facto*. — Where a statute in force at the time the crime was committed provided as regards the punishment for a scale of credits to be given for good behavior, a subsequent act abolishing the right to such credits and providing for an indeterminate sentence is *ex post facto* as to the person accused of such crime, and he cannot be sentenced thereunder. *State v. Tyree* (Kan.), 3-1020.

(2) Construction.

Word "penalty" as including "imprisonment." — The word "penalties," as used in the Ontario revised statutes, providing that notwithstanding the existence of a local option by-law the illegal sale of intoxicating liquor shall be subject to the penalties and procedure provided by the statute, is broad enough to cover punishment by imprisonment. *Rex v. Leach* (Ont.), 14-580.

Repeal of statutes by implication. — The Florida statute authorizing the punishment by imprisonment or fine of persons who sell intoxicating liquors in local option districts is not affected by the statute providing that "whenever punishment is prescribed to be fine or imprisonment in the alternative, the court may in its discretion proceed to punish by both fine and such imprisonment," because the former statute, which is inconsistent with the latter, was adopted subsequent to the latter, and also because the provision of the former statute repealing all laws and parts of laws inconsistent with it indicates a purpose on the part of the legislature to make the statute independent of repugnant laws. *Tanner v. Wiggins* (Fla.), 14-718.

b. Sentence.

(1) Power to impose.

Under statute prescribing no punishment. — The Massachusetts statute prohibiting the use of the state arms or the great seal for advertising purposes creates a crime though it does not provide for the punishment, and in such a case the court is authorized by another statute to impose such a sentence according to the nature of the crime as conforms to the common usage and practice in the state. *Commonwealth v. R. I. Sherman Mfg. Co.* (Mass.), 4-268.

(2) Time of imposition.

After suspension of judgment and end of term. — It is not error to pass sentence upon a defendant convicted of an offense

after judgment has been suspended, and a term of the court has intervened between the making of the order of suspension and the term at which the judgment was rendered. *Clampitt v. United States* (Ind. Ter.), 10-1087.

Under Montana statute. — The Montana statute providing that the time appointed by the trial court for pronouncing judgment after a conviction for felony "must be at least two days after the verdict, if the court intend to remain in session so long, but if not, then at as remote a time as can be reasonably allowed," means that the defendant is entitled to two days after the verdict is returned before judgment is pronounced, provided the term of court lasts so long, but that if the term is not to continue for two days after the rendition of verdict, the time for pronouncing judgment shall be postponed to a date as remote as can reasonably be fixed within the current term of the court. *State v. Lu Sing* (Mont.), 9-344.

Power of court after imposition and end of term. — As a general rule, after the term at which a trial court has legally imposed a sentence has passed, the power of the trial court over such sentence is, except for the purpose of its enforcement, at an end, the exclusive control of such a sentence being vested in other officials. *Tanner v. Wiggins* (Fla.), 14-718.

Modification of sentence during term. — During the same term of court at which the sentence is imposed, before the defendant had begun serving such sentence, the trial judge has the power to modify such sentence. *Tillman v. State* (Fla.), 19-91.

Opening judgment and inserting additional penalty after service of sentence. — A court has no jurisdiction to open the judgment record in a criminal case after the sentence has been served or discharged, and insert an additional penalty alleged to have been omitted from the records by oversight of the clerk. *Smith v. District Court* (Iowa), 11-296.

(3) Duty to inform defendant of verdict and permit him to be heard.

At common law and under New York statute. — At common law, and under the New York statute (Code Crim. Pro., § 480), an accused, convicted of a capital offense, must be asked whether he has any legal cause to show why judgment should not be pronounced, before the sentence is imposed. *People v. Faber* (N. Y.), 20-879.

Nebraska statute. — It is the duty of the court before passing sentence to inform the defendant of the verdict against him, as well as to ask him if he has anything to say why judgment should not be pronounced against him, as required by the Nebraska statute (Crim. Code, § 495); and if the court passes sentence without informing the defendant of the verdict, the supreme court on appeal will not disturb the conviction, but will remand the cause for sentence in accordance with the statute. *Evers v. State* (Neb.), 19-96.

(4) Presence of defendant in court.

In a criminal prosecution a judgment of imprisonment cannot be rendered in the absence of the defendant. *State v. Dolan* (W. Va.), 6-450.

(5) Record of sentence.

Supplying omission in judgment.

Where judgment as entered in a criminal cause fails to specify the offense for which the sentence is imposed, the deficiency may be supplied by reference to what appears in other parts of the record. *Demolli v. United States* (U. S.), 7-121.

(6) Amount of sentence.

(a) In general.

See BURGLARY, 6; EMBEZZLEMENT, 6; LARCENY, 6 b.

Cruel and excessive punishment, see GAME AND GAME LAWS, 3 b.

Excessive sentence as ground for discharge on habeas corpus, see HABEAS CORPUS, 2.

Punishment for malicious injury to animals, see ANIMALS, 3 c.

Sentence and punishment in prosecution for violation of liquor law, see INTOXICATING LIQUORS, 6 i.

Under Virginia intoxicating liquor statutes. — The Virginia statute providing for the suppression of the illegal sale of intoxicating liquors in certain specified counties is not exclusive of the general revenue statute declaring the sale of intoxicating liquors without a license to be unlawful, but merely affords a cumulative remedy, and, therefore, when the commonwealth prosecutes under the general statute for an offense against the revenue laws committed in a county embraced in the special statute, it is within the discretion of the trial court to impose a jail sentence of not exceeding twelve months in addition to the fine imposed by the jury. *Quil-lin v. Commonwealth* (Va.), 8-818.

Fine or imprisonment. — Where a crime is made by statute punishable by either a fine or imprisonment, the court is without authority to impose both punishments, and one illegally sentenced to both imprisonment and fine may upon payment of the fine be discharged from custody on habeas corpus. *In re McNeil* (Kan.), 1-733.

Conformity of punishment to statute. — Where a statute provides a punishment of from one to five years for cattle stealing, a sentence of two years imposed upon a defendant convicted of stealing a calf is not a cruel and unusual punishment. *Clampitt v. United States* (Ind. Ter.), 10-1087.

Fine of five hundred dollars as excessive. — It cannot be said, in view of the character of the offense committed, that the fine of five hundred dollars which was imposed in the case at bar was so excessive as to be unconstitutional. *Loeb v. Jennings* (Ga.), 18-376.

(b) Cumulative sentences.

Several sentences for several crimes as cumulative sentences. — Sentences are not cumulative merely because the imprisonments thereunder are made successive in point of time, if the prisoner is convicted of separate offenses and receives a separate definite sentence for each offense. *Harris v. Lang* (D. C.), 7-141.

Payment of fine or imprisonment as cumulative sentences. — The provision of the District of Columbia statute that cumulative sentences shall be deemed one sentence for the purpose of determining where the person shall be confined has no reference to a sentence to pay a pecuniary fine, followed by imprisonment in default of payment, but relates only to cases in which the punishment is to be imprisonment alone. *Harris v. Lang* (D. C.), 7-141.

Duty to separate sentence for each offense. — A sentence assessing one term of punishment upon a plea of guilty to an indictment charging both burglary and larceny is erroneous for not separately assessing the punishment for the two offenses. *State v. Kelley* (Mo.), 12-681.

Imposition of several sentences for forgeries committed against same person on same day. — In a prosecution under the federal statutes for forging several money orders, a separate sentence may be imposed for the forgery of each order, though all of the forgeries were committed on the same day. *United States v. Carpenter* (U. S.), 10-509.

Sentence to commence at expiration of another term of imprisonment. — A sentence of imprisonment may be imposed against a defendant who is at the time serving a prior sentence for a different offense, the second sentence to commence at the expiration of the former; and if the court imposing the second sentence has jurisdiction of the offense it can make no difference whether the prior sentence was imposed by the same court or some other court deriving its power from the same authority. *Rigor v. State* (Md.), 4-719.

Release from cumulative sentences on habeas corpus. — Where a judgment imposing cumulative sentences is defective in that it is uncertain as to the time when the term of imprisonment under one of the later sentences is to begin, the court, on petition for habeas corpus filed by the prisoner after the expiration of the first term, should afford the court which imposed the sentence an opportunity to correct it, before discharging the prisoner. *United States v. Carpenter* (U. S.), 10-509.

Where the second of three cumulative sentences is void, the prisoner, upon expiration of the term imposed by the first sentence, is not entitled to be discharged on habeas corpus, but his imprisonment under the third sentence should begin immediately. *United States v. Carpenter* (U. S.), 10-509.

(c) Suspension of civil rights.

When begins. — The suspension of the civil rights of a person sentenced to the peni-

tentiary for a term less than life begins at the date of his imprisonment under the sentence. *Harmon v. Bowers* (Kan.), 16-121.

(d) Submission of question to jury.

When proper. — In a prosecution under a federal statute for robbery committed in the Indian Territory, it is proper for the trial court to refuse to leave to the jury the matter of the assessment of the punishment. *Glover v. United States* (U. S.), 8-1184.

Where the jury are not required to fix the punishment, the trial court is under no obligation to tell them what penalty is annexed by law to the crime charged in the information. *Edwards v. State* (Neb.), 5-312.

Sufficiency of instruction. — An instruction in a criminal case as to the right of the jury to find the defendant guilty and recommend that he be punished as for a misdemeanor, held to be sufficient, though no explanation was given to the jury that in the event of their so finding the court could disregard the recommendation and punish the defendant as for a felony. *Lingerfelt v. State* (Ga.), 5-310.

Effect of punishment prescribed by jury on grade of crime. — Where there is a statute providing that offenses punishable by death or imprisonment shall be considered felonious, an offense which is so punishable by statute is not reduced to the grade of a misdemeanor by the fact that the jury, in the exercise of the discretion conferred upon them by statute, imposes only a fine. *Quillin v. Commonwealth* (Va.), 8-818.

(e) Matters for consideration in determination of sentence.

Another offense not admitted by prisoner. — The court ought not to take another offense into consideration if it is not admitted by the prisoner. *Rex v. McLean* (Eng.), 20-871.

Another offense admitted by prisoner. — Where a court before which a prisoner has been convicted on indictment of an offense is asked by the prisoner to deal with another offense which he admits having committed but for which he has not yet been tried, the court may properly do so if the other offense is of the same character as the offense of which the prisoner has been found guilty, whether there has been a committal for the other offense or not. If there has been a committal for the other offense, the court before dealing with it should ascertain that the prosecution consents. If the prosecution does not agree, the court should not as a matter of course take the other offense into consideration. It may be that the prosecution desires for a sufficient reason that the other charge should be separately investigated. *Rex v. McLean* (Eng.), 20-871.

Offense committed in another county. — If there is a committal in another county for an offense of a different character, the court should not take the other offense into consideration without the consent

of the authorities prosecuting the prisoner in respect thereto, and even where the prosecution does consent the court ought still to consider whether under the circumstances it ought to take that course, or whether the public interest requires a separate investigation. *Rex v. McLean* (Eng.), 20-871.

Evidence in aggravation or mitigation. — Where the trial judge has discretion as to the punishment to be imposed on a person convicted of crime, affidavits as to the character of the accused and the circumstances of the crime are admissible, after conviction, for the purpose of aggravating or mitigating the punishment. *State v. Reeder* (S. Car.), 14-968.

(f) Effect of error in sentence.

Excessive sentence is valid to extent of jurisdiction. — Where a court sentences a convicted offender for a term in excess of its jurisdiction, the sentence is valid within the limit of the court's jurisdiction. *Harris v. Lang* (D. C.), 7-141.

Discharge of invalid portion of sentence as entitling defendant to release from valid portion. — Where a statute authorizes a court to punish an offense by imprisonment in the county jail, or by a fine, and a sentence is passed imprisoning the defendant for twelve months in the county jail, the court is without authority to pass a further sentence to the effect that upon the payment of fifty dollars and costs the original sentence will be suspended during such time as the defendant abstains from selling by himself or others any spirituous, vinous, or malt liquors, etc., such additional sentence being void, and the payment by the defendant of the fifty dollars and costs affords, in a habeas corpus proceeding, no defense against the enforcement of the sentence of imprisonment. *Tanner v. Wiggins* (Fla.), 14-718.

(7) Place of imprisonment.

Imprisonment in county jail under statute providing imprisonment in penitentiary. — Where the penalty prescribed by statute for the commission of a crime is imprisonment in the state penitentiary or a money fine, the primary sentence of imprisonment in the county jail is unauthorized. In such a case the sentence to imprisonment in the county jail can properly be imposed only as an alternative penalty upon a failure to pay the money fine imposed. *Irvin v. State* (Fla.), 10-1003.

Proper place for imprisonment for nonpayment of fine. — An alternative sentence is erroneous in providing that the defendant be imprisoned in the state penitentiary upon default in the payment of the fine and costs. Where the primary sentence imposed is a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail, instead of in the state penitentiary, for the nonpayment of such fine and costs. *Enson v. State* (Fla.), 18-940.

(8) Suspension of sentence.

Review of order suspending sentence, see **APPEAL AND ERROR**, 13.

Right to postpone sentence. — A court of general jurisdiction, which has stated terms for the trial of criminal cases, may, for a good cause, place an indictment on file or continue the case to a subsequent term for sentence. *St. Hilaire, Petitioner (Me.)*, 8-385.

Effect of Maine statute on power of court to suspend sentence. — The Maine statute providing that "when a person has been convicted in the supreme judicial or superior court, of a violation of this chapter, the county attorney shall have him sentenced at the same term, unless for reasons satisfactory to the court the case is continued for sentence one term, but no longer," is directory as to the county attorney, but even if the statute were mandatory as to him it could not limit the discretion of the court to suspend sentence where the interests of justice demand it. *St. Hilaire, Petitioner (Me.)*, 8-385.

Presumption that discretion of court in suspending sentence was properly exercised. — Where a criminal court has discretionary power to suspend sentence, its action in suspending sentence in a given case will be presumed to have been proper in the absence of a showing to the contrary. *Harris v. Lang (D. C.)*, 7-141.

Power of court to suspend execution of sentence after imposition. — Although a trial court has power to suspend sentence, it has no power to suspend the execution of a sentence already lawfully imposed, except for the purpose of giving effect to an appeal, or where cumulative sentences are imposed, and in some cases of necessity or emergency. *Tanner v. Wiggins (Fla.)*, 14-718.

Validity of sentence four years after suspension. — Where, on a petition for a writ of habeas corpus, it appears that the plaintiff, upon being indicted for an offense, pleaded guilty, whereupon the court ordered the case continued for sentence, and that nearly four years after the plea of guilty was filed the indictment was brought forward and the plaintiff was sentenced to pay a fine and costs, and to imprisonment for a specified period, and in default of the payment of the fine and costs to an additional term of imprisonment, it will be held that the sentence and commitment of the plaintiff were legal. *St. Hilaire, Petitioner (Me.)*, 8-385.

(9) Contruction of sentence.

Sentence until pardoned not to exceed maximum term. — A sentence that the defendant be imprisoned "until discharged by the state board of pardons, as authorized and directed by law, providing such term of imprisonment . . . shall not exceed the maximum term," is not without a fixed limit to its duration, but is for

the maximum term, with the power of commutation in the board of pardons. *People v. Joyce (Ill.)*, 20-472.

(10) Repeal of statute as affecting prisoner already sentenced.

Right to parole after repeal of parole statute. — A conviction and sentence under the habitual criminal act does not confer upon the prisoner a right to be paroled which remains to him after the repeal of the act. *In re Kline (Ohio)*, 1-219.

8. NEW TRIAL.

See **NEW TRIAL**, 2 b.

9. APPEAL AND ERROR.

a. Preliminaries to obtaining review.

(1) Matters relating to indictment.

Motion to quash as essential to raising question of uncertainty of indictment. — A defendant in a criminal case who has filed no motion to quash the indictment, cannot, on appeal, claim that it was defective for uncertainty. *Com. v. Richmond (Mass.)*, 20-1269.

Objection to misnomer in indictment as essential to review. — A mistake in writing the name of a third person instead of the defendant's name in one count of an indictment is not available on a writ of error to a judgment of conviction, where the objection was not raised on the trial, and it does not appear that the defendant was prejudiced by the mistake. *Holmgren v. United States (U. S.)*, 19-778.

Raising question of sufficiency for first time in appellate court. — An objection to the sufficiency of an indictment cannot be raised for the first time on appeal unless by argument addressed to the discretion of the court, and such discretion does not belong to the New York court of appeals except in capital cases. *People v. Weichers (N. Y.)*, 1-475.

(2) Matters relating to instructions.

General objection to charge without request for instruction as sufficient. — A general objection to a charge on the subject of insanity, accompanied by no request for special instruction, will not avail. *State v. Charles (La.)*, 18-934.

Necessity of renewal of exception to repetition of erroneous instruction. — Where the defendant in a criminal prosecution has duly excepted to an erroneous instruction imposing upon him the burden of proving an alibi, it is not necessary for him to renew the exception when the erroneous matter is repeated in a subsequent instruction. *Glover v. United States (U. S.)*, 8-1184.

Waiver of objection by failure to except. — The failure of the defendant in a criminal prosecution to except to instructions within the time prescribed by the statute constitutes a waiver of any error in such

instructions. *State v. Bringgold* (Wash.), 5-716.

(3) Misconduct of counsel.

Objection alone insufficient. — A judgment of conviction in a criminal case will not be reversed because of alleged improper statements made by the prosecuting attorney in his opening address to the jury, where the record fails to show any request by the defendant's counsel that the jury should be instructed to disregard the statements in question. A mere objection to such statements, interposed by the defendant's counsel and sustained by the trial court, presents nothing for review by the appellate court. *Skaggs v. State* (Ark.), 16-622.

Exception essential. — A reviewing court will not consider assignments of error based on the misconduct of a trial court and of counsel for the prosecution in a criminal case, where the record fails to show that the defendant excepted to the objectionable conduct. *Miller v. Oklahoma* (U. S.), 9-389.

Objection, ruling, and exception essential. — Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury, and it is desired to raise a question on that point for decision in the supreme court, it is necessary that objection should be made to the trial court at the time, and an adverse ruling had thereon, and an exception thereto, and that the same should be made a part of the record by a proper bill of exceptions. *Hamblin v. State* (Neb.), 16-569.

Failure to object as waiver. — Failure to object to improper remarks of counsel at the time they are made is a waiver of the objection. *People v. Giddings*, 18 Mich. 844.

Failure to request special instruction after reprimand by court as waiver. — Where, in the trial of a case, counsel of the respective parties engage in an altercation in the presence of the jury and are properly reprimanded by the court, and no request for a special instruction on the subject is requested, no error can be predicated thereon. *Evers v. State* (Neb.), 19-96.

(4) Misconduct of jurors.

Failure to object to misconduct until motion for new trial as waiver. — The fact that the jury in a criminal action were allowed to take to the jury room the indictment bearing an indorsement showing that the defendant, on a former trial, had been convicted on one of the counts, to which no objection was taken until a motion was made for a new trial, is not a sufficient ground for the exercise of the power to review an error not properly reserved. *Holmgren v. United State* (U. S.), 19-778.

Review of refusal of new trial for prejudice of juror. — The refusal of the trial court, on conflicting evidence to set aside a conviction on the ground that a juror had prejudged the case is not reviewable on appeal. *Ausmus v. People* (Colo.), 19-491.

b. Review.

(1) In general.

See also APPEAL AND ERROR, 2 b, 4 g.

Presumptions on appeal, see APPEAL AND ERROR, 14 i.

Sufficiency of complaint. — A complaint in a court of the Philippine Islands charging an offense against "the United States government of the Philippine Islands," though technically inexact, is only "a defect in matter of form . . . which does not tend to prejudice a substantial right of the defendant upon the merits" (Pen. Code, P. I., § 10), and therefore not a ground for reversing a judgment of conviction. *Weems v. United States* (U. S.), 19-705.

Commitment of witness for perjury in presence of jury as reversible error. — The commitment of a witness for perjury during the trial and in the presence of the jury is prejudicial error as regards the party who put the witness on the stand. *State v. Swink* (N. C.), 19-422.

Taking prisoner to office of prosecuting attorney as reversible error. — That an accused person was brought from the place of his arrest to the prosecuting attorney's office is not ground for reversal where it does not appear that any injury resulted therefrom. *State v. Tharanot* (Mo.), 20-1122.

Comments by court regarding argument. — The remarks of the court in regard to an argument of counsel held not to be prejudicial, and not having been objected to, not to be considered on appeal. *State v. Tully* (Mont.), 3-824.

Harmless error in answer of court to question of juror. — An answer by the court, though incorrect, to an abstract question propounded by a juror, there being no testimony in the case to support the theory suggested by the question, is not reversible error. *People v. Kriesel* (Mich.), 4-5.

Harmless error in sentence. — It is harmless error to sentence a defendant to a definite term of imprisonment, though the statute (Code, Ia. Supp. 1907, § 5718-a13); provides that the court shall not fix the limit or duration of the imprisonment, but that the term shall not exceed the maximum term provided for the crime of which the prisoner is convicted, where the sentence imposed is for a shorter term than the maximum prescribed by law. *State v. Perkins* (Iowa), 20-1217.

(2) Matters relating to evidence.

Conclusiveness of finding of jury. — A finding by the jury on conflicting evidence on an issue of fact in a criminal case is conclusive in an appellate court. *Morse v. U. S.* (U. S.), 20-938.

When error in excluding evidence is harmless. — Error in excluding evidence in a criminal case is not prejudicial where the point is fully covered by other evidence in the case. *State v. Driggers* (S. C.), 19-1166.

When exclusion of evidence is reversible error. — Where the facts of the case are such that the appellate court cannot say that, if such evidence had been admitted, the jury would have returned the same verdict, the exclusion of such evidence will be held to be reversible error. *Gambrell v. State* (Miss.), 16-147.

When error in admitting is harmless. — In a criminal prosecution, error in admitting hearsay evidence against the defendant and in refusing to strike it out is fully cured, where the court not only strikes the whole of the evidence out a few moments later and admonishes the jury not to consider it, but also gives an instruction calling the attention of the jury specifically to the fact that certain testimony has been stricken out, and directing them to bear this in mind constantly during their deliberations and not to make use of the evidence in making up their verdict. *State v. Fuller* (Mont.), 9-648.

(3) Misconduct of counsel.

Improper remarks permitted by court. — Remarks of counsel in the argument of a criminal prosecution outside of the evidence and the reasonable bounds of argument, having no relation to the issues in the case and intended or calculated to excite the passions and influence the minds of the jury against the defendant, should be properly checked and prohibited by the trial court, and where such remarks are objected to by the defendant and the trial court overrules such objection and refuses to interfere, an exception to such ruling will be well assigned, and will be sufficient ground for the reversal of the judgment. *Clinton v. State* (Fla.), 12-150.

Under the North Carolina statute which provides that the husband or wife of the defendant in a criminal case shall be a competent witness for the defendant, but that "the failure of such witness to be examined shall not be used to the prejudice of the defense," it is improper for the prosecuting attorney, on the trial of a criminal case, to call the wife of the defendant, who is present under subpoena, and tender her to the defendant as a witness, and to comment, in his argument to the jury, on the defendant's failure to corroborate his own testimony by his wife. Where such course is pursued by the prosecuting attorney, it is the duty of the court to caution the jury that the defendant's failure to use his wife as a witness cannot be considered by them, and a failure by the court to do so constitutes reversible error. *State v. Cox* (N. Car.), 17-421.

It is error sufficient to reverse a judgment in a criminal case for the trial court to suffer counsel for the state, against proper objections of defendant, to state in his argument to the jury facts pertinent to the issue and not in evidence, or to comment upon facts calculated to prejudice the defendant which have no bearing whatever upon the issues, and evidence of which would have been excluded, if offered, or to assume such facts to

be in the case when they are not. *Clinton v. State* (Fla.), 12-150.

It is reversible error for the court in a criminal case to allow counsel for the prosecution to comment on the defendant's failure to offer evidence of good character. *Turner v. State* (Miss.), 19-407.

Improper remark withdrawn. — A conviction for murder will not be reversed for an improper remark made by the district attorney in summing up, where the trial court directed him to confine himself to a proper argument, whereupon he withdrew the remark and apologized for having made it, notwithstanding the fact that the court characterized as "frivolous" an exception taken by the defendant after the withdrawal of the remark. *Sawyer v. United States* (U. S.), 6-269.

Charge of court as curing misconduct in argument. — The conduct of a federal district attorney on a trial for murder, in characterizing as confessions certain alleged statements of the prisoner which are excluded because they were not freely made, does not require a reversal of the conviction, where the court tells the jurors that they are to decide the case on the testimony of the witnesses, and not on what counsel may say. *Holt v. U. S.* (U. S.), 20-1138.

Reversal where bearing of remark not shown. — A remark by the district attorney in his argument to the jury that the handcuffs used by the sheriff in arresting the accused were "not larger than a good many things that . . . [the accused] carries in his pocket" will not be considered prejudicial error, it not appearing in what connection the remark was made. *Stoddard v. State* (Wis.), 13-1211.

Necessity of showing prejudice by improper remarks. — A verdict approved by the trial judge in a criminal case will not be disturbed on appeal because of improper remarks by the prosecuting attorney where there is nothing to show that the jury were influenced by the remarks. *State v. Hamilton* (La.), 18-981.

A conviction in a criminal case will not be disturbed on appeal because of improper remarks by the state's attorney, where the evidence was ample to sustain the verdict, and the court can see that the remarks of counsel could not necessarily have influenced the jury. *State v. Pirkey* (S. D.), 18-192.

A conviction will not be reversed because of improprieties in the argument of the state's attorney unless it appears that the improper remarks contributed to produce the verdict. *People v. McCann* (Ill.), 20-496.

Comment on failure of accused to testify as reversible error. — Under the Florida statute, the state's counsel may not comment on the failure of the accused to testify in his own behalf, and such comment constitutes reversible error even though it be made in disclaiming the intention to argue certain conclusions therefrom and not in urging such argument. *Jackson v. State* (Fla.), 3-164.

(4) Matters relating to instructions.

Refusal of proper instructions. — It is error, in a criminal prosecution, to refuse to give instructions correct in form and applying abstract legal principles to the defendant's theory of the case as supported by the evidence. *State v. Hennessy* (Nev.), 13-1122.

Refusal of instructions already given. — The refusal of the trial court to give requested instructions as to the presumption of innocence and as to reasonable doubt is not error, where the jury are otherwise fully and correctly instructed on these matters. *Holt v. U. S.* (U. S.), 20-1138.

Error in instructing as to one count as harmless where other counts sustain judgment. — An error in an instruction applying to certain counts only of an indictment does not warrant a reversal, where there is a verdict of guilty also on other counts not affected by such instruction, which are sufficient to support the judgment. *Morse v. U. S.* (U. S.), 20-938.

Error in giving erroneous instruction. — An error in giving of an instruction imposing upon the defendant in a criminal prosecution the burden of establishing an alibi "by a preponderance of evidence, that is by the greater and superior evidence" is not cured by a subsequent instruction which repeats the objectionable matter but couples with it the statement that if the jury "have any reasonable doubt as to whether the defendant was at some other place when the crime was committed, they should give the defendant the benefit of that doubt." *Glover v. United States* (U. S.), 8-1184.

(5) Absence of judge during trial.

As reversible error. — The absence of the judge from the court room so as to be unable to pass upon objections by the defendant to the argument of the district attorney before the jury is reversible error. *Graves v. People* (Colo.), 2-6.

To authorize the reversal of a judgment of conviction in a criminal case because of the temporary absence of the trial judge from the court room during the trial, the record must show affirmatively that the absence was of such a character as to cause the judge to lose control of the proceedings of the trial. A reversal will not be granted for that cause where the record shows that the judge, during his absence of about fifteen minutes to answer a telephone call, was in touch with what was going on in the court room to the extent that he could hear the voice of counsel and note any interruption of the latter's speech or any unusual occurrence in the course of it, and was looking through a window which enabled him to note what was going on in the court room although the door was closed. *Cravens v. State* (Tex.), 16-907.

A judgment of conviction in a criminal case will not be reversed because of the action of the judge presiding at the trial in leaving

the court room for a short time during the argument of counsel to the jury, where the record fails to show that he was out of hearing of the proceedings in court during his absence from the room. The test in determining whether the absence of the judge from the court room during the progress of the trial calls for a reversal of the judgment is whether, by his absence, he loses control of the proceedings. If he does, even for a brief period, the integrity of the trial is destroyed; but to justify a reversal on that ground the fact must clearly appear from the record. *Skaggs v. State* (Ark.), 16-622.

c. Disposition of case on appeal.

Power to modify sentence in general.

— In North Dakota, where a sentence pronounced by the district court is excessive in some respects but not void, the supreme court may modify the sentence under the provisions of the statute. *State v. Wisniewski* (N. Dak.), 3-907.

Under the Missouri statute where a defendant convicted of burglary and larceny under one information, and sentenced to a separate term for each offense, appeals, and the appellate court decides that the information is good as to the charge of larceny, but fatally defective as to the charge of burglary, it may sentence the accused for the term imposed for larceny, without reversing the judgment and remanding the cause. *State v. James* (Mo.), 5-1007.

Modification of sentence under statute imposing cruel and unusual punishment.

— A sentence which is so severe as to violate such prohibition against cruel and unusual punishment cannot be modified on appeal so as to remove the objection, where the statute requires the full penalty to be imposed on conviction. In such case, the vice is in the law, and not in the sentence, and therefore no punishment at all can be inflicted. *Weems v. United States* (U. S.), 19-705.

Remanding case for resentence.

— Upon the reversal of a judgment of sentence in a criminal case, the Kansas supreme court is authorized by statute to remand the case with instructions to the court below to set aside the erroneous sentence and resentence the appellant. *State v. Tyree* (Kan.), 3-1020.

10. LIMITATION OF PROSECUTIONS.

See CONSPIRACY, 1 b; EMBEZZLEMENT, 1; INDICTMENTS AND INFORMATIONS, 4.
Prosecution barred by limitation as ground for habeas corpus, see HABEAS CORPUS, 2.

In case of absence from jurisdiction.

— The statute of limitations as to criminal prosecutions for offenses not punishable with death contains no exceptions on account of the accused concealing or absenting himself from the state, and if it appears from the indictment or information that the offense charged was committed more than two years prior to the institution of the proceedings, a

motion to quash should be sustained in the absence of a showing that the prosecution was based on one instituted before the expiration of the statutory limitation. *Rouse v. State* (Fla.), 1-317.

CRIMINATION.

Privilege of witnesses, see **WITNESSES**, 4 g.
Self-crimination by compelling accused to try on garment, see **CRIMINAL LAW**, 6 n (1).
Using shoes of accused to identify tracks, see **CRIMINAL LAW**, 6 n (1).

CRITICISM.

Criticising courts, see **CONTEMPT**.
Literary criticism as libelous, see **LIBEL AND SLANDER**, 2 c.
Right to criticize public officers, see **PRIVACY, RIGHT OF**.

CROPS.

1. GROWING CROPS AS REALTY OR PERSONALTY.
2. MORTGAGE OF CROPS.
3. LANDLORD AND TENANT.
4. LIFE TENANT AND REMAINDERMAN.
5. VENDOR AND VENDEE OF LAND.
6. MEASURE OF DAMAGES FOR INJURY TO CROPS.
7. LEVY OF EXECUTION UPON CROPS.

Accepting crops as creating relation of tenancy, see **LANDLORD AND TENANT**, 1.
Injury to crops by breach of irrigation contract, see **IRRIGATION**.
Liability for injury to crops as affected by sufficiency of inclosure, see **FENCES**, 1 a.
Right of lessee of farm to remove straw, see **LANDLORD AND TENANT**, 5 e.
Right to crops on land held by entirety, see **HUSBAND AND WIFE**, 9 b.

1. GROWING CROPS AS REALTY OR PERSONALTY.

Crops planted pending foreclosure suit. — Crops planted by the tenant of a mortgagor, who rents and plants the mortgaged land after the commencement of an action for foreclosure and the filing of a *lis pendens*, pass to the purchaser at the foreclosure sale. *Tittle v. Kennedy* (S. Car.), 4-68.

Crops as subjects of replevin. — Growing strawberry plants which have been sold under a parol contract may be replevied by the buyer, as they are the fruits of industry and must be treated as personal property. *Cannon v. Matthews* (Ark.), 5-478.

Devise of land from which crops are not severed. — Until a crop is severed from the land on which it is grown, it is such a

part of the real estate as will pass by a conveyance or by a devise of the land, unless reservation thereof is made in the deed, or there is evidence contained in the will of the testator that the devise of the land was not intended to include the crop. As regards this rule it is immaterial whether the crop is matured or not, so long as it is not severed from the land. *In re Andersen* (Neb.), 17-941.

2. MORTGAGE OF CROPS.

Specific performance of agreement to mortgage. — An agreement to execute, after they are growing, a mortgage upon crops, may be enforced specifically in equity if sufficiently definite in its terms and clearly established, and the situation of the parties and property is such that justice and equity call for such a remedy. It is no objection to such an agreement that the crops referred to were not in being when it was made. *Sporer v. McDermott* (Neb.), 5-396.

3. LANDLORD AND TENANT.

Crops maturing after termination of lease. — The general rule is that where farm land is rented for a time certain, the tenant is not entitled to the outgoing crops which mature after the termination of the lease, unless he is given the right thereto by the custom of the country or by an express agreement with his landlord. *Carmine v. Bowen* (Md.), 9-1135.

Though the general rule is that the tenant of farm land rented for a time certain is not entitled to the outgoing crops which mature after the termination of his lease, where there is no express agreement and no custom reserving that right to him, there may nevertheless be other circumstances that in a court of equity will estop the landlord to claim the crops. *Carmine v. Bowen* (Md.), 9-1135.

The provision in a lease of farm land for a time certain that the tenant "agrees to farm the fields in rotation in a proper manner" does not amount to an express agreement on the part of the landlord that the tenant shall be entitled to enter upon the premises and harvest and remove the crops after the expiration of the tenancy. *Carmine v. Bowen* (Md.), 9-1135.

Estoppel to deny right of tenant to remove. — Where the landlord in a lease of farm land for a time certain has estopped himself to deny the right of the tenant to remove the outgoing crop which has matured since the termination of the lease, a court of equity has jurisdiction to grant an injunction protecting the tenant's equitable interest in the crop. *Carmine v. Bowen* (Md.), 9-1135.

Evidence reviewed, in an action for an injunction, and held sufficient to show that the landlord in a lease of farm land for a time certain is estopped to deny the right of the tenant to remove the outgoing crop which has matured since the termination of the lease. *Carmine v. Bowen* (Md.), 9-1135.

Estate forfeited by act of tenant. — Where the estate of a tenant or occupant of land is forfeited or terminated by some act of his, and the landlord or owner re-enters, the

tenant or occupant is not entitled to the crops growing on the land at the time of the re-entry, such crops passing to the landlord or owner with the title to the land. *Meyer v. Roberts* (Ore.), 15-1031.

The rule that an owner of land is not entitled to annual crops grown and severed by an occupant thereof, does not apply where an occupant harvests the crop by securing and maintaining possession by means of an injunction wrongfully issued after the landlord has lawfully re-entered for condition broken. This is especially true where such occupant has, except by virtue of such injunction, never been in the exclusive possession of the premises, his possession while cultivating the crop having been at most joint with that of the landlord. *Myer v. Roberts* (Ore.), 15-1031.

4. LIFE TENANT AND REMAINDERMAN.

Crops growing at death of life tenant. — Annual crops growing upon land held as a life estate by one having power to appoint the fee in the land by will, pass upon the death of the life tenant to his personal representative, and not to those in whom the fee in the land is appointed. *Keays v. Blinn* (Ill.), 14-37.

5. VENDOR AND VENDEE OF LAND.

Parol reservation by vendor. — M. and another conveyed by warranty deed to G. a certain tract of land, for a consideration recited in the deed of \$2,900, at said time there being standing upon said land a matured crop of corn; it being agreed by parol that the grantors should gather and remove from said premises said corn as a part of the consideration of said conveyance. The grantee afterwards claimed said crop by virtue of said deed, there being no reservation of said crop in the face thereof. Held that it might be shown by parol that said corn was reserved by the grantors as a part of the consideration for said conveyance. *Grabow v. McCracken* (Okla.), 18-503.

6. MEASURE OF DAMAGES FOR INJURY TO CROPS.

Value at time and place of destruction. — The correct measure of damages for the destruction of a growing crop is the value of the crop at the time and place of destruction; and this value is to be estimated by taking the probable market value of the matured crop, less the cost of producing and marketing it. *Teller v. Bay, etc., Dredging Co.* (Cal.), 12-779.

The true measure of compensation for the destruction of growing crops is their value in the condition they were in at the time of the destruction and not the market value at the time of maturity or during the market season. *Lester v. Highland Boy Gold Min. Co.* (Utah), 1-761.

7. LEVY OF EXECUTION UPON CROPS.

What constitutes a sufficient levy. — In levying an execution upon a field of stand-

ing corn the officer need take only such possession as the nature of the property permits. He need not do anything which, but for the writ, would make him a trespasser. It is sufficient if he goes to the premises, and does thereon some open and unequivocal act which, as nearly as practicable, amounts to a seizure, and indorses the levy on the writ. *National Bank of Holton v. Duff* (Kan.), 15-882.

Where it appears that an officer, who executed a writ of replevin issued against the property of a husband and wife, went to the neighborhood of a field of corn owned by the husband, who was away at the time, and read the writ to the wife telling her that he intended to take the corn, and thereupon went to the cornfield, accompanied by a witness, and posted at a corner of the field a notice that the corn had been taken on execution and was in his possession, and duly indorsed the levy on the writ, the levy is sufficient. *National Bank of Holton v. Duff* (Kan.), 15-882.

It is not essential to the validity of such a levy that the officer should station and keep guard over the field. *National Bank of Holton v. Duff* (Kan.), 15-882.

CROSS-BILLS.

See EQUITY, 3; PLEADING, 4.

Necessity to give defendant affirmative relief in suit for accounting, see ACCOUNTS AND ACCOUNTING.

CROSS-EXAMINATION.

See CRIMINAL LAW, 6 m (8); WITNESSES, 4 b.

Expert witnesses, see EVIDENCE, 8 b (2).

Right to cross-examine witnesses in criminal cases, see CRIMINAL LAW, 6 c (7).

CROSSINGS.

Blow-post law limited to grade crossings, see RAILROADS, 3 b.

Compensation for laying railroad track over right of way of another company, see EMINENT DOMAIN, 7 c (5).

Condemnation of railroad right of way across tracks of another company, see RAILROADS, 2 c (1).

Injuries to persons at crossings, see RAILROADS, 8 b; STREET RAILWAYS, 8.

Liability of railroads for injuries at crossings, see RAILROADS.

Location of railroad tracks across tracks of other companies, see RAILROADS, 2 a.

Statutory requirement of safety devices at railroad crossings, see RAILROADS, 3 a (2).

Warnings of approach of trains, see RAILROADS, 8 b (3).

CROWD.

Injuries caused by crowd in department store, see NEGLIGENCE, 2.

CROWDING STREET CARS.

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CRUEL AND UNUSUAL PUNISHMENT.

See **CONSTITUTIONAL LAW**, 1; **CRIMINAL LAW**, 7.

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Cruelty to children, See **PARENT AND CHILD**, 2 a.
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CULTIVATION.

Reducing wild land to cultivation as improvement, see **IMPROVEMENTS**.

CULVERTS.

Liability for obstructing stream, see **WATERS AND WATERCOURSES**, 3 b (4).
Overflow caused by defective culverts, see **RAILROADS**, 7 e.

CUMULATIVE DIVIDENDS.

See **CORPORATIONS**, 9.

CUMULATIVE PUNISHMENT.

See **CRIMINAL LAW**, 7.
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CUMULATIVE REMEDY.

Effect of statute prescribing punishment for common-law offense, see **CRIMINAL LAW**, 2 b.

CURATIVE ACTS.

See **STATUTES**, 2.

CURTESY.

1. NATURE OF ESTATE.
2. WHO MAY TAKE BY CURTESY.
3. ESTATES TO WHICH INCIDENT.
4. EFFECT OF DIVORCE FROM BED AND BOARD.

Bar by ante-nuptial agreement, see **HUSBAND AND WIFE**, 2 a.

Effect of deed from tenant by curtesy, see **ADVERSE POSSESSION**.

1. NATURE OF ESTATE.

Estate by descent or purchase. — A tenancy by the curtesy is more in the nature of an estate by descent than by purchase. *Cooke v. Doron* (Pa.), 7-502.

As subject of enjoyment and possession. — As used in the statute relating to real property, the primary significance of the word "hold" is to enjoy and possess, and an estate by the curtesy can be enjoyed and possessed by the tenant. *Cooke v. Doron* (Pa.), 7-502.

2. WHO MAY TAKE BY CURTESY.

Aliens. — Under the Pennsylvania statutes, an alien is entitled as a tenant by the curtesy to the enjoyment of the real property of which his wife died possessed. *Cooke v. Doron* (Pa.), 7-502.

3. ESTATES TO WHICH INCIDENT.

Lands subject to life estate. — An estate by the curtesy does not attach to land in which the wife had only a remainder subject to a life estate in another, where she was never in actual possession of the property and died before the termination of the life estate. *Collins v. Russell* (N. Y.), 6-92.

Lands held under contract of purchase. — Under the Nebraska statute creating an estate by the curtesy in any "estate of inheritance" of which a wife is "seized," a husband is not entitled to an estate by the curtesy in lands of his deceased wife held by her under a contract of purchase. The estate of the wife to which the estate of curtesy may attach must be at least a freehold. *Grandjean v. Beyl* (Neb.), 15-577.

Equitable separate estate of wife. — A husband is entitled to curtesy in the equitable separate estate of his wife. Such estate by the curtesy is not impaired by the Missouri Married Woman's Statute which merely takes away the husband's common-law right to the possession and usufruct of the land during the wife's lifetime. *Donovan v. Griffith* (Mo.), 15-724.

Lands acquired after death of issue. — A husband is entitled to an estate by the curtesy in his wife's lands even though such lands are acquired after the death of the issue of the marriage. *Donovan v. Griffith* (Mo.), 15-724.

4. EFFECT OF DIVORCE FROM BED AND BOARD.

In general. — A decree from bed and board, with perpetual separation, in the terms provided by section 12, chapter 64 of the West Virginia Code, does not bar the curtesy of the husband, against whom such decree is pronounced, in lands belonging to the wife at the time of the decree; but upon lands thereafter acquired by her it operates like an absolute divorce, barring, as to such property, any claim to curtesy. *Hartigan v. Hartigan* (W. Va.), 17-728.

Special provision in decree. — *Quære*: May not the court by virtue of section 11, chapter 64, of the Code, in granting such a

divorce, bar, by a special order in the decree, the right of curtesy or dower in the existing real estate of the parties, or either of them? *Hartigan v. Hartigan* (W. Va.), 17-728.

Meaning of word "interest" in decree. — Within the meaning of the word "interest" there is usually embraced a mere contingent or inchoate interest. As used in a divorce decree, with reference to the rights of the parties in real property, the word embraces the husband's right of curtesy. *Hartigan v. Hartigan* (W. Va.), 17-728.

CUSTODIA LEGIS.

See ATTACHMENT, 4; EXECUTIONS, 5 d; REPLEVIN, 1.

CUSTODY.

Attachment of property in custody of bankruptcy court, see ATTACHMENT, 4.

Custody of children after divorce, see DIVORCE, 7.

Custody of jurors, see JURY, 7.

Exemption of property in custody of law, see EXECUTIONS, 5 d.

Habeas corpus to obtain custody of children, see HABEAS CORPUS, 2, 6 b.

Parent's right to custody of children, see PARENT AND CHILD, 1 b.

Property in custody of federal officer, see REPLEVIN, 1.

CUSTOMS.

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Breach of irrigation contract, see IRRIGATION.

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Construction of contract as stipulating for liquidated damages or penalty, see CONTRACTS, 3 c.

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Injury by animals, see **ANIMALS**, 2 i.

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Pleading damages in action for libel or slander, see **LIBEL AND SLANDER**, 4 e.

Polluting, diverting, or obstructing streams, see **WATERS AND WATERCOURSES**, 1, 3 b (7) (b).

Provision for liquidated damages as affecting right to specific performance, see **SPECIFIC PERFORMANCE**, 3 f (15).

Refusal of tenant to surrender premises at end of term, see **LANDLORD AND TENANT**, 5 c.

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Wrongful expulsion of member of society, see **SOCIETIES AND UNINCORPORATED ASSOCIATIONS**, 2.

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1. ACTIONS.

Injury causing loss of unborn child.

— A negligent act inflicting bodily injury on a pregnant woman, whereby the child dies and is caused to be prematurely born, gives the woman a right of action for her injury, including the mental and physical suffering endured as the natural and proximate result

of the injury to her person. *Big Sandy, etc., R. Co. v. Blanckenship* (Ky.), 19-264.

Plaintiff injured while engaged in unlawful act. — The fact that the plaintiff was riding in a race on which money had been wagered, even if in violation of law, would not justify the defendants in injuring him, when such injury was not the result of an effort to suppress such wrong or enforce the law; neither would it deny him the right to recover damages sustained by him in a race, caused by the negligent acts of the defendant in interfering with such race. *McClain v. Leviston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Proximate cause. — The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effect of his delinquency. The term "natural" imports that they are such as might reasonably have been foreseen — such as occur in an ordinary state of things; the term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss. *Smith v. Public Service Corporation* (N. J.), 20-151.

Power of court to compel physical examination. — In an action for personal injuries a court has no power to compel the plaintiff to submit to a physical examination by physicians and surgeons appointed by the court. *May v. Northern Pacific R. Co.* (Mont.), 4-605.

A court has no power to order the physical examination of a party to a civil action and to compel such party to submit thereto. *Austin, etc., R. Co. v. Chick* (Tex.), 1-261.

In an action for damages for personal injuries the trial court has power to compel the plaintiff to submit to a physical examination by reputable physicians selected by the defendant. *Johnston v. Southern Pacific Co.* (Cal.), 11-841.

In federal court. — Although a federal court, sitting in a state which has no statute authorizing the physical examination of the plaintiff in a personal injury case before trial, is without power to order such an examination, still, where the plaintiff in such a case voluntarily exhibits his injured limb to the jury, in open court, for the purpose of inspection, it is the duty of the court, on motion of the defendant, to compel him to submit the injured member to surgical examination, on the principle that where object evidence is produced it is subject to any legitimate examination and test which will elucidate the matter in dispute, and the denial of a motion for such examination constitutes reversible error. *Chicago, etc., R. Co. v. Kendall* (U. S.), 16-560.

2. NOMINAL DAMAGES.

Effect of failure to award. — Rule stated as to the effect of a failure to award nominal damages. *Blackburn v. Alabama Great Southern R. Co.* (Ala.), 5-223.

When not recoverable. — Where the sole object of an action is the recovery of damages, a failure to prove substantial damages

is a failure to prove the substance of the issue, and entitles the defendant to a judgment of nonsuit or a judgment that the plaintiff take nothing by his action. *Woodhouse v. Powles* (Wash.), 11-54.

3. UNCERTAIN OR REMOTE DAMAGES.

Future pain and suffering. — In an action to recover damages for personal injuries, it is erroneous to instruct the jury that they may take into consideration the physical and mental pain and suffering which the plaintiff "is liable to endure in future by reason of his injury," as the verdict should include only such damages as it is reasonably certain will of necessity result in future from the injury, and not damages that may result from the injury. *Green v. Catawba Power Co.* (S. Car.), 9-1050.

Damages too remote. — A husband cannot recover from a carrier damages for mental anguish suffered by him in consequence of the carrier's failure to deliver his prospective wife's trousseau to her in time for their marriage, especially where the carrier did not know of the intended marriage, as the damages are too remote. *Eller v. Carolina, etc., R. Co.* (N. Car.), 6-46.

Loss of prospective profits. — Damages may be recovered for loss of profits caused by a breach of contract, where it reasonably appears that the profits would have been made had the terms of the contract been observed, and that their loss has necessarily followed the breach, provided the evidence is sufficiently certain and definite to warrant the jury in estimating the extent of the profits lost. *Wilson v. Wernwag* (Pa.), 10-649.

Where commission merchants have agreed to sell a manufacturer's goods and to pay him a stipulated percentage upon the net amount of their sales, during a specified period, for and in consideration of a guaranty by the manufacturer against all losses from failures during such period, and before the expiration of that period the contract is broken through the merchant's discontinuance of their business, the manufacturer is entitled to recover as damages the stipulated percentage on the net sales of the goods which would have been made by the merchants between the date of the breach and the expiration of the specified period had they continued in business, less the losses from failure which would have been sustained during the same period, provided such profits and losses can be proved with reasonable certainty, as prospective profits which are susceptible of proof are never to be excluded simply because they are profits. *Wilson v. Wernwag* (Pa.), 10-649.

Damages recoverable upon breach of a contract for sales on commission are not merely discretionary with the jury. They include such loss of profits, past, and future, as is shown by the evidence to have proximately resulted from a breach of the contract, excluding from the award all uncertain and conjectural profits. *Emerson v. Pacific Coast, etc., Packing Co.* (Minn.), 6-973.

Evidence of sales made subsequently to breach of a contract for sales on commission

and during the pendency of the contract term, although made by the principal through other agents than the plaintiffs, is admissible, and under proper direction by the court may be weighed by the jury in estimating prevented gains. *Emerson v. Pacific Coast, etc., Packing Co.* (Minn.), 6-973.

Future damages certain to result. — Both at common law and under the North Dakota statute, one who suffers an injury by the wrongful act of another may recover compensation for all detriment proximately caused thereby, and this includes compensation not only for past detriment, but also for detriment resulting after the commencement of the action or certain to result in the future, and whether the damages alleged are general or special in character. *Shoemaker v. Sonju* (N. Dak.), 11-1173.

4. EXEMPLARY DAMAGES.

Power of court of equity to award. — Where it becomes necessary for an equity court to award damages, it should award compensatory but not exemplary damages. *Karns v. Allen* (Wis.), 15-543.

Right of legislature to withhold. — A person is without legal right to punitive damages, as that right attaches to actual damages suffered, and they may be affirmatively withheld by the legislature so far as impinging on the rights of property is concerned. *Louisville, etc., R. Co. v. Street* (Ala.), 20-877.

Double damages for trespass on state lands. — A statute imposing double or treble damages for trespass upon lands owned by the state does not violate the constitutional rights of a citizen, even though the same act of trespass may be punishable as a crime. *State v. Shevlin-Carpenter Co.* (Minn.), 9-634.

In action for injuries caused by automobile. — In an action for injuries caused by the frightening of a horse on a highway by an automobile, evidence that the defendant used language showing a disregard of the plaintiff's rights may be sufficient to show such malice as to warrant the recovery of punitive damages, although the words were spoken after the accident had taken place. *Martin v. Garlock* (Kan.), 20-84.

In action for wrongful death. — The Alabama statute (Code 1907, § 2486) giving to a personal representative an action for such damages as "the jury" may assess for wrongful death, if the decedent could have maintained an action for such wrongful act had it not caused death, provides for a recovery of punitive damages only. The amount rests in the discretion of the jury, whose verdict is not subject to review by the trial court for inadequacy. *Louisville, etc., R. Co. v. Street* (Ala.), 20-877.

As punishment. — The rule in Michigan limits exemplary damages to the aggravation of the injury to feelings arising from malice and does not permit damages for the punishment. *McChesney v. Wilson* (Mich.), 1-191.

Actual damages as basis for award. — In an action to recover damages for per-

sonal injuries, a finding that the plaintiff sustained actual damage and that the damage was inflicted under circumstances justifying the award of exemplary damages is sufficient to sustain a judgment awarding exemplary damages, though the finding does not state the amount of actual damage sustained by the plaintiff. *McConathy v. Deck* (Colo.), 7-896.

Question for court. — Whether there is any evidence in a given case to justify the assessment by the jury of exemplary damages is a question for the determination of the court. *Southern Ry. v. Goddard* (Ky.), 12-116.

Question for jury. — Whether exemplary damages shall be found, in any case, must be left to the discretion of the jury. It is error to instruct that they should find exemplary damages. *Carpenter v. Hyman* (W. Va.), 20-1310.

5. MITIGATION OF DAMAGES.

Gratuity from third person. — In an action against a carrier by a postal clerk for injuries caused by the derailment of the car in which he was traveling, where damages are claimed by the plaintiff for loss of time from his employment by reason of the injuries, the fact that the postal department of the United States gratuitously continued the plaintiff's salary during the period of his disability is immaterial, and evidence that his salary was so paid is properly excluded. *Illinois Cent. R. Co. v. Porter* (Tenn.), 10-789.

The fact that a person other than the wrongdoer, as a mere gratuity, pays to one injured a sum of money equal to what the latter would have earned during the period of disability will not mitigate the damages due from the wrongdoer to the injured party for lost time; and the rule is applicable though the person making the payment is the employer of the injured party. *Nashville, etc., R. Co. v. Miller* (Ga.), 1-210.

Provocation. — Words of provocation may be considered in mitigation of punitive but not compensatory damages. *Mahoning Valley R. Co. v. De Pascale* (Ohio), 1-896.

In an action for personal tort, compensatory damages which may be recovered from the principal for the wrongful and unlawful act of the agent are not subject to mitigation, nor is the liability of the principal defeated by proof that the act which caused the injury was provoked by abusive language used by the plaintiff to such agent. *Mahoning Valley R. Co. v. De Pascale* (Ohio), 1-896.

Where in an action for damages brought against a principal for the wrongful act of the agent, the jury is restricted by the instruction of the court to the allowance for compensatory damages only, an instruction that the jury may consider in mitigation of damages the provocation brought about by the insulting words used by the plaintiff to the agent of the defendant is properly refused. *Mahoning Valley R. Co. v. De Pascale* (Ohio), 1-896.

6. DAMAGES ACCRUING PENDING ACTION.

In equitable actions. — In an equitable action the plaintiff is entitled to a judgment not only for the damages which accrued prior to the commencement of the action, but for those which accrued thereafter up to the time of the trial. *Karns v. Allen* (Wis.), 15-543.

7. INTEREST.

Action for destruction of property. — Where a suit is brought for damages arising from the destruction of property and there is a basis of calculation as to the value, interest is not recoverable *eo nomine*; but the jury may consider the circumstances and increase the damages by adding an amount equal to the interest on the value of the property destroyed. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

Action for personal injuries. — In an action to recover damages for personal injuries sustained by the plaintiff while driving along a defective highway, where the plaintiff recovers, his judgment should not include interest on the damages awarded him. *Missouri, etc., Tel. Co. v. Vandervort* (Kan.), 6-30.

On unliquidated damages. — There is no rule prohibiting the allowance of interest upon unliquidated damages, but in such case interest should be allowed or disallowed, as justice may demand. *Bernhard v. Rochester German Ins. Co.* (Conn.), 8-298.

In an action for tort where the damages are unliquidated, the jury may not allow interest upon the damages assessed by them. *Lester v. Highland Boy Gold Min. Co.* (Utah), 1-761.

8. DUTY OF INJURED PARTY TO MINIMIZE DAMAGES.

Ordinary prudence in securing physician required. — A person who has been injured by the negligence of another is required to use only ordinary care and prudence in securing the services of a physician. *Berry v. Greeneville* (S. C.), 19-978.

9. MEASURE AND ELEMENTS OF RECOVERY.

a. In general.

Uniformity in awards. — As far as possible, some reasonable uniformity in awards of damages for like injuries should be observed. *Williams v. W. R. Pickering Lumber Co.* (La.), 19-1244.

b. In actions for breach of contract.

Executory contract for exchange of properties. — The damages for the breach of an executory contract for the exchange of properties are to be determined by the actual value of such properties, from which the plaintiff's real loss may be ascertained. *Norton v. Hinecker* (Ia.), 15-474.

But in the absence of any evidence as to the value of the properties, the price fixed thereon in the contract of exchange is *prima facie* some evidence as to what they are worth,

which may serve as a basis for the determination of the amount of the damages. *Norton v. Hinecker* (Iowa), 15-474.

Mental anguish. — Damages for mental anguish can be recovered in an action for breach of contract only in those exceptional cases where the breach amounts, in substance, to an independent wilful tort. *Beaulieu v. Great Northern R. Co.* (Minn.), 14-462.

The rule that all damages resulting from a single wrong or cause of action must be recovered in one suit precludes a woman, who has settled an action brought by her against a carrier to recover damages for delay in delivering her trousseau and for injury to property, from maintaining a subsequent action for the mental anguish which the delay caused her to suffer, whether or not mental anguish is a proper element of recovery. *Eller v. Carolina, etc., R. Co.* (N. Car.), 6-46.

Damages resulting from injury to feelings, reputation, and standing are recognized in Louisiana as actual, or compensatory, as contradistinguished from exemplary, or vindictive, damages, and where they arise *ex contractu*, and the liability of the obligor is fixed (subject to the obligation of the obligee to prove his case) by his being put in default, there is no reason why they should not be recovered in the same manner, and to the same extent, as damage to person or property. *Johnson v. Levy* (La.), 10-722.

c. In actions for personal injuries.

Expenses of care and nursing. — In an action for personal injuries, it is error to permit recovery for the expenses of care and nursing, in the absence of any basis furnished by proof of value. *Buxton v. Ainsworth* (Mich.), 5-146.

In an action to recover damages for personal injuries, the plaintiff cannot recover for the value of the services rendered him by his family in nursing him, and therefore it is erroneous to admit evidence of such services or to give an instruction authorizing a recovery therefor. *Jones, etc., Co. v. George* (Ill.), 10-285.

Expense of medical treatment. — Where the evidence in an action for personal injuries shows that the plaintiff was called upon after his injury by physicians in a professional capacity, but does not show what, if anything, he paid or was charged for such services, and the plaintiff testifies that he does not know the amount of his doctor's bills, an instruction that tells the jury that if they find for the plaintiff they will allow him "for any expenses necessarily incurred by him for medicines, medical, or surgical attention," etc., and thus leave to the jury a matter on which there is not sufficient evidence to form an estimate, is error. *Gibler v. Terminal R. Assoc.* (Mo.), 11-1194.

Mental pain and suffering. — Damages for mental suffering may be recovered though unaccompanied by physical suffering. *Barnes v. Western Union Tel. Co.* (Nev.), 1-346.

Mental suffering caused by sympathy. — A husband's mental distress caused

by his sympathy for his wife's suffering from physical injuries is not a recoverable element of damages in an action by him. *Woodstock Iron Works v. Stockdale* (Ala.), 5-578.

Fright. — A person who enters a house occupied by a married woman then in an advanced stage of pregnancy, and after being ordered to leave the house, unlawfully refuses to do so, making threats in regard to a debt which he claims is owing by her husband and taking an inventory of the personal property, whereby the woman is thrown into a state of nervous excitement resulting in labor pains of unusual severity and the premature birth of the child, is liable in damages for the injury caused, although he is guilty of no physical violence. *Engle v. Simmons* (Ala.), 12-740.

Permanent injuries. — In an action for personal injuries it is error to give an instruction allowing the jury to assess damages for permanent injuries or lasting impairment of health, unless there is evidence showing, with reasonable certainty, that such permanent injuries or lasting impairment of health have been in fact sustained by the plaintiff. *Goken v. Dallugge* (Neb.), 9-1222.

Aggravation of existing ailments. — In an action for damages for personal injuries, the amputation of a limb alleged to have been caused by the injuries sued for may be considered by the jury as an aggravation of ailments existing prior to the injury, since both sick and well persons have the right to recover damages for injuries received in the condition of health in which they are at the time of the injury. *Smart v. Kansas City* (Mo.), 13-932.

Future pain and suffering. — In an action to recover for personal injuries, instructions that the jury might find for the plaintiff on account of future pain and suffering, held not erroneous. *Kirkham v. Wheeler-Osgood Co.* (Wash.), 4-532.

A person who recovers damages for a personal injury is entitled to compensation for future pain and suffering where the evidence shows that such pain and suffering will be a reasonable result from the injury sustained. *Arkansas City v. Payne* (Kan.), 18-82.

Depreciated earning capacity. — The mere fact that a married woman is not engaged in a separate business at the time when she is injured does not deprive her of the right to recover for a disability that will permanently bar her from engaging in an occupation on her own behalf, and, consequently, in an action by a married woman to recover for personal injuries, an instruction that, in the absence of evidence that the plaintiff is engaged in any business, the jury cannot allow her anything for depreciated earning capacity, is properly refused. *Bliss v. Beck* (Neb.), 16-366.

Depreciated earning capacity before and after majority. — In an action for personal injuries to a boy an instruction that "in arriving at the amount of damages, you will take into consideration his earning powers, his ability to earn money, as to what extent, if any, it has been decreased, that is,

what he would be able to earn after he has arrived at the age when it is his duty to take care of himself," is not erroneous as failing to limit the recovery to damages suffered by reason of the diminished capacity to labor and earn money, or on the ground that the evidence does not afford a basis on which to rest the recovery, the proof showing the incapacity of the plaintiff to engage in certain occupations. *Beaudin v. Bay City* (Mich.), 4-248.

Loss of earnings during infancy. — In an action by an infant to recover damages for personal injuries sustained by him, the loss of his time or services during his minority is not an element of recovery. *Comer v. W. M. Ritter Lumber Co.* (W. Va.), 8-1105.

Infants — damages for personal injuries — loss of earnings before majority. — A minor cannot recover compensation for impaired capacity to pursue the ordinary vocations of life prior to his majority, unless it be alleged and proven that he has been given his liberty, that his parents do not claim the right to receive such compensation; but evidence may be offered showing his earning capacity to aid and guide the jury in determining the amount of damages to be awarded after he reaches his majority. *McClain v. Leviston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Loss of society of infant child. — In an action by a father for personal injuries to his infant child, loss of society of the child cannot form an element of recoverable damages. *Birmingham R., etc., Co. v. Baker* (Ala.), 18-477.

Loss of business profits. — In an action by a woman for personal injuries, where the evidence shows that the plaintiff at the time of the injury was fifty-six years old, and was engaged in business as a baker, but that after her injury she sold the business, and, notwithstanding some evidence as to profits being earned in the business, there is nothing to show a reasonable certainty of future profits, an allowance by the jury for loss of that regard being remote and conjectural, and the judgment should be reduced by deducting such allowance therefrom. *Wright v. Toronto R. Co.* (Can.), 17-657.

In an action for damages for personal injuries, the loss of the profits of a business, as distinguished from the loss of income derived from personal effort or particular skill, cannot be considered as an element of damages; and where it appears that the plaintiff was engaged in conducting a lunch business, in a room five by sixteen feet, selling clams and oysters and sea food, and employed from one to three assistants, that oysters and clams, which were the principal articles of food, were purchased by the barrel, and were opened as ordered, and that the price of supplies purchased by the plaintiff and the amounts sold varied to such an extent that the number of persons employed had to be changed from time to time, and it is not shown that any particular skill or ability was required for managing the business or that

the plaintiff had any particular skill in opening clams and oysters and serving food, the profit which the plaintiff made on the business cannot be considered in determining the damages. *Weir v. Union R. Co.* (N. Y.), 11-43.

Impairment of prospects of marriage. — In an action by a young woman to recover damages for personal injuries resulting from the defendant's negligence, the impairment of her prospects of marriage resulting from such injuries may be taken into consideration in estimating the damages. *Morin v. Ottawa Electric R. Co.* (Can.), 15-51.

Proximate results of injury. — In an action for damages for personal injuries alleged to have necessitated the amputation of a limb, it is proper to allow the jury to take into consideration the amputation of the limb in fixing the amount of damages if, upon the evidence, they find that the amputation was the result of the injury complained of. *Smart v. Kansas City* (Mo.), 13-932.

d. In actions for injuries to property.

In general. — The general rule is, that for the detention, conversion, damage, or destruction of property, the measure of damages is the value of the property at the time of its taking or destruction, together with interest on that amount at the legal rate; and the time for which such interest is allowed must be determined by the circumstances of each case. *Parks v. Sullivan* (Colo.), 17-1079.

Diminution in market value. — Where an artist claims damages for the wrongful breakage of a glass picture painted by him, the measure of damages is the diminution in market value of the picture resulting from breakage, without regard to any value which the broken picture may have to the artist individually as a design. *Wade v. Herndl* (Wis.), 7-591.

An instruction in an action for the negligent burning of cord wood that the measure of damages is the value of the wood in the locality where it was, is correct and there is no error in refusing a requested instruction that the measure of damages is the "value of the wood standing in the woods, plus the cost of cutting." *Hart v. Atlantic Coast Line R. Co.* (N. Car.), 12-706.

The proper measure of damages for permanent injury to real property is the diminution in the market value of the property, and this rule applies in actions between private persons as well as in actions where property is taken for public use. *Rabe v. Shoenberger Coal Co.* (Pa.), 5-216.

Property without market value. — In an action to recover for the loss of an article which had no market value, the measure of damages is the value of the article to the plaintiff, and in ascertaining this value inquiry may be made into the constituent elements of the cost to the plaintiff of producing the article. *Southern Express Co. v. Owens* (Ala.), 9-1143.

Allowance for owner's loss of time. —

Courts will sometimes allow damages for the usable value of property which has been converted or destroyed, but not for the loss of time of the owner, unless the facts are such that the latter is unable to perform his work without the use of the property, and then only for such time as he is unable to secure other employment. *Parks v. Sullivan* (Colo.), 17-1079.

In an action by a surveyor to recover damages for the negligent destruction of his transit by the defendant, an allowance of damages for the plaintiff's loss of time at the rate of five dollars per day during the time that he was without an instrument, based upon his testimony that he was engaged as city engineer and also did work for private parties at that rate, is erroneous, when there is nothing to show that the plaintiff lost any particular contract by reason of the destruction of his instrument, or that he procured a new instrument, as soon as possible, or that he was unable to perform any work without the use of a transit, or that he made any attempt to procure other employment in the interval. *Parks v. Sullivan* (Colo.), 17-1079.

Destruction of springs of water. —

In an action for damages against a mining company for permanent injury to the plaintiff's land by the removal of its subjacent support, where the principal injury complained of is the irremediable destruction of several springs of water, the proper measure of damages is the diminution in the market value of the entire tract of land, caused by the injury; and the value of the springs should not be considered as though they were independent pieces of property, but only as an element in estimating the value of the realty. *Rabe v. Shoenberger Coal Co.* (Pa.), 5-216.

Injury to fruit trees. — Damage caused by the destruction of fruit trees may be measured by estimating either their value as a distinct part of the land, or the difference in value of the land before and after their destruction; and where both methods are resorted to in the same case, the damage must be ascertained by the jury from all the evidence. *Atchison, etc., R. Co. v. Geiser* (Kan.), 1-812.

The measure of damages for the negligent destruction of and injury to fruit trees is the value of the trees destroyed and the diminution in the value of the trees injured. *Louisville, etc., R. Co. v. Beeler* (Ky.), 15-913.

Contract for services. — Where the defendant broke his contract with the plaintiff whereby the plaintiff was to cut and manufacture lumber at a certain price, the measure of damages is the difference between the contract price and the cost of doing the work. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

e. In actions for false representations.

Representations inducing exchange of property. — In an action to recover damages for false representations inducing an exchange of property, the measure of damages

is the difference between the value of the property parted with by the person defrauded and the value of the property received by him. *George v. Hesse* (Tex.), 15-456.

10. PLEADING.

a. Sufficiency of complaint.

Damages from breach of contract. —

A complaint which, after stating facts including a breach of contract, contains the further allegation, "All to plaintiff's damage two thousand dollars," sufficiently alleges damages arising from the breach of contract. *Welborn v. Dixon* (S. Car.), 3-407.

Mental anguish. — A complaint which charges at most the negligent failure of the carrier to perform its contract does not authorize a recovery of damages for mental anguish, such damages being recoverable only for a malicious or wanton breach. *Beaulieu v. Great Northern R. Co.* (Minn.), 14-462.

Exemplary damages. — When the complaint alleges and the proof shows facts such as will warrant a recovery of exemplary damages, they need not be claimed by name and as such, but may be recovered under the claim for damages generally. *Shoemaker v. Sonju* (N. Dak.), 11-1173.

Sufficiency of allegation of future disability. — Where the petition in an action to recover damages for personal injuries, after sufficiently alleging the negligence of the defendant as the cause of the accident, further alleges that the plaintiff fell and struck his right side against the edge of the platform of a coach, broke two ribs, and bruised the flesh and lacerated and strained the muscles of his right side; that as a result of such injuries he has suffered intense pain and mental anguish, and still suffers pain and mental anguish; that as a result of such injuries he received a severe shock to his nervous system, and ever since has been able to sleep but little; that he has ever since been unable to perform his usual vocation of a traveling salesman, and has been unable to walk or move about without pain and suffering, such allegations are sufficient to present to the jury the question of future disability. *Fugna v. St. Louis, etc., R. Co.* (Kan.), 20-115.

Effect of failure to allege substantial damages. — Where the complaint in an action for damages states facts sufficient to show that the plaintiff is entitled to nominal damages at least, it is good as against a demurrer based on the ground that it does not state facts sufficient to constitute a cause of action, though its allegations are wholly inadequate to authorize the recovery of substantial damages. *Bell v. Gonzales* (Colo.), 9-1094.

b. Necessity of pleading special damages.

In general. — In an action to recover damages for personal injuries sustained by the plaintiff, his inability to follow his ordinary vocation, which is consequent upon the injury sustained by him, may be proved un-

der a general allegation of damages to characterize the extent of such injury; but when damages are sought for special consequences which must depend upon the peculiar circumstances of the plaintiff at the time of or previous to the injury, as that he was actually engaged in some particular business yielding pecuniary profit, such special consequences constitute special damage which must be stated with particularity in the declaration. *Smith v. Whittlesey* (Conn.), 7-114.

In an action to recover damages for personal injuries sustained by the plaintiff, an averment in the declaration that the plaintiff has been prevented from attending to his ordinary business serves to characterize in a general way the injury and its extent and permanence, but does not lay a foundation for proof of special damages. *Smith v. Whittlesey* (Conn.), 7-114.

Consequential injury to eye. — In an action for an injury to the plaintiff's right eye resulting in the loss of the sight thereof, no recovery can be had for impairment of the sight of the left eye resulting from the injury, without a special averment of such resulting damage, unless the plaintiff proves that the impairment of the left eye was the necessary as well as the natural consequence of the injury to the right eye. *Gordon v. Northern Pacific R. Co.* (Mont.), 18-583.

In an action for injuries to the plaintiff's right eye resulting in the loss of the sight thereof, an averment in the complaint that the "injuries occasioned excruciating pain" is not broad enough to permit the admission of evidence of a generally weakened condition or general impairment of the left eye; and therefore it is erroneous to permit the plaintiff to testify, under such an averment, that the left eye "never pains particularly, only if I read a little, why, my eyes begin to water. . . . My eyes would ache in the sunlight." *Gordon v. Northern Pacific R. Co.* (Mont.), 18-583.

A complaint in an action for personal injuries alleging and enumerating specifically the injuries received, as well as the consequences resulting therefrom for which damages are claimed, but not containing any averment of injury to the plaintiff's eyes or any general averments of injury except an averment that the plaintiff has been incapacitated from performing daily work as a cook and housewife, is not sufficient to admit proof of a diseased condition of the plaintiff's eyes since the accident. *Pugmire v. Oregon Short Line R. Co.* (Utah), 14-384.

Lost time. — When a petition in an action for personal injuries makes no claim for damages on account of lost time, but shows in a general way that the plaintiff has lost time, the plaintiff may recover such damages, where the evidence fixing the time lost and the value thereof is admitted without objection. *Nashville, etc., R. Co. v. Miller* (Ga.), 1-210.

c. Matters in mitigation.

Special plea unnecessary. — In the absence of a specific statutory requirement to

the contrary, the general rule is that the facts in mitigation of damages, not being issuable matter, are not required to be set up by a special plea, but may be given in evidence under the general issue. *Creighton v. Board of Water Com'rs* (N. Car.), 10-218.

Payment by third person. — **Quære:** Whether the wrongdoer can plead the payment by a third person to the party injured to diminish the amount of the wrongdoer's liability where such payment is not a gratuity but a legal obligation. *Nashville, etc., R. Co. v. Miller* (Ga.), 1-210.

d. Failure to deny allegation regarding damages.

Effect where damages are unliquidated. — The Minnesota statute providing that "every material allegation in the complaint, . . . not denied by the pleading of the adverse party, shall, on the trial, be taken to be true," does not authorize a judgment for the plaintiff in an action to recover unliquidated damages, without proof of the amount of damages. *Nohre v. Wright* (Minn.), 8-1071.

11. EVIDENCE.

a. Admissibility.

Relevancy, in general. — Evidence offered in support of an element of damage alleged in the declaration and allowed over a general objection will not be held error if it is legally pertinent or relevant in any aspect of the case. *Western Union Tel. Co. v. Wells* (Fla.), 7-531.

Mental pain. — An allegation in a petition that the plaintiff has suffered great pain is sufficient to authorize the admission of evidence of mental pain and a recovery therefor. *Nashville, etc., R. Co. v. Miller* (Ga.), 1-210.

Pain caused by examination ordered by court. — In an action for personal injuries, it is not proper to allow the plaintiff to testify as to the pain and inconvenience caused by a physical examination made by physicians under an order of the court. *Etz-korn v. Oelwein* (Iowa), 19-999.

Nature and extent of suffering. — In an action for damages for personal injury, it is competent to ask the plaintiff to tell the jury how he suffered and the extent of the suffering. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Inability to labor. — In an action by a married woman for personal injuries, it is proper to prove that the plaintiff is incapacitated from performing labor, as the result of her injuries, for the purpose of showing the nature and extent of such injuries. *Bliss v. Beck* (Neb.), 16-366.

Disqualification for other occupations. — Where in an action for personal injuries it appears that the plaintiff has been incapacitated by his injuries from following his usual occupation, evidence as to the plaintiff's qualifications to engage in other occupations is admissible upon the question of the compensation to be awarded him.

Graham v. Mattoon City R. Co. (Ill.), 14-853.

In an action for personal injuries by a motorman who has been disabled from performing manual labor, the plaintiff may, as bearing on the question of damages, testify that he is unable to read and write well and has not sufficient education to fill a clerical position. *Graham v. Mattoon City R. Co.* (Ill.), 14-853.

Diminution of earning capacity. — In an action to recover damages for personal injuries, it is competent to show the earning capacity of the party injured, the nature and extent of his business, and his inability to pursue such business in his accustomed way, as aid and guide to the jury in exercising their judgment in determining the amount of damages to be awarded. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Result of consequential injury not pleaded. — Where the complaint, in an action for injury to the plaintiff's right eye is not broad enough to permit the admission of evidence of impairment of the left eye in consequence of the injury, it is erroneous to allow the plaintiff to testify that, owing to the weakened condition of his left eye he was unable to stand any bright light, and therefore he was unable to do any work for a year after the injury; because it is incompetent to show the result of a consequential injury, if it is not permissible to show the consequential injury itself. *Gordon v. Northern Pacific R. Co.* (Mont.), 18-583.

Domestic relations of plaintiff. — In an action to recover damages for personal injuries sustained by the plaintiff, it is erroneous to permit the plaintiff to prove that he is a married man and has children, as only compensatory damages are recoverable, and therefore evidence of the domestic relations of the parties is irrelevant; and the error is not cured by a remission of part of the damages awarded by the jury. *Jones, etc., Co. v. George* (Ill.), 10-285.

Evidence of manner of previous births where unborn child displaced by injuries. — In an action for personal injuries alleged to have caused an unborn child to be displaced from its natural position with injurious results, it is erroneous to permit the plaintiff to testify that all her other children were born in a normal position. The fact that a woman has one or more children born in a normal position has no tendency to prove that such will be the case with others. *Etz Korn v. Oelwein* (Iowa), 19-999.

Refusal to permit physical examination. — A refusal to submit to a physical examination is a fact which the opposing party is entitled to have go to the jury to be considered by them in weighing the evidence in the case. *Austin, etc., R. Co. v. Chick* (Tex.), 1-261.

Evidence of value before and after injury. — Evidence as to the value of the plaintiff's land before and after the destruction of and injury to fruit trees is ordinarily admissible as a circumstance which may be

considered by the jury in determining the weight to be given to the opinion evidence as to the value of the trees destroyed and injured. But it is not error to exclude such evidence where the difference between the witnesses who testify as to the value of the trees and those who propose to testify as to the diminution in the value of the land consists of the fact that the latter place a lower estimate on the value of the trees. *Louisville, etc., R. Co. v. Beeler* (Ky.), 15-913.

Condition of property injured at time remote from injury. — In an action to recover damages from a telegraph company for digging up the plaintiff's land and injuring his trees, evidence offered by the defendant to show the appearance and condition of the trees two years after the trespass complained of is irrelevant in the absence of a showing of a connection or relation between the situations at the two periods. *Western Union Tel. Co. v. Ring* (Md.), 5-969.

Estimate by witness. — In an action to recover damages from a telegraph company for digging up the plaintiff's land and injuring his trees, it is erroneous to permit a witness for the plaintiff to give his estimate in dollars and cents of the damage done, or to state how he has arrived at such estimate. *Western Union Tel. Co. v. Ring* (Md.), 5-969.

Estimate of value by nonexpert. — In an action to recover damages from a telegraph company for digging up the plaintiff's land and injuring his trees, a witness should not be permitted to testify as to "the value of the walnut tree as a tree for wood or timber," until he has shown his knowledge of the subject of the inquiry. *Western Union Tel. Co. v. Ring* (Md.), 5-969.

Offer of purchase as evidence of value. — In an action to recover damages from a telegraph company for digging up the plaintiff's land and injuring his trees, the plaintiff cannot prove the value of his property before the trespass by an offer of purchase. *Western Union Tel. Co. v. Ring* (Md.), 5-969.

Value of services. — In an action for the breach of a contract to cut and manufacture lumber at a certain price, testimony by one who has done the same kind of work under similar circumstances, as to what it cost him, is admissible on the measure of damages. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

Cross-examination as to other similar action. — In an action to recover damages from a telegraph company for digging up the plaintiff's land and injuring his trees, where the plaintiff on cross-examination admits having brought a similar action against a telephone company and having settled it for fifty dollars, and it appears that the damages in the action referred to were laid at two thousand dollars, the defendant telegraph company is not entitled to ask the plaintiff whether the trees cut by the telephone company were of the value of two thousand dollars. *Western Union Tel. Co. v. Ring* (Md.), 5-969.

b. Sufficiency.

In general. — Evidence examined and held sufficient to sustain the verdict and the judgment. *Fuqua v. St. Louis, etc., R. Co.* (Kan.), 20-115.

Permanency of injuries. — It is prejudicial error to leave the jury the opportunity to find that personal injuries for which recovery is sought are permanent where there is nothing more than testimony that the injuries may possibly be permanent, and the evidence does not tend to prove that they will be permanent. *Deneen v. Houghton County St. R. Co.* (Mich.), 13-134.

Loss of earnings. — In an action for personal injuries by which the plaintiff was wholly disabled, it is proper to leave for the consideration of the jury his testimony that before the accident he earned about a certain sum daily, though he states that he kept no account books, and cannot tell what he made any particular day or week while he was in business. *Wolfe v. Ives* (Conn.), 19-752.

Injury to premises. — In an action for damages, evidence that the premises of the plaintiff were damaged by the wrongful act of the defendant, that the plaintiff made repairs to the amount of \$1,100, and that about one-half of such expense was required on account of the defendant's acts, is sufficiently certain to sustain a verdict in favor of the plaintiff for \$250. *Jemo v. Tourist Hotel Co.* (Wash.), 19-1199.

12. INSTRUCTIONS.

Necessity of instructions. — Although it is improper for the trial court to leave the whole question of damages to the discretion of the jury, without instructions in respect to what elements may be considered and within what limits damages may be estimated in the action, the error is not ground for reversal where the jury finds damages in the sum testified to as the actual loss sustained. *Western Union Tel. Co. v. Lehman* (Md.), 14-736.

Application of annuity and mortality tables. — Instructions given by the court in its charge to the jury in regard to the application of annuity and mortality tables held to be inaccurate and confusing, and to tend to lead to erroneous results. *Atlantic Coast Line R. Co. v. Powell* (Ga.), 9-553.

Estimation of prospective damages.

— In cases where a plaintiff's prospective losses in the future during his life expectancy from the diminished earning capacity consequent upon his injuries is made a ground of recovery, the jury should be instructed that in estimating such prospective future damages resulting from the diminished earning capacity, they should reduce such damages to their *present value*, and that such *present value* thereof only should be included in their verdict. *Florida East Coast R. Co. v. Laster* (Fla.), 19-192.

Special damages. — Instructions as to special damages reviewed, in an action to recover damages for personal injuries sustained by the plaintiff, and held to be erroneous in

view of the pleadings and the evidence. *Smith v. Whittlesey* (Conn.), 7-114.

Binding instruction to give exemplary damages. — Exemplary or punitive damages in an action for tort are not matter of right, and it is with a jury to say whether or not they shall be given, and therefore an instruction binding the jury to give exemplary damages is erroneous. *Fink v. Thomas* (W. Va.), 19-571.

13. QUESTION FOR JURY.

Proximate cause. — Whether the defendant's act or omission alleged to be negligence naturally and proximately caused the plaintiff's injuries is, as a rule, a question for the jury. But if there is no evidence connecting the defendant's alleged negligence with the plaintiff's injuries, or if it is obvious that the defendant's act or omission was not the natural and proximate cause thereof, the question is for the court. *Smith v. Public Service Corporation* (N. J.), 20-151.

Assessment of damages. — The defendant in a personal injury case has no right to have the jury assess separately the plaintiff's damages for physical injury and for mental shock. *Toronto R. Co. v. Toms* (Can.), 20-985.

14. VERDICT.

a. In general.

Presumption as to inclusion of exemplary damages. — In an action for damages, where the court instructs the jury that they may under certain conditions allow exemplary damages, but does not direct them to state damages that are compensatory separately from those that are punitive, and the jury return a verdict for the plaintiff for a single sum, it will be presumed that the amount of the verdict is in part made up of exemplary damages. *Otto Kuehne Preserving Co. v. Allen* (U. S.), 8-746.

Reduction of amount by trial judge.

— In an action for personal injuries caused by the bite of a vicious dog, a judgment will not be set aside as excessive when the amount of the verdict returned by the jury is reduced on motion by the trial judge to a sum for which a judgment is entered and which the plaintiff elects to take. *Grissom v. Hofius* (Wash.), 4-125.

b. In action against joint tortfeasors.

In an action against joint tortfeasors where exemplary damages are awarded, it is not necessary that the verdict should be against each defendant in the same amount, because some of the defendants may have acted without malice. *St. Louis R., etc., Co. v. Thompson* (Tex.), 19-1250.

c. Inadequate damages.

\$1,000 for injuries to hand. — Where a boy not quite thirteen years old loses his thumb and forefinger and portions of the next two fingers as the result of an accident, an award of \$1,000 as damages, in an action

for the injury, is manifestly inadequate. *Rossey v. Lawrence* (La.), 17-484.

Compromise verdict. — It is the duty of the court in case of inadequate damages for a plaintiff, to set aside the verdict when the jury in rendering the verdict either disregarded the testimony or acted from passion or prejudice, or when the smallness of the verdict shows that the jury made such a compromise as was equivalent to a verdict for the defendant. *Leavitt v. Dow* (Me.), 17-1072.

New trial for inadequacy. — In an action to recover damages for personal injuries, it is within the discretion of the trial court to set aside a verdict for the plaintiff on the ground that the damages awarded are inadequate, and, in the absence of a showing of abuse, the exercise of this discretion will not be revised on appeal. *Ford v. Minneapolis St. R. Co.* (Minn.), 8-902.

By the general common-law rule, new trials were not granted upon the ground of inadequate damages in actions of trespass, or perhaps in any action of tort; but this rule has been relaxed, and it is now held in England and the United States, that no reason can be given for setting aside verdicts because of excessive damages, which does not apply to cases of inadequate damages. *Leavitt v. Dow* (Me.), 17-1072.

d. Excessive damages.

In general. — The amount of damages for personal injuries involving both physical and mental pain and suffering is peculiarly a question for the jury, and even though the verdict which it awards is large, it will not be disturbed on appeal if it is not so grossly excessive as to indicate passion, prejudice, or corruption on the part of the jury. *Yazoo, etc., R. Co. v. Grant* (Miss.), 4-556.

In an action to recover damages for personal injuries, a verdict in favor of the plaintiff will not be set aside as excessive, unless the amount of damages allowed is so large as to indicate partiality or prejudice on the part of the jury. *McCrorey v. Thomas* (Va.), 17-373.

Damages in excess of plaintiff's proof. — Where, in an action for the abatement of a nuisance, and for damages, the plaintiff's witness testifies on cross-examination that the value of the land damaged by the nuisance was, before the creation of the nuisance, worth from six to eight hundred dollars, that the land was worth little for anything but garden purposes, and that he cannot say what it was worth after the injury, and the defendant's witnesses place the value of the land at the time of the trial at about four hundred dollars, an allowance of nine hundred dollars as compensatory damages is excessive, and will be reduced to six hundred dollars. *Karns v. Allen* (Wis.), 15-543.

\$10,000 for personal injuries. — Where, in an action against a carrier of passengers by a passenger whose arm was injured by the falling of a window-sash of a car in which she was riding, it appears that

the passenger was twenty years of age at the time of the accident, strong, healthy, and active, skilled in household work, fond of driving and athletic games, well educated, competent to perform upon the piano, specially trained in elocution, and qualified to teach and give elocutionary and Delsartian entertainments, and had just commenced teaching a small class in elocution; that the injury was upon the elbow joint, affecting chiefly the ulnar nerve, was extremely painful, necessitating the use of opiates to produce sleep, and was still painful at the time of the trial; that the injury resulted in a numb feeling in the arm and two fingers, and that the muscles of the arm became and remained soft, flabby, and shrunken in size, and the power to grip and hold anything securely in the hand of that arm was lost, so that the injured person could not comb her hair or make her own toilet, could not help at housework, or play the piano, and was compelled to abandon elocutionary and Delsartian exercise; that she was nervous, often sleepless, had little appetite, and was somewhat reduced in flesh; and that the medical treatment of the injury had no perceptible effect, there being no improvement, and that conditions were rather worse than better, physicians being unable to foretell or promise when, if ever, recovery would occur, but regarded the outlook as unfavorable, a judgment for \$10,000 damages will not be disturbed as excessive. *Cleveland, etc., R. Co. v. Hadley* (Ind.), 16-1.

\$8,000 for personal injuries. — In an action for damages for personal injuries to a boy fourteen years of age, evidence examined and held not to justify the court in reversing, as excessive, a verdict and judgment for \$8,000. *Ferguson v. Truax* (Wis.), 13-1092.

\$5,500 for personal injuries. — Where, in an action to recover damages for personal injuries sustained by a young woman of about twenty-one years of age who, prior to the accident causing such injuries, was earning six dollars a week as a stenographer, it appears that the accident resulted in the amputation of her left leg at the knee, paresis in a hand and arm from which there may never be a complete recovery, injury to her back, bruises on her face, and a serious shock to her nervous system, a verdict for \$5,500 is not so excessive as to require a new trial. *Morin v. Ottawa Electric R. Co.* (Can.), 15-51.

\$1,900 for personal injuries. — In an action by a woman for personal injuries where the evidence shows that the injury to the plaintiff caused her great pain and suffering, the amount of \$1,900, awarded to her by the jury for her injuries, is not so large as to show that the jury neglected their duty, or were actuated by any improper motive, or did not appreciate the grounds on which they might act in awarding damages. *Wright v. Toronto R. Co.* (Can.), 17-657.

\$1,000 for personal injuries. — Where it appears in an action to recover for personal injuries that two ribs on the plaintiff's

right side were broken; that for five weeks it was necessary for him to remain with his body in straps, during which time he suffered intensely; that he spat blood; that the pain in his right side continued for more than a year; that before the injury he was a strong, robust, and active man, but that since the injury he lost flesh and his health was seriously impaired, and he could work only with difficulty, a verdict for \$1,000 is not excessive. *Merchants Ice, etc., Co. v. Bargholt* (Ky.), 16-965.

\$700 for injury to land. — In an action for damages for an injury to land, an allowance of \$700 for loss of rentals held to be supported by the evidence. *Karns v. Allen* (Wis.), 15-543.

\$2,000 for injuries to trees. — Where it appears in an action for injury to trees that there is a conflict in the evidence as to the value of eight or nine hundred apple trees, some of which were destroyed and others greatly injured by a fire which occurred through the defendant's negligence, that one of the defendant's witnesses put the damages at \$2.50 a tree, that two neighbors who handled fruit and fruit trees, and who shortly after the fire was procured by the defendant to assess the damages, placed the loss at \$2,461, and that some of the defendant's witnesses estimated the damages at a considerably lower amount and others at a higher amount, a verdict of \$2,000 will not be set aside as excessive. *Louisville etc., R. Co. v. Beeler* (Ky.), 15-913.

15. REVIEW ON APPEAL.

Separate items included in judgment.

— In an action by a passenger against a railroad company to recover damages for personal injuries alleged to have resulted from the negligence of the defendant's servants, where the jury find in favor of the plaintiff, a married woman, and assess her damages at \$1,900 for her injuries and \$600 for loss of business, the course pursued by the trial judge in entering judgment generally, in favor of the plaintiff, for \$2,500, does not prevent the court on appeal from considering the propriety of the amount allowed by the jury for loss of business. *Wright v. Toronto R. Co.* (Can.), 17-657.

DAMS.

See **WATERS AND WATERCOURSES**.
Obstruction of stream as public nuisance, see **NUISANCES**, 2 b.
Prescriptive right to maintain dam, see **WATERS AND WATERCOURSES**, 3 b (4).

DANCING SCHOOLS.

Regulation of, see **CONSTITUTIONAL LAW**, 10.

DANGER.

Acts done in sudden danger as negligence, see **STREET RAILWAYS**, 8 a (6).

DANGEROUS EMPLOYMENT.

Duty of master to warn and instruct servants, see **MASTER AND SERVANT**, 3 d (1).

DANGEROUS PREMISES.

See **NEGLIGENCE**.

Liability of carrier for defective or unsafe condition of conveyances, see **CARRIERS**, 6 e (3).

Liability of innkeeper for defects in premises, see **INNS, BOARDING HOUSES, AND APARTMENTS**, 6.

Liability of master for injuries to servants, see **MASTER AND SERVANT**, 3.

Liability of water company to trespassers, see **WATERS AND WATERCOURSES**, 4 d.

DANGEROUS WEAPONS.

See **WEAPONS**.

DATE.

Materiality of exact date of crime, see **CRIMINAL LAW**, 6 q (1).

Omission of date in indictment, see **INDICTMENTS AND INFORMATION**, 8.

Presumption of date of delivery of deed, see **DEEDS**, 1 c (1).

DAY.

Computation of time, see **TIME**.

Day's labor, see **LABOR LAWS**.

Fractions of day as affecting priority of events on same day, see **EXECUTIONS**, 11.

DEAD ANIMAL.

Pollution of water by burying dead animal, see **WATERS AND WATERCOURSES**, 1.

Property rights in, see **CONSTITUTIONAL LAW**, 9 b.

DEAD BODY.

See **CEMETERIES**; **CORONERS**.

Burial ground as nuisance, see **NUISANCES**, 1 b.

Liability of municipality for acts of officers in search for dead body, see **MUNICIPAL CORPORATIONS**, 9 a.

Rights of property and possession.

A widow has an interest in the unburied body of her deceased husband which the courts will recognize. *Louisville, etc., R. Co. v. Wilson* (Ga.), 3-128.

The common law recognizes no right of property in dead bodies, but there is a right of possession for the purpose of preservation and burial, wrongful and intentional interference with which gives a right of action for damages including damages for mental an-

guish. *Beaulieu v. Great Northern R. Co.* (Minn.), 14-462.

Action for injuries.—Facts held to constitute negligence giving a widow a right of action for injury to the dead body of her husband. *Louisville, etc., R. Co. v. Wilson* (Ga.), 3-128.

Damages for injuries to.—The parents of an infant child are not entitled, under the law, to recover damages for mental pain and anguish occasioned by the mutilation of the dead body of such infant. *Long v. Chicago, etc., R. Co. (Okla.)*, 6-1005.

In an action against a railroad company for damages for breach of contract in failing to deliver a corpse to a connecting carrier and thereby delaying the funeral arrangements twenty-four hours, damages for mental anguish cannot be recovered in the absence of wilful or malicious misconduct on the part of the company or its agents. *Beaulieu v. Great Northern R. Co. (Minn.)*, 14-462.

DEADLY WEAPONS.

See WEAPONS.

DEAF AND DUMB PERSONS.

Capacity of deaf mute to contract, see CONTRACTS, 2 a.

Contributory negligence of deaf persons, see NEGLIGENCE, 7 a.

Inability to communicate with others as showing insanity, see INSANITY, 7 a.

Mode of taking testimony of deaf-mutes, see WITNESSES, 4 a.

DEATH.

See DEATH BY WRONGFUL ACT.

Abatement of action by, see ABATEMENT AND REVIVAL.

Belief as to death of former spouse as defense to bigamy, see BIGAMY, 3.

Cause of death, see INSURANCE, 7 f (4).

Effect of death of judge pending motion for new trial, see JUDGES, 3 d.

Effect of death of one spouse on estate by entirety, see HUSBAND AND WIFE, 9 d.

Effect of death of party pending appeal, see APPEAL AND ERROR, 7 a.

Ground for canceling fines, see FINES, 4.

Infant heirs as affected by death of ancestor, see LIMITATION OF ACTIONS, 4 b (3).

Partnership dissolved by death of partner, see PARTNERSHIP, 8 a.

Power of appellate court to relieve against failure of defense by death of sole witness, see APPEAL AND ERROR, 15 a.

Prerequisite to grant of administration, see EXECUTORS AND ADMINISTRATORS, 1 a.

Presumption against suicide, see SUICIDE.

Proof of death of witness to render former testimony admissible, see CRIMINAL LAW, 6 n (1).

Revocation of decree of divorce after death of plaintiff, see DIVORCE, 8.

Right to issue execution in favor of firm after death of partner, see PARTNERSHIP, 5 b (5).

Sufficiency of proof of death, see BENEVOLENT OR BENEFICIAL ASSOCIATIONS, 9 a.

Termination of contract of employment by death of servant, see MASTER AND SERVANT, 1 c (2).

Vacancy in office of justice of the peace created by death before term begins, see JUSTICES OF THE PEACE, 1 b.

No presumption from absence alone.

—In order that the presumption that a person once shown to have been alive continues to live may be overcome by the presumption of death arising from seven years' unexplained absence from home or place of residence, there must be a lack of information concerning the absentee on the part of those likely to hear from him, after diligent inquiry. *Modern Woodmen v. Gerdorn (Kan.)*, 7-570.

The removal of a person to another part of the country, or his mere absence from a former home, where he has been unheard of for seven years, does not create the presumption of death. *Renard v. Bennett (Kan.)*, 14-240.

The inference of death to be derived from the unexplained absence of a person from his home for a period of seven years is, at best, only a presumption, and cannot arise unless the absence remains unexplained after diligent inquiry is made of the persons and at the places where tidings of the absentee, if living, would most probably be had. *Renard v. Bennett (Kan.)*, 14-240.

The fact that an absentee who has changed his domicile and does not intend to return has not communicated with, or is unheard of by, those remaining at his former home, does not raise the presumption of death, which only arises after due inquiry has been made at his last-named domicile and of the persons likely to know of his whereabouts if living. *Renard v. Bennett (Kan.)*, 14-240.

Inquiry necessary to raise presumption.—The inquiry which must be made concerning an absentee, before a presumption of death will arise from his unexplained absence of seven years, should extend to all those places where information is likely to be obtained, and to all those persons who in the ordinary course of events would be likely to receive tidings if the absentee were alive, whether members of his family or not; and in general the inquiry should exhaust all patent sources of information, and all others which the circumstances of the case suggest. *Modern Woodmen v. Gerdorn (Kan.)*, 7-570.

Circumstances sufficient to raise presumption.—The report of the death of certain heirs, together with their complete disappearance for more than twenty years, is sufficient *prima facie* evidence of the death of such persons. *Vaughn v. Langford (S. Car.)*, 16-91.

Presumption of survivorship.—There is no presumption of survivorship in the

case of persons who perish in a common disaster. In the absence of proof tending to show the order of dissolution, the question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous. *St. John v. Andrews Institute* (N. Y.), 14-708.

DEATH BY WRONGFUL ACT.

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Only punitive damages recoverable, see DAMAGES, 4.

Pleading statute of limitations in action for death by wrongful act, see LIMITATION OF ACTIONS, 8 b (1).

Survival of cause of action, see ABATEMENT AND REVIVAL.

1. VALIDITY OF STATUTE CREATING LIABILITY.

The Federal Employers' Liability Act of 1908 (Act of April 22, 1908, c. 149, 35 St. L. 65, Fed. St. Ann. Supp. 1909, p. 584) is unconstitutional in that it gives a remedy for injuries causing death, without limitation of the damages recoverable, in favor of the executor or administrator, and directs the fund to be distributed in a manner inconsistent with the law of every state with respect to the devolution of the estates of deceased persons, thus invading the sphere of legislation reserved to the states. *Hoxie v. New York, etc., R. Co.* (Conn.), 17-324.

2. WHEN ACTION WILL LIE.

Death not instantaneous.—Where one injured through the negligence of another

lives, though unconscious, until the following day, a right of action for the injury vests in and survives him, and no action accrues under a statute permitting recovery for instantaneous death. *Olivier v. Houghton County St. R. Co.* (Mich.), 3-53.

Death due to other than statutory causes.—Under a statute giving a right of action for a death caused by the negligence of the servants of a common carrier, the latter is not liable unless the servants are at the time of the negligence engaged in the carrying business. *Missouri, etc., R. Co. v. Freeman* (Tex.), 1-481.

Action in one state for death in another.—Under the Rhode Island statute providing that an action for the wrongful death of a person may be "brought by and in the name of the executor or administrator of such deceased person whether appointed or qualified within or without the state," an administratrix of another state can sue in the state of Rhode Island for a death occurring in such other state where the laws of that state create a cause of action for wrongful death substantially similar to that given by the statute of Rhode Island. The administratrix in such suit acts only as trustee for the beneficiaries named, and does not hold any sum which she recovers as assets of the estate to which she is accountable in the probate court of Rhode Island. *Connor v. New York, etc., R. Co.* (R. I.), 13-1033.

3. SURVIVAL OF CAUSE OF ACTION.

Under Missouri statute.—Prior to the amendment of section 2864 of the Missouri Revised Statutes of 1899 in the year 1905, the only persons who could bring an action under that section for the wrongful killing of another were the beneficiaries specifically named therein, viz., the husband or wife, minor child or children, or father or mother of the deceased, and the statutory right of action did not survive to the personal representative of a deceased beneficiary. *Gilkeson v. Missouri Pacific R. Co.* (Mo.), 17-763.

Sections 96 and 97 of the Revised Statutes of 1899 were intended to provide for the survival, in favor of and against personal representatives, of actions for wrongs to property rights and interests only, and not for actions based upon the death of a human being, and, consequently, where a married man is killed in a railroad accident, and one of his minor children is injured in the same accident and afterwards dies, the personal representative of such deceased child cannot maintain an action against the railroad company, under the sections above mentioned, to recover damages for the father's death. *Gilkeson v. Missouri Pacific R. Co.* (Mo.), 17-763.

The purpose of section 2864 of the Revised Statute of 1899, which makes a carrier of passengers liable to a fixed penalty of \$5,000, payable to certain beneficiaries, wherever a passenger is killed by the negligence of its servants, is not simply to afford compensation to the beneficiaries named therein for the damages suffered by them, but also to secure

the personal safety of passengers. To construe that section as giving a right of action for injury to property rights, which would survive to the personal representatives of a deceased beneficiary under sections 96 and 97 of the Revised Statutes, would be to render it unconstitutional, as authorizing the taking of private property for private use, and without due process of law, and also as denying the equal protection of the laws. *Gilkeson v. Missouri Pacific R. Co. (Mo.)*, 17-763.

As section 2864 of the Revised Statute of 1899, which makes a common carrier of passengers liable to a fixed penalty of \$5,000, wherever a passenger is killed by the negligence of its servants, is a special statute, enacted subsequently to sections 96 and 97 of the Revised Statutes, it must be taken as constituting an exception to, if not a repeal *pro tanto* of, the latter sections, assuming that those sections can have reference to a cause of action arising out of the death of a human being. *Gilkeson v. Missouri Pacific R. Co. (Mo.)*, 17-763.

Death of wrongdoer.—The Missouri statute providing that actions for personal wrongs shall not die with the person whose death is occasioned by the wrongful act, but making no provision, whether intentionally or by oversight, for the contingency of the death of the person wrongfully causing the death, being a complete enactment in itself and in derogation of the common law, will not be construed to give a right of action against the personal representative of a deceased wrongdoer, or to permit the revival of such an action commenced prior to his death. *Bates v. Sylvester (Mo.)*, 12-457.

4. PLEADING AND DEFENSES.

Sufficiency of petition.—As death caused either through negligence or with criminal intent gives a complete cause of action under the Missouri statute, a petition charging that the plaintiff's husband was shot and killed "negligently and with criminal intent" states a good cause of action, and the doctrine of *felo de se* does not apply. *O'Brien v. St. Louis Transit Co. (Mo.)*, 15-86.

Waiver of defects in pleading.—In such a case, even though the defendant could compel the plaintiff to elect between the two causes of action or could demur to the petition on the ground that inconsistent causes of action are stated in a single count, the defendant cannot complain of such defects after having answered and gone to trial on the issues. *O'Brien v. St. Louis Transit Co. (Mo.)*, 15-86.

Release of damages.—Where one injured through the negligence of another has for a valuable consideration released the latter from all liability therefor, the former's wife and children have no right of action for damages on account of his death resulting subsequently from the same injuries. *Thompson v. Ft. Worth, etc., R. Co. (Tex.)*, 1-231.

An action for death by wrongful act cannot be maintained under the Missouri statute by the widow or children of the deceased,

where he, during his lifetime and after the injury, executes a release of damages for a valuable consideration and without fraud, inadvertence, or mistake. *Strode v. St. Louis Transit Co. (Mo.)*, 7-1084.

A release by the driver of an express wagon of a claim for damages against a street railway company is supported by a valid consideration, and, in the absence of fraud, inadvertence, or mistake, is valid as to him, though he is paid no money thereunder, where he signs jointly with the express company upon the railway company's refusal to pay for damage to the wagon except on condition that he shall join in the release. *Strode v. St. Louis Transit Co. (Mo.)*, 7-1084.

Deceased a licensee on defendant's premises.—In an action to recover damages for death by wrongful act, the defendant cannot defeat a recovery by the plaintiff by showing that the deceased, at the time of the accident which caused his death, was working on an irrigation ditch located upon a railroad right of way, but not owned by the railroad company. Such proof does not show that the deceased was a trespasser, since a railroad company may lawfully grant a license to a private individual to use a portion of its right of way in a manner which does not interfere with the operation of its trains. *Mize v. Rocky Mountain Bell Tel. Co. (Mont.)*, 16-1189.

Justifiable or excusable homicide.—In an action for death by wrongful act based on an intentional killing, it is a good defense that the homicide was justifiable or excusable within the rule of the criminal law, as where the decedent was committing or attempting to commit burglary at the time he was killed, or where the killing was done in self-defense. *Suell v. Derricott (Ala.)*, 18-636.

Burden of proof.—In an action for death by wrongful act, where the killing was intentional and the defense is set up that it was justifiable or excusable, the burden is on the plaintiff to establish his case by proper and sufficient proof, as in other cases, and when this has been done the burden is on the defendant to show the justification or excuse for the killing. *Suell v. Derricott (Ala.)*, 18-636.

5. STATUTE OF LIMITATIONS.

When statute begins to run.—The Alabama statute which authorizes the personal representative of a servant or employee who has been killed by the negligence of his employer to maintain an action for damages does not create a new or independent cause of action in the personal representative, but simply continues the right of action which accrued to the deceased at the time of the injury, and, consequently, the one-year statute of limitations against the action runs from the date of the injury, and not from the death of the party injured or the granting of letters on his estate. *Williams v. Alabama Great Southern R. Co. (Ala.)*, 17-516.

6. WHO MAY SUE.

a. Husband.

Under Kansas statute.—The surviving husband is his deceased wife's next of kin within the meaning of the Kansas statute giving a right of action for death by wrongful act. *Achison, etc., R. Co. v. Townsend* (Kan.), 6-191.

b. Parent.

In general.—A father cannot maintain an action in his own right for damages on account of the negligent killing of his child. *Shaw v. Charleston* (W. Va.) 4-515.

Parent of illegitimate child.—The child referred to in the Louisiana statute giving to parents a right of action for the death of a child by wrongful act is a legitimate and not an illegitimate child. *Lynch v. Knoop* (La.), 10-807.

In an action for death by wrongful act, of the plaintiff's child, where the defendant denies that the child was legitimate, and tenders an issue requiring proof of the marriage, the burden of proof of the marriage is on the plaintiff. *Lynch v. Knoop* (La.), 10-807.

Adopting parent.—The right granted by the Louisiana Revised Civil Code to the surviving "father" or "mother" to recover damages for the death of their son is a right granted to the actual father or mother of the child, and not an adopting parent. *Mount v. Tremont Lumber Co.* (La.), 15-148.

c. Children.

In general.—Right of action by the children of the deceased for death by wrongful act. *Eichorn v. New Orleans, etc., R. Co.* (La.), 3-98.

For death of mother.—Where children are supported in a home maintained with the earnings of the father, and the mother performs the ordinary household duties, including such care of the children as a mother usually takes, and the mother loses her life through the wrongful act of a third party, the New Jersey statute permits an action to be maintained by the administrator of the mother to recover for the benefit of the children the damages occasioned by the deprivation of the expectation of pecuniary advantage which would have resulted by a continuance of the mother's life. *Carter v. West Jersey, etc., R. Co.* (N. J.), 16-929.

Although the statute above mentioned makes use of the term "pecuniary injury," the plaintiff in an action brought thereunder is not required to show that the next of kin would probably have received from the deceased contributions of money or of things purchased with money. *Carter v. West Jersey, etc., R. Co.* (N. J.), 16-929.

d. Personal representatives.

Administration of infant.—An action may be maintained by an administrator to recover for the death of an infant by wrong-

ful act. *Davis v. Seaboard Air Line Ry.* (N. Car.), 1-214.

Under the Florida statutes, the administrator of a deceased minor may recover damages for the death of his intestate, when such death was caused by the wrongful act, negligence, carelessness, or default of the corporation or its agents, and when such minor has left neither widow nor minor child or children, nor any person or persons dependent on him for support. *Bowden v. Jacksonville Electric Co.* (Fla.), 7-859.

Administrator of alien.—An administrator appointed in Iowa may maintain an action within the state for an injury resulting in death to a resident alien although the intestate's sole heir was at the time of the said death and is at the time of the commencement of the action a nonresident alien. *Romano v. Capital City Brick, etc., Co.* (Iowa), 2-678.

Where an unnaturalized alien resident of one of the United States, owning no estate and having no relatives in this country, loses his life by the negligence of another, his administrator appointed by the proper court of the state may maintain an action for such wrongful death. *Trotta v. Johnson* (Ky.), 12-222.

Under the Virginia death by wrongful act statute, a nonresident alien may maintain an action for the death of a resident alien. *Low Moor Iron Co. v. La Bianca* (Va.), 9-1177.

7. WHO LIABLE.

Municipal corporation exercising governmental power.—The Kentucky statute providing for the recovery of damages in case of the death of a person by wrongful act is not intended to give a right of action against a municipal corporation for the death of a person occurring as the result of an act done in the performance of a public duty, and the doing of which is but the exercise of a governmental power. *Twyman v. Frankfort* (Ky.), 4-622.

Railroad company keeping pest camp.—Where a railroad company establishes a pest camp for the treatment of its servants and through the negligence of a physician in charge smallpox is communicated to a third person who dies, the company is not liable, as the keeping of the camp is not a part of its carrying business. *Missouri, etc., R. Co. v. Freeman* (Tex.), 1-481.

8. EVIDENCE.

Mortality tables.—A mortality table showing the expectancy of life of a deceased person is admissible on the question of the amount of damages recoverable for the death of such person by wrongful act. *Calvert v. Electric Light, etc., Co.* (Ill.), 12-423.

Inventory and administrator's account.—In an action by an administrator to recover damages for the negligent killing of her intestate, the plaintiff's inventory of the personal property of the estate, and her annual account as administratrix, are not admissible in evidence to prove the intestate's

capacity to earn and accumulate money. *Cooper v. North Carolina R. Co.* (N. Car.), 6-71.

Marital relations of deceased.—In an action by a widow to recover damages for the death of her husband, alleged to have been caused by the defendant's negligence, it is not error for the court to admit evidence tending to show the marital relations of the deceased and his wife, or to instruct the jury that they may take into consideration the pecuniary loss, if any, of the widow on account of her being deprived of the comfort, protection, society, and companionship of her husband. *Mize v. Rocky Mountain Bell Tel. Co.* (Mont.), 16-1189.

9. QUESTIONS FOR JURY.

Cause of death.—In an action against a railroad company to recover damages for the death of a passenger, where the plaintiff's theory is that the death of the deceased was due to angina pectoris resulting from the shock of an accident caused by the defendant's negligence, and the defendant's theory is that the death, which did not occur until about eight months after the accident, was due entirely to causes which existed prior to the accident, and evidence has been introduced in support of both theories, the defendant's demurrer to the evidence is properly overruled, notwithstanding there is proof that the deceased went about his labors after the injury, and that physicians were unable for several months to determine the existence of heart trouble, and that such trouble may arise from many different and independent causes. Under such circumstances, the question as to the cause of death is properly left to the jury. *Macdonald v. Metropolitan St. R. Co.* (Mo.), 16-810.

10. INSTRUCTIONS

Injuries hastening death.—In an action to recover damages for death by wrongful act it is erroneous to instruct the jury that if they believe from the evidence that at the time of the accident the deceased "was suffering from . . . consumption, and that he died from such disease, and that whatever injuries he received in said accident only hastened his death and were not the cause of the same, the plaintiff is not entitled to recover, . . . and that this is true without regard to whether or not the defendant was negligent at the time of said accident." *Strode v. St. Louis Transit Co.* (Mo.), 7-1084.

Diseases prior to injury.—In such an action, it is not error for the trial court to instruct the jury that if they believe from the evidence that the death of the deceased was directly caused by the accident, and further find that the deceased would not have died at the time, under the circumstances, and in the manner he did, had it not been for the accident, their verdict should be for the plaintiff, notwithstanding they also find that the deceased suffered from certain diseases

prior to the accident. *Macdonald v. Metropolitan St. R. Co.* (Mo.), 16-810.

Natural and probable consequences of act.—In such an action, requests by the defendant for instructions to the effect that the jury must find for the defendant unless there was such connection between the negligent acts and the death of the decedent as to bring it within the reasonable contemplation of the defendant that such death would naturally result from the negligence, are properly refused. The liability of a person charged with negligence does not depend on the question whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained; but he may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act. *Macdonald v. Metropolitan St. R. Co.* (Mo.), 16-810.

11. MEASURE OF DAMAGES.

a. Generally.

Loss of earnings.—Where one injured through the negligence of another lives in an unconscious condition until the following day, the damages recoverable are measured by the loss of earnings for a period during which he would have lived but for the injury. *Olivier v. Houghton County St. R. Co.* (Mich.), 3-53.

Review on appeal.—Where a verdict for death by wrongful act is so great as to shock the mind unless the amount is justified by the circumstances of the case, the appellate court may consider such material facts not in the record of the case as are easily accessible, as, for instance, the amount of property left by the decedent, the terms of his will and the persons dependent on him for support. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

b. For death of parent.

In general.—The measure of damages in an action by the children of the deceased for death by wrongful act. *Eichorn v. New Orleans, etc., R. Co.* (La.), 3-98.

Verdict for five thousand dollars.—In an action against a railroad company to recover damages for the negligent killing of a man forty-six years of age, who left surviving him a widow and six children, where the evidence shows that the deceased had earned and contributed to the support of his family from seven hundred dollars to nine hundred dollars per annum, a verdict in favor of the plaintiff for five thousand dollars cannot be considered excessive. *St. Louis, etc., R. Co. v. Raines* (Ark.), 17-1.

c. For death of child.

Funeral expenses.—In an action by a father to recover damages for the negligent killing of his unmarried infant daughter, he cannot recover, either at common law or under Lord Campbell's Act, the expenses of the child's funeral. *Clark v. London General Omnibus Co.* (Eng.), 6-198.

d. For death of wife.

Loss of time and funeral expenses.—Independent of any statute, a husband whose wife is killed by the negligent act of another is entitled to recover for loss of time and funeral expenses resulting from the act complained of. *Philby v. Northern Pacific R. Co.* (Wash.), 13-742.

Deduction of expense of maintenance.—In an action by a husband to recover for the death of his wife caused by the defendant's negligence, the cost of the wife's maintenance should, in estimating the damages, be deducted from the value of the services of which the plaintiff has been deprived. *Gorton v. Harmon* (Mich.), 15-461.

e. For death of husband.

Verdict for forty thousand dollars excessive.—A verdict for \$40,000 for death by wrongful act is excessive where the decedent, whose estate exceeded \$70,000 in value, had no children and no person dependent on him except his wife, to whom he had bequeathed his entire estate for her life. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

f. In suit by next of kin.

Person receiving no pecuniary aid from deceased.—In an action for death by wrongful act, brought by the collateral next of kin who received no pecuniary aid from the deceased and who were not entitled to require such aid, only nominal damages can be recovered, and vague, uncertain, and indefinite proof of gratuitous legal services rendered by the deceased to the plaintiffs is insufficient to show a pecuniary loss to the plaintiffs resulting from the deprivation of such services. *Rhoads v. Chicago, etc., R. Co.* (Ill.), 10-111.

g. Exemplary damages.

Under Kansas statute.—Exemplary damages are not recoverable in an action for death by wrongful act brought under the Kansas statute. *Atchison, etc., R. Co. v. Townsend* (Kan.), 6-191.

Under Missouri statute.—The provision of the Missouri death by wrongful act statute that in assessing damages regard may be had to aggravating circumstances attending the wrongful act, negligence, or default, means that in a proper case exemplary damages may be awarded in addition to compensation for necessary loss. *Otto Kuehne Preserving Co. v. Allen* (U. S.), 8-746.

The Missouri statute authorizing recovery of exemplary damages for death by wrongful act does not authorize the recovery of such damages except where they might have been recovered by the deceased had he survived; and in an action under the statute, a case should be stated in the complaint which, according to settled principles of law, will authorize the recovery of such damages, and this should be followed by sufficient proof to merit an award by the jury. *Otto Kuehne Preserving Co. v. Allen* (U. S.), 8-746.

In an action for death by wrongful act, where it is sought to recover exemplary damages, it is not necessary to claim damages by name in the complaint, but such averments must be made as will advise the defendant that he will have to meet a demand of that kind at the trial, and the mere characterization of the defendant's negligence as "gross" is insufficient. *Otto Kuehne Preserving Co. v. Allen* (U. S.), 8-746.

In an action for death by wrongful act, a verdict which awards exemplary damages in addition to compensatory damages is unauthorized, in the absence of allegations in the complaint, and of substantial evidence fairly tending to show that the negligence of the defendant was wanton, wilful, or malicious, or was so reckless as to imply conscious disregard of his civil obligations. *Otto Kuehne Preserving Co. v. Allen* (U. S.), 8-746.

12. DISTRIBUTION AND APPORTIONMENT OF RECOVERY.

Statute controlling.—Damages recovered for death by wrongful act must be distributed in accordance with the provisions of the statute giving the right to recover. *Matter of Coe* (Iowa), 8-148.

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DECEASED PERSONS.

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Acceptance of dedication by municipality, see **MUNICIPAL CORPORATIONS**, 4 e.

Plat as dedication of highway, see **STREETS AND HIGHWAYS**, 6.

Statutory method of dedication as exclusive of common-law method.—The statutes of North Dakota, prescribing the method of dedicating real property to public uses, as well as easements therein for such purposes, are not and were not intended to be exclusive of the common-law method of dedication, nor do they abrogate the well-settled rule of implied dedication by estoppel *in pais*. *Cole v. Minnesota Loan, etc., Co.* (N. Dak.), 17-304.

Common-law dedication.—Where the owners and proprietors of a town site leave a square in the centre thereof, undivided into lots, and designated simply by a numeral, and divide the other blocks, surrounding the block so designated, into lots, facing toward such square, and one of the proprietors, who has active charge of the sale of lots therein, represents to prospective purchasers that such square is and will remain a public square or park, and a purchaser, in reliance upon such representations, and also upon like representations made by one who is a partner in the town site enterprise, purchases lots fronting on such square, and makes valuable improvements thereon, such acts and representations constitute a common-law dedication of the block in question as a public square or park, and the proprietors of the town site, and their successors, are thereby estopped from denying that it has been dedicated to the public for that use. *Cole v. Minnesota Loan, etc., Co.* (N. Dak.), 17-304.

In an action by purchasers of lots in a town site, against the successors of the original proprietors, to procure an adjudication that a certain block in the town site is a public square or park, and to enjoin the defendants from interfering with the public use

of the same, evidence examined and held sufficient to show an intention on the part of the proprietors of the town site to dedicate such block to the public use. *Cole v. Minnesota Loan, etc., Co. (N. Dak.)*, 17-304.

Dedication by estoppel. — The rule regarding dedication by estoppel with reference to streets applies equally to public squares and parks. *Cole v. Minnesota Loan, etc., Co. (N. Dak.)*, 17-304.

Method of showing intention to dedicate. — An intention to dedicate property to a public use must be clearly established, but such an intention may be shown by deed, by words, or by acts. *Cole v. Minnesota Loan, etc., Co. (N. Dak.)*, 17-304.

Method of showing acceptance. — An acceptance of property dedicated to the public use may be shown by an instrument in writing, executed by the proper authorities on behalf of the public, or by the use and improvement of the property dedicated, by the duly authorized authorities. *Atlantic City v. Associated Realities Corp. (N. J.)*, 17-743.

Use of dedicated property. — A square in a city dedicated as "a public place forever for the enjoyment of the community in general," and used as a park, may properly be used for the erection of a public library, it appearing that such use is not inconsistent with the public enjoyment of the park. The library building can, however, be used for library purposes only, and cannot be devoted to the establishment of municipal offices therein, or used for municipal administration purposes other than as a meeting place for the board of library directors, and injunction will lie at the suit of a resident abutting owner on the park to prevent such improper use of the building. *Spire v. Los Angeles (Cal.)*, 11-465.

Reverter. — Land dedicated to a public use does not revert because of misuse or non-use, unless its use for dedicated purposes has become impossible, or so highly improbable as to be practically impossible. *McAlpine v. Chicago, etc., R. Co. (Kan.)*, 1-452.

A strip of land along a navigable stream and dedicated to the public by the use of the word "levee" is not abandoned by the public so as to cause a reverter because railroads have been permitted to run upon it, nor because it has been used for other unauthorized purposes, nor because boats do not land upon it, nor because approach to the river margin has become difficult. *McAlpine v. Chicago, etc., R. Co. (Kan.)*, 1-452.

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1. REQUISITES.

a. Description of property.

In general. — A deed is void for uncertainty unless it contains on its face a description of the land which is sufficiently certain to enable the property to be identified, or unless it contains such a description as, with the aid of evidence outside of the deed and not contradicting it, will identify and locate the land. *Hoard v. Huntington*, etc., R. Co. (W. Va.), 8-929.

Deed to land purchased by a railroad company for the right of way held not void for indefiniteness in description. *Abercrombie v. Simmons* (Kan.), 6-239.

Description without starting point. — A deed that describes the land conveyed only as land located on a named island and containing a stated number of acres embraced within certain courses and distances, and does not fix any starting or ending point from which or to which the courses run, is too vague and indefinite to give notice to a subsequent purchaser or incumbrancer or to be aided by extrinsic evidence. *Merritt v. Bunting* (Va.), 12-954.

Unidentified portion of tract. — A deed conveying part of a tract of land but not locating the part conveyed is not void for uncertainty, but operates to convey to the grantee an undivided interest in the whole tract in the proportion that the amount conveyed bears to the amount of the whole tract. *Fisher v. Wailehua* (Hawaii), 2-916.

b. Execution, attestation, and acknowledgment.

(1) Signature.

Signature by agent. — If the signature of the grantor in a deed is written by another person in the presence of the grantor, and at his instance or with his assent, the act is the grantor's act, even though he can read and write, and if he then makes acknowledgment certified by a notary, the deed is his deed. *Ford v. Ford* (D. C.), 7-245.

(2) Seal.

What constitutes. — A deed concluding with the words, "Witness the following signature and seal," is not on that account a sealed instrument where no seal or scroll is actually affixed to the signature. *Burnette v. Young* (Va.), 12-982.

(3) Attestation.

Form under Florida statute. — The VOLS. 1-20 — ANN. CAS. DIGEST. — 42.

Florida statute does not require any particular form of words for the attestation clause of a deed. The phrase commonly used to denote that the persons signing are witnesses is, "signed, sealed, and delivered in the presence of," but any phrase which clearly denotes that the persons signing are witnesses is valid. *Richbourn v. Rose* (Fla.), 12-274.

Where a deed has the names of two persons written in the place where the names of subscribing witnesses are usually placed, with the letters "wit" above their names, and the *testificandum* clause is "in witness whereof we hereunto set our hands and seals, this the 4th day of May, 1903," other facts showing delivery, the attestation of the deed is sufficient. *Richbourn v. Rose* (Fla.), 12-274.

Interested person as witness. — Where it appears in an action of ejectment that a deed offered in evidence by the plaintiff, as a link in his title, was attested by a witness who furnished a part of the purchase money for the land, that the title was taken by the grantee in trust for this witness and the person who furnished the rest of the purchase money, but that the grantee sold and conveyed the land before the ejectment suit was brought, and divided the purchase money between the witness to the deed and the other person entitled thereto, and that the deed on its face does not show the interest of the witness, and it does not appear that the plaintiff at the time of the purchase of the property by him had any knowledge that the witness to the deed had any interest therein when it was executed, such witness is, under the Florida statute removing the disability of witnesses on account of interest, not incompetent as an attesting witness to such deed. *Cross v. Robinson Point Lumber Co.* (Fla.), 15-588.

Necessity as between parties. — The Alaska statute (Civ. Code, c. 11, § 821) which provides that deeds of lands or any interest in lands "shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such," does not make such attestation essential to the validity of the deed as between the parties. *Eadie v. Chambers* (U. S.), 18-1096.

The curative statute of Alaska (Civ. Code, c. 11, § 113) providing that all deeds "which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title . . . without any other execution or acknowledgment" was intended only to cure the want of a seal, and does not express the understanding of the legislature that an unattested deed was insufficient as between the parties to pass the title. *Eadie v. Chambers* (U. S.), 18-1096.

(4) Acknowledgment.

Necessity as between parties. — As between the parties, a deed of real estate, not a homestead, is good without being acknowledged. *Martin v. Martin* (Neb.), 14-511.

c. Delivery.

(1) In general.

Presumption as to date. — Where a deed bears an earlier date than the certificates of its acknowledgment, the deed is, in the absence of other evidence, presumed to have been delivered on the date of the acknowledgment. *Crabtree v. Crabtree* (Ia.), 15-149.

Burden of proof. — Where a son, while acting as attorney in fact for his father, secures possession of a deed from his father to himself, and records it after the death of his father, and there is evidence that the father retained possession down to the time of his death, the burden of proof is on the son to show delivery in the father's lifetime. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

Evidence of delivery. — Where there is no evidence of the delivery during the father's lifetime, of a deed executed to a son, and there is evidence that the father had declared that the deed was not to be recorded during the lifetime of his wife, and the father left his estate to his wife, with power of sale in the executor, a finding that the inference of delivery arising from the recording of the deed by the son after his father's death had been overcome will be sustained. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

(2) Delivery to third person.

See also ESCROW.

Sufficiency in general. — A delivery of a deed by the grantor to a third person for the grantee, with directions to deliver it to such grantee, constitutes a sufficient delivery of a deed of conveyance. *Martin v. Martin* (Neb.), 14-511.

The manual deposit of a deed with a third party, to receive and hold for the grantee, with the intent thereby to give it effect as a conveyance and to place it beyond the custody and control of the grantors, with a declared or manifest purpose of making a present transfer of title, is a sufficient delivery. *Harmon v. Bowers* (Kan.), 16-121.

For delivery after grantor's death. — Where a deed is delivered to a third person to be delivered upon the grantor's death, the doctrine of relation is not to be applied to strangers; but a subsequent grantee with knowledge of the prior grant is not a stranger, but in privity with the grantor, and cannot take title as against the prior grantee who subsequently accepts the benefit of the prior delivery. When the prior grantee is a member of the grantor's family she cannot be regarded as a grantee without equity as against a subsequent grantee. *Emmons v. Harding* (Ind.), 1-864.

Where a deed is delivered to a third person to be by the latter delivered upon the grantor's death, and statements of the grantor at the time of the delivery are sufficient to authorize an inference of an intent to deliver the instrument as his deed, the question of intent is for the jury. *Emmons v. Harding* (Ind.), 1-864.

Delivery to Agent of Grantee. — The delivery of a conveyance to an authorized agent of the purchaser is as effective as though made to the purchaser himself. *Dorr Cattle Co. v. Des Moines Nat. Bank* (Iowa), 4-519.

Delivery to agent of both parties. — Where a deed is left with the attorney of both parties without an understanding that he is receiving it for the grantee, or for delivery to the grantee, there is no delivery in law. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

Grantor as agent of grantee. — There is no absolute rule of law that prevents the grantor of a deed from becoming the agent of the grantee to accept delivery of the deed. *Blackwell v. Blackwell* (Mass.), 12-1070.

Where the grantor of a deed not actually delivered to the grantee, simultaneously takes from the grantee a mortgage on the same property as a part of the same transaction, causes both deed and mortgage to be recorded together, and for some time retains the mortgage as a valid security, this shows an intention on the part of the grantee that the deed should be immediately operative; and the execution and delivery of the mortgage and the subsequent exercise of possession and control over the property is a sufficient acceptance of the deed on the part of the grantee. The grantor therefore cannot maintain a bill in equity for the cancellation of the deed on the ground that the same was never delivered to the grantee. *Blackwell v. Blackwell* (Mass.), 12-1070.

(3) Deposit for registration.

Sufficiency as delivery. — Where a duly delivered deed containing an erroneous description of the land conveyed is returned to the grantor for correction, whereupon he executes a new deed containing a proper description, the action of the grantor in depositing the new instrument for registration amounts to delivery, even though the register returns it to the grantor. *Whiting v. Hoglund* (Wis.), 7-224.

For the purpose of determining whether there has been delivery of a deed, the possession of the clerk after recording will be regarded as being the possession of the grantee. *Hartman v. Thompson* (Md.), 10-92.

d. Acceptance.

Deed delivered to third person. — Where a deed is delivered to a third person to be by the latter delivered upon the grantor's death, a subsequent acceptance or ratification of the transaction may violate the deed by the operation of the fiction of relation. *Emmons v. Harding* (Ind.), 1-864.

2. VALIDITY.

a. Deed not naming grantor.
Validation by signature. — A deed signed by the grantor held not to be void because of the omission of the grantor's name in the operative clause. *Insurance Co. v. Waller* (Tenn.), 7-1078.

One who signs, seals, and delivers a deed, though not named therein as a grantor, is still bound as a grantor, and the deed is operative as a conveyance of his estate. *Sterling v. Park* (Ga.), 12-201.

b. Deed naming fictitious grantee.

In general. — As there is no privity of contract between the assignee of the reversion in land out of which a ground rent issues and the assignee of the term, there is no reason why the liability of the latter should not be as effectually destroyed by a deed made in good faith to a third person under an assumed name as by a deed made to the grantee under his true name. *Hartman v. Thompson* (Md.), 10-92.

A deed to a person who is in existence is not invalidated by the fact that the grantee is designated by an assumed or fictitious name. *Hartman v. Thompson* (Md.), 10-92.

Effect of acceptance. — Where the purchaser of an estate in land directs that the conveyance shall be made to him under an assumed name, and the grantor inserts in the conveyance as the name of the grantee an assumed name other than that selected by the grantee, the grantee, if he accepts the conveyance, is bound thereby. *Hartman v. Thompson* (Md.), 10-92.

c. Deed to deceased person.

Effect. — A conveyance which names a deceased person as grantee is not necessarily void, but it may be shown that the vesting of title in some existing person was intended. *City Bank v. Plank* (Wis.), 18-869.

Proof of grantor's intention. — A deed naming a deceased person as grantee will be held valid as a conveyance to the decedent's executor, where the consideration was paid by the executor out of the assets of the estate, and the executor was also the residuary devisee under the will subject to the support of the testator's widow. *City Bank v. Plank* (Wis.), 18-869.

d. Deed without revenue stamp.

Omission without fraud. — In the absence of fraud, the failure to affix a revenue stamp does not affect the validity of the deed. *Dorr Cattle Co. v. Des Moines Nat. Bank* (Iowa), 4-519.

e. Deed by convict.

Deed executed pending stay of judgment. — A sentence to the penitentiary for a term of years does not make void a conveyance duly executed by the convict before he is imprisoned under the sentence and while execution of the judgment of conviction is stayed by proceedings upon appeal to the Supreme Court. *Harmon v. Bowers* (Kan.), 16-121.

f. Deed by official grantor.

In general. — A deed executed by a person in an official or representative capacity is not the deed of the ostensible grantor, and

carries with it notice that it can have no greater effect than is warranted by the authority of the person executing it. *Pinkerton v. Fenelon* (Wis.), 11-729.

The signature of the county clerk to a deed in the name of the county has no effect unless placed there in pursuance of express authority from the county board, and the grantee in the deed and all claiming under him must rely upon the validity of the action of the county board. *Pinkerton v. Fenelon* (Wis.), 11-729.

Quitclaim by county clerk. — A quitclaim deed executed by a county clerk is limited as to its effect by the records of the county board, and where such records show that the whole transaction consisted of the offer of a price for lands that had been tax-deeded to the county, an acceptance of such offer, and a resolution of the county board authorizing the clerk merely to execute a deed of such tax-deeded lands, the equitable title that the county had in the lands prior to the tax sales and tax deeds does not pass to the purchaser. *Pinkerton v. Fenelon* (Wis.), 11-729.

3. CONSTRUCTION.

a. In general.

Meaning of words "more or less." — The words "more or less" in a deed ordinarily mean that the grantor does not warrant the precise quantity of land named therein, and if there is no more than a reasonable deficiency in the quantity there is no breach of the covenant in the deed, especially where the land is sold as an entire tract for a gross sum and not at a stipulated price per acre. *Kitzman v. Carl* (Iowa), 12-296.

Omission of words "with the appurtenances." — An easement appurtenant to land will pass by a conveyance, although the words "with the appurtenances" are not used. *Smith v. Garbe* (Neb.), 20-1209.

Parol evidence to explain. — Parol evidence, while not competent to alter the terms of a warranty in a deed, is admissible to show the meaning given by the parties themselves to the words used therein when such meaning is otherwise doubtful. *Kitzman v. Carl* (Iowa), 12-296.

b. Doubtful or uncertain description.

Consideration of circumstances of execution. — In construing a doubtful description in a deed, the court will keep in mind the position of the contracting parties, and the circumstances under which they acted, and will interpret the language of the instrument in the light of these circumstances. *Abercrombie v. Simmons* (Kan.), 6-239.

Deed of trust by husband and wife. — A deed of trust executed by a husband and wife to secure their creditors which describes the property conveyed as "all and singular the real and personal estate, wheresoever situate, . . . and all other property of every nature, kind, and description and whereso-

ever situate" of the grantors, covers a vested remainder owned by the wife individually and is not open to the objection that the property is not described so that it can be identified with reasonable certainty, or to the objection that the description embraces only property owned jointly by the grantors. *Roberts v. Roberts* (Md.), 5-805.

c. Restrictions and prohibitions.

Construction in general. — In the construction of deeds containing restrictions and prohibitions as to the use of property by a grantee, all doubts should be resolved against the restrictions. *Downen v. Rayburn* (Ill.), 3-36.

Building restrictions — automobile garage as violation. — Where parties hold under deeds providing, as a scheme for the benefit of the whole property, that no building on the lots shall be used or occupied for "carpenters' shops, white or black smiths' shops, or for any foundry, mechanical, or manufacturing purposes, or for any other business which shall be offensive to the neighborhood for dwelling houses," and it is shown that on one of such lots an automobile garage is proposed to be erected which will be about one hundred feet by thirty feet, accommodating about one hundred and twenty-five automobiles, and containing a steel tank arranged to hold ten barrels of gasoline, and also containing a repair shop with a small portable force furnishing facilities for the repair of six or eight large automobiles simultaneously, a finding that the proposed garage will be offensive to the neighborhood for dwelling purposes, and in violation of the restriction in the deed, is warranted. *Evans v. Foss* (Mass.), 11-171.

Billboard as violation. — Where the deeds to all the lots constituting a tract of land intended for residential purposes contain a covenant that the owner of each lot shall not erect any building "for the carrying on of any noisy, noisome, offensive, or dangerous trade or calling," such restriction is intended to prohibit the maintenance of a hoarding one hundred and fifty-six feet long and fifteen feet high on which the trade of bill posting is conducted, as such trade may be offensive to the adjoining owners. *Nussey v. Provincial Bill Posting Co.* (Eng.), 16-222.

Such hoarding is also a fence within a provision in such deeds requiring the owner of each lot to erect a fence consisting of a dwarf wall with iron palisading "against the side" of a certain road, the fact that such hoarding is somewhat removed from the road being immaterial. *Nussey v. Provincial Bill Posting Co.* (Eng.), 16-222.

Enforcement by one grantee against another. — Where one makes deeds of different portions of a tract of land, each containing the same restriction upon the lot conveyed, which is imposed as a part of a general plan for the benefit of the several lots, such a restriction not only imposes a liability upon the grantee of each lot as between him and the grantor, but it gives him a right in

the nature of an easement which will be enforced in equity against the grantee of one of the other lots, although there is no direct contractual relation between the two. *Evans v. Foss* (Mass.), 11-171.

A purchaser of a portion of a tract of land under a deed containing a restrictive covenant as to the manufacture and sale of liquor cannot enforce a similar covenant in the deed of a prior purchaser of another portion of the tract on the theory that the restrictive covenants were inserted pursuant to a general plan to have no liquor sold on the entire tract, unless it appears that the defendant had at the time of his purchase actual or constructive knowledge of such general plan, that the restrictive covenant in his deed was, pursuant to such plan, inserted for the benefit of the other lots, and that such plan entered into the consideration of the plaintiff's purchase. *Judd v. Robinson* (Colo.), 14-1018.

Waiver by acquiescence in violation. — Where a vendor sells off an estate in lots, with restrictions upon the use of the lots sold, he will lose an equitable right to enforce the restrictions against one grantee, if he has knowingly permitted the other grantees to violate the same restrictions. *Ocean City Assoc. v. Chalfant* (N. J.), 1-601.

Where one owns city property subject to a restriction that no building shall be constructed thereon nearer than twenty feet from the street line, and this restriction is incorporated in the deeds of over one hundred and fifty purchasers, but about one hundred of such purchasers violate the restriction, without any attempt being made to enforce the same except in one suit which is permitted to rest without trial for seven years, there is, by that time, an abandonment of the original plan with reference to the restrictions, and the restrictions cannot then be enforced against another purchaser who has violated them. *Chelsea v. Adams* (N. J.), 14-758.

Change of circumstances as defense to enforcement. — A court of equity will not grant an injunction at the instance of one landowner to compel the observance by another landowner, holding from a common source, of a covenant contained in the grant to each against the erection of an apartment house on the land so conveyed, where the greater part of the life of the covenant has elapsed, and owing to the changed circumstances of the neighborhood the enforcement of the covenant would be of no benefit to the party seeking the injunction, but a departure from its terms would actually increase the value of the premises. *McClure v. Leaycraft* (N. Y.), 5-45.

In the absence of any material change in conditions affecting the character and use of property in the locality where the land is situated on which a restriction has been imposed, the court cannot refuse to enforce the restriction by reason of an opinion that at some time in the future the character of the locality will be changed. *Evans v. Foss* (Mass.), 11-171.

Action at law for breach. — On an ap-

peal from the judgment of a lower court refusing an injunction to compel the observance of a building restriction on the ground that the proposed erection will cause no damage to the person seeking the enforcement, the appellate court will so far modify the judgment of the lower court as to make it without prejudice to an action at law for a breach of the covenant. *McClure v. Leaycraft* (N. Y.), 5-45.

d. Conditions as to use of property.

Enforcement by grantor. — Notwithstanding the fact that a condition in a deed to a canal company that the grantee shall construct a basin on the land conveyed may not be a covenant running with the land, the grantor may, so long as he remains the owner of the adjoining property, which was intended to be benefited by the use of the basin, prevent a purchaser of the canal with notice of the condition from using such basin in a manner "wholly at variance" with such condition. *Dawson v. Western Maryland R. Co.* (Md.), 15-678.

Enforcement by grantor's assignee. — But even if such condition should be treated as a reservation, the assignees of the grantor are not entitled to equitable relief where there was no attempted reservation in favor of the assigns of the grantor and the deed was executed before the enactment of a statute changing the common-law rule that words of inheritance are necessary in a grant of more than a life estate unless an intention to convey an absolute estate appears. *Dawson v. Western Maryland R. Co.* (Md.), 15-678.

Nor are such assignees entitled to equitable relief if it should be held that by the acceptance of the deed the canal company impliedly contracted that the grantor should have an easement in the basin, because such contract would confer no rights upon the assignees if it was not executed by the canal company and recorded in the same manner as a grant of land. *Dawson v. Western Maryland R. Co.* (Md.), 15-678.

Reverter upon breach. — If the provision in such deed in reference to the construction of the basin should be treated as a condition, it must be held to be a condition subsequent. Consequently upon the breach thereof the property would revert to the heirs and not to the assignees of the grantor. *Dawson v. Western Maryland R. Co.* (Md.), 15-678.

Words declaratory of purpose of conveyance. — Where a deed conveys lands to trustees and successors "to be used as a church location," the latter clause will be construed, in the absence of evidence of the contrary intent, to be merely declaratory of the purpose of the conveyance and not as rendering the estate conveyed conditional. *Downen v. Rayburn* (Ill.), 3-36.

e. Reservations and exceptions.

Distinction. — A reservation in a deed is the creation in behalf of the grantor of a

new right issuing out of the thing granted, something which did not exist as an independent right before the grant, while an exception is a clause in a deed which withdraws from its operation some part of the thing granted which would otherwise have passed to the grantee under the general description. A reservation is always in favor of the grantor, and if it does not contain words of inheritance it exists only for the life of the grantor. *Stone v. Stone* (Ia.), 18-797.

Exception of timber growing on land.

— A clause in a deed which reads, "excepting a certain lot of timber growing and standing in the southwest corner of the afore-described quarter section," and which describes by metes and bounds the land upon which such timber is situated, and which declares that "said timber reserve is made for the express use and benefit and behoof" of H. S., a son of the grantor, must be construed as an exception in favor of H. S. personally of a certain lot of timber, which exception terminates upon the death of H. S., or upon his conveyance of all his right, title, and interest in the property to the grantees in the deed. Such clause does not constitute a reservation in favor of the grantor or his heirs, nor does it constitute an exception in favor of H. S. of the land upon which the timber is situated. *Stone v. Stone* (Ia.), 18-797.

Reservation of life estate in grantor.

— Where a conveyance of land reserves a life estate in the grantor, the reservation is valid and effectual to prevent the vesting of an immediate estate of freehold in one to whom the grantee conveys land during the life of the original grantor. *Redding v. Vogt* (N. Car.), 6-312.

f. Inconsistent provisions or recitals.

Consideration of primary intention.

— A will or a deed containing two inconsistent provisions, one indicating that a life estate only in real estate is intended to be conveyed to a person, and the other giving or granting to such person the absolute and unlimited power of alienation and disposition of such estate in fee simple, will be held to pass a life estate, or a fee simple, as the one or the other may appear to be the primary intention disclosed by a consideration of the whole instrument. *Morgan v. Morgan* (W. Va.), 9-943.

Rejection of repugnant and uncertain provisions. — Where a deed conveys land to a trustee for the benefit of a married woman for life, with a direction that the trustee shall permit the life tenant to occupy and enjoy the land and its rents and profits for her sole and separate use, and provides that the trustee shall sell or otherwise dispose of the land at such time, in such manner, and upon such terms of credit or otherwise as the life tenant shall appoint or direct, and further provides that upon the death of the life tenant the land shall go to certain specified persons, the deed passes an equitable estate in fee simple to

the person designated as the life tenant, and an attempted limitation over after the death of the life tenant is inoperative and void for repugnancy and uncertainty. *Morgan v. Morgan* (W. Va.), 9-943.

Conflict between habendum and granting clauses. — Every part of a deed should be examined and the instrument construed as a whole, but if the *habendum* conflicts with the granting clause the *habendum* must give way, upon the theory that a deed must be construed most strongly against the grantor, in order to prevent contradiction or retraction by a subsequent part of the deed, or to prevent limitation being placed upon a right granted and given in the premises. *Whetstone v. Hunt* (Ark.), 8-443.

Where the granting clause of a deed recites that the land is sold and conveyed to the grantee and his heirs, and the *habendum* recites that the grantee shall hold the land for life without specifying the party to whose life the grant is limited, the deed will be construed as conveying the estate for the life of the grantor, notwithstanding the fact that the language of the *habendum* would ordinarily import an estate for the life of the grantee, as when the deed is given the prior construction the two clauses do not conflict. *Whetstone v. Hunt* (Ark.), 8-443.

g. As to time of taking effect.

Deed executed in accordance with contract. — A deed to the premises, executed upon the payment of the consideration, in accordance with the terms of a contract under which the purchaser has the right of possession, relates back to the date of the contract, and the title is considered, as between the parties, as having vested at the date of the contract. *Krakow v. Wille* (Wis.), 4-1016.

Several deeds executed on same day. — Where several deeds concerning the same subject-matter are executed between the same parties on the same day before the same officer, it is a fair inference that they constituted a single transaction, and they should be held to take effect in such order as will carry out the intentions and secure the rights of all the parties to the transaction. *Crabtree v. Crabtree* (Ia.), 15-149.

h. Conveyance in trust with power of sale.

Measure of estate created. — Where a deed conveying land in trust for the benefit of a married woman for life, with remainder over to a third person, which empowers the trustee to sell or dispose of the property in the manner and upon the terms directed by the life tenant is construed as passing an equitable estate in fee simple to the life tenant, the beneficiary has full power to convey her equitable estate in fee by a deed in which her husband joins as provided by statute, without the intervention of the trustee; and the grantee under a deed so executed by the beneficiary is entitled, upon the death of the trustee, to have another trustee appointed for the purpose of making a conveyance of the

legal title to the land. *Morgan v. Morgan* (W. Va.), 9-943.

i. Construction of deed as mortgage.

In general. — Where an agent of a creditor is authorized to foreclose a mortgage on land and to secure a settlement of the indebtedness, and the agent instead of foreclosing the mortgage takes a conveyance of the land to his principal with an agreement that the rents from the land are to be applied to the debt, and that the land will be reconveyed to the debtor when he pays the debt, and the creditor accepts and retains the conveyance, he does so subject to the conditions that properly render it a mortgage, especially when the consideration for the conveyance is only the principal of the unpaid debt. *De Bartlett v. De Wilson* (Fla.), 11-311.

Consideration of relations between parties. — The relations existing between the parties at the time of its execution may be considered in determining whether a deed of conveyance of land absolute on its face was intended to operate as a mortgage to secure the payment of a debt. *De Bartlett v. De Wilson* (Fla.), 11-311.

Deed given for support of grantor. — A conveyance conditioned for the support of the grantor is treated as a mortgage to secure the grantee's performance of the condition and may be foreclosed by a suit in equity upon breach of the condition. *Abbott v. Sanders* (Vt.), 12-898.

A bill in equity to extinguish and foreclose the defendant's title under a deed by the oratrix to the defendant, for failure of the defendant to support the oratrix as required by a condition in the deed, is not demurrable for want of an offer to do equity by returning a pecuniary consideration named in the deed, where the bill alleges a persistent and aggravated abuse of the oratrix with intent to drive her from the premises, and alleges no circumstances that can operate by way of excuse or palliation. *Abbott v. Sanders* (Vt.), 12-898.

Admissibility of parol evidence. — In order to carry out the intention of the parties and to prevent fraud and imposition and to promote justice, parol evidence is admissible to show that a deed of conveyance of land absolute upon its face was intended to operate as a mortgage; and where it is shown that such a conveyance was executed to secure the payment of money, equity will treat it as a mortgage and will decree a reconveyance upon accounting and settlement. *De Bartlett v. De Wilson* (Fla.), 11-311.

Sufficiency of evidence. — In a suit to have a deed conveying land adjudged to be a mortgage and for a reconveyance upon accounting and settlement, where it is admitted that the debt existed, and that the deed was executed to prevent the foreclosure of a mortgage upon the same land for such indebtedness, and no consideration for the conveyance other than the debt is shown, and there is ample evidence to sustain the finding of the chancellor that the deed was intended to se-

cure the payment of the debt, a decree holding the deed to be a mortgage, and directing an accounting before a master will not be disturbed on appeal on the ground that the proof is not clear, convincing, and positive. *De Bartlett v. De Wilson* (Fla.), 11-311.

4. COVENANT OF WARRANTY AGAINST INCUMBRANCES.

Eminent domain proceedings as breach. — A covenant of warranty in a deed against all incumbrances except those specified is not broken by the taking of a strip of land for a sewer by a municipality in eminent domain proceedings, as the city obtains thereby an independent title to the land which is not acquired "by, through, or under" the grantor. *Weeks v. Grace* (Mass.), 10-1077.

5. REVOCATION OR ANNULMENT.

Revocation by later conveyance. — A validly executed deed of sale of standing timber and lease of the land for turpentine purposes, duly acknowledged and recorded, is not revoked by the subsequently executed deed of conveyance of the land made by the same grantor. *Richbourg v. Rose* (Fla.), 12-274.

Annulment for mental incapacity of grantor. — In an action to set aside a deed on the ground of the mental incapacity of the grantor, the chancellor's decree for the defendant, sustained by the testimony of a number of witnesses, that the grantor was entirely sane and mentally capable of managing his property, and that the fair cash value of the property did not exceed at that time the price paid, will not be set aside where the evidence as to the mental capacity of the grantor is almost evenly balanced. *Onstott v. Edel* (Ill.), 13-28.

Avoidance in action of ejectment. — In an action of ejectment, deeds relied on by the defendant may be attacked and avoided as having been made by a grantor who was mentally unsound and incompetent to execute them, and it is not necessary to resort to a court of equity for that purpose. *Smith v. Ryan* (N. Y.), 14-505.

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1. **RIGHT TO TAKE.**

California statute. — Sections 2020 and 2021 of the California Code of Civil Procedure provide that the depositions of a witness out of the state in all cases, and of a witness in the state in certain enumerated cases, may be taken in an action at any time after the service of the summons or the appearance of the defendant. The disposition of the legislature to amplify the remedy is plainly apparent in the provisions of the code, both with respect to the proceedings to perpetuate testimony and the right to take depositions *de bene esse*, and in view of the

tendency of legislation, the right to take a deposition must be upheld in any case which falls at once within the principle upon which the jurisdiction in equity was founded, and the letter of the statute. *San Francisco Gas, etc., Co. v. Superior Court (Cal.)*, 17-933.

Causes in Probate Court. — The taking of depositions to be read on the trial in the Probate Court of a claim against a decedent's estate is authorized by statutes providing that depositions may be taken in suits at law and in suits in chancery, and that contested claims against a decedent's estate shall be tried and determined as other suits at law. *Zeigler v. Illinois Trust, etc., Bank (Ill.)*, 19-127.

Pending appeal. — Under the above sections of the California Code of Civil Procedure, the existence of an actual, as distinguished from a potential, issue of fact is not made a conclusive test of the right to take depositions *de bene esse*, and consequently such depositions may be taken pending an appeal, as well as before verdict or findings upon the issues of fact in the action. *San Francisco Gas, etc., Co. v. Superior Court (Cal.)*, 17-933.

2. WHO MAY BE EXAMINED.

Party without the state. — Under the Colorado statute providing in substance that parties to actions and proceedings shall be competent witnesses, that the testimony of a witness in the state may be taken by deposition when the witness is a party to the action, and that the testimony of a witness out of the state may be taken by deposition in an action, the testimony of a party although without the state may be taken by deposition. *Doherty v. Healy (Colo.)*, 10-958.

Prisoner confined in foreign state. — Where the only person who can establish facts, or a fact, material to the issue in a case is confined in prison in another state, a proper case exists for the issuance of a commission to take the testimony of such person, under the California Code of Civil Procedure. *San Francisco Gas, etc., Co. v. Superior Court (Cal.)*, 17-933.

3. ISSUANCE OF COMMISSION.

Duty of clerk to issue. — Duty of the clerk of court to issue a commission to take the depositions of absent witnesses as affected by the admissibility of the evidence sought to be produced. *State ex rel. Kehoe v. McRae (Fla.)*, 6-580.

Mandamus to compel issuance. — Mandamus will not be granted to compel the clerk of a Circuit Court to issue commissions to take depositions, if the depositions when taken would not be admissible as evidence in the proceeding for which they are taken. *State ex rel. Kehoe v. McRae (Fla.)*, 6-580.

Mandamus lies, in a proper case, to compel the issuance of a commission by the Superior Court to take the deposition of a witness. Assuming that an order of the Superior Court denying an application for a

commission is appealable, still the remedy by appeal is not exclusive, as it would be in many cases inadequate. *San Francisco Gas, etc., Co. v. Superior Court (Cal.)*, 17-933.

From what court issued pending appeal. — The Superior Court is the proper court to issue a commission to take the deposition of a witness, even though the cause in which the testimony is desired has been appealed to the Supreme Court, and the application is made pending the appeal. *San Francisco Gas, etc., Co. v. Superior Court (Cal.)*, 17-933.

4. EXECUTION OF COMMISSION.

a. Notice of execution.

What sufficient. — Under the Iowa statute authorizing the court to order the taking of depositions during "a term of court in which the action is pending," the court has the power to order the taking of depositions in disbarment proceedings within five days; and it is no objection to such order that the defendant has no notice thereof other than that with which he is charged by being a party to the proceedings and being present when the order is made. *State v. Mosher (Iowa)*, 5-984.

When not required. — Although the opposite party resides in the place where the depositions are to be taken, he is not entitled to be informed of the time when and the place where the depositions will be taken, if interrogatories are attached to the commission, and have been communicated to him, and the opportunity afforded him to cross the same. *De Renzes v. His Wife (La.)*, 5-893.

b. Who may execute, in general.

Officer to whom commission is not addressed. — A commission to take testimony cannot be executed by an officer to whom it is not addressed. If addressed to "any judge, justice of the peace, or Louisiana commissioner," it cannot be executed by a notary public. *De Renzes v. His Wife (La.)*, 5-893.

c. Who may write down testimony.

Clerk or stenographer, in general. — The Kentucky statute providing in substance that a deposition must be written and subscribed by the witness in the officer's presence, or written by the officer in the presence of the witness, and read to and subscribed by the witness in the presence of such officer, does not require the officer to do the manual labor of writing the deposition, but permits the use of a clerk or stenographer in taking down and transcribing the answers of the witness. *Western Union Tel. Co. v. Corso (Ky.)*, 11-1065.

Clerk or stenographer of attorney. — A clerk or stenographer in the employ of the attorney for a party to an action in which a deposition is taken is not a disinterested person within the meaning of the statute requiring that a deposition shall be

written down by a disinterested person. *Knickerbocker Ice Co. v. Gray (Ind.)*, 6-607.

d. Who may act as notary.

Clerk of attorney for party. — A clerk in the employ of the attorney for a party to an action is disqualified to act as notary in the taking of a deposition in the action. *Knickerbocker Ice Co. v. Gray (Ind.)*, 6-607.

e. Refusal of witness to answer questions or produce evidence.

Penalty. — The complaint of a plaintiff who, upon the taking of his deposition by the defendant, refuses to answer questions, cannot, under the provisions of the California Code of Civil Procedure, be stricken out unless he refuses to answer after having been adjudged guilty of contempt. *O'Neill v. Thomas Day Co. (Cal.)*, 14-970.

Duty of auxiliary court to compel production of evidence. — The rule as to the duty of an auxiliary court to compel the production of incompetent evidence prevails in taking testimony before a commissioner or examiner, under the federal rules in equity, in the taking of testimony before a master empowered to determine the admissibility of evidence under the federal rules in equity, and in the taking of evidence in actions of law under the U. S. Revised Statutes. *Dowagiac Mfg. Co. v. Lochren (U. S.)*, 6-573.

It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in a suit pending in the court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent, irrelevant, or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence sought cannot possibly be competent, material, or relevant, and that it would be an abuse of the process of the court to compel its production. *Dowagiac Mfg. Co. v. Lochren (U. S.)*, 6-573.

f. Objections and exceptions.

Time to take. — The Kentucky statute requiring exceptions to depositions, except as to the competency of the witness or the admissibility of his testimony, to be filed or noted on the record before or during the first term of the court after the filing of the deposition, applies to courts of continuous session, a term of such a court as to civil actions being regarded as sixty days, and in a cause in such a court an objection that a deposition was not written by the officer taking it cannot be made after the lapse of nearly two years after the filing thereof. *Western Union Tel. Co. v. Corso (Ky.)*, 11-1065.

5. FILING OF DEPOSITIONS.

What constitutes. — Depositions are deemed filed when they are delivered to a

clerk for the purpose of being filed. *Manning v. State (Tex.)*, 3-867.

6. TIME FOR INSPECTION.

Waiver. — Under the Maryland statute providing that depositions taken and returned in equity shall be opened by the clerk, and remain in court ten days subject to inspection before the cause shall be taken up for hearing, unless by agreement of the parties such time shall be waived, a party, by failing to object to taking up a cause in which the depositions have lain in court only five days, waives the statutory provision as to time. *Clark v. Callahan (Md.)*, 12-162.

7. SUPPRESSION OF DEPOSITIONS.

Incompetency of notary. — A deposition taken before a notary who is incompetent by reason of being in the employ of the attorney for one of the parties will be suppressed, on timely motion made by the opposite party, though it is not impeached for improper influence or for incorrectness. *Knickerbocker Ice Co. v. Gray (Ind.)*, 6-607.

Continuance to remedy defects. — Where depositions are suppressed upon the ground that when received by the clerk through the mails the envelope inclosing them was found torn open, it is error for the court to refuse an application for a continuance, made immediately thereafter, which complies with the provisions of the Kansas statute, if it appears that the defective condition in which the depositions were received was not caused by any fault or neglect of the party taking the same. *Order of United Commercial Travelers v. Barnes (Kan.)*, 7-809.

Waiver of right to suppress. — The fact that a party's attorney appears and cross-examines a witness whose deposition is taken before a notary who is a clerk in the employ of the attorney for the opposite party, does not operate as a waiver of his right to suppress the depositions for incompetency of the notary. *Knickerbocker Ice Co. v. Gray (Ind.)*, 6-607.

8. ADMISSIBILITY IN EVIDENCE.

Deposition not authorized by court rule. — Where no rule of the trial court authorizes the taking of depositions of certain witnesses, or where it is not shown that such witnesses are within the class of persons whose depositions are by the rules of court authorized to be taken, or that their presence in court cannot be obtained, their depositions are properly excluded. *Lyttle v. Denny (Pa.)*, 15-924.

Deposition of nonresident witness. — Under the Maryland statutes relating to the manner of taking the depositions of nonresident witnesses, all discrimination in this respect between nonresident parties and other nonresident witnesses is abolished, and the depositions of nonresidents who are not parties, taken as prescribed for use in courts of law, are admissible in courts of equity. *Clark v. Callahan (Md.)*, 12-162.

Notary's certificate as evidence of regularity. — A recital in a notary's certificate to a deposition that the testimony has been taken down by a disinterested person is not even *prima facie* evidence of the fact recited. *Knickerbocker Ice Co. v. Gray* (Ind.), 6-607.

Preliminary proof of absence of witness. — The California statute providing that in order for a deposition to be admissible in evidence "proof must be made at the trial that the witness continues absent or infirm, or is dead," applies only to depositions taken within the state, and therefore a deposition taken in another state may, whether the witness is a resident or a nonresident, be introduced in evidence without preliminary proof of the absence of the witness from the state, the presumption being that the absence of the witness has continued, and the burden of proving the contrary being upon the party objecting to the admission of the deposition. *Estate of Dolbeer* (Cal.), 9-795.

Under the California statute providing that "the testimony of a witness in this state may be taken by a deposition . . . when the witness is about to leave the country where the case is to be tried, and will probably continue absent when the testimony is required," the deposition of a witness may be admitted on proof that he has left the state two days previously, though the deposition has been taken since the commencement of the trial. *Estate of Dolbeer* (Cal.), 9-795.

Witness present under subpoena. — Where the contestant of a will has taken the deposition of the proponent, and the proponent attends the trial throughout under subpoena by the contestant, but is not called as a witness either in his own behalf or in behalf of the contestant, and at the conclusion of the proponent's evidence the contestant claims the right on the ground of surprise to introduce the deposition, it is proper for the trial court to refuse to permit depositions to be introduced in rebuttal, and it is within the discretion of the court to refuse to allow the contestant to reopen his case for the purpose of introducing the deposition. *Estate of Dolbeer* (Cal.), 9-795.

An officer of a corporation is a party to an action to which the corporation is a party within the Wisconsin statute prohibiting actions to obtain discovery under oath, but permitting a party to an action to take the deposition of the adverse party, and therefore the deposition of an officer taken under this statute before the trial may be read on the trial as independent evidence, notwithstanding he is present in court. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Striking out part. — Where in an action of ejectment the depositions of two old persons offered in evidence contain a deed made by them about thirty-three years before, which does not describe the land in controversy, and which is not under seal, and also a subsequent affidavit of one of them to the effect that about forty-seven years before he had executed a deed of the land in con-

troversy to a person through whose heirs the defendant seeks to hold the property, and that when he subsequently made a deed of the said land to a person through whom the plaintiff claims the land, the affiant thought he was duplicating the original deed, the court commits no error in striking the deed and affidavit from the depositions, although the party offering the depositions in evidence claims the right to do so to avoid the contradictions and unfavorable testimony contained in the depositions. *Cross v. Robinson Point Lumber Co.* (Fla.), 15-588.

DEPOT.

See RAILROADS.

Relation of union depot company to railroads using premises, see MASTER AND SERVANT, 3 f (1) (c).

DEPRECIATION.

Depreciated earning capacity as element of damage, see DAMAGES, 9 c.

Liability of pledgee for depreciation of pledged stock, see PLEDGE AND COLLATERAL SECURITY, 3.

DEPRIVATION OF LIBERTY OR PROPERTY.

See CONSTITUTIONAL LAW, 9.

DEPUTY.

Authority of deputy clerk to take acknowledgments, see ACKNOWLEDGMENTS.

Compensation of deputy sheriff, see SHERIFFS AND CONSTABLES, 3.

Liability of clerk for acts of deputy, see ACKNOWLEDGMENTS.

DERAILMENT.

Negligence inferred from derailment of car, see CARRIER, 6 l (4).

DERELICT.

Abandoned property as derelict, see SALVAGE.

DEROGATION.

Construction of statutes in derogation of common law, see STATUTES, 4 b.

DERRICK.

Injuries caused by defective derricks, see MASTER AND SERVANT, 3 c (1).

DESCENT AND DISTRIBUTION.

1. NATURE OF RIGHT OF SUCCESSION, 669.
2. CONFLICT OF LAWS, 669.
3. ACTIONS TO RECOVER PROPERTY ACQUIRED BY DESCENT, 669.
4. PROPERTY SUBJECT TO SUCCESSION, 669.
5. WHO MAY INHERIT, 669.
 - a. Murderer, 669.
 - b. Illegitimate brothers and sisters, 670.
6. RENOUNCING SUCCESSION, 670.

See ADVANCEMENTS; EXECUTORS AND ADMINISTRATORS.

Inheritance by adopted child, see ADOPTION OF CHILDREN.

Inheritance taxes, see TAXATION, 13.

1. NATURE OF RIGHT OF SUCCESSION.

The right to take property by inheritance or by will is a natural right which is protected by the Wisconsin constitution and which cannot be wholly taken away or substantially impaired by the legislature. *Nunemacher v. State* (Wis.), 9-711.

2. CONFLICT OF LAWS.

What law governs. — Whether distribution is effected by the state of the domicil of the decedent, or by that of the locus of the property, the law of distribution is that of the state of the domicil. *Kingsbury v. Bazeley* (N. H.), 20-1355.

3. ACTIONS TO RECOVER PROPERTY ACQUIRED BY DESCENT.

Heirs suing for the possession and partition of real estate to which they have acquired title by descent are not required to show, as a condition precedent to recovery, that the land is not subject to appropriation for the payment of the decedent's debts. *O'Keefe v. Behrens* (Kan.), 9-867.

4. PROPERTY SUBJECT TO SUCCESSION.

Lands held under contract of purchase. — Where a purchaser is in possession of real property under a contract of sale and has paid a part of the purchase price, his interest descends at his death to his heirs and does not pass to his administrator, as it is alienable, descendible, and devisable in the same manner as if it were real property held by legal title. *Cutler v. Meeker* (Neb.), 8-951.

Where, under an agreement between the heirs and the widow of a deceased purchaser who at the time of his death was in possession of land under a contract of sale, the equitable interest in the land has been treated as if it were real property of which the decedent died seized, and dower therein has been assigned to the widow, a deed issued to her in her own name by the vendor for the portion of the land assigned to her as dower upon her payment of a *pro rata* share of the

balance due under the contract of sale gives her no new right in the land as against the heirs, but the title she thereby acquires inures to their benefit, and she takes the legal title as trustee for them only, and therefore upon her death the heirs of the original purchaser are entitled to have their title quieted as against third persons to whom the widow has devised the portion of land assigned to her as dower and subsequently conveyed to her by the original vendor. *Cutler v. Meeker* (Neb.), 8-951.

A vendee in possession of land under a contract of purchase, on which part of the purchase price has been paid, holds an equitable title to the land which on his death descends to his heirs. *Grandjean v. Beyl* (Neb.), 15-577.

5. WHO MAY INHERIT.

- a. Murderer.

Iowa statute. — The Iowa statute providing that a murderer shall not inherit or take by devise or legacy from his victim, does not prohibit a wife who has murdered her husband from taking her distributive share in his estate provided for by the statute. *Matter of Kuhn* (Iowa), 2-657.

Kansas statute. — The power to declare the rule for the descent of property is vested in the legislature; and where it is provided in plain and peremptory language that a husband shall inherit from his deceased wife, and no exception is made on account of criminal conduct, the court is not justified in reading into the statute a clause disinheriting a husband because he feloniously killed his intestate wife for the purpose of acquiring her property. *McAllister v. Fair* (Kan.), 7-973.

Common-law maxim in force in Missouri. — The common-law maxim that one who commits murder or claims under a murderer cannot profit by the criminal act is a part of the law of Missouri unchanged and unmodified by the statutes of that state, and must be read together with the statutes of descent and distribution. *Perry v. Strawbridge* (Mo.), 14-92.

Under the Missouri statute by which the "widower" is given a share of the deceased wife's property, the word "widower" is to be construed to mean one who has been reduced to that condition by the ordinary and usual vicissitudes of life, and not one who has created that condition by murder, and a husband who has murdered his wife or those claiming under him are not entitled to any share of the wife's property. *Perry v. Strawbridge* (Mo.), 14-92.

Disqualifying murderer from inheriting as attainer. — The provisions of the Bill of Rights of Missouri that "no person shall be attainted of treason or felony by the general assembly," and that "no conviction can work corruption of blood," are not violated by the construction of an inheritance statute so as to prevent a murderer and his heirs from inheriting from his victim. *Perry v. Strawbridge* (Mo.), 14-92.

b. Illegitimate brothers and sisters.

The Texas statute of 1840 (section 16) providing that "bastards shall be capable of inheriting or of transmitting inheritance on the part of their mother, and shall also be entitled to a distributive share of the personal estate of any of their kindred on the part of their mother in like manner as if they had been lawfully begotten of such mother," which is based upon a similar Virginia statute as construed by the Supreme Court of that state, invests bastards with inheritable blood on the mother's part, and enables illegitimate brothers and sisters who are children of the same mother to inherit from each other. *Berry v. Powell* (Tex.), 16-986.

The Texas statute of 1848 which amended the above section by substituting the words "from and through" instead of "on the part of" their mother, was intended so to change the section as to remove all doubt upon the question. *Berry v. Powell* (Tex.), 16-986.

6. RENOUNCING SUCCESSION.

Effect of. — Brothers and sisters, by renouncing, in favor of their mother, the succession of a deceased brother, do not estop themselves to contest the right of persons claiming as the children of such deceased brother to share in the mother's estate. Succession of Gabisso (La.), 12-574.

DESCRIPTION.

Describing stolen property in indictment, see LARCENY, 5 a.

Sufficiency of description of property, see FRAUDS, STATUTE OF, 3 e (2).

Supplying description in contract to sell land, see FRAUDS, STATUTE OF, 2.

DESERTION.

Bar of right to alimony, see ALIMONY AND SUIV MONEY, 4 b.

Desertion from army as disqualification for jury service, see JURY, 2.

Ground for divorce, see DIVORCE, 2 c.

Inducing husband to desert wife, see CONSPIRACY, 1 a.

DE SON TORT.

Executor *de son tort*, see EXECUTORS AND ADMINISTRATORS.

DESTITUTE.

Homes for the destitute as charitable institutions, see CHARITIES, 1.

DESTRUCTION.

Destroying property used in violation of law, see GAME AND GAME LAWS, 6.

Destruction of remainders, see REMAINDERS.
Destruction of will as revocation, see WILLS, 6 b (5).

Effect of destruction of record as against subsequent purchasers, see RECORDS, 5.

Power of health officer to destroy property, see HEALTH, 1.

Right of seller to recover price of goods destroyed after delivery, see SALES, 5 c.

Seizure and destruction of gambling implements, see GAMING AND GAMING HOUSES, 4.

Seizure and destruction of unwholesome or adulterated articles of food, see FOOD, 4.

Summary destruction of intoxicating liquors, see INTOXICATING LIQUORS, 9.

Termination of lease by destruction of premises, see LANDLORD AND TENANT, 3 g.

DETAINER.

Forcible detainer, see FORCIBLE ENTRY AND DETAINER.

DETECTIVES.

Commission of crime procured at solicitation by complaining witness, see PHYSICIANS AND SURGEONS, 3 c.

Shadowing by detectives as officers. —

It is not an offensive or disorderly act for a private detective to shadow a person, unknown to the latter, for the purpose of keeping the latter in view in case it may be necessary to serve a subpoena upon him. *People v. Weiler* (N. Y.), 1-155.

Testimony of detectives. — Testimony of private detectives hired by one spouse to watch the other with a view of obtaining evidence on which to base a suit for divorce, is to be weighed and considered like other testimony, and tried by the same tests, but with the fact in view that the testimony is from a hired witness. Such testimony is sufficient, though uncorroborated, to sustain a decree for divorce. *Taft v. Taft* (Vt.), 12-959.

The giving of instructions to the jury as to the caution to be observed in weighing the testimony of private detectives or persons employed to find evidence is based upon rules of practice rather than of law, and rests largely in the discretion of the trial judge. *Jaynes v. People* (Colo.), 16-787.

DEVIATION.

Estoppel of carrier to enforce limitation of liability, see CARRIERS, 4 f (3).

Liability of carriers of live stock, see CARRIERS, 5 a (2).

DEVISEES.

See WILLS, 10.

Competency of devisee as attesting witness to will, see WILLS, 3 e (2).

DIAGNOSIS.

See **PHYSICIANS AND SURGEONS.**

DICTIONARY.

Judicial notice of, see **EVIDENCE**, 1 h.

DICTUM.

Judicial dictum distinguished from obiter dictum, see **STARE DECISIS**, 4.

DIET.

Confining on bread and water diet, see **CRIMINAL LAW**, 7 a (1).

DIPLOMA.

Dentists required to hold diploma, see **PHYSICIANS AND SURGEONS**, 1 b.

DIRECT EXAMINATION.

Of witnesses in criminal cases, see **CRIMINAL LAW**, 6 m (7).

DIRECTING VERDICT.

See **CRIMINAL LAW**, 6 r (1); **EXPLOSIONS AND EXPLOSIVES**; **TRIAL**, 6.
In probate proceedings, see **WILLS**, 7 k.

DIRECTORS.

See **CORPORATIONS**, 7 e.
Powers, duties, and liabilities of bank directors, see **BANKS AND BANKING**, 3 a.

DISABILITIES.

Persons in contempt, see **CONTEMPT**, 7.
Married women, see **HUSBAND AND WIFE**, 1.

DISAFFIRMANCE.

Right of infant to disaffirm contract, see **INFANTS**, 2 b.

DISAGREEMENT.

Effect of disagreement of jury in criminal cases, see **CRIMINAL LAW**, 5 b.

DISAPPROVAL.

Disapproval of bills by executive, see **STATUTES**, 1 e.

DISBARMENT OF ATTORNEYS.

See **ATTORNEYS AT LAW**, 2.
Right of disbarred attorney to hold office of prosecuting attorney, see **PROSECUTING ATTORNEYS**.

DISBURSEMENT.

Public funds, see **STATES**, 5.

DISCHARGE.

See **RELEASE AND DISCHARGE**.
Discharge by grand jury as termination of prosecution, see **MALICIOUS PROSECUTION**, 1 d.
Discharge of fireworks as nuisance, see **EXPLOSIONS AND EXPLOSIVES**, 5.
Discharging jury in criminal case, see **CRIMINAL LAW**, 5 b, 6 l.
Effect of discharge in bankruptcy, see **BANKRUPTCY**, 9.
Effect of discharge on preliminary examination as bar to subsequent prosecution, see **CRIMINAL LAW**, 5 b.
Effect of discharge without trial, see **FALSE IMPRISONMENT**, 1.
Guarantors, see **GUARANTY**, 3.
Seaman, see **SEAMEN**, 3 b.
Statutory duty of master to state cause for discharge of servant, see **MASTER AND SERVANT**, 2 b.
Termination of contract of employment by discharge, see **MASTER AND SERVANT**.
Validity of discharge in bankruptcy, see **BANKRUPTCY**, 15.

DISCHARGING FIREARMS.

See **WEAPONS**.

DISCLOSURE.

Duty to disclose dangerous character of substance delivered to carrier, see **EXPLOSIONS AND EXPLOSIVES**, 6 b.

DISCONTINUANCE.

See **DISMISSAL**, **DISCONTINUANCE**, AND **NON-SUIT**.
Review of order granting or refusing, see **APPEAL AND ERROR**, 13.
Discontinuing streets, see **STREETS AND HIGHWAYS**, 3 c.

DISCOVERY.

Right to maintain bill of discovery.
— The receiver of an insolvent corporation

that has outstanding shares of stock on which an assessment is due may maintain a bill of discovery against a broker who has purchased such shares for responsible clients, but who, with the intention of concealing their identity, has had the certificates of stock issued in the name of an irresponsible person, to compel such broker to disclose the names of the real owners. *Kurtz v. Brown* (U. S.), 11-576.

Validity of statutes authorizing discovery. — A state statute providing for the production of documents, which applies only to documents outside of the state, does not deny the equal protection of the laws, because a classification may be based upon the fact that the persons or property dealt with are not within the territorial jurisdiction of the regulating authority. *Hammond Packing Co. v. Arkansas* (U. S.), 15-645.

Even assuming that an order for the production of documents which is general and indefinite amounts to an unreasonable search and seizure and is consequently wanting in due process of law, a state may, in view of its visitatorial powers over corporations doing business within its borders, require the production, in a proceeding to determine whether a corporation is violating a state anti-trust statute, of the books and papers of the corporation, although such books and papers may never have been within the state. *Hammond Packing Co. v. Arkansas* (U. S.), 15-645.

An order to produce such documents and witnesses is not wanting in due process of law because it is made in a pending suit for the purpose of eliciting evidence as to the liability of the corporation, and because such evidence may be relevant to the defense of the corporation to the claim asserted by the state. *Hammond Packing Co. v. Arkansas* (U. S.), 15-645.

The provision of such a statute authorizing the striking out of the defendant's pleadings and the entry of a judgment by default because of the defendant's failure to comply with such order, does not amount to a denial of due process of law. *Hammond Packing Co. v. Arkansas* (U. S.), 15-645.

The federal Supreme Court will not relieve from the consequence of an absolute refusal to obey an order passed in a proceeding under a state anti-trust statute, for the production by a corporation of its nonresident officers or employees whose testimony the attorney-general desires to take, as well as of documents in the possession or under the control of such officers or employees, when such statute and order have been interpreted by the state court to require merely a *bona fide* effort to comply therewith. *Hammond Packing Co. v. Arkansas* (U. S.), 15-645.

Grounds. — A bill which seeks discovery of one not a party to a pending action at law, to recover money paid to the complainant as a carrier on overcharges on freight, and for failure to furnish cars according to agreement with the party suing at law, and which seeks to enjoin the action at law, held not to state a cause for discovery on the

ground that the complainant does not know the person to whom it is liable, for the plaintiff in the action at law must show that the transactions were with himself before he can recover. *Terrell v. Southern R. Co.* (Ala.), 20-901.

A bill of discovery solely in aid of a defense to an action at law will not lie against one who is not a party to the record at law. *Terrell v. Southern R. Co.* (Ala.), 20-901.

Tendency to incriminate as ground for refusal. — In an action for damages for conspiring to induce the plaintiff's workmen to breach their contracts with him, it is no ground for refusing an order requiring the defendants to discover material documents, that some of the documents may tend to incriminate them. *National Assoc. of Operative Plasterers v. Smithies* (Eng.), 5-738.

Denial of possession or control. — Under the Wisconsin statute authorizing the compulsory inspection by a party to an action, of books, papers, and documents in the possession or under the control of the adverse party, an unqualified credible denial by the latter party that such books and papers are in his possession or under his control calls for the vacation of an order requiring the production thereof. *Schlesinger v. Ellinger* (Wis.), 15-315.

Under such statute it is not the duty of the adverse party, if he has not control of papers and records of which he is the rightful custodian, to obtain such control for the purpose of complying with an order for the inspection thereof by his adversary. *Schlesinger v. Ellinger* (Wis.), 15-315.

The rule that where papers have been shown to have been in the possession of the adverse party, it devolves upon him to show what has become of them, is inapplicable to a case wherein there is nothing to indicate that such papers have been in his possession, and where it appears from his own and other affidavits that such papers have never been in his possession, and that he has made diligent and unsuccessful efforts to ascertain their whereabouts. *Schlesinger v. Ellinger* (Wis.), 15-315.

Sufficiency of notice to produce. — Notice to a corporation to produce books and papers is not too broad where it is limited to books and papers concerning dealings between certain dates with named parties and describes with particularity the proceedings in which the papers are to be used. *Consolidated Rendering Co. v. Vermont* (U. S.), 12-658.

An officer of a corporation, ordered to surrender the books and documents of the corporation for production before the grand jury, cannot complain that the order is too broad, or requires the production of more documents than are necessary, or subjects the business of the corporation to undue investigation, or is designed to fish for evidence in a case not then under consideration, as such objections may be urged by the corporation through its proper officer, before submitting the documents to the grand jury, but afford no ground of personal privilege to the officer ordered to

surrender them. *Ex p. Hedden* (Nev.), 13-1173.

DISCRETION.

Admission to bail, see BAIL, 3, 4.
 Allowing withdrawal of plea of guilty, see CRIMINAL LAW, 6 j (2).
 Awarding custody and support of children, see DIVORCE, 7.
 Controlling exercise of discretionary power, see MANDAMUS.
 Denial of motion to vacate adjudication in bankruptcy, see BANKRUPTCY, 3.
 Determining fitness of lien for citizenship, see NATURALIZATION.
 Excluding veniremen from jury, see JURY, 6 e (1).
 Exercise of discretion by railroad as to facilities and equipment, see RAILROADS, 5 e.
 Exercise of municipal power over streets, see STREETS AND HIGHWAYS, 3.
 Exercise of power of eminent domain, see EMINENT DOMAIN, 3.
 Granting or refusing amendments, see PLEADING, 9 b.
 Granting change of venue generally, see CHANGE OF VENUE, 1 e.
 Granting or refusing change of venue in criminal cases, see CHANGE OF VENUE, 2 d.
 Granting or refusing continuances, see CONTINUANCES; CRIMINAL LAW, 6 d (1).
 Granting or refusing interlocutory injunctions, see INJUNCTIONS, 4 a.
 Granting or refusing mandamus, see MANDAMUS, 1.
 Granting or refusing new trial, see NEW TRIAL, 2.
 Issuance of writ of quo warranto, see QUO WARRANTO, 5.
 Latitude in cross-examination of witnesses, see WITNESSES, 4 b.
 Leading questions put to witness, see WITNESSES, 4 c (2).
 Limiting number of witnesses, see TRIAL, 2 c.
 Order of proof in criminal cases, see CRIMINAL LAW, 6 m (1).
 Permitting counsel to comment on evidence in criminal cases, see CRIMINAL LAW, 6 p.
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1. DISMISSAL OF ACTIONS.

- a. Dismissal by court.

For failure to prosecute. — Even in the absence of statutory authorization, a

court may dismiss a suit for a failure of the plaintiff to prosecute it with due diligence, where no sufficient excuse for the failure is presented. *Sanitary District v. Chapin* (Ill.), 9-113.

For failure to prove immaterial allegation. — A motion for a nonsuit in an action for death by wrongful act on the ground that no evidence has been given to support the allegation in the complaint of wilful conduct on the part of the defendant is properly denied, where such allegation is not of the gravamen of the pleading, but merely stands by itself without any conclusion being predicated on it. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

After entry of interlocutory decree. — A court of equity has power to dismiss a cause after the expiration of the term in which an interlocutory decree is entered; and such a dismissal will have the effect of vacating the interlocutory decree. *Gray v. Ames* (Ill.), 5-174.

Dismissing action upon objection to evidence. — Where a plaintiff offers evidence which is admissible under his complaint, and also offers evidence which is admissible only in rebuttal in the event the defendant attempts to sustain the allegations of his answer, it is error for the trial judge in sustaining objections to the evidence admissible only in rebuttal to dismiss the complaint on the merits. *Auten v. Bennett* (N. Y.), 5-620.

Questions not raised by motion for nonsuit. — A motion to nonsuit is directed solely to the proof of the plaintiff's cause of action, and not to the measure of damages or to the collateral matters such as ancillary proceedings, and hence in an action by a vendee of personal property against the vendor to recover damages for stoppage of the property *in transitu*, where the plaintiff has proved facts which entitle him to at least nominal damages, a motion to nonsuit based on the ground that there is no proof of substantial damages, or on the ground that there is a variance between plaintiff's affidavit for an attachment and the proof on the trial, in that the former alleges a breach of the contract while the latter shows a tort, is properly denied. *Edwards v. Erwin* (N. Car.), 16-393.

Effect of motion. — Where a defendant moves for a nonsuit on the plaintiff's evidence, he is deemed to admit the existence of every fact which such evidence tends to prove or which can be gathered from any reasonable view of the evidence. *Allen v. Phoenix Assur. Co.* (Idaho), 10-328.

Waiver of error in denying motion. — Error in the denial of a defendant's motion for nonsuit, made at the close of the plaintiff's evidence and based upon the ground that the plaintiff has not made out a *prima facie* case, is waived by the defendant where instead of resting upon the denial of his motion he introduces evidence in his own behalf which supplies the defects in the plaintiff's proof. *Lyon v. United Moderns* (Cal.), 7-672.

Dismissal of equitable action. — A motion to dismiss a complaint on the ground that there is no testimony tending to sustain the allegations thereof, is, in effect, a motion for a nonsuit, which cannot properly be granted in an equitable action. *Garner v. Garner* (S. Car.), 5-210.

b. Dismissal by plaintiff.

After submission upon demurrer to evidence. — When a case has been submitted upon a demurrer to evidence, the plaintiff's absolute right to dismiss without prejudice is lost. *Bee Building Co. v. Dalton* (Neb.), 4-508.

After final submission. — A plaintiff cannot dismiss his action without prejudice, after there has been a final submission of it either to the court or jury. *Bee Building Co. v. Dalton* (Neb.), 4-508.

A District Court of Nebraska may in its discretion permit a plaintiff to dismiss a case after it has been finally submitted to the court or jury; but where the discretionary power of the court is not invoked and the application to dismiss after final submission is made and allowed as a demandable right, the order of dismissal will not be upheld unless a denial of the application would amount to an abuse of discretion. *Bee Building Co. v. Dalton* (Neb.), 4-508.

After set-off filed. — After a valid plea on set-off has been filed, the plaintiff is not entitled to dismiss his action so as to interfere with the rights of the defendant except upon sufficient cause shown. *Wilson v. Exchange Bank* (Ga.), 2-597.

After filing of answer. — After the filing of an answer by a defendant to a bill in equity, the mere filing of a præcipe for dismissal by the complainant, no order of the court being made thereon, cannot operate as a dismissal of the bill. The complainant cannot in this manner discontinue the suit, an order of the court being necessary. *Long v. Anderson* (Fla.), 5-846.

Bills in chancery. — There is no statute or equity rule in force in Florida regulating the dismissal of bills in chancery by the complainant. *Long v. Anderson* (Fla.), 5-846.

There being no rule of practice adopted by the United States Supreme Court regulating the dismissal of bills in chancery by a complainant, the practice of the courts of Florida upon this point must be regulated by the practice of the High Court of Chancery in England. *Long v. Anderson* (Fla.), 5-846.

Necessity for order of court. — While it is the general rule that a complainant in an equity suit may dismiss his bill at any time before the hearing, it is equally well settled that he cannot do so without an order of court, this practice implying a certain discretion on the part of the court to refuse such order, if, under the particular facts of the case a dismissal would be prejudicial to the rights of the defendant. *Long v. Anderson* (Fla.), 5-846.

2. RENEWAL, REVIVOR, AND REINSTATEMENT OF ACTIONS.

Renewal under Georgia Code. — Where the liability of the defendants is joint and several with no right of contribution, as in libel, a second action against all the defendants to the first suit, served upon some of those jointly suable but severally liable, is within the saving provision of the code granting the right to renew an action within six months. *Cox v. Strickland* (Ga.), 1-870.

Under the code provision granting the right to renew an action, the second suit must be substantially the same cause of action but does not have to be a literal copy of that dismissed. It must be by the same plaintiff or his legal representative and against all the defendants who are necessary parties to the first suit or their legal representatives. *Cox v. Strickland* (Ga.), 1-870.

The code provision granting the right to renew an action within six months forms an exception to the statute of limitations and has no reference to the subject of venue, and a new action may be brought in any court having jurisdiction thereof in the state. *Cox v. Strickland* (Ga.), 1-870.

Successive actions. — A statute providing that a plaintiff who has been nonsuited "may commence a new action within one year after such nonsuit" is intended to extend the period of limitation where there has been a decision not affecting the merits, and it does not authorize successive actions each within a year after nonsuit in the previous action. *Morrow v. Atlanta, etc., R. Co.* (S. Car.), 19-1009.

Reinstatement after expiration of term. — After the expiration of the term in which a suit in equity is dismissed, the court has no power to reinstate the cause. *Gray v. Ames* (Ill.), 5-174.

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Place of habitual violation of usury laws as disorderly house. — A person who maintains a place of business in which the law against usury is habitually violated is guilty of the offense of keeping a disorderly house. *State v. Martin* (N. J.), 18-986.

Abatement as nuisance. — A bawdy house may be abated as a nuisance at the suit of a private citizen where the latter owns the adjoining premises and is specially injured. *Ingersoll v. Rousseau* (Wash.), 1-35.

Injunction to prevent maintenance. — An injunction will lie to prevent the main-

tenance of a bawdy house as a public nuisance injurious to an adjoining resident's property, the remedy at law being inadequate. *Ingersoll v. Rousseau* (Wash.), 1-35.

Prior use as defense to injunction. — The right of a landowner to restrain an adjoining property owner from using his property as a bawdy house, or house of ill fame, to which persons resort for the purposes of prostitution and lewdness, is a right belonging to the land, and the fact that defendant's premises were so used before plaintiff purchased his property constitutes no defense to an action to enjoin the same. *Seifert v. Dillon* (Neb.), 17-1126.

Change in construction as defense. — A change in the construction of a bawdy house rendering the same less conspicuous but not materially affecting the injury to the surrounding property is not a defense to an action to abate as a nuisance. *Ingersoll v. Rousseau* (Wash.), 1-35.

Effect of laches. — The illegal use of property as a house of ill fame constitutes a continuing injury to a near-by property owner which is unaffected by lapse of time. *Seifert v. Dillon* (Neb.), 17-1126.

Effect of toleration by authorities. — The fact that city authorities have tolerated bawdy houses upon certain property does not legalize their maintenance there when other property is injuriously affected. *Ingersoll v. Rousseau* (Wash.), 1-35.

The fact that municipal authorities tolerate the maintenance of a house of prostitution on defendant's property, and thereby violate the law themselves, constitutes no defense to a suit by a near-by property owner to enjoin such maintenance, special damages being shown. *Seifert v. Dillon* (Neb.), 17-1126.

Sufficiency of evidence in prosecution for keeping bawdy house. — Under the Alaska statute expressly making "common fame" competent evidence in support of an indictment for keeping a bawdy house for purposes of prostitution, such evidence is not alone sufficient to sustain the conclusion that a house is in fact a bawdy one for purposes of prostitution, and a conviction cannot be had without some additional evidence of the immoral purposes for which the house is kept. *Bofts v. United States* (U. S.), 12-271.

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Invalid divorce as defense to bigamy, see **BIGAMY**, 3.

Marriage of divorced persons, see **MARRIAGE**, 1 b.

1. **JURISDICTION OF COURT**.

To grant divorce to defendant. — Where the plaintiff in a divorce suit has

resided within the state for the full statutory period, and the defendant has appeared in the cause, the court has jurisdiction over the parties, and has the right to dispose of all the issues between them upon their merits and according to equity, even if, in order to do so, it is necessary to grant a divorce to a nonresident defendant upon cross-petition. *Pine v. Pine* (Neb.), 9-1198.

2. GROUNDS FOR DIVORCE.

a. Adultery.

In District of Columbia. — It cannot be presumed that the common-law rule that adultery is not a ground for an absolute divorce is in force in the District of Columbia, and that a divorce on that ground granted in a foreign jurisdiction will not be recognized in the District, inasmuch as there is an Act of Congress applicable to the District which provides that an absolute divorce may be granted "where either party has committed adultery during the marriage." *Dimpfel v. Wilson* (Md.), 15-753.

b. Cruel and inhuman treatment.

Necessity of personal violence. — Such conduct and acts by a husband toward his wife and such treatment of her by him as produce reasonable apprehension in her of personal violence, or produce mental anguish, distress, and sorrow, and render cohabitation miserable, impairing or tending to impair the wife's health or mind, constitute cruel and inhuman treatment authorizing a divorce from bed and board under the West Virginia statute, though there is no personal violence. *Goff v. Goff* (W. Va.), 9-1083.

The statutory ground of divorce consisting of cruel and inhuman treatment that indicates a settled aversion of the husband toward the wife and destroys her peace and happiness, may arise in various ways that fall short of assault and bodily injury, and are not attended with apprehension of violence or danger, and in the nature of the case each complaint under the statute must be determined by the facts as they are presented. *Hooe v. Hooe* (Ky.), 13-214.

c. Desertion.

Refusal to follow change of domicil. — A husband is entitled to a divorce on the ground of desertion if his wife refuses to accompany him in a change of domicil from one country to another, unless such change is plainly unreasonable. *Franklin v. Franklin* (Mass.), 5-851.

Refusal of sexual intercourse. — The statutory ground of divorce defined, in substance, as the wilful desertion of the spouse by the other and the remaining absent without reasonable cause, is not made out by proof of a refusal of sexual intercourse, but requires the complete separation of the parties by one absenting himself or herself from the other. *Pfannebecker v. Pfannebecker* (Iowa), 12-543.

d. Conviction and imprisonment for crime.

Effect of pardon. — The conviction of a married person of an offense involving moral turpitude, followed by a sentence of imprisonment in the penitentiary for two years or longer, gives to the other party to the marriage a right to a divorce; and this right is not affected by an executive pardon granted after the sentence has been imposed. *Holloway v. Holloway* (Ga.), 7-1164.

3. DEFENSES.

a. Recrimination.

Offenses of different character. — When it is shown that each party to the suit has been guilty of a matrimonial offense which the statute has made a ground for divorce, they will be deemed in "equal wrong," and the court may, in its discretion, refuse to grant a divorce, although the offenses may not be of the same character. *Day v. Day* (Kan.), 6-169.

Condoned acts as defense. — If a husband is guilty of cruel treatment toward his wife, or of adultery, and with full knowledge thereof she condones the offense and cohabits with him, and he is not guilty of any further misconduct, she cannot thereafter at her mere will desert him, and, if suit is brought against her for a divorce on the ground of wilful and continued desertion for three years before the filing of the suit, set up the condoned acts and thereby prevent the granting of a divorce. *Davis v. Davis* (Ga.), 20-20.

If after the condonation the conduct of the husband is such as to revive the condoned acts and give her a right to assert them, she is not debarred from so doing; nor is she prevented from setting up misconduct on his part after the condonation, for the consideration of the jury in determining whether a divorce should be granted. *Davis v. Davis* (Ga.), 20-20.

b. Condonation.

Of adultery. — A husband will not be granted a divorce on the ground of adultery where the evidence shows that he lived and cohabited with his wife for more than a year after learning of her misconduct, as he will be deemed to have condoned the offense. *Day v. Day* (Kan.), 6-169.

Of loathsome disease. — The statutory ground of divorce consisting of the existence of a loathsome disease concealed from the other spouse at the time of the marriage or contracted afterwards, is not condoned by subsequent cohabitation, especially where the disease is of long continuance and is likely to grow worse with time. *Hooe v. Hooe* (Ky.), 13-214.

c. Connivance.

What constitutes. — Evidence that a husband, who is the libellant in an action for divorce, actively aided in procuring a house for an adulterous use by his wife, which otherwise she would not have had, and ar-

ranged that she should not be interfered with or interrupted in its occupancy, shows a connivance on his part which defeats any right to the relief asked, and it is immaterial that the wife was unaware of such connivance and assistance. *Noyes v. Noyes* (Mass.), 10-818.

d. Insanity.

Insanity after desertion. — A divorce for wilful desertion will be granted the plaintiff, where it appears that the defendant was guilty of desertion while of sound mind, though he subsequently became insane and was in that condition at the time of the institution of the divorce suit. *Fisher v. Fisher* (W. Va.), 1-251.

e. Illicit relation between parties before marriage.

Wife pregnant by another. — Illicit relations between a husband and wife before marriage are not a bar to an action for divorce under a statute authorizing the maintenance of such an action "when the wife at the time of the marriage was pregnant by another than the husband, of which he had no knowledge." *Wallace v. Wallace* (Ia.), 15-761.

But in such an action the antenuptial conception does not weaken the presumption of legitimacy arising from the postnuptial birth. Consequently the evidence of the nonaccess of the husband must be of as conclusive a character as that required to bastardize a child conceived during wedlock. *Wallace v. Wallace* (Ia.), 15-761.

4. PLEADING.

Form of action. — An equitable petition for the annulment of marriage, and for the cancellation of a bond to stop a prosecution for seduction, executed pursuant to the Georgia Penal Code, which fails to allege a cause of action in these respects, cannot be retained as a statutory proceeding for divorce, especially when it is lacking in a jurisdictional averment required in a libel for divorce, and contains no specific prayer for divorce. *Griffin v. Griffin* (Ga.), 14-866.

Bill alleging two grounds. — A bill seeking a divorce on two grounds, which is good as to the one ground and bad as to the other, must be sustained as against a general demurrer. *Trough v. Trough* (W. Va.), 8-837.

Averment of residence for statutory period. — Under a statute providing that "a divorce must not be granted unless the plaintiff has been a resident of the state for one year next preceding the commencement of the action," a complaint for divorce failing to allege the statutory period of residence is fatally defective and confers no jurisdiction on the court to decree a divorce. *Rumping v. Rumping* (Mont.), 12-1090.

Averment of nonresidence of defendant. — Under the Missouri statute providing for the issuance of an order of publication in suits for divorce upon an allegation

in the petition that the defendant is a non-resident of the state or has absconded or absented himself from his usual place of abode in the state, an allegation "that the defendant is a nonresident of this state, or that he has absconded or absented himself from his usual place of abode in this state," is contradictory and nugatory, and does not authorize an order of publication in divorce proceedings. Such alternative allegation of the nonresidence of the defendant is not simply a defect which can be taken advantage of only by special demurrer or motion to make the pleading more definite and certain, but goes to the jurisdiction, and publication based thereon is not a legal or sufficient service of the defendant. *Hinkle v. Lovelace* (Mo.), 11-794.

Necessity of pleading noncompliance with statutory requirements in defense. — A statute providing that a divorce must be denied unless the action is brought within a certain time is not a mere statute of limitation, but is a substantive part of the cause of action, and an answer setting up the statute is not required to authorize the court to refuse a divorce on the ground that the action was not brought within the time limited. *Franklin v. Franklin* (Mont.), 20-339.

Verification of petition. — Under the Mississippi statute providing that in suits for divorce "the petition shall be accompanied by an affidavit annexed thereto, that the facts stated therein are true according to the best knowledge and belief of the plaintiff," and that the complaint is not made by collusion or out of fear but in sincerity and truth, an affidavit sworn to only by an agent or next friend of an infant plaintiff is insufficient, and a decree of divorce rendered on a petition verified only in such manner is a nullity, and subject to collateral attack. In such a case, the proper verification of the petition on the day of entering the final decree in the cause does not cure the previous defective verification, where the defendant has been served by publication only and is not present in court. *Hinkle v. Lovelace* (Mo.), 11-794.

5. EVIDENCE.

a. Admissibility.

Of confessions of adultery. — Confessions of adultery which are made in the country cannot be given in evidence or considered in a suit for divorce for such offense. *Trough v. Trough* (W. Va.), 8-837.

Of adulterous disposition. — In an action for divorce on the ground of adultery, evidence of incidents showing defendant's adulterous disposition, though not connected in time or place with the alleged act of adultery, are relevant to add to the probability of her having committed the acts relied on. *Houlton v. McGuirk* (La.), 16-1117.

The court having found that two acts of adultery, relied on for a divorce, were committed, evidence of other occasions when the parties were together alone either before or

after such acts, is admissible for the purpose of showing an adulterous disposition. *Taft v. Taft* (Vt.), 12-959.

Illicit intercourse with third persons before marriage. — As neither the declarations nor the testimony of either spouse may be received in evidence to prove access or nonaccess to the other, the affidavit of a wife tending to show nonaccess of her husband during the period when antenuptial conception must have taken place is inadmissible in an action by the husband for a divorce on the ground that at the time of the marriage the wife was pregnant by a person other than the plaintiff. *Wallace v. Wallace* (Ia.), 15-761.

b. Sufficiency.

Of marriage. — In an action for divorce on the ground of adultery, evidence that the plaintiff and the defendant were living together as husband and wife, and passed as such in the community in which they lived, creates a presumption of marriage which is sufficient proof thereof, in the absence of any denial. *Houlton v. McGuirk* (La.), 16-1117.

Of adultery. — In an action for divorce on the ground of adultery, testimony of detectives, corroborated by that of a disinterested witness, considered and held sufficient to sustain a finding of the defendant's guilt. *Houlton v. McGuirk* (La.), 16-1117.

Adultery, as a ground of divorce, may be proved by circumstantial evidence, provided the circumstances are such as to produce a reasonable belief that the act has been committed. *Taft v. Taft* (Vt.), 12-959.

Of cruelty. — Evidence examined upon a trial *de novo* and found sufficient to justify the granting of a divorce for extreme cruelty. *De Roche v. De Roche* (N. Dak.), 1-221.

In an action for divorce on the grounds of the refusal of the wife to have sexual intercourse with the husband and of cruel and inhuman treatment of the husband by her, evidence examined and held sufficient to show a state of health on the part of the wife justifying refusal of intercourse, and insufficient to show cruel and inhuman treatment justifying a decree of divorce. *Pfannebecker v. Pfannebecker* (Ia.), 12-543.

Of desertion. — Evidence held to make out a case of desertion entitling the husband to a divorce for the refusal of the wife to follow him to a new domicile. *Franklin v. Franklin* (Mass.), 5-851.

6. DECREE.

a. In general.

Division of property between parties. — Under the Michigan statute, the court, in granting a divorce, has the right to decree a division of property between the husband and the wife. *Carnahan v. Carnahan* (Mich.), 8-53.

The Wisconsin statute (St. 1898, § 2364) providing that on a divorce the court may divide and distribute the estate of the husband, and so much of the estate of the wife

as shall have been derived from the husband, does not authorize the court to award to the husband any part of the wife's estate not derived from him. *Brenger v. Brenger* (Wis.), 19-1136.

In settling the property rights of parties upon a judicial dissolution of their marriage contract it is proper, if not the duty of the court, so to provide as to preserve to them, subject to their individual rights after the separation of contracting to the contrary, their statutory exemptions from claims of creditors, while at the same time the indebtedness of each, in determining the property status to be dealt with in settling property rights, should be considered. *Brenger v. Brenger* (Wis.), 19-1136.

Divorce decree as decree for payment of money. — A decree granting a divorce and requiring the successful party to pay a specific fund to the unsuccessful party is not a decree for payment of money in the ordinary sense, and the nature of the decree is not affected by its assignment pursuant to the bankruptcy of the party to whom payment is to be made. *Carnahan v. Carnahan* (Mich.), 8-53.

A decree granting a wife a divorce but requiring her to pay a specific fund to the husband by way of division of their property is not enforceable by execution, as it is not a decree for the payment of money in the ordinary sense, and therefore under the Michigan statute contempt proceedings lie against the wife for disobeying the decree notwithstanding a void execution has issued and an ineffective levy has been made. *Carnahan v. Carnahan* (Mich.), 8-53.

Defense stricken out. — The court has no power to strike out and disregard a deposition filed by the defendant in defense of a suit for divorce, for failure to pay money required of him to enable his wife to prosecute her suit and for temporary alimony, and pass a final decree of divorce against him. *Trough v. Trough* (W. Va.), 8-837.

Right to final judgment under New York Code. — Under the provisions of the New York Code of Civil Procedure relative to actions for absolute divorce, it cannot be held that the final judgment in such an action follows automatically and as a matter of course upon the interlocutory judgment. On the contrary, final judgment can be entered as of course only within a specified period, and even within that period it is within the power of the court to forbid its entry. *Matter of Crandall* (N. Y.), 17-874.

b. Extraterritorial effect.

Decree of court of existing domicile. — The court of the *bona fide* existing domicile has jurisdiction to render a decree of divorce between persons originally domiciled and married in another country. The English courts will recognize a divorce so granted, even though the cause for which it was obtained would not have been sufficient ground for divorce in England. *Bater v. Bater* (Eng.), 4-854.

A divorce granted in the New York courts held to have been granted with jurisdiction and entitled to recognition in England. *Bater v. Bater* (Eng.), 4-854.

The courts will recognize the validity of a divorce granted by a court of the country where the parties were legally domiciled at the time when the proceedings were taken, although the decree was founded upon causes which would not be considered sufficient in an English court. *Rex v. Hamilton* (Can.), 20-868.

Decree of foreign court without notice. — Where a woman who has married in Canada a man who has always been a domiciled Canadian goes to one of the United States with the intention of separating from her husband and of thenceforth making her home there, and she thereafter obtains a divorce in such state, but her husband is not served with any notice of the divorce proceedings and does not take any part therein, the divorce is of no validity or force in Canada. *Rex v. Brinkley* (Ont.), 10-407.

Decree of foreign court upon constructive service. — Where a husband abandons his wife without justifiable cause, removes to another state, and acquires domicile therein, but the wife remains in the matrimonial domicile, her domicile continues in that state and does not constructively follow her husband; and therefore if the husband sues for a divorce in the state of his domicile, and a decree is rendered upon constructive service, the court does not acquire such jurisdiction over the wife as entitles the decree to obligatory enforcement in the state of her domicile by virtue of the full faith and credit clause of the Federal Constitution, though the state in which the decree is rendered may have power to enforce it within its borders, and the state of the wife's domicile may have power to give it such efficiency as it may see fit. *Haddock v. Haddock* (U. S.), 5-1.

If a suit for divorce is a proceeding *in rem*, the *res* is divisible when the plaintiff is domiciled in the state where the suit is brought and the defendant is domiciled in another state, so that, though a divorce granted upon constructive service may be valid in the state of the plaintiff's domicile, it has no obligatory extraterritorial force in the state of the defendant's domicile. *Haddock v. Haddock* (U. S.), 5-1.

Decree of foreign court directing conveyance of land. — Where the Supreme Court of a state makes a decree in an action of divorce, directing the husband, against whom a divorce is granted, to convey certain real property situated in another state to his wife, and a deed is made by a commissioner appointed by the court, in pursuance of the decree, but the husband executes a deed of the same property to a third person, a judgment of the Supreme Court of the state in which the land is situated refusing to cancel such deed by the husband as a cloud on the wife's title, on the ground that the foreign decree gives no such equities as can be recognized as justifying an action to quiet title, does not offend the full faith and credit

clause of the Constitution, and must be affirmed. *Fall v. Eastin* (U. S.), 17-853.

Power of state to refuse recognition. — Every state has full power to determine whether the marriage relation of its citizens shall be dissolved, and the exercise of that power by a state in behalf of its citizens by refusing to recognize the validity of a divorce rendered in a foreign state upon constructive service of process does not violate the full faith and credit clause of the Federal Constitution. *Haddock v. Haddock* (U. S.), 5-1.

Prohibition of remarriage. — The validity of a marriage contracted in the District of Columbia by a man who has been divorced in New York is not affected by a provision in the decree of divorce prohibiting him from remarrying during the lifetime of his former wife, such prohibition having no extraterritorial effect. Nor is such marriage invalidated by the Act of Congress of June 19, 1869, which provides in effect that the contracting by a divorced person upon whom "restraint shall have been imposed" of a second marriage during the lifetime of the former spouse, shall be a ground for divorce. *Dimpfel v. Wilson* (Md.), 15-753.

c. Effect upon property rights.

Separate property of wife. — After a decree of divorce the husband has no right of possession in the separate property of the wife occupied as a homestead while the marriage relation subsisted. *Cizek v. Cizek* (Neb.), 5-464.

Effect of decree of divorce a mensa et thoro. — A decree of divorce from bed and board without alimony dissolves the relation of husband and wife so far as the duty of the former to maintain the latter is concerned. *Chapman v. Parsons* (W. Va.), 19-453.

7. CUSTODY AND SUPPORT OF CHILDREN.

Power to award custody. — A court of equity in denying a wife's petition for divorce may grant the custody of the children to the parents alternately, and award the wife an allowance for the support and maintenance of the children during the periods when they shall be in her custody. *Horton v. Horton* (Ark.), 5-91.

Discretion of Court. — The question of the custody of children is one largely of judicial discretion to be exercised for the best interests of the children, and that discretion will not be reviewed by an appellate court unless it has been manifestly abused. *Seeley v. Seeley* (D. C.), 12-1058.

Effect of foreign decree. — A decree of divorce in one jurisdiction awarding as between the parties the custody of a child residing in another jurisdiction does not preclude the courts of the latter jurisdiction from determining the custody of the child. *Seeley v. Seeley* (D. C.), 12-1058.

Decree awarding custody without support. — Under the Maryland statute the power of a court to decree the custody of children and to decide who shall maintain

them are separate and distinct powers, and a decree of custody and guardianship does not carry with it any necessary implication of support. *Alvey v. Hartwig* (Md.), 14-250.

Power to decree support. — A decree of divorce and for the custody of the children rendered in favor of the wife in a proceeding of which the husband is given notice only by publication cannot validly include an order requiring the husband to support the children, and hence the fact that the decree is silent on the subject of the support of the children creates no estoppel against the wife as to her right to claim such support. *Alvey v. Hartwig* (Md.), 14-250.

Duty to support not dependent on right to custody. — The obligation of a father to furnish money for the support of his minor children to the extent that they are unable to support themselves is not impaired by a decree of divorce which, on account of his own misconduct, deprives him of their care and custody. *Graham v. Graham* (Colo.), 12-137.

The father is not released from his obligation to support his infant children by reason of the fact that the mother has been granted an absolute divorce from him, and has been awarded the custody of said children by a decree making no provision for their maintenance. *Alvey v. Hartwig* (Md.), 14-250.

Modification of allowance. — A judgment in divorce proceedings awarding the custody of minor children to the wife and as alimony for the support of herself and children a stated sum per month not exceeding in the aggregate a certain amount, does not determine conclusively the extent of the husband's liability or prevent an additional allowance for the support of the minor children until they become of age. *Graham v. Graham* (Colo.), 12-137.

Earning capacity of children. — A decree requiring a divorced husband to pay an additional allowance for the support of his minor children in the custody of the wife is erroneous in allowing a stated monthly sum for the support of each child until its majority regardless of the amount which a son, almost of age, is able to earn during that time. *Graham v. Graham* (Colo.), 12-137.

Effect of decree on legal obligation. — The legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the suit of his wife for his misconduct, which gives the custody of the children to her but is silent as to their support, and if under such circumstances the father refuses or neglects to support the children, his divorced wife may recover from him in an original action a reasonable sum for necessities furnished by her for their support after such decree, as the law implies a promise on his part to pay for such necessities. *Spencer v. Spencer* (Minn.), 7-901.

8. VACATING OR SETTING ASIDE DECREE.

Revocation for fraud. — A decree of divorce may be revoked on the ground that it was obtained by fraud, where the application is timely and no rights of third per-

sons have intervened. *Graham v. Graham* (Wash.), 18-999.

After death of plaintiff. — A judgment of divorce cannot be vacated after the death of the plaintiff, even with the consent of his executors, though it is void for want of jurisdiction over the person of the defendant. *Dwyer v. Nolan* (Wash.), 5-890.

By person not party to suit. — A divorce granted by a foreign court, being a judgment affecting the status of the parties, stands on the same footing as a judgment *in rem* and cannot be set aside in England, even on the ground of fraud by a person not a party to the proceedings in which the judgment was pronounced. *Bater v. Bater* (Eng.), 4-854.

Sufficiency of evidence. — Evidence considered in a bill to review a decree of divorce, and held not to sustain the allegations that the decree was procured by fraud, and that the complainant had no knowledge of the rendition of the decree until after the expiration of the time for appeal. *Watkinson v. Watkinson* (N. J.), 6-326.

Laches. — Five years' delay after discovery of the fraud in commencing a suit to avoid a decree of divorce therefor, constitutes such laches as will defeat the suit, where the limitation of the analogous action at law is three years. *Horton v. Stegmyer* (U. S.), 20-1134.

9. APPEAL.

Right of appeal. — The Rhode Island statute providing that petitions for divorce "shall follow the course of equity so far as the same is applicable," but nowhere stating that a divorce proceeding is always to follow the course of equity, does not give a right of appeal from a final decree of divorce either a *vinculo* or a *mensa et thoro*, and no appeal lies from such decree. *Fidler v. Fidler* (R. I.), 13-835.

Bill of review on ground of condonation. — One against whom a divorce for adultery has been granted is not entitled to a bill of review on the ground of condonation, as that is a matter which should have been set up as a defense to the original suit. *Watkinson v. Watkinson* (N. J.), 6-326.

Review of evidence. — The weight and sufficiency of evidence of adultery to warrant a decree for divorce is for the trial court, and is not reviewable on appeal. *Taft v. Taft* (Vt.), 12-959.

10. ABATEMENT OF ACTION ON DEATH OF PLAINTIFF.

Death after interlocutory judgment. — Where a husband, suing for an absolute divorce, obtains an interlocutory judgment in his favor, but fails to apply for or obtain a final judgment within the time prescribed by the statute, and dies without having applied for or obtained the same, the action abates, and a final judgment thereafter entered by his attorney, pursuant to an order of the Supreme Court, is ineffectual to dissolve the marriage relation so as to prevent the wife from administering on the estate of

the deceased as his widow. *Matter of Crandall* (N. Y.), 17-874.

Section 763 of the New York Code of Civil Procedure, providing that if either party to an action dies after an interlocutory judgment, but before final judgment is entered, the court must enter final judgment in the names of the original parties, unless the interlocutory judgment is set aside, applies only to actions which do not abate by death, and has no application to an action for an absolute divorce. Such an action is pre-eminently of a personal nature, and necessarily abates with the death of the plaintiff. *Matter of Crandall* (N. Y.), 17-874.

DOCKETS.

Waiver of right to trial in equity by failure to transfer cause to equity docket, see TRIAL, 1.

DOCKING.

Prohibiting docking of horses' tails, see ANIMALS, 5.

DOCKS.

See WHARVES.

DOCTOR.

See PHYSICIANS AND SURGEONS.

DOCTRINE OF APPROXIMATION.

See CHARITIES, 3.

DOCTRINE OF IMMISCIBILITY.

See DOMICIL.

DOCTRINE OF RELATION.

Effect of delivery in escrow, see ESCROW.

DOCUMENTS.

See EVIDENCE, 9.

Admissibility of book entries to corroborate witness, see CRIMINAL LAW, 6 n (1).

Compelling production of documents by defendant in criminal case, see CRIMINAL LAW, 6 n (1).

Compelling witness to produce incriminating documents, see WITNESSES, 4 g.

Production of documents generally, see DISCOVERY.

DOGS.

Barking of dogs as nuisance, see NUISANCES, 1 b.

Evidence as to trailing by bloodhounds, see CRIMINAL LAW, 6 n (10).

Injuries by dogs generally, see ANIMALS, 2 d.

Injuries by trespassing dogs, see ANIMALS, 2 b.

Killing trespassing dogs, see ANIMALS, 2 b.

DOING BUSINESS.

By foreign corporations, see CORPORATIONS, 13 c (5).

DOMAIN.

See EMINENT DOMAIN; PUBLIC LANDS.

DOMESTIC ANIMALS.

See ANIMALS.

DOMESTIC CORPORATIONS.

See CORPORATIONS.

DOMESTIC RELATIONS.

See APPRENTICES; HUSBAND AND WIFE; MASTER AND SERVANT; PARENT AND CHILD.

DOMICIL.

Change of domicile as affecting rights to community property, see HUSBAND AND WIFE, 2 h.

Place of taxation of personalty, see TAXATION, 3 b.

Refusal of wife to follow husband's change of domicile as desertion, see DIVORCE, 2 c.

Right of voters, see ELECTIONS, 5.

Definition. — Domicil is habitation fixed in any place, without any present intention of removing therefrom. *Mather v. Cunningham* (Me.), 18-692.

Acquisition in foreign country. — An American citizen may acquire a domicile in the province of Shanghai, China, though by treaty American law has been there substituted for the local Chinese laws in respect to American citizens. *Mather v. Cunningham* (Me.), 18-692.

Doctrine of immiscibility. — The doctrine of immiscibility as to persons of different races having different laws, religions, manners, and customs, *e. g.*, Americans and Chinese, does not raise a conclusive presumption against the acquisition by one of domicile in the country of the other. *Mather v. Cunningham* (Me.), 18-692.

Evidence of acquisition. — Evidence examined and held sufficient to show abandonment of domicile of origin and acquisition of domicile of choice in a foreign city. *Mather v. Cunningham* (Me.), 18-692.

Loss by temporary absence. — A person does not lose his domicile in a state by a temporary absence therefrom, unless to the fact of residence elsewhere is added the *animus manendi*. *Watkinson v. Watkinson* (N. J.); 6-326.

DOMINANT TENEMENTS.

See **EASEMENTS**.

DOMINION OF CANADA.

Liability of government for fires from locomotives on governmental railroad, see **RAILROADS**, 7 c (1).

DONATION.

See **GIFTS**.

DOORS.

Breaking down doors to make arrest, see **ARREST**, 1 b.

Opening unlocked door as breaking in burglary, see **BURGLARY**, 1.

Storm doors as fixtures, see **FIXTURES**, 3.

DORMANT JUDGMENTS.

Restraining enforcement of dormant judgment, see **INJUNCTIONS**, 2 c (2).

Revival by scire facias, see **JUDGMENTS**, 14.

DOUBLE ASPECT.

Contingent remainder with double aspect, see **REMAINDERS**.

DOUBLE DAMAGES.

See **DAMAGES**, 4.

DOUBLE TAXATION.

See **TAXATION** 1 b.

DOWER.

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1. OF WHAT WIFE IS DOWABLE.

In general. — The right of dower attaches only to those lands of which the husband is seized during coverture and in which he has an estate of inheritance. *Redding v. Vogt* (N. Car.), 6-312.

The bare possession of land is not seizin. *Redding v. Vogt* (N. Car.), 6-312.

Lands in constructive possession of husband. — Under the Michigan statute providing that a nonresident widow shall be entitled to dower in lands of which her husband dies seized, a nonresident widow is entitled to dower in lands of which her husband has the legal right of possession at the time of his death, as well as to lands of which he is in actual possession. *Putney v. Vinton* (Mich.), 9-147.

Estates in remainder. — Dower does not attach to land in which the husband has only an estate in remainder expectant upon a life estate, which life estate is not determined during coverture. *Redding v. Vogt* (N. Car.), 6-312.

Land conveyed without joinder by wife. — Where the purchaser of land from a married man whose wife refuses to join in the conveyance pays two-thirds of the purchase price and deposits the other third to be paid to the grantor in case he survives his wife, but agrees that in case the grantor dies first the right of dower of the widow shall be satisfied, the purchaser cannot be heard to claim as against the surviving widow that her acceptance of testamentary provisions made for her by her husband bars her right of dower, and the wife is entitled to recover her dower in the premises exclusive of the improvements placed thereon by the purchaser. *Onstott v. Edel* (Ill.), 13-28.

Lands fraudulently conveyed. — When a fraudulent conveyance of a husband's lands is set aside, the dower right of his wife, even though she participated in his fraudulent purpose and joined him in the conveyance, is revived as against his creditors and their assigns. *Huntzicker v. Crocker* (Wis.), 15-444.

Land conveyed under power of attorney. — An owner of land, who gives to another a power of attorney to take possession of the land and sell the same, does not thereby ratify the prior unauthorized act of the attorney in giving a title bond to the land, of which bond the owner was entirely ignorant; and his widow whom he married after the execution of the power of attorney but before it was recorded is entitled to dower in the land, although after the mar-

riage the land was conveyed by her husband through his attorney to the person to whom the attorney had theretofore given the bond for title. *Britt v. Gordon* (Ia.), 11-407.

Equity of redemption. — At common law a widow was not dowerable of an equity of redemption. *Harris v. Powers* (Ga.), 12-475.

Where an owner of land makes a deed thereof to secure an indebtedness, and takes a bond for reconveyance upon payment of the debt, and dies without having paid any part of the debt or having obtained a reconveyance, his widow is not entitled to take dower either in the land as a whole or in the equity of redemption, at least not without first redeeming the property. *Harris v. Powers* (Ga.), 12-475.

Where the insolvent estate of a decedent is placed in the hands of a receiver for administration by a court of equity, and the case is referred to an auditor for an accounting, creditors, whose claims would be effected by the allowance of dower, have a right to contest the widow's claim to have dower allowed to her in land in which the husband held only an equity of redemption at the time of his death. *Harris v. Powers* (Ga.), 12-475.

The right of the creditors to contest such allowance of dower is not affected by the fact that the receiver, under order of the court, has sold the land conveyed to secure the debts, has paid off the indebtedness, and has a surplus on hand, or by the fact that the creditors have assented to the payment of the secured indebtedness, except as to fees, in order to save accruing interest on the secured debts. *Harris v. Powers* (Ga.), 12-475.

Leasehold estate. — Under the Missouri statute (Am. St. 1906, p. 1690) providing that dower in a leasehold estate for a term of twenty years or more shall be granted and assigned as in real estate, and that in a leasehold estate for a less term than twenty years dower shall be granted and assigned as in personal property, the term of years referred to is that named in the lease and not the unexpired portion of the term remaining at the husband's death. The words "granted" and "assigned," as used in the statute, are synonymous and are equivalent to "shall have." *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

A leasehold is "an interest in real estate" within the purview of the Missouri statute (Ann. St., p. 1700) which declares that a devise of any real estate to the testator's widow shall be in lieu of dower unless the will provides otherwise, and that in such case the widow shall not have dower in any of the real estate whereof the husband died seized or in which he had "an interest" at the time of his death, unless she elects not to accept the provisions of the will. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

2. BARRING AND DEFEATING DOWER.

a. Adultery of wife.

In absence of divorce. — Under the statute of Westminster II., adopted in Arkansas

as part of the common law, and extended over the Indian Territory by Congress, a wife who willingly separates from her husband and lives in adultery with another, without being thereafter reconciled to her husband, forfeits her right of dower in his lands, and also the interest in his personality given her by statute as part of her dower. *Daniels v. Taylor* (U. S.), 7-352.

Adultery of the wife does not of itself, in the absence of divorce, bar her right to dower. *In re Taylor* (Ind. Ter.), 5-226.

b. Agreement for separation.

In absence of provision for wife's maintenance. — An agreement between husband and wife for separation and for release of dower, which makes no provision for the wife's maintenance or for the allotment of property to her, is void for want of consideration. *In re Taylor* (Ind. Ter.), 5-226.

c. Release, waiver, or conveyance by wife.

Release to husband. — A release executed by a wife to her husband is ineffectual to extinguish her right of dower in his real property. *In re Taylor* (Ind. Ter.), 5-226.

Waiver. — A testator's widow is entitled to dower and her thirds where no provision is made for her in the will; and this is so though the will states that she has waived her right thereto, where there is no proof of a waiver. *Matthews v. Targarona* (Md.), 10-153.

Quitclaim to husband's grantee. — A quitclaim deed by a married woman releasing to her husband's grantee her contingent right of dower is effectual without the joinder of her husband. *Fowler v. Chadima* (Ia.), 13-141.

d. Adverse possession against husband.

Under Michigan statute. — Under the Michigan statute providing that a nonresident widow shall be entitled to dower in the lands of which her husband dies seized, such widow is not entitled to dower in the land if her husband's title thereto was extinguished by adverse possession during his lifetime. *Putney v. Vinton* (Mich.), 9-147.

e. Act of legislature.

Legislative control over inchoate right. — The interest of the wife in the lands of her husband by virtue of a statute is an inchoate right merely of which she may be divested by the legislature at any time before the death of her husband. *Griswold v. McGee* (Minn.), 12-186.

Lands sold under execution. — The Michigan statute abolishing the right of the surviving husband or wife to a one-third interest in such lands of the other "as have been divested by execution sale," etc., applies to lands which prior to the passage of the act have been sold under execution against the owning spouse and no redemption made therefrom. *Griswold v. McGee* (Minn.), 12-186.

f. Tax sale.

A tax sale creates a new and independent title free from all liens and incumbrances and, therefore, defeats the inchoate right of dower of the wife of the delinquent owner. *Lucas v. Purdy* (Ia.), 19-974.

g. Husband's bankruptcy.

The power of Congress to enact bankruptcy laws does not include any limitation or regulation of the right of dower of the bankrupt's wife, because such right is the individual property of the wife and not a part of the bankrupt's estate. Therefore the provision of section 8 of the Bankruptcy Act (1 Fed. St. Ann. 561) that "the widow and children [of a bankrupt] shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence" cannot be construed as affecting the wife's inchoate right of dower to land in a state other than that of the bankrupt's residence. *Thomas v. Woods* (U. S.), 19-1080.

3. ACTIONS OR PROCEEDINGS TO ENFORCE DOWER RIGHT.

Statute of limitations. — An action in equity by a widow for the partition of land held adversely to her, and for the recovery of her dower right therein, is governed by the general statute of limitations for the recovery of real property, and must be brought within ten years after the right of action accrues, which accrual is upon the death of her husband. *Britt v. Gordon* (Ia.), 11-407.

Action against assignee for benefit of creditors. — Under a statute giving a right of action against those claiming adversely to one having the legal title to land or a lien or incumbrance thereon, an inchoate right of dower is such an interest in land as well as an incumbrance thereon as enables a wife to maintain an action to establish such dower right against an assignee for the benefit of her husband's creditors. *Huntzicker v. Crocker* (Wis.), 15-444.

Restoration of discharged mortgage to defeat. — In an action of ejectment brought by a widow for her unassigned right of dower, a discharged mortgage cannot be restored for the purpose of destroying or reducing the plaintiff's dower right, notwithstanding the fact that it is inequitable that the widow should profit by the transaction, as the discharged mortgage can be restored in an equitable proceeding only. *Putney v. Vinton* (Mich.), 9-147.

Protection of husband's grantees. — Upon a petition for the assignment of dower under the North Carolina statute providing that a jury summoned for the purpose of assigning dower to a widow "shall not be restricted to assign the same in every separate and distinct tract of land, but may allow her dower in one or more tracts, having a due regard to the interest of the heirs as well as the rights of the widow," where it appears that the husband during his lifetime sold and conveyed portions of his land for a valu-

able consideration without the joinder of his wife, but that he retained other lands which have descended to his heirs, and it further appears that such other lands are of a kind and quality which permit dower to be assigned out of them according to the provisions of the statute, the purchasers have a right to require that dower shall be allotted out of the lands descended, and that the lands which they have purchased and paid for shall be relieved of the widow's claim. *Harrington v. Harrington* (N. Car.), 9-489.

4. ALLOWANCE TO WIDOW.

Widow living separate from husband. — In the absence of statutory prohibition, a widow is entitled to statutory allowances from her deceased husband's estate, though she was living separate from him at the time of his death. *In re Taylor* (Ind. Ter.), 5-226.

Forfeiture by misconduct. — The Indian Territory statute providing special allowances for a widow contemplates the case of a widow who in the lifetime of her husband lived with him as a member of his family and performed the duties of that relation, and not one who wilfully separated from him, performed none of the duties of a wife, and by her gross misconduct disqualified herself from succeeding him as the head of the family. *Daniels v. Taylor* (U. S.), 7-352.

5. NATURE OF ESTATE CREATED.

A widow to whom land has been assigned as dower is a life tenant thereof, and she must protect the land from injury to the freehold and not commit waste, and she may not sell the standing timber on the land when not essential to the legitimate use of the property for the purposes of husbandry. *Nashville Lumber Co. v. Barefield* (Ark.), 20-968.

DRAFTS.

See **BILLS AND NOTES.**

Authority of agent to receive draft in payment, see **AGENCY**, 3 a (2).

DRAINS.

Artificial ditch as watercourse, see **WATERS AND WATERCOURSES**, 3 a.

Liability for draining mine water into stream, see **WATERS AND WATERCOURSES**, 3 b (5).

Liability of municipality for injuries in construction, maintenance, and repair of sewers, see **MUNICIPAL CORPORATIONS**, 9 b (2).

Rights acquired by drainage district in condemnation proceedings, see **EMINENT DOMAIN**, 8.

Corporate status under Illinois statute. — The organization of a drainage district under the Illinois statute authorizing the organization of such a district upon the

petition of a majority of the landowners within the proposed district is for the exclusive benefit of the lands located therein. Such district is therefore not an involuntary quasi-public corporation. *Bradbury v. Vandalia Levee, etc., Co. (Ill.)*, 15-904.

Validity of statute authorizing special assessment. — The Montana drainage district law (Laws 1905, c. 106) is not subject to the objection that it does not give to persons specially assessed an opportunity to be heard before the assessment is finally made. *Billings Sugar Co. v. Fish (Mont.)*, 20-264.

Liability for tort, in general. — A drainage district which, by building a levee, obstructs the natural flow of water in times of floods and freshets, thereby damaging the lands of an upper proprietor, is liable for the damage sustained by such proprietor. *Bradbury v. Vandalia Levee, etc., District (Ill.)*, 15-904.

The formation of a drainage district for the purpose of improving the lands within the district for agricultural purposes is not an exercise of the police power of the state through a governmental agency. Consequently such drainage district is liable for damages resulting to the lands of an upper proprietor from the construction of a levee. *Bradbury v. Vandalia Levee, etc., District (Ill.)*, 15-904.

Form of action for damages. — Under the provision of the Illinois statute that lands embraced in a drainage district shall be liable for all damages which may be sustained by any lands lying above such district by the construction therein of any levee, ditch, or drain, such damages may be recovered in an action on the case against the district, the damages so recovered being collectible by assessment against the lands within the district. *Bradbury v. Vandalia Levee, etc., District (Ill.)*, 15-904.

Pleading in action for damages. — In an action against a drainage district, to recover damages caused by the construction of a levee, a declaration alleging that such construction caused a strip of land above the levee to become inundated, but not alleging that lands other than the plaintiff's were damaged or stating any cause of action as to such other lands, is not subject to special demurrer on the ground that it charges that lands other than the plaintiff's have been damaged. *Bradbury v. Vandalia Levee, etc., District (Ill.)*, 15-904.

DRAMATIC COMPOSITIONS.

Protection of, see COPYRIGHT.

DRAWING.

Drawing jurors, see JURY, 4.

DRESS.

Power of school board to regulate dress of public school teachers, see SCHOOLS 5 c.

DRINKING WATER.

Duty of carrier to supply drinking water for passengers, see CARRIERS, 6 e (5).

DRINKS.

See INTOXICATING LIQUORS.

DRIVERS OF VEHICLES.

Negligence of driver imputed to passenger, see NEGLIGENCE, 7 e (2).

DROVER'S PASS.

Person riding on drover's pass as passenger, see CARRIERS, 6 d (10).

DRUGS AND DRUGGISTS.

1. STATUTORY REGULATION, 687.
2. LIABILITY OF DRUGGIST, 688.
3. RIGHT TO RETAIN PRESCRIPTION, 688.

Compelling issuance of pharmacist's license, see MANDAMUS, 2 f.

1. STATUTORY REGULATION.

Validity of Minnesota statute. — The Minnesota statute regulating the business of pharmacy within the state, creating a state board of pharmacy, prescribing its duties, providing for the licensing of pharmacists, and imposing fees for the issuance and renewal of licenses, is a valid exercise of the state's police power, and is not unconstitutional either as depriving persons licensed under prior statutes of vested rights, or as being otherwise obnoxious to the principles of the fundamental law. *State v. Hovorka (Minn.)*, 10-398.

The license fee imposed by the Minnesota statute regulating the business of pharmacy, for the issuance or renewal of a license, is not a tax upon the business of pharmacy, but is a charge upon those engaged in that occupation for the support and maintenance of machinery provided for the regulation of the business, and the amount of such license fee is not unreasonable. *State v. Hovorka (Minn.)*, 10-398.

English statute. — By section 17 of the English Pharmacy Act 1868, "it shall be unlawful to sell any poison . . . unless the . . . bottle . . . in which such poison is contained be distinctly labeled with the . . . name and address of the seller of the poison, . . . and any person selling poison otherwise than is herein provided shall, upon a summary conviction, . . . be liable to a penalty." A duly qualified chemist sold poison which was contained in a bottle labeled with his trade name but not with his personal name: — Held, that the "name" of the seller mentioned in the section includes his

trade name; that there had therefore been a sufficient compliance with the section; and that the chemist was not liable to the penalty imposed by it upon a person who sells poison contained in a bottle not labeled with the name of the seller. *Edwards v. Pharmaceutical Soc. (Eng.)*, 20-488.

2. LIABILITY OF DRUGGIST.

Negligent sale of poison. — A druggist's failure to observe the statutory precaution in selling poison is *per se* neglect of duty, and when special damage flows from it there exists, *prima facie*, a case of actionable negligence; and therefore in an action against a druggist based on the negligent sale of poison, it is erroneous to strike out from the petition an averment charging a specific breach of the statute, even though the defendant may have been otherwise negligent in the transaction. *Sutton v. Wood (Ky.)*, 8-894.

In an action against a druggist to recover damages for death resulting from a mistake in the sale of poison, where the petition alleges a breach of statutory duty in addition to alleging other negligence, instructions on the question of the defendant's negligence are erroneous if they fail to submit to the jury negligence consisting of a breach of statutory duty. *Sutton v. Wood (Ky.)*, 8-894.

Contributory negligence. — Where a druggist negligently sells poison by mistake, the negligence of the purchaser's agent or servant in administering the poison is not contributory negligence which will defeat an action against the druggist for the purchaser's death, but the druggist and the servant are concurrently liable. *Sutton v. Wood (Ky.)*, 8-894.

It is not true that a druggist and his customer are under the same degree of care in the furnishing and the taking of a drug, as the duty of the former is to exercise the highest degree of care for the safety of the public dealing with him, while the latter is bound only to exercise ordinary care for his own safety. *Sutton v. Wood (Ky.)*, 8-894.

3. RIGHT TO RETAIN PRESCRIPTION.

On customer's refusal to pay. — An apothecary who refuses to deliver medicines called for in a prescription because the party presenting it is unable or unwilling to comply with his terms as to payment, may not retain the prescription against a demand for its return. *White v. McComb City Drug Store (Miss.)*, 4-518.

A declaration charging that a druggist willfully, knowingly, and oppressively refused to return a prescription, after having refused to fill the same, states an action arising *ex delicto*. *White v. McComb City Drug Store (Miss.)*, 4-518.

DRUMMERS.

Authority of traveling salesmen, see **AGENCY**, 3 b, 3 f.

Employment of drummers by physicians, see **PHYSICIANS AND SURGEONS**, 1 a.

Judicial notice of drummers' customs, see **EVIDENCE**, 1 e.

Lien of innkeeper on drummer's samples, see **INNS, BOARDING HOUSES, AND APARTMENTS**, 7.

Sale by drummer as doing business by foreign corporation, see **CORPORATIONS**, 13 c (5).

DRUNKENNESS AND INTOXICATION.

1. COMPULSORY COMMITMENT OF HABITUAL DRUNKARDS.

2. PROOF OF INTOXICATION.

3. EFFECT OF INTOXICATION.

- a. Upon contractual liability.
- b. Upon criminal responsibility.
- c. Upon responsibility for contributory negligence.
- d. Upon credibility of witness.

See **INTOXICATING LIQUORS**.

Credibility of witness as affected by intoxication, see **WITNESSES**, 5 b (2).

Nonexpert opinion evidence as to habits of intemperance, see **EVIDENCE**, 8 c.

1. COMPULSORY COMMITMENT OF HABITUAL DRUNKARDS.

Validity of statute. — The Minnesota statute providing for the compulsory commitment by the probate court, after full notice and an opportunity to be heard, of chronic inebriates to a state hospital farm for inebriates, the statute also giving to an alleged inebriate the right to a trial by jury in case he appeals to the District Court, is constitutional. *Leavitt v. Morris (Minn.)*, 15-961.

2. PROOF OF INTOXICATION.

Opinion of nonexpert. — Intoxication is a matter of common observation and a subject on which the opinion of a nonexpert witness is admissible, provided the testimony is based upon actual knowledge and observation of the witness and that the fact is first proved as a foundation for the admission of testimony. *Commonwealth v. Eyler (Pa.)*, 10-786.

3. EFFECT OF INTOXICATION.

a. Upon contractual liability.

In the absence of fraud, the intoxication of a party which will invalidate a contract must be such as temporarily to dethrone his reason and judgment, and this rule applies in a suit in equity to rescind the contract as well as in an action at law to recover on the contract. *Cook v. Bagnall Timber Co. (Ark.)*, 8-251.

In the absence of fraud, the contract of a person partially intoxicated at the time he enters into it will not be set aside because of his intoxication, as his condition results from his own act and entitles him to no consideration whatever in either a court of law, or a court of equity. *Cook v. Bagnall Timber Co. (Ark.)*, 8-251.

One who deals with a sober man upon an equal footing owes him only the duty not to mislead him to his prejudice by a material false representation concerning the subject-matter of the transaction, or by a failure to disclose a material fact within his knowledge which the circumstances may make it his duty to disclose; whereas one who deals with a person whom he knows to be partially intoxicated owes him the duty not to take advantage of his condition by knowingly imposing a harsh contract upon him. *Cook v. Bagnall Timber Co.* (Ark.), 8-251.

b. Upon criminal responsibility.

Reducing grade of offense. — Intoxication is not an excuse for homicide, but when it exists to such degree as to render the slayer incapable of deliberation or premeditation, or even of formation of a specific intent, it may reduce the grade of the offense. *Commonwealth v. Eyler* (Pa.), 10-786.

c. Upon responsibility for contributory negligence.

A person who becomes voluntarily intoxicated is chargeable with contributory negligence in the same degree and to the same extent as if he had remained sober. *Little Rock, R., etc., Co. v. Billings* (U. S.), 10-1173.

d. Upon credibility of witness.

The effects of intoxication upon the perceptive faculties is so well understood that no error is committed in refusing a requested instruction that if the jury believe from the evidence that any of the witnesses were intoxicated at the time of the occurrences about which they testified, the jury may consider this fact in weighing the testimony of such witnesses and in determining their credibility. *Knapp v. State* (Ind.), 11-604.

DUAL CAPACITY DOCTRINE.

See MASTER AND SERVANT, 3 f (3).

DUCES TECUM.

Subpoena *duces tecum*, see WITNESSES, 1 a (2).

DUE CARE.

Duty of master to protect servant from injury, see MASTER AND SERVANT, 3.

DUELING.

What is dueling within prohibition of statute. — A duel, within the meaning of the Kentucky statutes against dueling, is a combat with deadly weapons, fought according to the terms of a precedent agreement, and under certain agreed or prescribed rules. *Ward v. Commonwealth* (Ky.), 19-71.

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Challenge to Duel. — It is not a challenge to fight a duel, within the meaning of the Kentucky statutes against dueling, for one person to accost another in opprobrious terms and, drawing a pistol, say to him: "You started to draw a gun this morning; now, . . . shoot." *Ward v. Commonwealth* (Ky.), 19-71.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW.

Administration on estate of absent persons, see EXECUTORS AND ADMINISTRATORS, 1 b.

Imposing liability on stockholders for debts of corporation, see CORPORATIONS, 8 g (1).

Validity of local option laws, see INTOXICATING LIQUORS, 3 d.

DUES.

Payment to building and loan association, see BUILDING AND LOAN ASSOCIATIONS, 1.

DUMB PERSONS.

Mode of taking testimony of deaf-mutes, see WITNESSES, 4 a.

DUPLICITY.

See INDICTMENTS AND INFORMATIONS, 4; PLEADING, 3 d.

DURATION.

Contract of agency, see AGENCY, 1 b.

Judgment lien, see JUDGMENTS, 5 b.

Partnership, see PARTNERSHIP, 1 d.

DURESS.

Admissibility of confession obtained by duress exercised on accomplice, see CRIMINAL LAW, 6 n (11) (b).

Annulment of marriage for duress, see MARRIAGE, 3 a.

Criminal liability, see THREATS.

Defense in prosecutions for murder, see HOMICIDE, 2.

Ground for avoidance of release, see RELEASE AND DISCHARGE, 5 a (3).

Plea of guilty induced by fear, see CRIMINAL LAW, 6 j, (1).

Recovery of payments made under duress, see PAYMENT, 4 b.

Threats against husband as duress of wife, see HUSBAND AND WIFE, 2 d.

DUTIES.

Principal and agent respectively to third persons, see AGENCY, 3.

DWELLING HOUSE.

Burning dwelling house, see **ARSON**.
 Storage of explosives near dwelling house as nuisance, see **EXPLOSIONS AND EXPLOSIVES**, 1 b.

DYING DECLARATIONS.

See **HOMICIDE**, 6 a (3) (b).
 Admissibility in prosecution for incest, see **INCEST**, 4 b.

DYNAMITE.

See **EXPLOSIONS AND EXPLOSIVES**.

EARNING CAPACITY.

Decrease in earning capacity as element of damage for injury to infant, see **DAMAGES**, 9 c.
 Effect of earning capacity of children on decree for support after divorce, see **DIVORCE**, 7.
 Loss of as element of damage, see **DAMAGES**, 9 c.

EARNINGS.

Loss of earnings by infant as element of damage for personal injuries, see **DAMAGES**, 9 c.
 Right of husband to wife's earnings, see **HUSBAND AND WIFE**, 2 c.
 Right of parent to child's earnings, see **PARENT AND CHILD**, 1 c.
 Taxation of gross earnings, see **RAILROADS**, 3 b.
 What are earnings under workmen's compensation act, see **MASTER AND SERVANT**, 3 m (3).

EARTH.

Right to remove earth from highway, see **STREETS AND HIGHWAYS**, 6.

EARTHQUAKE CLAUSE.

See **INSURANCE**, 5 g (8).

EASEMENTS.

1. ACQUISITION.
 - a. By reservation in deed.
 - b. By prescription.
2. DETERMINATION OF NATURE.
3. EXTINGUISHMENT.
4. RIGHTS AND LIABILITIES OF PARTIES.
5. ACTIONS RELATING TO EASEMENTS.

See **LICENSE (REAL PROPERTY)**; **PRIVATE WAYS**.

Action to recover easement, see **FORCIBLE ENTRY AND DETAINER**.

Compensation for easements destroyed in condemnation proceeding, see **EMINENT DOMAIN**, 7 c (1).

Power of municipality to accept dedication, see **MUNICIPAL CORPORATIONS**, 4 e.

Recovery of land subject to easement, see **EJECTMENT**.

1. ACQUISITION.**a. By reservation in deed.**

Designation of location. — Where a conveyance of real property contains a reservation for an easement appurtenant for a passageway, but the place is not designated, the grantor may designate; but if he omits to do so, the right to designate passes to the grantee or his assigns. *Callan v. Hause* (Minn.), 1-680.

Where the parties to a reservation for an easement have failed sufficiently to express their meaning, their intent becomes a question of fact, to be ascertained by the court, which may inquire into the surrounding circumstances, including the fact that the estate was once held by the parties as tenants in common, was then partitioned, and that the reservation was incorporated into a deed of partition. *Callan v. Hause* (Minn.), 1-680.

b. By prescription.

Void parol grant as basis. — The use of an easement in land, although founded upon a void parol grant, if continued uninterruptedly for the prescriptive period, is presumed to be adverse so as to give title by prescription. *Lechman v. Mills* (Wash.), 13-923.

The donee by parol of a road right of way who has uninterruptedly used the same for more than twenty years with the knowledge and acquiescence of the donor and his grantees, and has made improvements and expended money on his property, which he would not have purchased except for the right of way, acquires a right to use the road which may not be terminated by the donor or his grantees. *Gyra v. Windler* (Colo.), 13-841.

Evidence in action to establish. — Evidence of the price paid by a parol donee of a road right of way for the land reached by the road, and as to his construction of a residence at the end of the road, is admissible as showing that the donee has expended money on the faith of the grant and of acquiescence therein by the donor. *Gyra v. Windler* (Colo.), 13-841.

2. DETERMINATION OF NATURE.

Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. If it is in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it

will be held to be an easement appurtenant to the land and not an easement in gross. *Smith v. Garbe* (Neb.), 20-1209.

3. EXTINGUISHMENT.

By merger of estates. — Unity of seizin of an estate in fee will not cause an easement of ancient light to be extinguished where there is no unity of possession and enjoyment. *Richardson v. Graham* (Eng.), 12-301.

The lessee for a term of years of a tenement who has acquired under the English Prescription Act of 1832, section 3, an easement of light over an adjoining tenement, does not lose the right to such easement by the conveyance of the leased premises in fee to the freeholder of such adjoining tenement. *Richardson v. Graham* (Eng.), 12-1301.

4. RIGHTS AND LIABILITIES OF PARTIES.

Changes and alterations in use. — Under the grant to a city of a right of way for the purpose of obtaining a municipal water supply, the laying of a single pipe of a certain size, with the acquiescence of both parties, measures and limits the location and extent of the easement and therefore precludes the city from subsequently laying an additional pipe without the consent of the grantor, unless it clearly appears from the language of the grant or the conditions existing when it was executed that it was intended to give the city the right to increase from time to time the number of pipes laid. *Winslow v. Vallejo* (Cal.), 7-851.

Duty to repair and protect. — As a general principle of law it is the duty of an individual or the public entitled to an easement or right of way over the lands of another to keep up, maintain, and protect such easement or right of way, the presumption as to such duty and obligation arising as one of law; and where it is sought to maintain an action on the theory that such duty rests upon the owner of the fee, it is necessary for the plaintiff to plead and prove the facts from which the duty or obligation arises. *Bellevue v. Daly* (Idaho), 14-1136.

The fact that a municipality uses water which it conveys to the place of use through a ditch that runs across the field of another does not of itself entitle the municipality to maintain an action against the owner of the land for a perpetual injunction restraining him from allowing his cattle to feed and graze in the field along the banks of the ditch and to cross over the same or wade through the waters thereof. *Bellevue v. Daly* (Idaho), 14-1136.

In such a case the primary duty of fencing or protecting the ditch and the waters therein from contamination and impurities rests upon the owner of the easement, and not upon the owner of the fee. *Bellevue v. Daly* (Idaho), 14-1136.

5. ACTIONS RELATING TO EASEMENTS.

Sufficiency of evidence to establish. — In an action involving the title to a right of

way claimed by the plaintiff, evidence and record examined and held to support the decree for the plaintiff, except as to that part of the decree specifying the width of the right of way. *Gyra v. Windler* (Colo.), 13-841.

Decree fixing extent. — The court cannot specify in its decree the width of a road right of way awarded to a party, in the absence of any allegation or proof as to the width. *Gyra v. Windler* (Colo.), 13-841.

A decree quieting title to an easement in lands covered by water from a canal, dam, and reservoir at the time of the decree is not too broad as defining the area of the user in the absence of any evidence of its extent, where there is no suggestion in the record that the area involved is not the same that it has been during all the years of occupancy. *Lechman v. Mills* (Wash.), 13-923.

Injunction to prevent increased user. — Where the grantee of an easement to lay water pipes has exercised his right to the full extent of the grant, an injunction lies to restrain him from laying an additional pipe without the consent of the grantor. *Winslow v. Vallejo* (Cal.), 7-851.

EAVES.

Encroachment by overhanging eaves, see TRESPASS.

ECCLESIASTICAL COURTS.

Review of decisions by civil courts, see RELIGIOUS SOCIETIES.

EDITORIAL COMMENT.

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EDITOR.

Liability for libel, see LIBEL AND SLANDER.

EDUCATION.

See SCHOOLS.

Lack of education as element of damages, see DAMAGES, 11 a.

Right of parent to control education of child, see PARENT AND CHILD, 1 a.

Statutory regulation of education of infants, see INFANTS, 4 a.

EFFECTS.

Liability of carrier for effects of passenger, see CARRIERS, 6.

Liability of innkeeper for effects of guest, see INNS, BOARDING HOUSES, AND APARTMENTS, 5.

EGRESS.

Duty of master to make premises safe, see
MASTER AND SERVANT, 3 b.

EIGHT-HOUR LAWS.

See LABOR LAWS.

EJECTION.

Ejection of passengers, see CARRIERS, 6 g.
Liability of railroad for injuries in ejecting
trespassers, see RAILROADS, 8 i.

Right of innkeeper to remove disorderly guest,
see INNS, BOARDING HOUSES, AND APART-
MENTS, 4.

EJECTMENT.

1. FOR WHAT THINGS ACTION WILL LIE, 692.
2. WHO MAY MAINTAIN, 692.
3. PARTIES DEFENDANT, 693.
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DEEDS, 5.

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grounds of defense as harmless error,
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Remedy by abutting owner against railroad
laying tracks in street, see STREETS AND
HIGHWAYS, 5 e.

Remedy for removal of fences, see FENCES, 2.
Right of one tenant by entirety against the
other, see HUSBAND AND WIFE, 9 b.

1. FOR WHAT THINGS ACTION WILL LIE.

Land subject to easement. — The owner
of the fee of land subject to an easement of
a public highway may maintain ejectment
against an intruder who wrongfully appro-
priates the same to a purpose wholly foreign
to the easement, but his recovery of posses-
sion will be subject to the easement in ques-
tion. *Bork v. United N. J. R., etc., Co.* (N.
J.), 1-861.

The rule that the owner of the fee in land
subject to the easement of a public highway,
street, or common, may maintain ejectment
against a person who has wrongfully seized
and appropriated such land exclusively to his
own use, applies in a case where the state
erects a penitentiary upon and across a pub-
lic street, in a city, without acquiring or at-
tempting to acquire the title of the owner of
the fee therein. *Weyler v. Gibson* (Md.), 17-
731.

Mining interests. — An action of eject-
ment may be maintained to recover a mineral
interest in lands. *Morange v. Doe* (Ala.),
5-331.

Telephone wires unlawfully strung. —
Ejectment lies to compel the removal of a
telephone wire unlawfully strung by the de-
fendant over the plaintiff's land a few feet
above the soil, though the wire is not sup-
ported by any structure standing upon the
plaintiff's land. *Butler v. Frontier Tel. Co.*
(N. Y.), 9-858.

2. WHO MAY MAINTAIN.

Remaindermen. — Remaindermen can-
not maintain an action for ejectment until
after the death of the life tenant, as their
right to possession does not accrue until the
termination of the life estate. *Stump v.*
Warfield (Md.), 10-249.

Personal representatives. — An admin-
istrator may maintain ejectment to recover
possession of real estate of his intestate with-
out regard to whether it is intended for dis-
tribution or for the payment of debts. *Mo-
range v. Doe* (Ala.), 5-331.

In the absence of statutory authority, an
administrator as such cannot maintain eject-
ment to recover the possession of land which
belonged to the deceased at the time of his
death. *Grant v. Hathaway* (Mo.), 15-567.

The Missouri statute providing in effect
that executors or administrators shall not
rent or control the real estate of the deceased
except under the order of the Probate Court
having jurisdiction thereof when the court
shall be satisfied that it is necessary to rent
such real estate for a limited period for the
purpose of paying debts, and that upon such
order an executor or administrator may main-
tain an action for the recovery of such real
estate, does not authorize an administrator
to maintain ejectment without such an order
or for a purpose other than the renting of
such real estate. *Grant v. Hathaway* (Mo.),
15-567.

Tenants in common. — In an action of
ejectment brought by one tenant in common
against a person who is not a cotenant, or
one holding under a cotenant, the plaintiff
may recover the entire premises and not
merely his undivided share thereof. *Godfrey*
v. Rowland (Hawaii), 7-993.

In an action of ejectment brought by one
tenant in common against a third person, the
plaintiff's recovery should be confined, both
in right and possession, to his undivided
interest in the property in controversy. *Wil-
liams v. Coal Creek Mining, etc., Co.* (Tenn.),
5-822.

Equitable owners. — Under the North
Carolina statute a party may recover in eject-
ment upon an equitable title. *Walker v.*
Miller (N. Car.), 4-601.

Where a husband is only a formal party
plaintiff to an action of ejectment brought
by his wife, he cannot recover on his equi-
table title if there is no allegation in the
complaint to which proof of his equitable
interest can apply. *Perry v. Hackney* (N.
Car.), 9-244.

Grantor claiming breach of condition subsequent. — A grantor who conveys her entire interest in certain real estate upon condition that the grantee and his wife shall subsequently perform certain services for the grantor cannot, upon a breach of the condition, maintain an action of ejectment under the Wisconsin statute to recover possession of the premises before a re-entry thereof or before giving notice to the grantee to the effect that she insists upon a forfeiture and demands possession. *Mash v. Bloom* (Wis.), 14-1012.

3. PARTIES DEFENDANT.

Tenant in possession. — An action of ejectment cannot be maintained against a landlord without joining as a codefendant a tenant who is in possession of the premises for which the action is brought. The fact that the landlord is in possession of part of the premises does not authorize a judgment for him where there is no description of the portions occupied respectively by the landlord and tenant. *Hunter v. Wethington* (Mo.), 12-529.

State official seizing land for state purposes. — The rule that no suit can be brought against the state without its consent, does not prevent an owner of real property from prosecuting an action of ejectment against a state official who unjustly and wrongfully seizes and withholds such property for state uses. *Weyler v. Gibson* (Md.), 17-731.

Where the state wrongfully takes possession of land and erects a penitentiary thereon, the warden of the penitentiary, being in the actual personal occupation of the premises, and residing thereon, is a proper party defendant in the action. *Weyler v. Gibson* (Md.), 17-731.

4. DEFENSES.

Rent due from plaintiff to state. — In an action of ejectment between private individuals to recover land under water, it is no defense that certain rents due to the state from the plaintiff are in arrears. *Philadelphia Brewing Co. v. McOwen* (N. J.), 16-648.

Defense good at law. — A defense which is good at law cannot be pleaded as an equitable defense, and consequently, in an action of ejectment, a plea setting up by way of equitable defense that the defendant is in possession of the premises under a written lease for ten years, and has paid rent for the same, which rent has been accepted by the plaintiff, is bad, since the facts alleged constitute a legal defense to the action, even though the lease mentioned in the plea is insufficient to convey any legal estate to the defendant because not acknowledged or recorded. *Falck v. Barlow* (Md.), 17-538.

Adverse possession. — A defendant in ejectment claiming under adverse possession does not have to admit possession in order to have the benefit of his claim. Ejectment must be brought against the party in possession, but the possession required for the

purpose of maintaining the action is entirely different from the possession required to ripen a title by adverse possession. *Hunter v. Worthington* (Mo.), 12-529.

In an action of ejectment, a plea on equitable grounds which sets up a holding by adversary possession is bad, as that defense is not an equitable one, but one at law. *Stump v. Warfield* (Md.), 10-249.

5. PLEADING.

Complaint. — A complaint in an action of ejectment which fails to show the plaintiff's interest in the premises or that the plaintiff is entitled to the possession thereof, as required by statute, is defective. *Mash v. Bloom* (Wis.), 14-1012.

A petition in an action to recover land fails to set out a cause of action where the title of the plaintiffs to the premises as therein alleged is insufficient in law to support a recovery. *Chidsey v. Brookes* (Ga.), 14-975.

Plea. — In an action of ejectment brought by remaindermen against persons claiming under the purchase at a sale had under a second mortgage, where it appears that the second mortgage was valid only as to the mortgagor's life estate, a plea on equitable grounds is bad which asks the court to subrogate the defendants to the rights of the mortgagee under a prior mortgage covering the fee which has been assigned to the second mortgagee, but under which no sale has been had, and at the same time asks the court to declare the plaintiffs barred by reason of the possession of the defendants and those under whom they claimed, as the defendants' right to subrogation, if it exists at all, exists only to the extent of the prior mortgage, and the plea in order to be valid should allege that the defendants have demanded of the plaintiffs and been refused the amount of that mortgage, or must show the defendants' willingness to have surrendered the property upon payment of the prior mortgage. *Stump v. Warfield* (Md.), 10-249.

6. PROOF OF TITLE.

General rule requiring proof by plaintiff. — In an action of ejectment, the plaintiff is bound to recover on the strength of his own title, and not on the weakness of that of his adversary. *Krause v. Nolte* (Ill.), 3-1061.

In an action of ejectment, the plaintiff must recover, if at all, upon the strength of his title, and not upon the weakness of the defendant's title, and until the plaintiff has made out a *prima facie* case by showing title sufficient to establish a right to recover, the defendant is not required to offer evidence of his title. *Mobile Dry Docks Co. v. Mobile* (Ala.), 9-1230.

A plaintiff in ejectment must recover upon the strength of his own title and not upon the weakness of his adversary's. He cannot recover as against one without title, unless he proves title or prior possession. *Florida Finance Co. v. Sheffield* (Fla.), 16-1142.

Tracing title to ultimate source. — A plaintiff in ejectment cannot recover merely on the strength of a deed to himself, without showing that his grantor had a *prima facie* right to recover, and a mere deed unaccompanied by evidence of the grantor's seizin is not *prima facie* evidence of the grantor's title. He must trace his title back to the ultimate source of title or to a grantor in possession at or near the time of his grant. *Florida Finance Co. v. Sheffield* (Fla.), 16-1142.

A plaintiff in ejectment, who does not show that he was ever in possession of the land in controversy, and does not connect himself with any prior grantor who was in possession, must deraign title from the government to himself. *Krause v. Nolte* (Ill.), 3-1061.

Where parties claim from common grantor. — In an action of ejectment where both parties on the trial claim title from a common grantor, it is not in general requisite that either should trace his title back of such common source. *Philadelphia Brewing Co. v. McOwen* (N. J.), 16-648.

In an action of ejectment to recover land under water claimed by both parties under grants from the riparian commissioners, evidence examined and held insufficient to support defendant's contention that the state never had title to the premises in question, or, if it ever had title, that rights adverse thereto had been acquired by private persons by the operation of a shore fishery on the land in question. *Philadelphia Brewing Co. v. McOwen* (N. J.), 16-648.

Proof of lost will. — The rule that clear and satisfactory proof is required to establish a lost will has reference as well to the existence of the instrument as to its sufficiency or insufficiency as a will, and therefore applies not only where it is sought to establish such a will as a muniment of title, but also where the instrument is relied upon by the defendant in an action of ejectment as color of title under the Betterment Act. *Nunn v. Lynch* (Ark.), 16-852.

Title acquired after suit brought. — When an action is brought for the recovery of land either under the common-law form or under the code, the plaintiff must recover, if at all, upon the state of his title as it subsisted at the commencement of the suit. Evidence of any after-acquired title is wholly inadmissible. *Deas v. Sammons* (Ga.), 7-1124.

Adverse possession by defendant. — The testimony of two witnesses, undisputed by direct testimony, that the defendant in ejectment has been in adverse possession for the statutory period does not require the trial court to find for the defendant, the credibility of such testimony being a question of fact. *Hunter v. Worthington* (Mo.), 12-529.

7. DIRECTION OF VERDICT.

When proper. — Where it appears in an action of ejectment that the defendant is simply a trespasser, it is not error to give an affirmative charge in favor of a plaintiff who has shown title to the property in dispute. *Cross v. Robinson Point Lumber Co.* (Fla.), 15-588.

Evidence reviewed in an action to recover the possession of real property and held sufficient to justify the trial court in refusing to grant a motion for nonsuit made on the ground of a total failure to prove the *locus in quo*. *McCreary v. Coggeshall* (S. Car.), 7-693.

8. JUDGMENT.

a. In general.

Relation back to commencement of suit. — As no demise is laid in the Alabama statutory action of ejectment, the only time to which a judgment for the plaintiff in such action can relate is the date of the commencement of the action, and in a subsequent action for trespass against the ejectment defendant in which no evidence of the plaintiff's possession or right to possession is offered except the record of the judgment in ejectment, no recovery can be had for damages occurring prior to the commencement of the ejectment proceeding, and evidence of such damages is inadmissible. *Henry v. Davis* (Ala.), 13-1090.

Conditional verdict. — Defendants in ejectment, who rely on an invalid deed from a wife to her husband, are not entitled to have a conditional verdict rendered to cover their improvements. *Alexander v. Shalala* (Pa.), 20-1330.

b. Damages and mesne profits.

When granted. — One desiring to recover mesne profits in ejectment should give notice in his declaration or prior to the trial. *Alexander v. Shalala* (Pa.), 20-1330.

Measure in action for mineral rights.

— Where a grantor, who has reserved mineral rights in land conveyed brings ejectment to recover possession of such rights and to recover mesne profits, the royalty payable to the grantee under a lease of such rights, made by him, is the proper measure of the damages recoverable. *Morange v. Doe* (Ala.), 5-331.

Interest on rental value of property.

— In an action of ejectment the plaintiff is entitled to recover interest upon the rental value of the property during the period of its unlawful detention, as part of his damages for such detention. *Nunn v. Lynch* (Ark.), 16-852.

Damages for cutting trees.

— Damages to land by cutting trees thereon by one in possession are not recoverable against him in an action of ejectment. *Henry v. Davis* (Ala.), 13-1090.

Rent as offset against taxes and improvements. — Upon the adjudication of counterclaims in an action of ejectment, where one in possession of land under a tax deed has been defeated by the holder of the legal title and claims compensation for permanent improvements and taxes paid, reasonable rent of the premises without the improvements should be offset, but not rent as increased by the improvements. *Gibson v. Fields* (Kan.), 17-405.

In such a case the rent is to be determined from the cash price usually paid for the use

of like premises during the same time and in the same locality. *Gibson v. Fields* (Kan.), 17-405.

c. Credits.

For improvements. — Under the betterment statute of Arkansas the defendant in an action of ejectment cannot be allowed anything for improvements which he has made upon the land, unless they were made under color of title. *Nunn v. Lynch* (Ark.), 16-852.

For taxes. — In an action of ejectment the amount of taxes paid by the defendant is properly credited on the rents chargeable against him, since taxes, like necessary repairs, go to the reduction of the net rental value of the land. *Nunn v. Lynch* (Ark.), 16-852.

ELECTION.

Compelling election between actions, see TRIAL, 1.

Election between counts, see CRIMINAL LAW, 6 f; INDICTMENTS AND INFORMATIONS, 5, 7.

Election of offenses, see EMBEZZLEMENT, 1; INCEST, 6; INTOXICATING LIQUORS, 6 e. Indictments in different districts, see CRIMINAL LAW, 6 b.

Infants' right to repudiate contracts, see INFANTS, 2 b.

Requiring election of defenses, see PLEADING, 4 a (6).

Requiring plaintiff to elect between causes of action, see PLEADING, 3 b.

Right to take against provisions of will, see WILLS, 10 i.

ELECTION OF COUNTS.

In prosecution for rape, see RAPE, 2 a.

ELECTION OF REMEDIES.

Action against principal for wrong done by agent, see AGENCY, 3 c.

By seller of goods, see SALES, 8 b.

Right to sue on original debt after taking note for amount due, see PAYMENT, 1.

Application of doctrine, in general.—

Doctrine of election of remedies stated. *Zimmerman v. Robinson & Co.* (Ia.), 5-960.

When the doctrine of the election of remedies applies. *Rowell v. Smith* (Wis.), 3-773.

Where remedies are consistent. — The doctrine of election of remedies does not preclude a person who has pursued one of two coexistent and consistent remedies to judgment, which he has been unable to collect, from subsequently resorting to the other remedy. *Standard Sewing Mach. Co. v. Owings* (N. Car.), 6-211.

A seller of goods is not precluded from maintaining an action to recover damages for the buyer's fraud and deceit in procuring the sale, by the fact that he has previously pursued to judgment an action on notes given by

the buyer for the purchase price of the goods, where such judgment remains uncollected and is apparently uncollectible, as the two actions are consistent in theory and both are in affirmance of the sale. *Standard Sewing Mach. Co. v. Owings* (N. Car.), 6-211.

Where remedies are inconsistent. —

Where more than one remedy to deal with a single subject of action exists, and they are inconsistent, all may be used concurrently, but satisfaction in one is satisfaction in all. *Rowell v. Smith* (Wis.), 3-773.

Whether coexistent remedies are inconsistent is to be determined by a consideration of the relation of the parties with reference to the right sought to be enforced as asserted in the pleadings. *American Process Co. v. Florida White Pressed Brick Co.* (Fla.), 16-1054.

Improper remedy adopted by mistake. —

Where only one remedy exists to deal with a single subject-matter, but through a mistake one not appropriate is invoked, the proper remedy is not thereby waived. *Rowell v. Smith* (Wis.), 3-773.

Where a person has but one remedy, the fact that he unsuccessfully invokes another remedy will not preclude him from subsequently resorting to the remedy to which he is entitled, as the doctrine of election of remedies does not apply to such case. *Zimmerman v. Robinson & Co.* (Ia.), 5-960.

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1. CONSTITUTIONALITY OF ELECTION LAWS.

a. In general.

The Wisconsin primary election law (Laws 1903, c. 451) is not invalid because by its terms it went into effect only after a ratification by the people, for it became a complete law when it received executive approval and was published, subject to the submission to the people for their ratification or rejection. *State v. Frear* (Wis.), 20-633.

Legislation on the subject of elections is within the power of the legislature, so long as it merely regulates the exercise of the elective franchise, and does not deny the franchise itself, either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial. *State v. Frear* (Wis.), 20-633.

b. Laws restricting right of suffrage.

Property qualification for voters. —

The provision of the Kansas bill of rights that no property qualification shall be required for any office of public trust or for any vote at any election applies only to those

offices and elections contemplated by the constitution, and does not prevent the legislature from authorizing the creation of drainage districts, the powers of which are to be exercised by directors who are required to be freeholders elected by resident taxpayers. *State ex rel. Gibson v. Monahan* (Kan.), 7-661.

c. Primary election laws.

Power of legislature to regulate primaries, in general. —

A state legislature has the right to prescribe reasonable regulations for holding primary elections, but such regulations must not contravene constitutional provisions relating to elections, though primaries were not a part of the election system at the time of the adoption of the constitution. *People ex rel. Breckon v. Board of Election Com'rs* (Ill.), 5-562.

The nomination of party candidates for public office concerns the public welfare, and the legislature in the exercise of the police power may make reasonable regulations therefor. *State ex rel. Webber v. Felton* (Ohio), 12-65.

Nominations of senators. — The Wisconsin primary election law (Laws 1903, c. 451), providing for the nomination of candidates at primaries for the office of United States Senator, and declaring that the person receiving the greatest number of votes at the primary as the candidate of the party, and requiring the secretary of state to publish the result of a canvass of the primary, imposes no legal obligation on any legislator to vote for his party nominee at the primary, and there is nothing which forbids the members of the legislature from making nominations or preventing the holding of any party caucuses, but the action of the electors at a primary amounts only to a petition to the legislature, and the statute so construed is not violative of the Federal Constitution (art. 1, § 3), providing that senators shall be chosen by the state legislatures. *State v. Frear* (Wis.), 20-633.

Law requiring cash payments by candidates. —

The provision of the Illinois Primary Election Act requiring cash payments of specific amounts into the public treasury from persons desiring to become candidates for certain offices, which payments bear no relation to services rendered or to election expenses, are illegal and void as unwarrantably restricting the right of eligible persons to become candidates for public office and the right of the voters to choose eligible persons as candidates. *People ex rel. Breckon v. Board of Election Com'rs* (Ill.), 5-562.

Law prescribing different systems for different counties. —

The Illinois Primary Election Act is as a whole void, as it prescribes one primary election system for one county of the state and a different system for other counties, and therefore violates the constitutional provision against special legislation and the constitutional guaranty that all elections shall be free and equal. *People ex rel. Breckon v. Board of Election Com'rs* (Ill.), 5-562.

Law regulating residence of candidates. — The provisions of the Illinois Primary Election Act requiring that the legislative candidates in a district shall come from particular counties is void as imposing upon candidates and voters restrictions as to the eligibility of candidates, in addition to those imposed by the state constitution. *People ex rel. Breckon v. Board of Election Com'rs* (Ill.), 5-562.

Delegation of power to party committee. — The provision in a statute regulating primary elections, that the county central committee of each political party shall determine whether the county officers shall be nominated by the voters at a primary election or by delegates chosen at such election, and shall also determine whether the candidates shall be nominated by a majority or a plurality vote, is unconstitutional as an attempted delegation of legislative power. *People ex rel. Breckon v. Board of Election Com'rs* (Ill.), 5-562.

Restriction of primaries to political parties. — The Ohio statute providing for primary elections by political parties that cast at least ten per cent. of the vote cast at the last general election, is not violative of the constitution of the state or of the United States, as depriving any person of the equal protection and benefit of the law, or as not being of uniform operation throughout the state, or as authorizing the expenditure of public funds for other than a public purpose, or as delegating legislative power, or as restricting the elective franchise, or as impairing the secrecy of election by ballot. *State ex rel. Webber v. Felton* (Ohio), 12-65.

The Wisconsin primary election law (Laws 1903, c. 451), in restricting a candidate for nomination on a party ticket to be voted for at a primary, as to the number of signatures which he may procure, while the statute (St. 1898, §§ 30-32) permits a person nominated by nomination papers to secure all the signatures to his petition that he is able to secure, does not discriminate in favor of candidates nominated by nomination papers and against candidates securing a place on the ballot as the nominees of a political party at the primary election, for as between the candidates at the primary there is no discrimination, and unless there is similarity of conditions there is no discrimination. *State v. Frear* (Wis.), 20-633.

Prescribing qualifications. — The Wisconsin primary election law (Laws 1903, c. 451), though permitting members of one political party to vote at the primaries for candidates of a different political party, is not invalid as providing for an opportunity for disrupting political parties through the selection of improper candidates. *State v. Frear* (Wis.), 20-633.

d. Laws regulating manner of voting.

(1) Laws prescribing form of ballot.

Australian ballot. — The provision in the Pennsylvania ballot law allowing voters who wish to vote for every candidate of a

political party to make a cross mark opposite the name of such party is not in violation of the Pennsylvania constitution, which requires that "elections shall be free and equal," notwithstanding that voters wishing to vote a split ticket are required to make a cross mark opposite the name of every candidate voted for. *Oughton v. Black* (Pa.), 4-141.

Number of times name may appear on ballot. — The North Dakota statute prohibiting the printing of the name of a candidate for office in more than one column of the official ballot is, as to a candidate who is the nominee of a single political party and the nominee of electors by petition, a reasonable regulation of the manner of exercising the right of suffrage and is valid and constitutional. *State v. Porter* (N. Dak.), 3-794.

(2) Laws providing for use of voting machines.

Validity, in general. — The Illinois statute providing for the use of voting machines at elections is not in conflict with the constitutional provision that "all votes shall be by ballot." *Lynch v. Malley* (Ill.), 2-837.

The Michigan statute authorizing the use of voting machines at elections held to be constitutional. *Detroit v. Board of Inspectors* (Mich.), 5-861.

The use of voting machines is not open to constitutional objections where the choice between candidates can be expressed by the use of the machine or by any other method which does not disclose to the inspector or others the purpose of the voter. *Helme v. Board of Election Commissioners* (Mich.), 12-473.

The Minnesota statute providing for and authorizing, under certain conditions and restrictions, the use of voting machines at elections does not contravene the provision of the state constitution that all elections shall be by ballot, though the only method of voting in existence at the time the constitution was adopted was by printed ballots. *Elwell v. Comstock* (Minn.), 9-270.

Delegation of power to voting machine commission. — The Minnesota statute creating a state "voting machine commission" and providing for the use of voting machines at elections is not rendered unconstitutional, as delegating judicial and legislative functions to the commission, by the fact that it empowers the commission to pass upon and determine the efficiency of any machine submitted for use, as the power so delegated is administrative in character and is in no proper sense either judicial or legislative. *Elwell v. Comstock* (Minn.), 9-270.

Where right of secrecy is infringed. — A statute requiring the use of voting machines in an election at which several candidates are to be elected violates the constitutional right of the elector to cast a secret ballot where it is impossible so to arrange the names of candidates upon such machines as to permit a voter to vote for certain combinations of candidates and the voter can vote for certain combinations of candidates only by applying to the election inspector for

a paper ballot, for the reason that a voter cannot ask for and vote such paper ballot without indicating that he does not vote for a combination of candidates that can be voted for on the machine. *Helme v. Board of Election Commissioners (Mich.)*, 12-473.

2. CONSTRUCTION OF ELECTION LAWS AND CONSTITUTIONAL PROVISIONS.

Liberal construction in favor of citizen. — The rule that statutes tending to limit the citizen in the exercise of his right to vote and of having his vote counted should be liberally construed in his favor applies to a statute requiring ballots to be numbered. *Montgomery v. Henry (Ala.)*, 6-965.

Constitutional provision requiring ballot. — The provision of the constitution of South Carolina that "all elections by the people shall be by ballot" requires secret voting at elections, and applies to a local option election which by the terms of the local option statute must be conducted according to the rules provided for general elections. *State ex rel. Birchmore v. State Board (S. Car.)*, 13-1133.

The provision of the Minnesota constitution that all elections except for town officers shall be by ballot was intended to secure to the electors the privilege of exercising the right of franchise secretly and effectively, and therefore any method of conducting elections which is sanctioned by legislative authority and which will secure and effect that right is a substantial compliance with the constitutional mandate. *Elwell v. Comstock (Minn.)*, 9-270.

The fact that the legislature soon after the adoption of a constitutional provision that "all votes shall be by ballot," provided by a statute for use at elections of written or printed ballots, does not amount to a contemporaneous construction of such provision as referring to such kind of ballots only. *Lynch v. Malley (Ill.)*, 2-837.

Constitutional and statutory certificates of registration. — The certificate of registration which in South Carolina is a condition precedent to legal voting, is not the certificate contemplated by the constitution of that state providing that certificates of registration of electors registered prior to 1898 "shall be sufficient evidence to establish the right of said citizens to any subsequent registration and the franchise under the limitations herein imposed," the intention of the constitutional provision being merely to make the county clerk's certificate of an elector's registration prior to 1898 evidence of qualification by which the certificate which is a condition precedent to voting can be obtained. *State ex rel. Birchmore v. State Board (S. Car.)*, 13-1133.

Meaning of term "majority of voters." — Where a statute requires a proposition to be decided by a majority of the voters of an electorate, it is not necessary that a majority of all the persons entitled to vote shall vote for the affirmative of the proposition, but only that the result shall be decided by the majority of the votes cast;

and this is so although the original draft of the statute provided for the decision of the matter by the majority of the voters present and voting while the statute as enacted provides for a decision by the "majority of the legal voters." *Southington v. Southington Water Co. (Conn.)*, 13-411.

Application of general election laws to primaries. — A provision in a primary election law that the provisions of the general election laws "shall be applicable hereto except in so far as the provisions thereof may be inconsistent herewith," expressly limits the applicability of the general election laws to such provisions of the primary election law as are not inconsistent therewith. *Line v. Board of Election Canvassers (Mich.)*, 16-248.

3. SPECIAL ELECTIONS AND SUBMISSION OF QUESTIONS TO VOTERS.

a. Notice of election.

Compliance with statutory requirements. — Where a statute requires a notice of a special election to be given, stating the time and place thereof, such requirement must be substantially complied with in order to hold a valid election. *State ex rel. Utah Savings, etc., Co. v. Salt Lake City (Utah)*, 18-1130.

Specifying polling places. — A statute providing that notice shall be given of the time and place of holding elections does not require a specification in the notice of the polling places. *State ex rel. Utah Savings, etc., Co. v. Salt Lake City (Utah)*, 18-1130.

b. Special election to fill vacancies.

How ordered. — Where, under a charter of a town, elections to fill vacancies in town offices can be ordered only by a quorum of the intendant and wardens or of the wardens, an election ordered by the intendant alone, pursuant to the authority of a mass meeting of a portion of the citizens of the town held without notice or call, is illegal. *State ex rel. Jernigan v. Stickley (S. Car.)*, 15-136.

Who may question validity. — A person illegally appointed to fill a vacancy in the office of mayor of a city has no standing to question the legality of a special election to fill the vacancy, where he was not a candidate at such election and voted for the one who was elected. *Hogins v. Bullock (Ark.)*, 19-822.

c. Special election to vote tax.

Sufficiency of petition for holding. — In Louisiana the police jury is authorized to order an election for voting a tax in aid of a railway enterprise only when thereto petitioned by one-third of the property taxpayers entitled to vote at the election. When, therefore, the fact of the petition having been signed by the requisite number of voters is put at issue in a suit contesting the election, the burden of proof lies on the police jury, and is not discharged by proof of a com-

mittee having verified the signatures and found a sufficient number. The signatures themselves must be produced, or their absence supplied, in case of loss, by equivalent evidence. *Tolson v. Police Jury* (La.), 12-847.

What must be mentioned in the petition to the police jury for the holding of an election to vote a tax in aid of a railway enterprise, under the Louisiana statute, is the amount of money to be realized from the tax, and not the rate of the tax. *Tolson v. Police Jury* (La.), 12-847.

Recitals in notice. — Under a statute requiring an election on the question of a proposed issue of bonds by a city, and providing that a sufficient tax shall be levied annually to pay the interest on the bond and to create a sinking fund for the payment of the interest within twenty years from the date of the issue, the mode of paying the bonds is not submitted to the voters, but is fixed by the law; and therefore an election authorizing a city to issue bonds is not invalidated by a statement in the notice of election that the net revenue of the water system shall be set apart as a fund for the payment of the bonds. *State ex rel. Utah Savings, etc., Co. v. Salt Lake City* (Utah), 18-1130.

Necessity that propositions be stated singly. — In voting a tax under article 270 of the Louisiana constitution, the proposition of the particular tax must be submitted singly and on its own merits to the voters, and not so coupled with some other proposition that the voters cannot vote upon either proposition singly, but must vote for, or else against, both. *Tolson v. Police Jury* (La.), 12-847.

A ballot submitting to the voters of a city a proposition to issue bonds to purchase or to contract for the construction of waterworks is dual under the Kansas statute, and an election carried by the use of such ballots is void. *Leavenworth v. Wilson* (Kan.), 2-367.

d. Local-option election.

Form of proposition to be submitted.

— Under the Kentucky statute, electors who petition for the holding of a local-option election may embody in a proposition to be submitted to the voters the questions whether the sale of intoxicating liquors in the territory mentioned shall be prohibited and whether the prohibition shall apply to drug-gists; and when the proposition is so framed it must be voted upon as a whole, as the two questions are not severable. *Erwin v. Benton* (Ky.), 9-264.

4. NOMINATION OF CANDIDATES.

a. Primaries.

Use of voting machines. — Under a statute authorizing the use of voting machines at all state, county, city, village, and township elections, the elections referred to are elections to public office, and such ma-

chines cannot be used at a primary election unless it can be fairly inferred from the primary election law that the use of voting machines was intended or unless such machines are adapted to the requirements of such law. *Line v. Board of Election Canvassers* (Mich.), 16-248.

Where the objects of a primary election law are to prevent voters from voting except for the candidates of their respective parties and to give to each candidate an equal advantage with his party competitors so far as position upon the ballot is concerned, a provision in the general election laws authorizing the use of voting machines cannot be held to be adapted to primary elections. *Line v. Board of Election Canvassers* (Mich.), 16-248.

Under a provision in a primary election law that ballots other than those furnished by the board of election commissioners shall not be used, cast, or counted, a primary election can be held only through the use of ballots, the use of voting machines at such elections being unlawful. *Line v. Board of Election Canvassers* (Mich.), 16-248.

b. Nomination by petition.

Sufficiency of nominating papers. —

Nomination papers for the office of county judge are sufficient under a statute requiring that each voter shall "add to his signature his business and residence, street and number, if any," where some of the subscribers to the papers indicate their business or residence by placing ditto marks below the business or residence of former subscribers. *State ex rel. Dithmar v. Bunnell* (Wis.), 11-560.

The fact that nomination papers after being signed are wrongfully and unlawfully changed by interlineation, so as to make the papers nominate the candidate for both the unexpired and full terms of the office to be filled, does not of itself require the rejection of the votes cast for such candidate. *State ex rel. Dithmar v. Bunnell* (Wis.), 11-560.

c. Contested nominations.

Special tribunal for determination. —

The Kansas statute creating a special tribunal for the settlement of contested nominations is not unconstitutional as granting judicial powers to executive officers or as impairing the original jurisdiction of the Supreme Court. *Allen v. Burrow* (Kan.), 2-539.

Mandamus. — A dispute over the nomination for a public office can ordinarily be settled only by a special tribunal having power by statute to determine such questions; but if it appears that the tribunal has entered into a corrupt agreement to give the decision to one party, the courts will take jurisdiction of the controversy and decide the question in mandamus proceedings to compel the certification of the proper name for printing on the official ballot. *Allen v. Burrow* (Kan.), 2-539.

d. Effect of fraudulent nomination.

Where fair vote was not prevented. — In the absence of a statutory provision to the contrary, an election is not invalidated by the fact that the nomination of the successful candidate was fraudulent or illegal because not made in the manner prescribed by statute, unless the noncompliance with the law had the effect of preventing a fair vote. *Territory ex rel. Willis v. Kanealii (Hawaii)*, 7-837.

5. QUALIFICATIONS OF VOTERS.

Legal domicil. — The actual domicil of an elector is his legal domicil for voting, though he has departed from it temporarily, with the intention of returning. *Erwin v. Benton (Ky.)*, 9-264.

Permanent residence. — Under the provisions of the Wisconsin statutes, a voter who, shortly before an election, comes into a ward for temporary purposes, and continues to be a mere sojourner therein until the day of election, is not qualified to vote at such election. *State ex rel. Hallam v. Lally (Wis.)*, 15-242.

Conviction of crime as disqualification. — The provision of the New York constitution requiring the legislature to exclude from the right of suffrage persons "convicted" of crime, authorizes such disfranchisement only upon a judgment of conviction based upon a verdict of guilty, and a person whose sentence has been suspended after such a verdict is not convicted within the meaning of the constitution or the statutes enacted in pursuance thereof. *People v. Fabian (N. Y.)*, 15-100.

6. ELECTION OFFICERS.

At local-option elections. — The Kentucky statute requires that the election commissioners of a county shall appoint special officers to hold local-option elections within the county. *Erwin v. Benton (Ky.)*, 9-264.

7. CONDUCT OF ELECTIONS.

a. Place of holding.

Change of polling place. — It is the general rule that an election should be held at the place designated in the election notice. But, where the board cannot procure the place so designated for the purpose of holding the election, they may, in such emergency, change the polling place to another suitable, convenient, and proper location, giving due notice of that fact; and, unless it appears that a sufficient number of the electors to change the result of the election were deprived of an opportunity to cast their votes by reason of such change, and where it affirmatively appears that the election was fairly and honestly conducted, and that the result would have been the same had it been held at the place designated in the notice, such change will not render the election void. *Whitcomb v. Chase (Neb.)*, 17-1088.

b. Challenge of electors.

Who is a rejected voter. — Under the Kentucky statute, a person who is challenged at an election, and who is honestly refused the right to vote, does not become a rejected voter until he either qualifies by showing his right to vote, or offers to qualify by making the affidavit required by statute. *Erwin v. Benton (Ky.)*, 9-264.

c. Ballots.

Definition. — The word "ballot" defined and the term "voting by ballot" defined. *Detroit v. Board of Inspectors (Mich.)*, 5-861.

Use of unauthorized emblems. — A local-option election which is otherwise valid is not invalidated by the fact that each side uses ballots containing emblems, without having legal authority for their use, where the use of emblems is not expressly prohibited by statute, notwithstanding the fact that the emblem used by the electors favoring prohibition is the Holy Bible, the use of which as an emblem for candidates for office is prohibited by statutes. *Erwin v. Benton (Ky.)*, 9-264.

Name of candidate to appear but once. — Under the Michigan statutes a candidate for the office of delegate to the constitutional convention of that state can have his name appear only once on the official ballot, although he has been selected by three political parties. *Helme v. Board of Election Commissioners (Mich.)*, 12-473.

d. Use of voting machines.

Legality, in general. — The use of voting machines at an election is not in contravention of a constitutional provision that the elections shall be by ballot. *United States Standard Voting Machine Co. v. Hobson (Ia.)*, 10-972.

See also 1 d (2) *ante*, *Laws Providing for Use of Voting Machines*.

e. Counting and canvassing the vote.

(1) What ballots should be counted.

Diagonal mark instead of cross. — Under statutes providing that the method of voting at an election of a certain kind shall be by the voter's "making a cross in the square at the right of the answer which he intends to give," and that a ballot shall not be counted if the voter's choice "cannot be determined," the making of a diagonal mark and nothing more in the square opposite an answer does not sufficiently indicate the voter's intention to authorize the counting of the ballot. *Brewster v. Sherman (Mass.)*, 11-417.

Ballot marked for identification of voter. — An election ballot that is so marked by the elector that his identity is thereby disclosed to any person other than himself is void; and when a mark of identification appears upon a ballot, the elector who cast the ballot cannot be heard to say that he did not

intend to mark it for that purpose. *Elwell v. Comstock* (Minn.), 9-270.

Writing upon ballot. — An election ballot is not rendered void by the fact that it has written upon it after the name of one of the candidates the word "nit" or the words "may the best man win," if it is clearly apparent that the ballot was not so labeled for the purpose of disclosing the identity of the voter. *Elwell v. Comstock* (Minn.), 9-270.

Ballots not numbered. — The Alabama statute requiring ballots cast in elections to be numbered, but not directing that ballots not numbered shall not be counted, is directory merely, and therefore an unsuccessful candidate for office cannot complain of the election inspectors in counting unnumbered ballots. *Montgomery v. Henry* (Ala.), 6-965.

Blank ballots. — At common law, a blank ballot is not to be counted in estimating the total number of votes cast for an office. *Murdoch v. Strange* (Md.), 3-66.

A mark in the square opposite the blank line on a ballot which contains the names of two candidates, and a blank line with a square opposite each is no evidence of the elector's intent to vote for either of such candidates, within the meaning of the Wisconsin statute (L. 1907, c. 583) providing that if an elector marks his ballot in the square after the name of any candidate, "or at any place within the space in which the name appears indicating an intent to vote for such person, it shall be deemed a sufficient vote for the candidate whose name is opposite," and therefore it is proper for the court to refuse to submit to the jury the question of the intent of the elector in so marking such ballot. *State v. Acker* (Wis.), 20-670.

Defects due to fault of officer. — The provision of the Kansas statute that "no ballots other than those provided, printed, and indorsed in accordance with the provisions of this act shall be delivered to a voter, deposited in the ballot box, or counted," does not authorize the election board or other canvassing body to review the work of the officer who prepared the ballot and to reject votes by reason of some wrongful act or omission on his part in that connection. *Peabody v. Burch* (Kan.), 12-719.

The fact that the officer who is charged with the duty of preparing an official ballot wrongfully causes to be printed thereon the ticket of a political party which has forfeited its right to representation on the ballot by a failure to file a certificate of nomination, does not justify a refusal to count ballots marked in favor of such ticket. *Peabody v. Burch* (Kan.), 12-719.

(2) Votes necessary to a choice.

Effect of votes for ineligible candidate. — Votes for an ineligible candidate are not thrown away in the absence of a statute so declaring, and where the ineligible candidate has received a majority or plurality of votes, the eligible candidate receiving the next highest number is not entitled to the office. *Sheridan v. St. Louis* (Mo.), 2-480,

Where a person who is ineligible to hold an office receives a majority of the votes cast in an election therefor, the effect is not to give the office to the qualified person having the next highest number of votes, but to invalidate the election, and in such a case a new election must be held. *Dobbs v. Buford* (Ga.), 11-117.

(3) Tie vote.

Decision by lot. — In case of a tie vote at an election of village trustees, the candidates cannot determine the result by lot, there being no statute authorizing it. *State v. Solomon* (Neb.), 17-573.

f. Effect of irregularities in election or ballots.

Irregularities not affecting result. — Irregularities or illegalities in an election which do not change the result, will not, in the absence of fraud, cause the expressed will of the body of voters to be set aside unless a constitutional provision is thereby violated or it is specifically provided by statute that such irregularities or illegalities shall invalidate the election. *State ex rel. Birchmore v. State Board* (S. Car.), 13-1133.

Evidence considered, in an election contest, and held insufficient to show that the proceedings of the state voting-machine commission in selecting a particular voting machine for use were so irregular as to justify the disfranchisement of the electors who used the machine in the election in question, inasmuch as no fraud is charged and it does not appear that the election was not fairly and honestly conducted. *Elwell v. Comstock* (Minn.), 9-270.

Irregularities in preparation of ballots. — Although mandatory provisions of statute are disobeyed in the preparation of the official ballot, the will of the voters expressed by means thereof cannot on that account be disregarded. *Peabody v. Burch* (Kan.), 12-719.

Irregularities invalidating election. — The rule which authorizes the court to disregard irregularities in the conduct of an election and declare the result according to the legal votes cast where it is shown with reasonable certainty that the irregularities in question did not affect the result, has no application where the irregularities proved are so widespread and general as to leave the judicial mind in doubt as to how the election would have resulted if they had not occurred. *Harrison v. Stroud* (Ky.), 16-1050.

Where the proof in an election contest shows that the election officers permitted about twenty per cent. of the persons who voted at the election to vote openly, in violation of the constitutional and statutory provisions requiring elections to be by secret ballot, the court should not find in favor of either party to the contest, but should adjudge that there has been no election. *Harrison v. Stroud* (Ky.), 16-1050.

Estoppel to question validity of election. — Electors, by taking part in an elec-

tion conducted in violation of a constitutional requirement that all elections by the people shall be by ballot, do not waive the right, or become estopped, to contest the election. *State ex rel. Birchmore v. State Board* (S. Car.), 13-1133.

8. ELECTION CONTESTS.

a. Remedies available.

Mandamus. — A voter and taxpayer of a town in which an election has been held to decide whether licenses shall be issued in such town for the sale of intoxicating liquors, is a proper party to sue for a writ of mandamus to compel the registrars of the town not to count a certain ballot cast in such election, and mandamus is the proper remedy. *Brewster v. Sherman* (Mass.), 11-417.

Injunction. — Injunction does not lie to prevent an incumbent of a public office, who has received a certificate of election from the election officers, from qualifying and discharging the duties of office pending a contest of the election. Such a certificate, when regular on its face, gives to the person to whom it is issued a *prima facie* right to the office, and entitles him to discharge the duties thereof pending an election contest. *Harrison v. Stroud* (Ky.), 16-1050.

While a court of chancery has jurisdiction to enjoin the holding of an election which is in violation of the constitution or laws of the state, the court will not interfere in any election which is not called in violation of such constitution or laws. *Conner v. Gray* (Miss.), 9-120.

The Mississippi statute creating a new county out of the territory of two old counties and providing for the election of officers for the new county is a valid exercise of the power conferred on the legislature by the state constitution, and therefore a court of chancery has no power to issue an injunction stopping the election or preventing the election commissioners from making their returns to the secretary of state, notwithstanding the fact that the holding of the election will entail additional expense on the taxpayers. *Conner v. Gray* (Miss.), 9-120.

b. Evidence.

Certificate of election. — A certificate of election duly certifying the election of a person to public office is conclusive evidence of his election and title to such office in a collateral action of mandamus to compel the recognition of another's title to the office. *Hoy v. State ex rel. Buchanan* (Ind.), 11-944.

Declarations of elector as to how he voted. — Declarations of a voter, made after casting his ballot, that he was not a legally qualified voter and as to how he voted, are admissible, though there is no absolute right to the admission of such evidence, and the court may receive or reject it according to circumstances. The weight of such evidence, if admitted, depends largely upon the circumstances of the case as well as upon the

circumstances under which the declarations were made. *State ex rel. Hallam v. Lally* (Wis.), 15-242.

c. Appeal.

Right of appeal. — A proceeding to contest an election is not an action at law or a suit in equity, but is a purely statutory proceeding, and therefore not one in which a writ of error is a writ of right, but an appeal as provided by the election law is the only mode of bringing the record up for review. *Devous v. Gallatin County* (Ill.), 18-422.

Waiver of authentication of transcript. — To perfect an appeal from the County Court to the District Court in an election contest, the filing of a duly authenticated transcript is required. But if the transcript filed is not duly authenticated, yet no objection thereto is made by the appellee, and the parties treat it as sufficient and try the case on its merits, the jurisdiction of the District Court cannot be questioned for the first time on appeal to this court. *Whitcomb v. Chase* (Neb.), 17-1088.

9. CORRUPT PRACTICES ACTS.

Statement of expenditures by candidate. — Under the Minnesota statute known as the Corrupt Practices Act, requiring every candidate for public office to file a verified statement of his expenditures, a political aspirant does not become a candidate until he files, in accordance with a statutory requirement, his affidavit of intention of becoming a candidate for a specified office; and his verified statement of his expenditures need not include items of expense incurred or paid prior to the time of filing such affidavit of intention. *State ex rel. Brady v. Bates* (Minn.), 12-105.

Fraudulent registration. — Evidence examined in a prosecution for fraudulent registration and held to show that the place of registration was within the voting precinct where the accused was alleged to have registered falsely, though the contract for the use of the place was excluded. *State v. Thavanot* (Mo.), 20-1122.

The secretary of the board of election commissioners may testify to the fact that there was a general registration of voters in the city on the date alleged in an indictment for fraudulent registration. *State v. Thavanot* (Mo.), 20-1122.

A remark by the state's counsel in a prosecution for falsely registering that "one who steals your vote is worse than a thief" is beyond the scope of legitimate argument. *State v. Thavanot* (Mo.), 20-1122.

10. ACTION FOR WRONGFUL DEPRIVATION OF RIGHT TO VOTE.

Liability for wrongful act. — The right of a qualified elector to vote is neither a property right nor a right of person, but it is a mere political privilege; and therefore an elector has no cause of action against a per-

son who prevents him from voting at an election unless such person acts maliciously. *Morris v. Colorado Midland R. Co. (Colo.)*, 20-1006.

ELECTORS.

See ELECTIONS.

ELECTRICITY.

1. LIABILITY OF ELECTRIC LIGHT AND POWER COMPANIES IN GENERAL.

2. LIABILITY FOR INJURIES TO PERSON OR PROPERTY.

Contract between electric companies as monopoly, see **MONOPOLIES AND CORPORATE TRUSTS**, 2 b.

Degree of care required in using electricity as motive power, see **STREET RAILWAYS**, 8 a (2).

Electric cars, see **STREET RAILWAYS**.

Fixing charges for electric light as denying equal protection of laws, see **CONSTITUTIONAL LAW**, 10.

Liability of municipality for injuries in operation of electric light plant, see **MUNICIPAL CORPORATIONS**, 9 b (1).

Power house as nuisance, see **NUISANCES**, 1 b.

Right of electric light and power company to condemn private property, see **EMINENT DOMAIN**, 4 b.

Right of railroad to use electricity for motive power, see **RAILROADS**, 5 a.

Right to use water of stream for generation of electric power, see **WATERS AND WATERCOURSES**, 3 b (3).

1. LIABILITY OF ELECTRIC LIGHT AND POWER COMPANIES IN GENERAL.

As manufacturers. — An electric light company is not a "manufacturer" within the meaning of the Louisiana constitution authorizing the legislature to impose license taxes but exempting "manufacturers" from liability to such taxation. *State v. New Orleans R., etc., Co., (La.)*, 7-724.

2. LIABILITY FOR INJURIES TO PERSON OR PROPERTY.

Liability as contractual or tortious — limitation of actions. — Where a minor is injured, while residing in his mother's house, by contact with an electric wire in use there under a contract between an electric company and his mother, and the evidence, in an action to recover damages for the injury, tends to show that the wire which caused the injury was ordinarily charged with a harmless current of low pressure, but that, at the time of the accident, it was crossed with a wire carrying a current of high pressure, the action must be regarded as based on negligence, rather than on breach of contract, and if the defendant company is operating under the Consolidated Railway Company's Act of 1896 (59 Vict., c. 55 [B.

C.]), it is entitled to the benefit of the six months' limitation of actions provided by section 60 of that statute. *British Columbia Electric R. Co. v. Crompton (Can.)*, 17-1038.

Duty to guard against injuries, in general. — Electric companies are bound to use reasonable care in the construction and maintenance of their poles, crossarms, and wires, and other apparatus, along streets and highways, for the protection of persons and property from injury. *Mize v. Rocky Mountain Bell Tel. Co. (Mont.)*, 16-1189.

Failure to insulate wires. — Where an electric light company places its wires alongside of and about ten feet from a bridge but within the limits of the land dedicated with the bridge as a highway, and subsequently the bridge is widened to a point within a few inches of the wires, the company is liable for injuries sustained by a boy under nine years of age touching the uninsulated wires while he is playing on the bridge. *Gloster v. Toronto Electric Light Co. (Can.)*, 6-529.

Where a derrick used in putting up a house in a city street is brought into contact with uninsulated and unguarded overhead wires of an electric light and power company which is authorized by statute to place its wires either overhead or underground, with the result that the current of electricity is diverted to the street, where it kills a workman engaged in operating the derrick, the electric company cannot be held liable for the injury, in the absence of a showing that the insulation or guarding of the wires would have been effectual to avert the accident. *Dumphy v. Montreal Light, etc., Co. (Eng.)*, 9-749.

Removal of insulation from wires. — In an action for damages for an injury to a child ten years old alleged to have been received by coming in contact with a live electric wire, a declaration which alleges that the defendant, in transmitting electricity, which it knew to be a dangerous agency, through a thickly settled part of the city, negligently removed the insulation from its wires at the place where they passed through the limbs of a tree which had numerous branches extending almost to the ground, and in which the plaintiff and other children played, and that by reason of the removal of the insulation from the wires they thereby became dangerous, while, if properly insulated, they would have been harmless, and that the plaintiff being ignorant of their dangerous condition, while climbing among the branches of the tree came in contact with the uninsulated wire and received the injuries complained of, is not demurrable as failing to aver that the defendant had reason to believe that the wires were constructed in such a place and manner as to result in an injury to the plaintiff, or as failing to aver that it was through the fault of the defendant that the plaintiff was injured. *Temple v. McComb City Electric Light, etc., Co. (Miss.)*, 10-924.

Stringing wires overhead as negligence. — Where an electric light and power company is authorized by statute to place its wires either overhead or underground, it is

not negligence for the company to place its wires overhead. *Dumphy v. Montreal Light, etc., Co. (Eng.)*, 9,749.

Injuries from crossed wires. — Where a telephone wire falls upon an electric light wire and thereby becomes charged with an electric current dangerous to human life, and such current is in turn communicated by the telephone wire to a guy wire attached to a telephone pole, and by the guy wire to a wire fence, and by such wire fence to a second wire fence, and finally causes the death of a person who comes in contact with the fence, the negligence of the telephone company and the electric light company in permitting their wires to come in contact may properly be considered the proximate cause of the death of such person, although the place where he is killed is several miles distant from the place where the wires came in contact. In such a case both companies are chargeable with knowledge that serious injury is likely to result to some person, if their wires are permitted to come in contact. *Mize v. Rocky Mountain Bell Tel. Co. (Mont.)*, 16-1189.

Question of negligence for jury. — In an action against the telephone company and the electric light company jointly, to recover damages for the death of a person killed under the circumstances above described, where the proof shows that neither of the defendants took any precautions to prevent the wires from coming in contact, except to fasten them to the poles, and that the wires, after crossing, were permitted to remain in contact for many hours prior to the accident, the case is properly submitted to the jury, and their finding of negligence against both defendants will not be disturbed. *Mize v. Rocky Mountain Bell Tel. Co. (Mont.)*, 16-1189.

Violation of ordinance as evidence of negligence. — In such an action, proof that the wires which came in contact were strung within less than four feet of each other, in violation of a municipal ordinance, is sufficient to make out a *prima facie* case of negligence on the part of both defendants. *Mize v. Rocky Mountain Bell Tel. Co. (Mont.)*, 16-1189.

ELEVATORS.

Duty of railroads to maintain public grain elevators, see **RAILROADS**, 5 c.

Passenger elevator in private building as carrier of passengers, see **CARRIERS**, 1.

Rights and liabilities of proprietors of grain elevators, see **WAREHOUSES**, 1.

ELIGIBILITY.

Effect of votes for ineligible candidate, see **ELECTIONS**, 7 e (2).

ELISORS.

See **JURY**, 4 a.

EMANCIPATION.

Emancipation of children, see **PARENT AND CHILD**, 7.

EMBALMERS.

Licensing embalmers, see **LICENSES**, 5.

EMBANKMENTS.

See **WATERS AND WATERCOURSES**, 3 b (6).

EMBEZZLEMENT.

1. DEFINITION AND ELEMENTS OF OFFENSE, 704.
2. PARTICULAR CLASSES OF PERSONS, 705.
3. VENUE OF PROSECUTION, 706.
4. SUFFICIENCY OF INDICTMENT, 706.
5. EVIDENCE, 706.
 - a. Admissibility, 706.
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6. SENTENCE AND PUNISHMENT, 707.

Bankruptcy as affecting liability for embezzlement, see **BANKRUPTCY**, 9.

Expression in title of statute providing for punishment for embezzlement, see **STATUTES**, 3 b.

Liability of bank for embezzlement by employees, see **BANKS AND BANKING**, 5 b (2).

Receipt of deposit by bank, see **BANKS AND BANKING**.

1. DEFINITION AND ELEMENTS OF OFFENSE.

In general. — Embezzlement defined. *State v. Moyer (W. Va.)*, 6-344.

Essential elements of crime of embezzlement stated. *State v. Moyer (W. Va.)*, 6-344.

Refusal of demand for money. — In a prosecution for embezzlement it is not necessary to show a demand for the return of money collected by an agent, and a refusal upon his part to return it, where, by the terms of the contract, the time for an accounting and the payment of the money is definitely fixed. *State v. Moyer (W. Va.)*, 6-344.

Under the West Virginia statute, in a prosecution for embezzlement, if it appears that money or property is unlawfully withheld by the accused from the person entitled thereto, and that he has failed to restore or account for such property or money within thirty days after proper demand has been made therefor, he shall be presumed to be guilty, but such presumption may be rebutted by proof. *State v. Moyer (W. Va.)*, 6-344.

While, under the West Virginia statute relating to embezzlement, a demand for the return of property or money may be made

for the purpose of creating a presumption of fraudulent conversion against the accused, yet it is not essential when embezzlement or fraudulent conversion can be otherwise proved, except when, under the peculiar circumstances of the case, demand should be made. *State v. Moyer* (W. Va.), 6-344.

Fraudulent intent. — The mere detention of money belonging to another without a fraudulent intent to deprive that other of his property does not constitute embezzlement. *State v. Moyer* (W. Va.), 6-344.

Receipt of money by virtue of office or employment. — A statute providing that the conversion of money or property received by virtue of one's "office, agency, or employment" shall constitute embezzlement, should be construed reasonably in order to discourage defalcation, and should be held to include the conversion of money or property received by virtue of the implied as well as the express authority of the agent. *Smith v. State* (Tex.), 15-435.

A traveling salesman who, having charge of a branch of his employer's business, permits an article in his custody by virtue of his employment to be removed by another traveling salesman, and who subsequently accepts from the latter the money realized from the sale thereof for the purpose of being transmitted to their common employer, receives such money by virtue of his "office, agency, or employment," within the meaning of such a statute, and if he converts such money to his own use he is guilty of embezzlement. *Smith v. State* (Tex.), 15-435.

Distinction between embezzlement and larceny. — Where, in a prosecution for larceny, it appears that the driver and servant of a transfer company received goods from a railroad company, lawfully and by virtue of his employment, with instructions to deliver the same to the freight depot of another railroad company, and arriving too late to make such delivery drove to the warehouse of his employer, the transfer company, to leave the team and goods for the night, and after doing so entered into a criminal arrangement with another person for appropriating the goods, and the following morning, in pursuance of such arrangement, took charge of the team and goods, and, acting with such other person, feloniously converted them, and there is no evidence of any intent on the part of the driver to convert the goods to his own use until after the team and goods were left in the transfer company's warehouse, the mere fact that the goods were left for the night does not change his agency or relationship so as to create a new taking with felonious intent on the following morning, and he and his associate in the felonious conversion are guilty of embezzlement and not of larceny. *State v. Casey* (Mo.), 13-878.

Under a count of an indictment charging that a named person, being the agent and servant of a transfer company, then and there, by virtue of such employment, had in his possession and under his care and control certain property, and did unlawfully and feloniously

embezzle and convert to his own use the said property, with the unlawful, fraudulent, and felonious intent to deprive the owner, the said transfer company, of the use thereof, and that the defendant then and there feloniously was present aiding, abetting, and assisting the said servant and agent, the said embezzlement to do and commit, the defendant, whether guilty as a principal or as an accessory before the fact, is only guilty of the offense of which the servant and agent of the transfer company is guilty. *State v. Casey* (Mo.), 13-878.

New Mexico statute construed. — The New Mexico statute providing that if "any person" or "any collector or treasurer of any precinct or county" or "the treasurer or disbursing officer of this territory," or "any other person holding an office under the laws of this territory," shall in any way convert to his own use or dispose of moneys of the territory intrusted to him, "so that he shall not be able to meet the demands of any person lawfully demanding the same," is not limited to embezzlement by officers, but the clause last quoted applies only to the part of the section including officers. *Territory v. Hale* (N. Mex.), 13-551.

Election of offenses. — Under the Mississippi statute providing that if any director, agent, etc., of an incorporated company "shall embezzle or fraudulently secrete, conceal, or convert to his own use, or make way with, or secrete with intent to embezzle or convert to his own use, any goods," etc., he shall be guilty of embezzlement, the alternate acts denounced, while separate and distinct, are all acts of embezzlement, stated in different forms, and in a prosecution under the statute no error is committed in refusing to compel the district attorney to elect, after the evidence is all in, as to which of the single acts of embezzlement charged he will rely on for a conviction, especially where the evidence overwhelmingly shows that the accused is guilty of every act of embezzlement supported by the testimony. *Starling v. State* (Miss.), 13-776.

Statute of limitations. — Under the Iowa statute, an indictment for embezzlement must "be found within three years after the commission of the offense and not afterwards," and the running of the statute of limitations is not interrupted by the return of an indictment which is so defective that it is set aside. *State v. Disbrow* (Ia.), 8-190.

2. PARTICULAR CLASSES OF PERSONS.

Agents. — An agent who is allowed to retain the amount of his commissions from a fund collected for his principal is guilty of embezzlement if he converts the entire fund to his own use. *Commonwealth v. Jacobs* (Ky.), 15-1226.

Where by the terms of the contract under which an agent is employed to collect money on commission, he is required to turn over to his employer the whole amount collected before being entitled to commissions, the agent is not such a joint owner of the fund as

will prevent his prosecution and conviction for embezzlement of the whole sum. *State v. Moyer* (W. Va.), 6-344.

On a trial for embezzlement, it is not error to instruct the jury that if any portion of the money alleged to be embezzled came into the defendant's hands as agent and in behalf of the principal, and he fraudulently converted the money to his own use, he is guilty of embezzlement thereof. *State v. Moyer* (W. Va.), 6-344.

Guardian. — A charge of embezzling money, in an indictment against a guardian for embezzlement, is sufficiently sustained by proof that the guardian received money of his ward, that he let the money out upon interest, and that he embezzled notes taken from borrowers of money. *State v. Disbrow* (Ia.), 8-190.

Partner. — Where a person engaged in the business of dealing in organs, the instruments remaining the property of the manufacturer until sold, employs another person to sell the organs under an agreement that the employer is to furnish the person employed a team and vehicle and is to board him and take care of the team and vehicle while they are in town, and that the person employed is to pay his own expenses while traveling, and that the two are to share equally in the amount of money received for the organs over and above the cost price and freight, the employer and the person so employed are copartners, and both the organs and the profits are partnership property and cannot be the subject of embezzlement as the property of the employer. *McCrary v. State* (Tex.), 14-722.

Where, under such circumstances, an organ is sold by the copartner engaged in selling the instruments and a written mortgage is taken on the instrument as the property of the other copartner, the copartner making the sale cannot be guilty of a conversion of the instrument sold or embezzlement of the proceeds of the sale on the ground of an intention at the time of making the sale to appropriate the proceeds thereof. *McCrary v. State* (Tex.), 14-722.

3. VENUE OF PROSECUTION.

Checks drawn on bank in another county. — The venue of a prosecution for embezzlement by the defendant in checking out for his own purposes the funds of the county deposited in bank is properly laid in the county where the checks were drawn and all the acts of the defendant were done, although the depository bank which paid the checks is situated in another county. *Territory v. Hale* (N. Mex.), 13-551.

4. SUFFICIENCY OF INDICTMENT.

Joinder of embezzlement and larceny. — Under the Iowa statute providing that an indictment must charge but one offense, an indictment containing counts of embezzlement and larceny charges two offenses, and a conviction thereunder cannot be had unless the prosecution is required to elect

upon which count it will proceed. *State v. Finnegean* (Ia.), 4-328.

Demand and refusal. — In an indictment under a statute which does not make demand and refusal an essential element of the offense of embezzlement, it is unnecessary to allege a demand for the property converted and the refusal of the accused to deliver the same. *Commonwealth v. Kelly* (Ky.), 15-573.

Value of property embezzled. — An indictment charging the embezzlement of the sum of a stated number of dollars in money sufficiently alleges the value of the money embezzled. *Territory v. Hale* (N. Mex.), 13-551.

Ownership of Property. — Unless the rule is modified by statute, the ownership of property embezzled must be alleged with the same accuracy as in an indictment for larceny. *People v. Brander* (Ill.), 18-341.

An indictment for embezzlement of property, etc., of the "American Express Company, an association" without alleging incorporation or such facts as would show that the company could own property by the name given, is fatally defective. *People v. Brander* (Ill.), 18-341.

5. EVIDENCE.

a. Admissibility.

Solvency of defendant. — On a trial for embezzlement, evidence of the solvency of the defendant at or immediately prior to the time of the embezzlement is admissible. *State v. Moyer* (W. Va.), 6-344.

Failure to account for other funds.

— In a prosecution against a guardian for embezzlement, it is erroneous to admit evidence that as guardian of other persons the defendant failed to account for trust funds in his hands, as the mere failure to account neither proves nor implies embezzlement. *State v. Disbrow* (Iowa), 8-190.

Other offenses. — In the prosecution of a post office clerk for the embezzlement of an article contained in a letter, evidence that the defendant had stated, shortly before his arrest, that he had recently burned up and destroyed a lot of circulars that came into his post office, is admissible, the destruction of mail matter being kindred in its nature to the theft of it and bearing on the question of the defendant's disposition and intention. *Chitwood v. United States* (U. S.), 11-814.

On prosecution of postal clerk. — In a prosecution of a post office clerk for the embezzlement of an article contained in a letter, where the testimony of government inspectors that they were watching at a distance and saw the defendant cut open the letter, take the article therefrom, and place it in a pigeonhole is contradicted by the defendant, who testifies that he found the article loose on his table while he was assorting the mail, and placed it in the pigeonhole, intending, if he did not find the package from which it came, to turn it over to the proper authorities, evidence is admissible to show

that immediately preceding and up to the time in question it was common for the mail to come into the office in bad condition with the ends and edges of envelopes and packages so broken and worn that solid substances might readily fall from them, such fact being a circumstance tending to support the defendant's theory. *Chitwood v. United States* (U. S.), 11-814.

b. Sufficiency.

Embezzlement of part of sum alleged.

— Under an indictment for embezzlement it is sufficient for the state to prove embezzlement of any part of the amount alleged to have been embezzled. *State v. Moyer* (W. Va.), 6-344.

Embezzlement at different times. — On the trial of a charge of embezzlement, proof that the money alleged to have been embezzled by the agent was received in several sums, at different times, and from different persons, during the course of continuous dealing between such agent and his principal, will support a verdict of the jury finding the aggregate sum as the amount of a single embezzlement. *State v. Moyer* (W. Va.), 6-344.

Drawing checks as embezzlement of money. — There is no variance between an allegation of embezzlement of the public moneys of a county and proof that the defendant, without obtaining possession of the actual money, drew checks against the account to which the moneys were deposited which were duly presented and paid. *Territory v. Hale* (N. Mex.), 13-551.

Proof of corpus delicti. — In a prosecution against the secretary of a corporation for embezzlement of its funds, evidence reviewed and held to constitute sufficient proof of the *corpus delicti* to warrant the submission of the case to the jury. *People v. Wilson* (Mich.), 17-628.

6. SENTENCE AND PUNISHMENT.

Imprisonment for failure to make restitution. — No principle of justice is violated by a statute which permits a sentence for embezzlement to include an order for restitution to an amount named, to be satisfied, if the defendant is unable to pay, by further imprisonment, the result of which is to permit the person defrauded to sue the defendant civilly for any excess due him over the amount found by the court. *Freeman v. United States* (U. S.), 19-755.

A provision in a judgment on a conviction of embezzlement, that the defendant, in addition to a term of imprisonment for the crime, shall restore to the owner the sum embezzled, or in lieu thereof shall suffer imprisonment for a further term, does not constitute imprisonment for debt, where the statute requires a sentence for embezzlement to include an order of restitution and for the payment of costs, and provides that if the defendant is unable to satisfy the pecuniary liabilities he shall be subject to a certain additional term of imprisonment. *Freeman v. United States* (U. S.), 19-755.

EMBLEMS.

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EMBRACERY.

Good faith as defense. — Under a statute making it a crime for any person to dissuade or attempt to dissuade any person by threats, bribes, or other corrupt means from giving evidence in any cause, the offense is committed by attempting by corrupt means to dissuade a witness from giving at the final trial of a cause the same evidence that he gave on the preliminary hearing, although the accused honestly believes that the evidence is untrue, and although his object is to get the witness to tell at the final trial what the accused believes to be the truth. *Rex v. Silverman* (Can.), 13-577.

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1. IN GENERAL.

Constitutionality of Indiana statute.

— The Indiana eminent domain statute is not violative of either the federal or the state constitution. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

2. WHO MAY EXERCISE POWER.

Street railway company. — A street railway company has no right to enter on land for the purpose of constructing its road, until it has acquired the right to do so by agreement with the owners or by payment into court of the amount awarded in condemnation proceedings duly had; but it has the right, if it proceeds in good faith, and without unnecessary and unreasonable delay, to go ahead and appropriate land in the manner prescribed by law, and to be pro-

tected in the exercise and enjoyment of its franchise. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co. (N. Car.)*, 9-683.

Telegraph company. — The Act of Congress empowering telegraph companies to construct lines on public lands, roads, or waters of the United States is merely an exercise of national power to withdraw commercial intercourse by telegraph from state control and does not confer upon such companies the right of eminent domain. *Western Union Tel. Co. v. Pennsylvania R. Co. (U. S.)*, 1-517.

De facto corporation. — A corporation which is such *de facto* only may maintain condemnation proceedings under the law of eminent domain. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

Foreign corporation. — Under the constitution and statutes of Montana, a foreign corporation is not authorized to exercise the right of eminent domain. *Helena Power Transmission Co. v. Spratt (Mont.)*, 10-1055.

Lessee of corporation. — The lessee of a corporation cannot exercise the right of eminent domain conferred by statute upon such corporation. *Western Union Telegraph Co. v. Pennsylvania R. Co. (U. S.)*, 1-533.

3. DISCRETION IN EXERCISE OF POWER.

Obligation to take. — The federal statute authorizing a certain railroad company to locate its freight yard within a described area in the District of Columbia and empowering it to acquire by purchase or condemnation "the land and property necessary" for that purpose, does not require the company to acquire all the land within the prescribed area, but merely empowers it to acquire such lands as are necessary for the authorized purpose. *United States ex rel. Riley v. Baltimore, etc., R. Co. (D. C.)*, 7-335.

Right of landowner to compel taking. — The provision of the federal statute authorizing a certain railroad company to locate its freight yard in the District of Columbia, to the effect that any property owner whose land is included in the location selected by the railroad, and approved by the commissioners of the District, "shall have the right, within two years, to begin proceedings to compel the appropriation of said lands," does not entitle a property owner whose land, though situated in the area prescribed by the statute, is not included in the location selected by the company in the exercise of its discretion and approved by the commissioners, to compel the company to appropriate his land. *United States ex rel. Riley v. Baltimore, etc., R. Co. (D. C.)*, 7-335.

Remedy for abuse of discretion. — While a corporation has primary discretion in determining what land is necessary for the purpose for which it is authorized to make appropriations, the probate judge has power under the Ohio statute to prevent abuse of such discretion and to dismiss a

petition for appropriation on the ground that the same will be an abuse of corporate power or destructive of the public use to which the land is already devoted; and since such an adequate remedy at law exists, injunction will not lie on such grounds to prevent a prosecution of appropriation proceedings. *Wheeling, etc., R. Co. v. Toledo Ry., etc., Co. (Ohio)*, 2-941.

4. USES FOR WHICH PROPERTY MAY BE TAKEN.

a. In general.

Private use. — A condemnation of property for private use is forbidden by the Fourteenth Amendment of the Constitution of the United States. *Hairston v. Danville, etc., R. Co. (U. S.)*, 13-1008.

The provision in the constitutions of the United States and of Utah that private property shall not be taken for a public use without just compensation means that private property cannot be taken for a strictly private use. *Nash v. Clark (Utah)*, 1-300.

Private property can be taken under the power of eminent domain only for a public purpose, and the owner may always raise the question whether the purpose for which his property is sought to be taken is public in its nature. *New Orleans Terminal Co. v. Teller (La.)*, 2-127.

Use partly public and partly private. — Where the purposes stated in a petition to take private property under the right of eminent domain are partly public and partly private, the right to proceed must be denied. *Minnesota Canal, etc., Co. v. Koochiching Co. (Minn.)*, 7-1182.

When private property is taken for public use the general rule is that it can be taken only to the extent required by the public use to which the property is to be applied. *Sears v. Chicago (Ill.)*, 20-539.

b. What constitutes public use.

In general. — Public use, within the meaning of the constitutional provisions as to taking private property therefor, is a use that will promote the public interest and tend to develop the natural resources of the commonwealth. *Nash v. Clark (Utah)*, 1-300.

A use is not public so as to authorize a taking of private property under the right of eminent domain, unless the public has the right, under proper regulations, to resort to the property for the use for which it is acquired, independently of the will or caprice of the taker. *Minnesota Canal, etc., Co. v. Koochiching Co. (Minn.)*, 7-1182.

Question for court. — It is for the courts to determine whether the use for which a statute authorizes the condemnation of land or the imposition of taxes is a public use. *Billings Sugar Co. v. Fish (Mont.)*, 20-264.

Following decision of state courts. — The United States Supreme Court, in determining whether a taking of property un-

der the right of eminent domain is in violation of the Fourteenth Amendment of the Federal Constitution as a taking for a private use, will keep in view the diversity of local conditions, and show great respect for the judgment of the state court as to what should be deemed a public use in that state. *Hairston v. Danville, etc., R. Co. (U. S.)*, 13-1008.

Private railroad to quarry. — One engaged in the business of quarrying stone who needs a right of way for a private railroad across the lands of others may obtain the same by condemnation proceedings under the constitution and laws of Georgia. *Jones v. Venable (Ga.)*, 1-185.

Spur railroad tracks to private establishments. — The condemnation of land for a spur railroad track which can be used and is designed to be used not only for access to a nearby private manufacturing establishment, but for the storage of cars to be laden or unladen by consignees and shippers of freight and to relieve the congestion of business which overburdens the limited trackage of the road, is for a public use and not in violation of the Fourteenth Amendment of the Federal Constitution; and the use is not the less public because the motive dictating the particular location of the road is to reach a private industry, or because the proprietors of that industry contributed to the cost of construction. *Hairston v. Danville, etc., R. Co. (U. S.)*, 13-1008.

Where a proposed spur track is intended for the transportation of freight in carload lots to and from a number of industrial plants in a town or city, its use is open to the public, and a railroad company constructing such track has the right to expropriate necessary crossings over the spur tracks of another railroad company. *Kansas City, etc., R. Co. v. Louisiana Western R. Co. (La.)*, 7-831.

Business of Mining. — As the business of mining for the benefit of the mine owner is as much a private affair as that of the farm or factory, the right of eminent domain cannot be invoked in aid of it. *Sutter v. Nicols (Cal.)*, 14-900.

The mining of gold to be applied to the private use of the miner is, regardless of the extent to which it may help to maintain the gold standard, not a public purpose in behalf of which the power of eminent domain may be exercised, or for which the private property of others may be taken or its injury lawfully authorized. *Sutter v. Nicols (Cal.)*, 14-900.

Mine railways. — The construction and operation of roads and tramways for the development and working of mines is a public use, and the Utah statute providing that eminent domain may be exercised in behalf of such a use is not in conflict with the state constitution as authorizing condemnation for a use not public. *Highland Boy Gold Min. Co. v. Strickley (Utah)*, 3-1110.

Generation of electric power. — The taking of land by a corporation organized as a water power company and an electric

power company, for the purpose of establishing a water power to run a power house in which electricity is to be generated or manufactured and thence transmitted to neighboring cities and there sold for public lighting, the operation of railways, manufacturing, private lighting and heating, etc., is not taking for public use and is not a legitimate exercise of the right of eminent domain, where the right of the public to the use and enjoyment of the property has not been regulated, guaranteed, and safeguarded by proper legislation. *State v. White River Power Co.* (Wash.), 4-987.

The Georgia statute which confers authority to exercise the right of eminent domain upon any owner of water power desiring to generate electricity by water or steam power for the purpose of supplying light, heat, or power to others, under specified conditions, is not violative of that clause of the constitution which prohibits the taking of property without due process of law. *Jones v. North Georgia Electric Co.* (Ga.), 5-526.

The generation and sale of electricity to manufactories do not constitute a public use for which private property may be taken under the right of eminent domain for the purpose of obtaining a supply of water power by a corporation chartered only to operate electric cars and an electric lighting system. *State ex rel. Harris v. Superior Court* (Wash.), 7-748.

A corporation empowered by its charter among other things to build, maintain, and operate a reservoir, dam, water power, and electrical plant intended to furnish water and electrical power to the public generally, or to such portion of the public as may have occasion to purchase and use the same, and to furnish water for sale, rental, and distribution to the public generally for the irrigation of lands and for other beneficial purposes, may condemn lands for the accomplishment of such purpose, as this is a public use for which private property may be taken. *Helena Power Transmission Co. v. Spratt* (Mont.), 10-1055.

Creation of water power. — The generation of electricity by water power for distribution and sale to the general public on equal terms, subject to governmental control, is a public enterprise, and property used for that purpose is devoted to a public use; but the creation of water power and a water-power plant for the purpose of "supplying water power from the wheels thereof" to the public is a private enterprise, in aid of which the power of eminent domain cannot be exercised. *Minnesota Canal, etc., Co. v. Koochiching Co.* (Minn.), 7-1182.

Irrigation. — The use of water for irrigation is a public use, and the legislature may provide by statute for the condemnation of private property for irrigation purposes or for the condemnation of a right of way in an irrigation ditch already constructed. *Nash v. Clark* (Utah), 1-300.

The Utah statute providing for the condemnation of the land of one individual to allow another individual to obtain water

from a stream in which the latter has an interest to irrigate his land, is not, in view of the conditions of the soil and climate of the state where it was enacted, invalid as authorizing condemnation for a private use. *Clark v. Nash* (U. S.), 4-1171.

Under the constitution and statutes of this state irrigating canals are declared to be a public use. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

The taking of land for the construction of drains for "the improvement or reclamation of agricultural lands, public health, convenience, or welfare" (Laws Mont. 1905, c. 106) is for a public use. *Billings Sugar Co. v. Fish* (Mont.), 20-264.

Destruction of private right of way. — A private right of way is real property, and it is taken for a public use so as to entitle the owner to compensation, where it is destroyed by the condemnation of the servient land. *United States v. Welch* (U. S.), 19-680.

5. WHAT MAY BE TAKEN.

Right to fish. — The right to fish in an inland lake of New Jersey cannot be taken under the power of eminent domain. *Albright v. Sussex County Lake, etc., Commission* (N. J.), 2-48.

Property already appropriated to public use. — Property which has been appropriated to a railroad or other public use may, under lawful authority and procedure, be condemned and appropriated to another public use; but in the absence of legislative authority given in express terms or by necessary implication, this power cannot be exercised where the second appropriation is entirely inconsistent with and practically destructive of the first. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co.* (N. Car.), 9-683.

Where it is sought by condemnation proceedings to take a piece of property that is already devoted to a public use, the necessity will not be measured by the extent to which the use is actually applied, but rather to the public nature and character of the use to which it has been previously applied. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

Right to use canal of another irrigating company. — Where the necessity for the taking is shown, one canal company will be allowed to condemn a part of the right of way of another canal company, for the purpose of enlarging the old canal to a sufficient capacity to carry such additional volume of water as may be needed for the use of the latter company. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

Railroad rights of way. — The Act of Congress of July 24, 1866, confers on telegraph companies no right to condemn the rights of way of railroads for the erection of telegraph lines. *Western Union Telegraph Co. v. Pennsylvania R. Co.* (U. S.), 1-533.

Railroads are not highways within the meaning of a statute authorizing a telegraph company to construct lines upon the high-

ways of the state. *Western Union Tel. Co. v. Pennsylvania R. Co.* (U. S.), 1-533.

The right of way of a railroad is properly devoted to a public use, but cannot be taken under the power of eminent domain without compensation, and under an Act of Congress telegraph companies cannot occupy a railroad right of way except with the consent of the latter; nor do the New Jersey statutes make such right of way public property so as to subject them to such occupation. *Western Union Tel. Co. v. Pennsylvania R. Co.* (U. S.), 1-517.

Abandoned roadbed. — The fact that the charter of a railroad company gives it the specific right to condemn old and abandoned roadbeds does not give it the right to condemn an abandoned roadbed which another railroad company has already made a part of its right of way by a valid prior location. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co.* (N. Car.), 9-683.

Interests in water. — Interests in water, as well as in land, are subject to the law of eminent domain, and when the waters of a stream are diverted, the inferior riparian proprietor is entitled to compensation for the use of the water of which he is deprived. *Clear Creek Water Co. v. Gladeville Improvement Co.* (Va.), 13-71.

Water rights apart from land. — Under the Virginia statute authorizing public service corporations to condemn for their purposes "sand, earth, gravel, water, or other material," and prescribing the procedure for the condemnation of any "land or other property, or any interest therein," a water company desiring to divert a running stream for its purposes has power to condemn, as against a lower riparian owner, the water right apart from the land of such owner, notwithstanding a further provision of the statute that nothing therein shall be construed as authorizing the condemnation of a "less estate" in the property than is owned by the party against whom the proceeding is brought, the word "estate" being used to denote the quantity of interest of the owner in the particular subject sought to be condemned. *Clear Creek Water Co. v. Gladeville Improvement Co.* (Va.), 13-71.

Public lands. — The taking of private property only is authorized by statutes providing for the exercise of the power of eminent domain, unless there is express or clearly implied authority to extend their provisions to public property. *State v. Boone County* (Neb.), 15-487.

The Nebraska statutes relating to the establishment of public roads do not authorize the taking of public lands for the purposes of establishing roads not on section lines. *State v. Boone County* (Neb.), 15-487.

6. WHAT AMOUNTS TO TAKING.

Incidental injuries to property. — If an injury to property is only incidental to the legitimate exercise of governmental powers for the public good, there is no taking of property for the public use, and a right to

compensation on account of the injury does not attach under the Federal Constitution. *Chicago, etc., R. Co. v. People* (U. S.), 4-1175.

Requiring removal of bridge. — Requiring a railroad to remove a bridge for a drainage purpose held not to amount to the taking of private property for public use within the meaning of the Federal Constitution, or to a denial of the equal protection of the laws. *Chicago, etc., R. Co. v. People* (U. S.), 4-1175.

Construction of subway under city streets. — The construction of a rapid transit subway under the streets of a city is a permanent appropriation of land, and therefore is a taking of private property for public use for which the New York Constitution (art. 1, § 6) requires compensation to be made. *In re Rapid Transit R. Com'rs* (N. Y.), 18-366.

Erection of poles and wires in street. — Poles and wires which permanently and exclusively occupy portions of a street or highway constitute an additional burden for which an abutting owner is entitled to compensation in case he is damaged thereby. *Bronson v. Albion Tel. Co.* (Neb.), 2-639.

The lines and poles of a telephone system upon a city street constitute an additional servitude, where the fee of the street is in the owner of the abutting property, though the city has the right to use the same poles for its fire alarm and police signal system. *De Kalb County Tel. Co. v. Dutton* (Ill.), 10-464.

Where a telephone company organized to furnish telephone service to the public places its poles and wires in the streets of a city, pursuant to authority duly conferred by statute, such use of the streets does not constitute an additional burden upon the fee of abutting owners for which they are entitled to compensation. *Frazier v. East Tenn. Tel. Co.* (Tenn.), 5-838.

The construction of a telephone system along the city streets imposes no additional servitude upon the property owners and they are not entitled to compensation for damages sustained thereby. *Kirby v. Citizens' Tel. Co.* (S. Dak.), 2-152.

A telephone line on the highway is not an additional servitude for which the original owner of abutting property, or those claiming under him, may bring action. *Cumberland Tel., etc., Co. v. Avritt* (Ky.), 8-955.

The construction and maintenance of a telephone line upon a rural highway is not an additional servitude entitling the owner of the land over which the highway is laid to compensation. *McCann v. Johnson County Tel. Co.* (Kan.), 2-156.

A telephone line is not an additional servitude upon a rural highway. *Hobbs v. Long Distance Tel., etc., Co.* (Ala.), 11-461.

Laying pipe line in highway. — A pipe line, laid in a public rural highway under proper authority and used for supplying the public with natural gas for heating and illuminating purposes, though it imposes an additional public service upon the road, is not

a use in excess of the right of the public in such road, and does not impose an additional burden upon the estate in fee in the land. *Hardman v. Cabot* (W. Va.), 9-1030.

Construction of street railway in highway. — The construction and operation of an electric railway on a township highway do not constitute an additional servitude. *Austin v. Detroit, etc., Ry.* (Mich.), 2-530.

An interurban electric railroad authorized to carry, in trains of one or two cars, passengers, baggage, light express matter and mail, is not an additional servitude on a city street entitling an abutting owner to compensation; but the abutting owner may recover special damages sustained by the construction of such railroad. *Mordhurst v. Ft. Wayne, etc., Traction Co.* (Ind.), 2-967.

Where the fee in the street is in the abutting owner, and the public have only an easement in the street or highway, the laying of a steam railroad track along said street on his soil without his consent and without taking and paying just compensation therefor, is an unlawful appropriation of the property of such owner, and the abutting owner has all the remedies of any other owner of the soil, and an injunction will lie to restrain the taking possession of the street until payment be made therefor or secured to him by deposit of money. *Seaboard Air Line Ry. v. Southern Investment Co.* (Fla.), 13-18.

Use of streets for purpose for which dedicated. — Constitutional provisions that private property shall not be taken for public use without compensation do not apply to the use of the streets of a city for the purposes for which they were dedicated. *Kirby v. Citizens' Tel. Co.* (S. Dak.), 2-152.

7. COMPENSATION.

a. In general.

Meaning of term. — For constitutional purposes the payment into court of the award of the commissioners in eminent domain proceedings is *prima facie* a just compensation to which the defendant is entitled before his property can be taken; but for statutory and final purposes the term "just compensation" means the final amount awarded by the jury on a fair trial, and the defendant cannot deprive the plaintiff of the right to litigate the question of damages by accepting the commissioners' award and putting the money in his pocket. *St. Louis, etc., R. Co. v. Aubuchon* (Mo.), 8-822.

b. Time with reference to which compensation is to be estimated.

Date of filing petition. — The value of property taken under the right of eminent domain is to be fixed as of the date of the filing of the petition for its appropriation. *Sanitary District v. Chapin* (Ill.), 9-113.

Injury to land after assessment of damages. — The damages to be assessed for the taking of property in condemnation proceedings is fixed by the statute (section 5221) as of the date of the issuance of the

summons, and if the damages so assessed are paid to the landowner, the fact that the plaintiff in condemnation may subsequently commit waste or damage on the lands so condemned, and may not prosecute the proceeding to final judgment, can in no way prejudice the landowner whose damages are assessed as of a previous date. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

c. Measure and elements of compensation.

(1) In general.

Under Oklahoma statutes. — Measure of damages recoverable upon exercise of the right of eminent domain under the Oklahoma statutes. *Blincoe v. Choctaw, etc., R. Co.* (Okla.), 8-689.

Instructions of the court in eminent domain proceedings as to damages recoverable, held not erroneous. *Blincoe v. Choctaw, etc., R. Co.* (Okla.), 8-689.

Decrease in market value of lands. — In determining the amount of damages which the defendant is entitled to recover in a proceeding to condemn a right of way for a railroad, the court is bound to take into consideration every element of value which would be considered if the plaintiff as a willing purchaser were negotiating with the defendant as a willing seller. In other words, the court must ascertain the market value of the lands after the right of way shall have been taken. *Yellowstone Park R. Co. v. Bridger Coal Co.* (Mont.), 9-470.

Deprivation of conditional legacy. — Where a legacy is given to a church upon condition that it shall erect a parish house upon a designated parcel of land, and such land is afterwards taken by exercise of the power of eminent domain, the amount of the legacy cannot be included in the damages awarded to the church in the condemnation proceeding. The law requires the plaintiff in such a proceeding to pay to the landowner only the market value of the premises taken. *New Haven County v. Parish of Trinity Church* (Conn.), 17-432.

Damages for injuries to business. — While the constitution of Arkansas has broadened the right of the property owner to compensation in condemnation proceedings, and included damage as well as taking and appropriation in the elements going to make up such compensation, it has not extended the right so far as to include the recovery of damages for injuries to the business of the landowner, incident to the enforced purchase of his property. *Kansas City Southern R. Co. v. Anderson* (Ark.), 16-784.

Compensation for fixtures. — In a condemnation proceeding the landowner is entitled to compensation for fixtures, such as machinery which has been permanently annexed to the land sought to be condemned. The intention of permanency in its installation is what determines the character of the property as a fixture, and such intention may be inferred from the nature of the article annexed, the relation and situation of

the party making the annexation, the structure and mode of annexation, and the purpose or use for which it is made. *Kansas City Southern R. Co. v. Anderson* (Ark.), 16-784.

Damages to personal property.— Compensation cannot be recovered in such a proceeding, either for damages resulting to personal property not annexed to the freehold, or for the cost of removing the same from the premises. *Kansas City Southern R. Co. v. Anderson* (Ark.), 16-784.

Damages to land not taken.— In a proceeding to condemn land for the right of way of a railroad, the defendant may give evidence tending to show damage to portions of his land which are not to be traversed by the railroad and which are not described in the petition, though he has not specially pleaded his claim for such damages. *Yellowstone Park R. Co. v. Bridger Coal Co.* (Mont.), 9-470.

Separate tract not affected.— In determining the value of land taken under the right of eminent domain, where it appears that there are two or more independent farms which the landowner holds by separate chains of title and which he has subjected to independent and distinctly separate uses, and it further appears that the land taken is a strip off one of these farms, the other farms are not to be considered. *St. Louis, etc., R. Co. v. Aubuchon* (Mo.), 8-822.

Improvements made pending proceedings.— The owner of land sought to be taken for a street, in street opening proceeding under the New York City Charter, is entitled to compensation for a building which he has erected or placed upon the land in good faith after the map of the street has been filed as required by the charter. To hold otherwise would be to impose a restriction upon the use of the land by the owner pending the proceeding, which would amount to an incumbrance and be unconstitutional. But this rule applies only where the improvement has been made in good faith. Where the landowner, pending such a proceeding, purchases a building already erected on other land, and, acting in bad faith, moves it upon the land sought to be condemned, he cannot be permitted to recover damages for the same as a part of the real property taken by the city. In such a case, the building, upon its severance from the land upon which it originally stood, becomes personal property, and the damages in the condemnation proceeding are to be awarded accordingly. *Matter of City of New York* (N. Y.), 17-1032.

Value of easement.— The value of an easement cannot be ascertained in a condemnation proceeding without reference to the dominant estate to which it was attached. *United States v. Welch* (U. S.), 19-680.

(2) Part of tract taken.

General rule of damages.— Where land sought to be taken for public use is of greater value considered as a part of the entire prop-

erty than if taken as a distinct and separate piece entirely disconnected from the residue, the just compensation for the part so taken is its fair cash or market value when considered in its relation to, and as a part of, the entire property, and not simply what may appear to be its value as a separate and distinct piece. *West Skokie Drainage Dist. v. Dawson* (Ill.), 17-776.

Tract cut in two by railroad.— Where a railroad, in condemning a right of way, cuts in two a tract of land, the facts that the operating of the trains over the line of the road and across a particular land increases the danger of fire to the buildings and crops, and increases the danger to stock, are not matters which constitute independent elements of damage for which a specific award may be made; but such facts when proven, together with any other inconveniences or damages occasioned by the building or operating of the road, may be considered by the jury in determining the value of that part of the land not taken. *St. Louis, etc., R. Co. v. Oliver* (Okla.), 10-748.

(3) Where land is taken for railroad.

In general.— The right of way of a railroad company has no general market value for other uses than that to which it is applied, and the appropriation to public use amounts to a withdrawal of the right of way from any use except that necessary or auxiliary to the operation of the railroad. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

Situation of remaining lands.— In a proceeding to condemn land for a railroad, the manner in which the remaining lands are divided by the right of way, in respect to the size and shape of the fields or parcels, the condition in which the lands are left as to access to water for stock purposes, the means of passage from one part of the premises to another, and, in the case of steam roads, the possible danger of fires set out by properly equipped locomotives, are legitimate items of damages to be considered relative to the diminished market value of the lands out of which the right of way is carved. *Indianapolis, etc., Traction Co. v. Larrabee* (Ind.), 11-695.

Possible future injury to person or property.— In a proceeding to condemn land for a railroad, damages resulting from any danger or peril to which the person of the owner or occupant of the lands remaining unappropriated, or any stock thereon, may be exposed by reason of the construction or operation of the road in question, are too remote and speculative to be considered by the jury in fixing the compensation for the depreciation in value of the lands not actually appropriated. *Indianapolis, etc., Traction Co. v. Larrabee* (Ind.), 11-695.

In a proceeding to condemn a right of way for a railroad through a farm, the owner is not entitled to an allowance of damages on account of the risk of injury incident to the necessity of crossing the railroad track in or-

der to reach the public road from the farm. Such risk is not within the provision of the Indiana statute (Acts 1905, p. 59) allowing "damages to the residue of the land," caused by taking the part required for the railroad. *Indianapolis, etc., R. Co. v. Branson* (Ind.), 19-925.

Possible future injury to live stock. — In a proceeding to condemn land for a railroad, the damages ought to be sufficient to cover the actual value of the lands appropriated, together with all damages occasioned by reason of the construction of the road over the right of way as appropriated, and for all physical injuries to the remaining lands, and all inconveniences of every character, excluding remote or speculative damages, such as the danger of injury to live stock, which danger, in view of the statute requiring both sides of the right of way to be fenced, is little more than imaginary. *Indianapolis, etc., Traction Co. v. Larrabee* (Ind.), 11-695.

Cost of building fences. — In assessing damages to a farm caused by condemning a right of way through it for a railroad, the railroad company is entitled to an instruction that the cost of fencing the right of way is not to be considered, where the statute requires the company to erect the fence within a certain time, and provides that if it fails to do so, the landowner may erect the fence and recover the cost thereof from the company. *Indianapolis, etc., R. Co. v. Branson* (Ind.), 19-925.

Railroad easement over oil-bearing lands. — In an action by a railroad company to condemn a right of way over oil-bearing lands, the damages accruing to the defendant are not measured by the value of the fee of the land taken including the value of the oil beneath the surface, but are restricted to the value of a mere easement in the land condemned. *Southern Pac. R. Co. v. San Francisco Sav. Union* (Cal.), 2-962.

Construction of subway under street. — In a proceeding to assess the compensation to which abutting owners are entitled by reason of the construction by the city of a subway under the streets, a provision of the statute authorizing the work that the title of the city to the rights sought to be acquired shall vest on the filing of the oaths of the commissioners of appraisal, does not limit the commissioners to an award of the difference between the value of the property before and after the filing of such oaths; but the proper measure of damages is the value of the fee taken and the amount of the injury to the abutting property by the proper construction and operation of the subway, including the rental value of the premises for such time as they may have been untenable on account of the work. *In re Rapid Transit R. Com'rs* (N. Y.), 18-366.

(4) Telegraph lines along railroad.

General rule of damages. — The measure of damages where a telegraph company has condemned a railroad right of way is the value of the land actually taken and the

extent to which the use of the right of way by the railroad company is diminished by its use by the telegraph company. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

Speculative damages. — Where a telegraph company condemns a railroad right of way, speculative damages cannot be recovered, such as a damage which might result if the railroad company in the future should lay additional tracks or build new structures. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

Danger of poles falling on track. — Where a telegraph company condemns a railroad right of way, the possibility of poles placed at a greater distance than their height from the track falling upon the track is too remote to be considered in estimating damages. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

Inconvenience to railway company. — Where a telegraph company condemns a railroad right of way, the inconvenience to the railway company must be of such a character as to interfere with its right to exercise its business in order to become an element of damage. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

Impairment of contract with another company. — Where a telegraph company condemns a railroad right of way, the benefit the railroad company may derive from a contract with another telegraph company already occupying the right of way is not an element of damage. The measure of damage includes the extent such other contract would be impaired by the construction of the second line of telegraph. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

Peculiar benefits to telegraph company. — Where a telegraph company condemns a railroad right of way, the peculiar benefits accruing to the telegraph company from its use of the same are not elements of damage. The railroad company can only claim compensation for the land taken and for damages resulting from the construction of the telegraph line. A burden not imposed by the telegraph company is not an element of damage, as, for example, the cost of the change of grade or the clearing of the right of way and keeping it free from obstructions. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

(5) Crossings.

One railroad over another. — Rule stated for measuring the damages for the expropriation by a railroad company of a crossing over the tracks of another railroad company. *Kansas City, etc., R. Co. v. Louisiana Western R. Co.* (La.), 7-831.

Street across railroad. — In an action by a municipality to condemn for street purposes a strip of land across a railroad right of way, the railroad company is entitled to compensation for the diminution in value of its exclusive right to the use, for railway purposes, of the property sought to be

condemned, caused by the existence and use of the street. But it is not entitled to recover for structural changes, such as grading, approaches, planking, etc., made necessary by the opening of the street. The constitutional provision that private property shall not be taken or damaged for public use without just compensation does not require compensation for such changes, the making thereof being imposed by statutes enacted under the police power of the state. *Grafton v. St. Paul, etc., R. Co. (N. Dak.)*, 15-10.

(6) Improvements by condemnor.

When landowner is entitled to compensation. — In fixing the compensation to which the owner of land taken under the power of eminent domain is entitled, the value of structures placed upon the land by the appropriator before the institution of condemnation proceedings, without authority of law, and without the consent of the landowner, should be taken into consideration. *St. Johnsville v. Smith (N. Y.)*, 6-379.

When not entitled to compensation. — Where a school township, with authority to condemn land for school purposes, expends money in good faith in the construction of a schoolhouse and fences on premises with the knowledge and acquiescence of the owner of the property, and uses the same without objection, such owner is not entitled to compensation, in a subsequent proceeding to condemn the land, for the improvements so placed upon the premises. *McClarren v. Jefferson School Township (Ind.)*, 13-978.

(7) Benefits.

Constitutionality of statute authorizing deduction. — In a condemnation proceeding a valid award cannot be made for less than the value of the property actually taken, and section 822 of the Greater New York Charter, providing in substance that the measure of compensation for a part of lands taken for water front improvement may be diminished by the estimated benefit to the remaining property, is in violation of the constitutional provision that private property shall not be taken without just compensation. *Matter of New York (N. Y.)*, 13-598.

Such charter provision cannot be supported as an exercise of the power of taxation, as making the person whose property is benefited by the improvement bear a proportionate part of the cost, since the tax would operate arbitrarily and unequally among the owners affected. *Matter of New York (N. Y.)*, 13-598.

Loss of right to deduct. — Where a town wrongfully builds a road over certain land, but both the town and the landowner treat the act as a permanent taking, notwithstanding the illegality of its inception, and the court finds that the town has appropriated the land to itself for a highway, the owner may recover the full value of the land without deductions for benefits resulting from the improvement, and such compensation will

bar any future action by the owner. An "appropriation" of land is more than a mere entry thereon, and includes a setting apart, or applying the land to the use of a particular person for a particular purpose. *Pinney v. Winsted (Conn.)*, 20-923.

d. Allowance of interest.

When improper. — Where it appears in a condemnation proceeding brought by the United States under the statutes of Massachusetts that the owner has not been deprived of the use of his land, and it does not appear that he has been put to trouble or expense, or has incurred loss in the use of his land not considered in assessing the damages, he is not entitled, as part of his compensation, to interest from the institution of the proceeding to the date of the verdict. *Hingham v. United States (U. S.)*, 15-105.

Award increased or diminished on appeal. — In condemnation proceedings, where a landowner appeals from an award and the case is tried to the jury in a District Court, it is not proper to permit the jury to be informed of the amount of the award made by the commissioners; and as the allowance of interest is dependent upon the question as to whether the amount of damages awarded by the jury is greater or less than the award of the commissioners, the court may, where the question is uncontroverted as to the date from which interest should be allowed, reserve the question of interest for determination by the court and direct the jury not to include interest in their verdict. *St. Louis, etc., R. Co. v. Oliver (Okla.)*, 10-748.

e. Who entitled to compensation.

Land subject to irredeemable ground rent. — Where part of a lot of land upon which there is irredeemable ground rent is taken under the power of eminent domain, the owner of the rent has the right to recover damages for the taking, though the part of the lot not taken is ample security for the rent. *Baltimore v. Latrobe (Md.)*, 4-1005.

Apportionment between lessor and lessee. — Where a considerable portion of a lot of land upon which there is an irredeemable ground rent is taken under the power of eminent domain, the commission or jury in fixing the respective damages of the leaseholder and reversioner, should apportion the rent by the extinguishment or abatement of a just proportion thereof, allowing the reversioner a sum of money as compensation for the diminution. Such apportionment of the rent does not impair the obligation of the contract between the reversioner and the leaseholder. *Baltimore v. Latrobe (Md.)*, 4-1005.

In fixing the compensation for land taken under the power of eminent domain, upon which there is an irredeemable ground rent, the respective estates of the leaseholder and the reversioner should be valued separately, and each should be allowed the actual value of his interest, though the result may be to allow a total compensation in excess of what

would be allowed if the entire estate in the land were owned by one person, as the owner of such interest has a constitutional right to be compensated fully for the taking of his property. *Baltimore v. Latrobe* (Md.), 4-1005.

Lessee holding over. — Where the lessor under a reasonable lease has exercised the right given him by the lease to refuse to renew upon paying for the improvements made by the lessee, the latter, if he remains in possession after the expiration of his term, is a tenant at will, and is not one of the "persons interested" in the land within the meaning of the Canadian Railway Act providing for the payment of compensation for land expropriated. Consequently such lessee is not entitled to compensation for the expropriation of the leased premises. *Canadian Pac. R. Co. v. Alexander Brown Milling, etc., Co.* (Can.), 15-709.

Mortgagee. — A mortgagee out of possession but holding the legal title and having a right to demand possession is entitled to be compensated out of the damages awarded in condemnation proceedings to the extent of the value of his interest in the land taken. *Hagerstown v. Groh* (Md.), 4-943.

f. Waiver of compensation.

What insufficient to constitute. — Under the constitution of Nebraska, 1866, as well as that of 1875, mere passive acquiescence by a landowner in the taking of his property for a public use, unaccompanied by any conduct indicative of affirmative assent thereto, and not continued for the statutory period of limitations, is not a waiver of his right to compensation therefor and cannot be made so by statute. *Kime v. Cass County* (Neb.), 8-853.

8. NATURE AND EXTENT OF RIGHTS ACQUIRED BY CONDEMNATION.

Telegraph line along railroad right of way. — A telegraph company acquires only an easement to the right of way of a railroad company condemned for the purposes of constructing and operating a telegraph line thereon. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

The easement acquired by a telegraph company which has condemned a railroad right of way embraces the land actually occupied by the poles and fixtures for wires, and the right to stretch the wires upon the poles and to enter upon the right of way to construct and repair the lines. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

The only exclusive right of occupancy acquired by a telegraph company by condemning a railroad right of way is the occupancy of the land occupied by the poles for telegraph purposes. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

Water rights acquired by canal company. — The Minnesota statutes authorizing canal companies to incorporate and to take private property do not, as incident to the construction of a canal and the creation of

water power, authorize the canal company to withdraw and divert waters from public navigable lakes and streams to such an extent as to interfere with present or future navigation, and, by means of canals, to carry such waters over a divide and discharge them into a different drainage area, thus withdrawing them permanently from their natural course. *Minnesota Canal, etc., Co. v. Koochiching Co.* (Minn.), 7-1182.

Land taken for drainage ditch. — In Illinois, under both the Levee Act and the Farm Drainage Act, drainage districts have perpetual easements in land condemned for ditch purposes, the fee remaining in the owners. *West Skokie Drainage Dist. v. Dawson* (Ill.), 17-776.

Where a strip of land condemned for a drainage ditch is wider than the ditch itself, the landowner retains a qualified right to use the portion not actually occupied by the ditch, but such right extends only to the use of the land in a manner not inconsistent with the easement acquired by the drainage district, and, consequently, an instruction by the court, in a proceeding to condemn land for such a ditch, that the landowner will have the right to use and control all of the land taken but not used for the ditch, is too broad. *West Skokie Drainage Dist. v. Dawson* (Ill.), 17-776.

Land taken for street purposes. — The condemnation of land for the purposes of a street vests in the city only an easement in the absence of a statute which in terms or by necessary implication authorizes the city to take property in fee for street purposes. *Tacoma Safety Deposit Co. v. Chicago* (Ill.), 20-564.

9. CONDEMNATION PROCEEDINGS.

a. In general.

Statute governing proceedings. — Under the Indiana statute taking effect subsequent to April 11, 1905, relating to condemnation proceedings, repealing all laws in conflict therewith, and providing that "this repeal shall not affect pending proceedings, but such proceedings may be completed as if this act had never been passed," a condemnation proceeding in which the complaint was filed on March 20, 1905, and in which summons was served on April 11, 1905, is a pending proceeding unaffected by the statute, and is governed by the Act of 1881, even if the earlier act is repealed by the later. *McClarren v. Jefferson School Township* (Ind.), 13-978.

The Ohio statute providing for the crossing of one steam railroad by another is original legislation, and pending actions or proceedings are not exempted from its operation by virtue of section 79, Revised Statutes; hence it is error for the court to refuse to entertain an application under the act to ascertain and define the mode of such crossing, on the ground that proceedings to appropriate the right to cross had been commenced prior to the passage of the act.

Wheeling, etc., R. Co. v. Toledo Ry., etc., Co. (Ohio), 2-841.

Proof of legislative authority. — A corporation seeking to exercise the power of eminent domain must show clearly that it is proceeding under legislative authority, as every presumption is in favor of the individual landowner. *Minnesota Canal, etc., Co. v. Koochiching Co.* (Minn.), 7-1182.

Jurisdiction of court. — Primarily, the power to exercise the right of eminent domain for and on behalf of the state rests with the legislature and the constitutional provision with reference to the exercise of that power (section 14, article 1) is a limitation and not a grant of power. The legislature may determine the necessity for the taking, and its determination thereon is final. The legislature of this state has delegated the power to determine the necessity for the taking to the courts, and jurisdiction is thereby vested in the courts to pass upon, determine, and adjudicate all the matters and things specified by the statute to be determined before the taking is finally consummated and title divested. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

Exceptions to rulings. — The practice of referring to the merits exceptions which do not involve merits is deplorable, and especially should such exceptions not be referred to the jury, whose jurisdiction is special and extends to those questions alone which the law directs shall be submitted to it. *New Orleans Terminal Co. v. Teller* (La.), 2-127.

Dismissal for want of prosecution. — It is proper to dismiss an eminent domain proceeding for want of prosecution, where it appears that the original summons was returned "not found;" that no *alias* was issued and no other step was taken in the prosecution of the proceeding until more than four years after the filing of the petition, when an *alias* was issued and served on the defendant; that in the meantime the property sought to be condemned has greatly increased in value; and that the petitioner refuses to stipulate that the value of the property shall be fixed as of the date when the *alias* was served on the defendant. *Sanitary District v. Chapin* (Ill.), 9-113.

Presumption as to regularity. — When, after the lapse of thirty years or more, the record of proceedings in the exercise of the power of eminent domain is shown to be such that they would have been valid under any circumstances, and where both parties have treated them as valid, such circumstances will, if necessary, and in the absence of evidence to the contrary, be presumed to have existed. *Roberts v. Sioux City, etc., R. Co.* (Neb.), 10-992.

b. Nature of proceeding.

At common law. — At common law, a proceeding for condemnation of property to a public use was inquisitorial and *ex parte*, and was instituted at the instance of the sovereign, and the fixing or assessing damages

to be paid for the taking was merely for the purpose of satisfying the sovereign conscience, and a trial by jury was not recognized in such proceedings. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

At the time of the adoption of the constitution of Idaho, the exercise of the right of eminent domain was recognized and existed as a "special proceeding of a civil nature," and was not classed or recognized as an action at law. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

Under Indiana statute. — A proceeding by a corporation under the Indiana eminent domain statute is a special proceeding by the plaintiff to avail itself of a statutory remedy, and the plaintiff must, by the allegations of its complaint, bring itself substantially within the provisions of the statute upon which it relies; and the proof upon the hearing must sustain the essential facts as alleged. *Morrison v. Indianapolis, etc., R. Co.* (Ind.), 9-587.

Under Wisconsin statute. — A proceeding under the Wisconsin statutes (St. 1898, §§ 1845-1851) to acquire property by the right of eminent domain, is a suit in court, a judicial proceeding from the commencement to the end, except as to an appeal from the award. To that extent it is in the nature of an ordinary action in court. *Milwaukee Light, etc., Co. v. Ela Co.* (Wis.), 20-707.

A proceeding under the Wisconsin statutes (St. 1898, §§ 1845-1851) to acquire property by right of eminent domain, being a suit commenced by filing the petition, the court has all inherent power in respect thereto which it has, in general, respecting actions or suits in the nature of actions, including power to vacate the award of commissioners therein for improper conduct, or such conduct of parties. *Milwaukee Light, etc., Co. v. Ela Co.* (Wis.), 20-707.

A proceeding under the Wisconsin statute (St. 1898, §§ 1845-1851) to acquire property by the right of eminent domain being a suit in court, and not denominated as an action, or being such because commenceable by the service of a summons, its statutory name is "a special proceeding," since all civil remedies under the code are divided into ordinary actions or such proceedings. *Milwaukee Light, etc., Co. v. Ela Co.* (Wis.), 20-707.

c. Venue.

Land located in two counties. — If the land sought to be condemned under the Georgia Civil Code (§§ 4657 *et seq.*) is located partly in two counties the proceedings to condemn may be had in either county. *Whitney v. Central Georgia Power Co.* (Ga.), 19-982.

d. Effort to purchase as condition precedent.

Necessity. — Before a corporation which has brought a proceeding under the Indiana eminent domain statutes can demand that the court shall make an interlocutory order appointing appraisers, it must establish that

it is a corporation which under the statutes is vested with the right to exercise the power of eminent domain, and that it has, as a condition precedent, made an effort to purchase the property which it seeks to condemn. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

Waiver. — When a landowner appears in a condemnation proceeding and consents to the selection of a jury and contests the case upon the merits, he thereby waives the failure of the petitioner to make any attempt to agree on the value of the property before commencing the proceeding. *West Skokie Drainage Dist. v. Dawson (Ill.)*, 17-776.

e. Notice to landowner.

Necessity. — Under the Texas constitution providing for compensation where a person's property is taken for public use, and the Texas statutes which provide for the opening of county roads over private property and for the assessment of damages for the land so taken, notice to the landowner of the assessment of damages is essential to the validity of proceedings to open a road. *Morgan v. Oliver (Tex.)*, 4-900.

By whom given. — Under the Georgia Civil Code (§§ 4657 *et seq.*) where the land sought to be condemned lies in two counties, the ordinary of the county where the condemnation proceeding is had is the official referred to in section 4665, upon whom the law devolves the duty of mailing notice of condemnation to a nonresident owner. *Whitney v. Georgia Central Power Co. (Ga.)*, 19-982.

f. Parties.

Mortgagor of land. — In a suit by a mortgagee against the condemnor of property, to satisfy his claim out of the proceeds of the condemnation of the land mortgaged, failure to join the mortgagor renders the bill bad on demurrer. *Hagerstown v. Groh (Md.)*, 4-943.

g. Pleadings.

Allegations of complaint as to necessity. — Under the North Dakota Revised Codes of 1905 a complaint in an action to condemn for street purposes a strip of land across a railroad right of way need not allege the public necessity of the crossing. *Grafton v. St. Paul, etc., R. Co. (N. Dak.)*, 15-10.

Amendment of complaint. — In a condemnation proceeding the court has full power to allow the complaint to be amended, after the report has been filed by the appraisers, so as to make the description of the real estate in the complaint agree with the description contained in the appraisement. *McClarren v. Jefferson School Township (Ind.)*, 13-978.

Necessity for demurrer or answer. — A defendant in eminent domain proceedings has no standing in court for any purpose, unless he makes appearance by either demurrer or answer; and this is so notwithstanding the provision of the Montana statute

requiring commissioners appointed to assess damages to hear the allegations and evidence of all persons interested, as that provision evidently contemplates cases where the parties defendant are not in default. *Yellowstone Park R. Co. v. Bridger Coal Co. (Mont.)*, 9-470.

Nature and purpose of objections. — Under the Indiana statute providing that the defendant in an eminent domain proceeding "may object to such proceeding on the ground that the court has no jurisdiction either of the subject-matter or of the person, or that the plaintiff has no right to exercise the power of eminent domain for the use sought, or for any other reason disclosed in the complaint, or set up in such objections," and further providing that these objections shall be in writing, the written objections serve the purpose of a plea or answer as well as of a demurrer, and therefore enable the defendant to interpose objections which exist in point of fact but which do not appear on the face of the complaint. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

Extension of time to file objections. — The provision of the Indiana eminent domain statute that the defendant's written objections to the jurisdiction of the court, the right of the plaintiff to maintain proceedings, etc., "shall be filed not later than the first appearance of such defendant," is merely directory, and the court has discretionary power to extend the time for filing such objections; but the exercise of this discretion is subject to review on appeal. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

Necessity of alleging claim for damages. — There is no provision in the Montana statute concerning condemnation proceedings requiring the defendant to set up his claim for damages in his pleadings in any form, and the statute relating to form of pleadings and declaring what may be set up as counterclaims clearly excludes damages awarded in eminent domain proceedings, whether the damages are general or special. *Yellowstone Park R. Co. v. Bridger Coal Co. (Mont.)*, 9-470.

h. Preliminary hearing or trial.

Right to preliminary hearing. — Under the Indiana statute providing that the defendant in an eminent domain proceeding may file written objections denying the jurisdiction of the court or the right of the plaintiff to maintain the proceeding, the defendant is entitled to a preliminary hearing on the issues raised by such objections. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

The provision of the Indiana eminent domain statutes for a preliminary hearing before the appointment of appraisers, for the purpose of determining all questions in respect to the right of the plaintiff to condemn, is for the protection of the landowner, and the landowner should not be refused the right to appear at such hearing and contest the right of the plaintiff to condemn, unless

he has defaulted in the manner prescribed by statute. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

Where defendant is in default. — The only effect of the failure of a defendant in an eminent domain proceeding to make appearance by demurrer or answer is to shut him out from participating in the proceedings; and the court, in spite of such default, must determine whether the use for which the property is sought to be taken is a public use, must limit the amount taken to the necessities of the case, and must ascertain the damages under procedure and in accordance with the standard prescribed by statute. *Yellowstone Park R. Co. v. Bridger Coal Co. (Mont.)*, 9-470.

Joint questions determinable. — The provision of the Indiana statute that any party to an eminent domain proceeding who is "aggrieved by the assessment of benefits or damages may file written exceptions thereto, . . . and the cause shall further proceed to issue, trial, and judgment as in civil actions," does not contemplate the determination of preliminary questions of fact, but merely contemplates the trial of those issues joined and raised by the report of the appraisers and by the exceptions filed thereto by the aggrieved party. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

Determination of necessity in limine. — The question as to the necessity for the taking of a definite piece of property for a public use, when denied, should be determined by the court *in limine* before appointing commissioners to assess the damages that will be sustained by reason of the taking. *Portneuf Irrigating Co. v. Budge (Idaho)*, 18-674.

In an action by a municipality to condemn property for street purposes, it is unnecessary to allege or prove the public necessity of the proposed street. Where the power to determine whether the laying out of particular streets is for the benefit of the public has been delegated to the legislative department of a municipality, its determination is conclusive. The only question for the court to determine is whether the particular property sought to be condemned is necessary for such public use. *Grafton v. St. Paul, etc., R. Co. (N. Dak.)*, 15-10.

Proof of corporate existence of plaintiff. — In an eminent domain proceeding brought by a corporation, where the corporate existence of the plaintiff is questioned, the plaintiff must show at the hearing that it is either a *de jure* or a *de facto* corporation. *Morrison v. Indianapolis, etc., R. Co. (Ind.)*, 9-587.

Questions for jury. — In a proceeding by a railroad company to expropriate crossings from the tracks of another railroad company, the location and number of the crossings, and their necessity, involve questions of fact properly submitted to the jury of freeholders. *Kansas City, etc., R. Co. v. Louisiana Western R. Co. (La.)*, 7-831.

Right of jury to rely on own information. — The right of a jury in expro-

priation proceedings to rely on their own information and opinions. *Shreveport v. Youree (La.)*, 3-300.

i. Tribunal to assess damages.

Right to jury. — The provision of the Illinois constitution that when private property is taken for public use compensation therefor, "when not made by the state, shall be ascertained by a jury, as shall be prescribed by law," has no application to condemnation proceedings begun by the state commission under specific authority conferred upon it by the legislature. *Deneen v. Unverzagt (Ill.)*, 8-396.

It is the uniform ruling of the American courts that the right of trial by jury in proceedings for condemnation of property to a public use does not exist as a constitutional right unless the constitution itself contains a specific grant and guaranty of such right. *Portneuf Irrigating Co. v. Budge (Idaho)*, 18-674.

Constitutionality of assessment by commissioners. — Under the provisions of section 14, art. 1 of the constitution of Idaho, which provides that "private property may be taken for public use, but not until a just compensation to be ascertained in a manner prescribed by law shall be paid therefor," the legislature had the power and authority to enact section 5226, Rev. Codes, and provide for assessing the damages sustained by any landowner by three commissioners to be appointed by the court. A tender of the amount so assessed to the landowner, or in case of his refusal to accept the same, a payment thereof into court to await the determination of the action, is sufficient compliance with the constitutional requirements as to payment in advance of the taking to justify and authorize the court in letting the party seeking to condemn into possession of the property. *Portneuf Irrigating Co. v. Budge (Idaho)*, 18-674.

j. Evidence.

Situation and character of land. — In such a proceeding, evidence as to the location of the land with reference to a city, its character, and how it compares with other lands similarly situated and which have been sold for a certain price, is admissible on behalf of the defendant. *West Skokie Drainage Dist. v. Dawson (Ill.)*, 17-776.

Opinion of witnesses as to damages. — In an eminent domain proceeding, it is not prejudicial error to permit witnesses for the defendant to give their opinions as to the damages sustained by the defendant to lands not taken, after deducting all benefits, instead of requiring them to state the damages and the benefits separately, where the witnesses are questioned fully as to the bases of their opinions, and the jury, under instructions by the court, assess the damages in the manner required by the statute, and the items found by the jury are well within the extreme limits of the testimony. *Yellowstone Park R. Co. v. Bridger Coal Co. (Mont.)*, 9-470.

Where a witness has given his opinion as to the value of land since the construction of a railroad, he may be questioned on cross-examination as to the value of part of the land or as to any other pertinent matters which will enable the jury to estimate fairly the weight to be given his testimony, though the questions do not involve the correct rule for measuring the damages to the land. *Davis v. Pennsylvania R. Co. (Pa.)*, 7-581.

In condemnation proceedings, a witness cannot base his opinion of the value of the land sought to be taken on what he has heard that the plaintiff has paid for other land for use in the same enterprise. *Oregon R. etc. Co. v. Eastlack*.

Conjectural and speculative testimony. — In an action by a railroad company to condemn a right of way over oil-bearing lands, the whole testimony of a qualified witness as to the market value of the property in question should not be stricken out because part of the testimony is conjectural and speculative. *Southern Pac. R. Co. v. San Francisco Sav. Union (Cal.)*, 2-962.

Character and value of crops raised on land. — In an action by a landowner to recover damages for the taking of an easement over his land under the right of eminent domain, the plaintiff may testify as to the character, value, and quantity of the crops raised by him on the land prior to the taking, as such testimony tends to establish a relative fact to aid the jury in determining the value of the land. *Creighton v. Board of Water Com'rs (N. Car.)*, 10-218.

Insurance rates on building. — In a condemnation proceeding instituted by a railroad company to determine the necessity for laying its tracks along a city street and to assess the damages to an adjoining owner, where the respondent expressly disclaims any damages for increased fire risks, it is not erroneous to exclude evidence showing the insurance rates on the respondent's buildings. *Boyne City, etc., R. Co. v. Anderson (Mich.)*, 10-283.

Progressive decrease in value of land. — In an action by a railroad company to condemn a right of way over oil-bearing lands, the plaintiff may prove a progressive decrease in the productiveness of the oil-field within which the land is situated as bearing upon the market value. *Southern Pac. R. Co. v. San Francisco Sav. Union (Cal.)*, 2-962.

Price paid for land by owner. — In an action to recover damages resulting to the plaintiff's land from the construction of a railroad thereon, it is proper to exclude evidence of the price paid by the plaintiff for the land seventeen years prior to the time of the taking, as such evidence does not tend to prove the value of the land immediately before the taking. *Davis v. Pennsylvania R. Co. (Pa.)*, 7-581.

In condemnation proceedings, evidence of what the property was sold for, or was estimated to have brought, in an exchange made twelve or fifteen years before, is inadmissible.

Oregon R. etc. Co. v. Eastlack (Ore.), 20-692.

Offers to purchase. — It is not error for the trial court, when a question of damages under the law of eminent domain is being tried, to reject evidence of offers to purchase other property in the neighborhood of the land in question, about the time the condemnation proceedings were instituted. *Blincoe v. Choctaw, etc., R. Co. (Okla.)*, 8-689.

Price paid for other lands. — In condemnation proceedings, evidence of what the plaintiff paid for other property for use in the same enterprise is incompetent, whether offered as substantive evidence, or on cross-examination as a test of an expert's knowledge. *Oregon R., etc., Co. v. Eastlack (Ore.)*, 20-692.

Ordinance declaring necessity of taking. — In an action by a municipality to condemn for street purposes a strip of land across a railroad right of way in such municipality, an ordinance of the city council declaring it necessary to extend one of the streets of the city across such right of way, is admissible in evidence for the purpose of proving the official determination by the council of the necessity of the crossing. *Grafton v. St. Paul, etc., R. Co. (N. Dak.)*, 15-10.

Deed granting easement to condemnor's predecessor. — In an action by a landowner to recover damages for the taking of an easement over his lands under the right of eminent domain, the defendant, for the purpose of reducing the damages, may introduce in evidence a deed executed by the plaintiff granting to the corporation to which it has succeeded an easement over the part of the land in controversy, where the answer alleges that the defendant holds all the rights, franchises, privileges, and easements of the predecessor corporation, and further alleges that the defendant, under its charter, has "taken, holds, and controls the land by virtue of this very deed" executed to the predecessor corporation. *Creighton v. Board of Water Com'rs (N. Car.)*, 10-171.

Injuries to property by construction of subway. — In a proceeding to assess the compensation to which abutting owners are entitled by reason of the construction of a city of a subway under the streets, pursuant to a statute (*New York Rapid Transit Act*, § 47) which provides that the title of the city to the rights sought to be acquired shall vest on the filing of the oaths of the commissioners of appraisal, the property owners are entitled to show all physical injuries inflicted on the property by the proper construction of the work so far as they can be ascertained at the date of the hearing. *In re Rapid Transit R. Com'rs (N. Y.)*, 18-366.

Benefits. — In a proceeding to condemn land for a railroad right of way, the plaintiff cannot, for the purpose of showing that all the lands along the route of the railroad have been enhanced in value by the building of the road, introduce evidence that offers of a certain price per acre have been made

by various persons to owners of selected parcels of land in the vicinity of the defendant's land, where these offers have arisen out of negotiations between persons none of whom are parties to the proceedings or witnesses on the trial. *Yellowstone Park R. Co. v. Bridger Coal Co.* (Mont.), 9-470.

k. Instructions.

Rule for determination of market value. — A statement by the court in the course of its instructions to the jury in a condemnation proceeding, relative to the rule for determining the market value of the land, that "to sell real estate at its market value sometimes requires effort and negotiation for some weeks, and even for some months," while not to be commended, does not present reversible error. *Kansas City Southern R. Co. v. Anderson* (Ark.), 16-784.

Damages to land not taken. — In a proceeding to condemn land for a drainage ditch, where the evidence shows that the defendant's land consists of two parcels and that the proposed ditch will run through one parcel but not through the other, an instruction which limits the defendant's damages for the land not taken to the particular parcel through which the ditch will run, is erroneous. *West Skokie Drainage Dist. v. Dawson* (Ill.), 17-776.

In a proceeding to condemn a part of a tract of land for a naval magazine, it is not error for the trial court, in the absence of the testimony of competent witnesses as to the diminution of the value of the remaining land by the use to which the land condemned is to be put, to refuse to instruct the jury to consider the damage resulting to the remaining land from its proximity to the land condemned. *Hingham v. United States* (U. S.), 15-105.

l. Judgment.

Effect of confirmation of award. — A judgment confirming an award of damages in a condemnation proceeding after an assessment of benefits, which the statute provides shall be not less than half of the amount of the damages, has been set aside, is not an adjudication that the property affected by the proceeding has not been benefited. *Columbia Heights Realty Co. v. Rudolph* (U. S.), 19-854.

m. Review of proceedings.

Right to appeal. — Where a telegraph company institutes condemnation proceedings against a railroad company in the county where the main office of the latter is located and the award is filed in the office of the clerk of the Superior Court of such county, an appeal to the Superior Court of such county is authorized by statute. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co.* (Ga.), 1-734.

What judgments are appealable. — An order made by the trial court in a condemnation proceeding, before commissioners have been appointed or a jury impaneled,

determining that the petitioner has power to exercise the right of eminent domain, is merely interlocutory, and therefore not reviewable by the Supreme Court on appeal or writ of error, under the Colorado statute relative to appeals and writs of error in such proceedings. The only determination reviewable by the Supreme Court in such a proceeding, under the statute, is the final judgment approving the award of commissioners or verdict of a jury as to the amount of damages; and on review of such judgment, the right to condemn, the necessity for taking, and other interlocutory questions are determinable. *Burlington, etc., R. Co. v. Colorado Eastern R. Co.* (Colo.), 16-1002.

A judgment in condemnation proceedings that the land sought to be taken is appropriated and taken from the defendant by the plaintiff on the deposit by the plaintiff of a specified sum, and without reserving anything for the court's further determination, is a final judgment, and appealable, though the plaintiff did not make any deposit. *Oregon R., etc., Co. v. Eastlack* (Ore.), 20-692.

Questions reviewable. — The appeal allowable in condemnation proceedings is solely to review the honest judgment of the commissioners respecting compensation for property taken. It does not undo, directly, the wrong committed by improper conduct of commissioners such as would vitiate a verdict in a civil action. *Milwaukee, etc., Co. v. Ela Co.* (Wis.), 20-707.

The landowner is entitled to the fair judgment of the commissioners in condemnation proceedings, and to appeal therefrom if dissatisfied. *Milwaukee, etc., Co. v. Ela Co.* (Wis.), 20-707.

A motion to set aside the award of commissioners for improper conduct is addressed to the sound discretion of the court, and the result will not be disturbed on appeal unless it clearly appears to have been the result of abuse of discretion or mistake of law. *Milwaukee, etc., Co. v. Ela Co.* (Wis.), 20-707.

In vacating the award of commissioners in condemnation proceedings for improper conduct on their part, the court acts by virtue of its inherent power which stands by the side of and goes with, or without, the statute, where necessary in the due administration of justice. *Milwaukee Light, etc., Co. v. Ela Co.* (Wis.), 20-707.

Trial de novo on appeal. — In an eminent domain proceeding, the trial on appeal to the Montana District Court from the award of the commissioners is *de novo* as to the damages; and where the award of the commissioners has not been introduced in evidence, it is not erroneous for the trial court to instruct the jury that they must not consider such award but must confine themselves exclusively to the testimony of the witnesses examined at the hearing. *Yellowstone Park R. Co. v. Bridger Coal Co.* (Mont.), 9-470.

Question for jury. — On appeal from an award of the assessors in a proceeding by a telegraph company to condemn a railroad

right of way, the issue of fact for the jury is the amount of compensation to be paid for the property taken or damaged for public purposes. *Atlantic Coast Line R. Co. v. Postal Tel.-Cable Co. (Ga.)*, 1-734.

Waiver of objections to regularity of proceedings. — On an appeal by the plaintiff to the District Court from the award of the commissioners in an eminent domain proceeding, where it appears that the defendant failed to answer in the proceedings below, but it also appears that the plaintiff failed to take a default and that the defendant was permitted to appear at the hearing before the commissioners when the order of condemnation was made, and that the case proceeded to the making of the order of condemnation without objection by the plaintiff, the plaintiff will not be heard to complain that the proceedings before the commissioners were irregular. *Yellowstone Park R. Co. v. Bridger Coal Co. (Mont.)*, 9-470.

Waiver of irregular impaneling of jury. — An objection that the jurors called to assess benefits in a condemnation proceeding were not examined as to their qualifications and sworn, as required by the statute under which the proceeding was had, cannot be raised for the first time in the appellate court. *Columbia Heights Realty Co. v. Rudolph (U. S.)*, 19-854.

Presumption in favor of award. — In a condemnation proceeding instituted by a railroad company to determine the necessity for laying its tracks along a city street, and to assess the damages to an adjoining owner, the range of inquiry upon the subject of damages is quite wide, the object of the inquiry being to ascertain the respondent's entire loss for the purpose of making it good to him, and a judgment will not be reversed for the alleged commission of errors affecting the amount of the damages awarded, where there is an abundance of testimony to sustain the award. *Boyne City, etc., R. Co. v. Anderson (Mich.)*, 10-283.

Harmless error in admission of evidence. — In a condemnation proceeding instituted by a railroad company to determine the necessity for laying its tracks along a city street, and to assess the damages to an adjoining owner, where the jury find that it was necessary for the petitioner to occupy the street upon which its line has been laid, the error, if any, in admitting evidence to show that the petitioner could have built its line upon another street in the city, and in permitting the jury to view and go over such other line, is harmless. *Boyne City, etc., R. Co. v. Anderson (Mich.)*, 10-283.

n. Costs and fees.

What recoverable as costs. — As used in the Utah statute providing for the allowance of costs in eminent domain proceedings, the term "costs" refers to and includes only the costs that are taxable in an ordinary civil action or proceeding, that is, such costs and fees as are fixed and regulated by statute.

McCready v. Rio Grande Western R. Co. (Utah), 8-732.

Counsel fees. — The New York Rapid Transit Act (Laws 1891, c. 4, and amendatory acts) providing for the payment by the city of the fees and expenses of the commissioners of appraisal "and such allowance for counsel fees as may be made by order of the court, and all reasonable expenses incurred by" the counsel for the city in condemnation proceedings under the act, does not mean that counsel fees, etc., may be allowed to the property owners. *In re Rapid Transit R. Com'rs (N. Y.)*, 18-366.

Under the Illinois statute providing that upon the failure of the petitioner in eminent domain proceedings to take land, the court may make an order for the payment of reasonable attorney's fees paid or incurred by the defendant, the appellate court will not reverse the judgment for allowance of such fees on the ground that there is no evidence that they have been paid by the defendant, where the evidence shows without contradiction that services have been rendered by the attorneys employed by the defendants, and that the amounts allowed are reasonable. *Deneen v. Unverzagt (Ill.)*, 8-396.

Where proceeding is discontinued. — One who in good faith and without malice commences an action under the Utah eminent domain statutes to condemn land is not liable, upon his voluntary dismissal of the action without unreasonable delay, to the owner of the land for the expenses to which the latter has been put in employing counsel and hiring expert witnesses, or for the landowner's expenditures and loss of time necessitated by defense of the action, as such expenditures and loss are not taxable as costs in the action. *McCready v. Rio Grande Western R. Co. (Utah)*, 8-732.

Review by mandamus. — Under the Michigan statute providing that whenever any lands are condemned by a railroad company the company shall pay to the landowner, "in addition to the damages and compensation awarded by the commissioners and jury, a reasonable attorney's fee, to be fixed and determined by the court when the report or verdict is confirmed," the circuit judge is the final arbiter as to the amount of the attorney's fees to be awarded, and the Supreme Court will not issue a writ of mandamus to review his determination of such question. *Boyne City, etc., R. Co. v. Anderson (Mich.)*, 10-283.

o. Possession pending proceedings.

Constitutionality of Idaho statute. — The provisions of section 5226 for the appointment of commissioners to assess damages that the defendant will sustain by reason of the condemnation and appropriation of his property, and for the payment of the sum so assessed to the defendant, or, in case of his refusal to accept the same, its being paid into court to abide the result of the action, and for the plaintiff thereupon to enter upon and take possession of the property

pending the final hearing and determination of the proceeding, are not in conflict with either section 7 or section 14 of article 1 of the constitution. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

The fact that the statute grants to a defendant in condemnation proceedings the right to a trial subsequent to the assessment made by the commissioners, and also the right of appeal, does not render the provision of the statute, authorizing the appointment of the commissioners and assessment of damages and the taking of possession after payment of the amount so assessed, obnoxious to the constitution. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

10. REVERSION OF CONDEMNED LAND.

In general. — There is no distinction between failure to use condemned land because its use is impossible, and abandonment after user, so far as a reverter to the owner of the fee is concerned. *Bell v. Mattoon Waterworks Co.* (Ill.), 19-153.

Land in which an easement has been taken by condemnation will revert to the owner of the fee where it appears that, by reason of natural barriers or obstacles the land cannot be used for the purpose for which it was condemned. *Bell v. Mattoon Waterworks Co.* (Ill.), 19-153.

11. REMEDIES OF LANDOWNER.

a. In general.

Statutory proceeding not exclusive. — The Oklahoma statute authorizing railroad corporations to exercise the right of eminent domain, which specifies the procedure by which the damages may be ascertained, and gives to the landowner as well as to the corporation the right to institute proceedings, does not provide an exclusive remedy, but where land is appropriated for railway purposes the common-law remedy afforded the owner in such cases may, at his election, be pursued. *Blackwell, etc., R. Co. v. Bebout* (Okla.), 14-1145.

Recovery of lands unnecessarily condemned. — A landowner who has been defaulted in a condemnation proceeding cannot afterwards recover a part of the land on the ground that more was taken than was necessary for the purpose, but he may recover any part that cannot be used for the purpose for which it was condemned. *Bell v. Mattoon Waterworks Co.* (Ill.), 19-153.

b. Action for damages.

Right to maintain, in general. — After a railroad company has entered upon private lands and appropriated its right of way, either with or without the consent of the owner, either party may institute condemnation proceedings to determine the relative rights of the parties and to ascertain the damages sustained by the landowner, or the latter may sue for damages. *Blackwell, etc., R. Co. v. Bebout* (Okla.), 14-1145.

After institution of condemnation proceedings. — After condemnation proceedings have been instituted for the purpose of ascertaining the rights of the parties for the appropriation of a right of way by a railroad company and of fixing the compensation to the landowner, such landowner cannot maintain an action at law to recover damages for the injury done to his property, and if such suit is brought it should be dismissed at the plaintiff's costs. *Blackwell, etc., R. Co. v. Bebout* (Okla.), 14-1145.

c. Injunction.

To prevent use before payment of damages. — The owner of land attempted to be taken for a public road may enjoin the use of the same for such purpose until his damages for the taking have been ascertained and paid or provision has been made for their payment, provided such injunction is sought before the public have acquired a prescriptive right to the land taken. *Kime v. Cass County* (Neb.), 8-853.

As remedy for incidental injuries. — Where property is not taken directly by a public undertaking, but an owner suffers some injury in an incidental right so that ordinary condemnation proceedings are impracticable, the owner will be left to his remedy at law and is not entitled to an injunction unless upon proof of insolvency or some other special circumstance. *Bronson v. Albion Tel. Co.* (Neb.), 2-639.

Erection of telephone line in street.

— An abutting owner who owns part of the fee in a city street will not be granted an injunction restraining the erection of telephone lines in a portion of the street in which he does not own the fee and upon which his property does not abut, where it appears that the telephone company is acting under a license granted by the city. *De Kalb County Tel. Co. v. Dutton* (Ill.), 10-464.

Evidence. — Evidence reviewed, in an action by a street railway company against a railroad company to enjoin the defendant from interfering with an abandoned roadbed claimed by the defendant as its right of way, and held sufficient to show that the plaintiff has a prior right to the use of the roadbed. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co.* (N. Car.), 9-683.

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Jurisdiction to restrain criminal prosecution, see *INJUNCTIONS*, 2 f.

Jurisdiction to vacate judgment at law, see *JUDGMENTS*, 9 a.

Masters in chancery, see *MASTERS IN CHANCERY*.

Necessity of cross bills in suit for accounting, see *ACCOUNTS AND ACCOUNTING*.

Pleading statute of limitations in equity suit, see *LIMITATION OF ACTIONS*, 8 b (1).

Power to award exemplary damages, see *DAMAGES*.

Power to compel removal of railway from street, see *STREETS AND HIGHWAYS*, 5 f.

Proceeding to set aside tax sales, see *TAXATION*, 10 e.

Relief from usurious contract, see *USURY*, 2 c.

Relief on ground of mistake, see *BOUNDARIES*, 2.

Remedy for nuisance, see *NUISANCES*, 6 b.

Right of owner of equitable title to sue in justices' court, see *JUSTICES OF THE PEACE*, 2.

Right to sue at law on decree in equity, see *JUDGMENTS*, 12.

Specific performance of contracts, see *SPECIFIC PERFORMANCE*.

Taking additional proofs after demurrer to answer, see *INJUNCTIONS*, 3 d.

Subrogation in equity, see *SUBROGATION*.

Waiver of right to trial in equity by failure to transfer cause to equity docket, see *TRIAL*, 1.

1. EQUITABLE MAXIMS.

He who seeks equity must do equity.

— In a suit in equity to enforce rights granted by a decree in a former suit, the rule that he who seeks affirmative relief in equity must do equity requires that the plaintiff shall stand, not upon the decree in his favor entered through mistake, but upon the merit or lack of merit in the cause of action upon which the decree was entered. *Bank of Fayetteville v. Lorwein* (Ark.), 6-202.

Equity suffers no wrong without a remedy. — In applying the maxim "there is no wrong without a remedy," the courts of law and equity as well must regard wrong, so called, which is not remediable because of

the statute on the subject as not wrong at all in a judicial sense. *Rowell v. Smith* (Wis.), 3-773.

2. EQUITY JURISDICTION.

a. In general.

Nature of question of jurisdiction. —

The question of equity jurisdiction relates, technically, to power itself, but in the broader sense, to when such power should or should not be used. *Wadhams Oil Co. v. Tracy* (Wis.), 18-779.

Legal enactments binding on courts of equity. — Courts of equity are as much bound by positive enactments of law as are courts of law. *Allen v. Kitchen* (Idaho), 18-914.

Legal title to land. — Where the question of legal title to land is incidental to other elements calling for the exercise of equitable remedies, equity will take jurisdiction. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

Complete relief. — Where a court of equity acquires jurisdiction for any purpose it will, as a general rule, determine the whole cause, although in so doing it may decide questions which, standing alone, would furnish no basis of equitable jurisdiction. *Sumner v. Staton* (N. Car.), 18-802.

Where on bill to set aside a deed and a will on the ground of fraud, it appears that the fraudulent legatee and grantee is also the executor under the will, a court of equity, having acquired jurisdiction over the person and subject-matter, will not only set aside the fraudulent deed, but will declare the defendant a trustee for the benefit of the heirs and next of kin, and enjoin him, and those claiming under him, from setting up title under the will, and enter such other interlocutory orders regarding the requirement of a bond, and the like, as may be deemed necessary to preserve the rights of all parties, pending an application to the probate court to remove the executor. *Sumner v. Staton* (N. Car.), 18-802.

Unconscionable conduct or result. —

The exclusion of a plaintiff from the peculiar favors of equity results equally where his conduct has been unconscionable by reason of a bad motive, as where the result, in any degree induced by his conduct, will be unconscionable, either in the benefit to himself or the injury to others. *Larscheid v. Kittell* (Wis.), 20-576.

b. Absence of adequate remedy at law.

Remedy at law must be certain, full, and complete. — The adequate remedy at law which will prevent relief in equity must be as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. *Castle Creek Water Co. v. Aspen* (U. S.), 8-660.

The adequate remedy at law which will prevent relief in equity must be a full and complete remedy, and one that is accommodated to the wrong which is to be redressed by it.

It is not enough that there is some remedy at law; it must be as complete, practical, and efficient to the ends of justice and its prompt administration as the remedy in equity. *Sumner v. Staton* (N. Car.), 18-802.

Remedy at law inadequate. — The wrong done a railroad company by ticket brokers who purchase and resell on a large scale its nontransferable, reduced rate tickets, and assert their intention to continue to do so, is not one for which there is an adequate remedy at law, but is a proper subject for equitable intervention. *Bitterman v. Louisville, etc., R. Co.* (U. S.), 12-693.

Although a court of equity will not entertain a bill the sole purpose of which is to set aside a will on the ground of fraud, it will take jurisdiction of a bill filed for the purpose of converting the sole residuary legatee under a will into a trustee *ex maleficio*, where it is alleged that such legatee has not only procured the testamentary provision in his favor by fraud and undue influence, but also, prior to the death of the testator, fraudulently induced and influenced the latter to convey property to him by deed. In such a case the probate court would be without jurisdiction to grant relief against the fraudulent deed, and, consequently, the rule that a court of equity will not assume jurisdiction where the party applying for relief has an adequate remedy at law, has no application. *Sumner v. Staton* (N. Car.), 18-802.

When objection must be raised. — Objections to jurisdiction in equity on the ground of an adequate remedy at law will not be entertained unless made within a reasonable time after bill filed. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

c. Prevention of multiplicity of suits.

In general. — The aid of a court of equity cannot be invoked where the remedy at law is plain, adequate, and complete; nor has any court the right to infringe upon the wholesome doctrine of multifariousness which prevents a mingling in one suit of entirely distinct and separate causes of action between different parties. Subject, however, to these restrictions, the principle and rule is that where numerous parties are jointly or severally claiming against one, or where one is claiming against many liable jointly or severally, and the same title or right of defense will be called in question, and will be determinative of the issue for or against all, a case for the interposition of equity to avoid a multiplicity of suits is made without the aid of any independent equity. *Southern Steel Co. v. Hopkins* (Ala.), 16-690.

The rule that the prevention of a multiplicity of suits is a ground of equitable jurisdiction applies where one party may be sued several times in relation to the same subject-matter in its entirety, or in respect to some element or elements thereof, but does not apply where each of the parties to a joint and several obligation is liable to be sued independently. *Johnson v. Swanke* (Wis.), 8-545.

Necessity of privity or joint action.

— Although the unity of claim or defense which authorizes the interposition of a court of equity to prevent a multiplicity of actions generally or frequently arises from privity or joint action by or between the many, it may also arise from the nature of the transaction or the situation and relation of the parties, independent of all privity or joint action, and therefore the application of the principle is not limited to cases where privity or joint action exists. *Southern Steel Co. v. Hopkins* (Ala.), 16-690.

Infringement of right to jury trial.

— Where circumstances exist authorizing a resort to equity by suit in the nature of a bill of peace to avoid a multiplicity of actions, the allowance of the suit is no infraction of the constitutional right of trial by jury, for that guaranty refers to, and is co-extensive only with, the common-law right then existing, and it was always a principle of the common law that the trial by jury must give way to an appeal to equity when, from the nature of the situation, the transaction to be investigated, and the relation of the parties to that transaction, the ordinary proceeding at law would not answer sufficiently the purpose of administering justice. *Southern Steel Co. v. Hopkins* (Ala.), 16-690.

Multiplicity of actions for negligence. — A bill in equity which alleges that an explosion occurred in a coal mine, killing one hundred and ten persons; that the several administrators of the persons killed have brought separate actions against the party filing the bill, as owner and operator of the mine, for damages, on the ground of negligence; that if such actions are allowed to proceed at law the party filing the bill will be ruined in costs and expenses, even though it is successful in every action, since the plaintiffs in such actions are all insolvent and unable to pay the costs taxed against them if unsuccessful; that the actions are pending and will be called for trial in different courts at the same time, by reason whereof it will be impossible for the party filing the bill to present proper defenses to them all; and that such party has a defense to all of said actions, which will be put forward in each case, and which will be determinative of all alike; and which asks that the prosecution of such actions be enjoined pending the determination of the defense thereto, has equity on the ground of preventing a multiplicity of suits, and cannot properly be dismissed on motion for want of equity. *Southern Steel Co. v. Hopkins* (Ala.), 16-690.

d. Mistake as ground for equity jurisdiction.

Mutual mistake held remediable. — Mutual mistake, either of fact in making a contract or of law or fact in reducing the same to writing, is remediable in the absence of a waiver of the right in that regard or estoppel to the assertion of it. *Rowell v. Smith* (Wis.), 3-773.

The maxim, *ignorantia juris non excusat*, has no application when, under a mutual mistake and misapprehension, one party purchases from another property which the purchaser already owns. *Houston v. Northern Pac. R. Co.* (Minn.), 18-325.

Mistake of law. — The general rule that one cannot obtain affirmative relief, or defend himself against an otherwise well-founded claim, on the bare ground of mistake of law, is relaxed where its enforcement will cause great injustice. *Riggs v. Warren* (Mass.), 20-1244.

Where the beneficiary under a testamentary trust gives a release of claims against the estate in consideration of a void note given by the trustees for future payment, the transaction being designed to avoid forcing the trust property on a depressed market, and the parties believe the transaction to be valid, and no loss to the estate is entailed thereby, the beneficiary's right to rescind the release and receive the sum due him from the estate is not precluded because the mistake is one of law. *Riggs v. Warren* (Mass.), 20-1244.

What party alleging mistake must show. — A written contract is presumed to contain the final agreement and to express the real intent of the parties; and when a mistake in such a contract is claimed by a party, the burden rests upon him to establish by clear and convincing evidence that the writing does not contain the agreement actually entered into by the parties, that there is a mistake as to a material fact, that the mistake is mutual, and that it did not occur by his negligence. *Grieve v. Grieve* (Wyo.), 11-1162.

A bill by a beneficiary under a testamentary trust to cancel a release of his claim against the estate given in consideration of a note for the sum he was entitled to in cash, on the ground of mutual mistake of the parties as to the validity of the transaction, is not bad for failing to show that he had a right to rely on his cotrustees' or on his own belief as to such validity, where the transaction was entered into to give him his legal rights and to avoid loss to the estate by forcing its property on a depressed market, and where no loss appears to have resulted to the estate or to the remaindermen. *Reggio v. Warren* (Mass.), 20-1244.

Mistake the result of negligence or not mutual. — A court of equity will not relieve a party against a mistake in a written contract where it appears that the mistake, if any, was one that the most ordinary care would have guarded against, and the party does not claim to have read the portion of the contract alleged to be erroneous, or to have been misled in any way as to its contents. *Grieve v. Grieve* (Wyo.), 11-1162.

Equity will rarely relieve a party from the performance of his contract on the ground that it was entered into on his part through mistake, the mistake not being mutual, and especially where the mistake was the result of negligence, or could have been avoided by the exercise of reasonable diligence on his

part. *Vallentyne v. Immigration Land Co.* (Minn.), 5-212.

e. Laches as barring relief in equity.

Elements of laches. — The essential elements of laches stated. *Selden v. Kennedy* (Va.), 7-879.

Analogy of statute of limitations. — In courts of equity the estoppel of laches takes the place of statutes of limitation, and they apply it in analogy to the limitation of the like action at law. *Horton v. Stegmyer* (U. S.), 20-1134.

A mere delay for any length of time short of a period sufficient to extinguish a right under the statute of limitations does not bar an action in equity to vindicate such right. *Rowell v. Smith* (Wis.), 3-773.

When party is chargeable with knowledge. — In applying the doctrine of laches the party is chargeable with knowledge of the facts, if the circumstances were such as should have induced inquiry, and the means of ascertaining the truth were readily available on such inquiry. *Ater v. Smith* (Ill.), 19-105.

Jury's finding against laches sustained. — The evidence considered in an action to enjoin the further prosecution of an application by the defendant for incorporation under a corporate name alleged to infringe on the plaintiff corporation's name and held to have authorized the jury to find that there had been no such laches on the part of the plaintiffs as to bar them from a right to equitable relief. *Creswill v. Grand Lodge* (Ga.), 18-453.

f. Complication of accounts.

Long account. — Where the remedy at law and the remedy in equity involve an accounting and the consideration of many items, the remedy in equity is more complete and efficient and better adapted to attain the ends of justice than the remedy at law. *Castle Creek Water Co. v. Aspen* (U. S.), 2-660.

Account involving merely proof and calculation. — An action against a carrier for the recovery of money paid on overcharges of freight and for failure to furnish cars according to agreement involves a mere matter of proof and calculation, and there is no such complication of accounts as gives equity jurisdiction. *Terrell v. Southern R. Co.* (Ala.), 20-901.

g. Miscellaneous grounds of equity jurisdiction.

Fraud. — Equity will interfere to grant relief where necessary to prevent the consummation of a fraud. *Adams v. Gillig* (N. Y.), 20-910.

Recovery of legacy. — A court of equity has jurisdiction of a proceeding to recover a legacy, even though a bond has been given to pay the debts and legacies. *Matthews v. Targarona* (Md.), 10-153.

Enforcement of decree for payment of money. — A decree for the payment of

money may be enforced in chancery proceedings for contempt, even though an execution might also have issued. *Jastram v. McAuslan* (R. I.), 17-320.

Protection of political rights. — Upon the principle that courts of equity cannot interfere by injunction to protect political, as distinguished from civil rights, a court of equity has no jurisdiction to restrain, at the suit of a voter and taxpayer, the use at an election of voting machines duly authorized to be used by the county board of supervisors. *United States Voting Machine Co. v. Hobson* (Ia.), 10-972.

Supervision of award at exposition. — In the absence of fraud, accident, or mistake, a court of equity will not interfere with an award made to an exhibitor at an exposition, under the scheme of which a board is constituted a special tribunal for the final determination of awards, and will not compel the exposition company to change its records relating to such award or enjoin the publication of the true report of its proceedings. *Borden's Condensed Milk Co. v. Louisiana Purchase Exposition Co.* (U. S.), 15-189.

Where an exhibitor at an exposition enters several articles in a single group and asks for an award on the exhibit as a collective one, but instead received separate awards on the articles, the court cannot decree a collective award and thereby assume the functions of the special tribunal which alone has authority to make such an award. *Borden's Condensed Milk Co. v. Louisiana Purchase Exposition Co.* (U. S.), 15-189.

3. GENERAL PRINCIPLES OF PLEADING AND PRACTICE.

a. The bill.

Parties. — A devisee under a will alleged to have been procured by fraud and undue influence, is not a proper party to a suit in equity by the heirs of the testator to charge the residuary legatee as a trustee *eo maleficio*, on the ground of fraud and undue influence in procuring the execution of the will and also of certain deeds conveying the testator's real property. As regards the devisee, the only remedy of the heirs is in the probate court. *Sumner v. Staton* (N. Car.), 18-802.

Multifariousness. — A bill in equity by the receiver of a national bank against persons who were directors of the bank at various times, which alleges the commission of a series of negligent or wrongful acts extending over a period of several years, is not multifarious as to defendants who were directors during the whole of the period covered by the allegations of the bill, but is multifarious as to defendants who were not directors at the time of the commission of the alleged negligent or wrongful acts. *Emerson v. Gaither* (Md.), 7-1114.

A bill of equity by a railroad company to enjoin seven ticket brokers or scalpers from purchasing and reselling the unused portions of the complainant's tickets is not multi-

furious for misjoinder of parties and causes of action where it appears that the acts complained of as to each defendant are of like character, that their operation upon the rights of the complainant is identical, that the relief sought is the same as to all defendants, and that the defenses that may be interposed are common to each defendant and involve like legal questions. *Bitterman v. Louisville, etc., R. Co.* (U. S.), 12-693.

Averments assailing title or right. — In assailing a *prima facie* right or title, by a bill in equity, the plaintiff must aver and prove facts sufficient to overcome it. Ordinarily he cannot otherwise put the defendant to the proof of a perfect, indefeasible title or right. *Hardman v. Cabot* (W. Va.), 9-1030.

Prayer for relief. — A prayer for general equitable relief, coupled with one for specific relief, cannot be extended so as to warrant the granting of relief not embraced within and comprehended by the allegations of fact contained in the pleading. *Vila v. Grand Island Electric Light, etc., Co.* (Neb.), 4-59.

b. Amendments.

When permitted, in general. — When a court will permit an amendment of equity pleadings. *Ratliff v. Sommers* (W. Va.), 1-970.

In Florida, where no replication has been filed to the answer, equity rule No. 42 gives the complainant the right, upon motion or petition without notice, to obtain an order from the court for leave to amend his bill, on or before the next succeeding rule day, with or without payment of costs, in the discretion of the court. *Long v. Anderson* (Fla.), 5-846.

Curing multifariousness. — It is not necessary to dismiss a multifarious bill, as the plaintiff may be granted leave to amend so as to relieve the bill of the objection. *Emerson v. Gaither* (Md.), 7-1114.

c. Cross bills.

Addition of parties. — Where a cross bill seeks affirmative relief, and shows that certain persons are necessary parties, and that they have an interest in the subject-matter in dispute between the parties to the original bill, they are properly added. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

New issues. — A cross bill may introduce new issues, it being only necessary that the facts set out shall be germane to the subject of the bill. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

Waiver of objections. — The objection that a cross bill is not germane to the original bill is waived by a general answer to the cross bill. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

d. Taking testimony.

Extension of time. — The matter of extending the time for the taking of testimony in an equity suit is within the discretion of the trial court, and the determination of this

question will not ordinarily be disturbed on appeal in the absence of an abuse of judicial discretion. *Long v. Anderson* (Fla.), 5-846.

Where a court has granted an extension of the time for taking testimony in an equity suit, and the defendant is prevented from taking testimony within such time by reason of the absence of the master in chancery appointed to take the testimony, it is an abuse of judicial discretion for the chancellor to refuse a further extension of the time for taking testimony. *Long v. Anderson* (Fla.), 5-846.

Failure to answer interrogatories. — Under the Wyoming statute providing that answers to interrogatories may be enforced by a nonsuit, etc., it is within the sound discretion of the court whether the plaintiff shall be nonsuited for failure to answer interrogatories, and where the record in no way discloses what guided the court in the exercise of discretion, the appellate court cannot say that in refusing to enter a nonsuit there was an abuse of discretion. *Horton v. Driskell* (Wyo.), 3-561.

e. Withdrawal of bill filed by intervenor.

Discretion of court to permit. — In a suit brought by a waterworks company in a federal Circuit Court to enjoin a municipal corporation from depriving the complainant of its rights under an existing contract between the two corporations, where another waterworks company has intervened as the party complainant and has filed its original bill in the nature of a supplemental bill, it is within the discretion of the Circuit Court to permit the withdrawal of such pleading and the striking out of testimony taken thereunder, and the exercise of that discretion will not be revised by the Supreme Court except for gross abuse. *Vicksburg v. Vicksburg Waterworks Co.* (U. S.), 6-253.

f. Decrees.

Partly final and partly interlocutory. — A decree may be partly final and partly interlocutory; final as to its determination of all issues of law and fact, and interlocutory as to its mode of execution. A final decree disposing of all the substantial equities of the case is not made interlocutory by the mere reservation of the right to direct the mode of its execution. *Moody v. Muscogee Mfg. Co.* (Ga.), 20-301.

Decree framed by Supreme Court. — A decree framed by the Supreme Court, and entered by the Superior Court in pursuance of a discretion of the Supreme Court, is, in effect, a decree of the latter court. *Jastram v. McAuslan* (R. I.), 17-320.

4. BILLS OF REVIEW.

a. In general.

Purpose of bill. — The purpose of a bill of review stated. *Watkinson v. Watkinson* (N. J.), 6-326.

Leave to file. — When it is sought to reverse a decree by a bill of review upon the

discovery of some new matter, a leave of the court must first be obtained by petition, supported by affidavit, that the evidence is not only new, but could not have been discovered by reasonable diligence before the hearing. *Watkinson v. Watkinson* (N. J.), 6-326.

Time for filing. — Although there is no express statutory limitation as to the filing of bills of review, the analogous limitation of the right of appeal should govern, and a bill of review cannot be filed after the lapse of three years from the final decree, except in case of new or newly discovered matter. *Watkinson v. Watkinson* (N. J.), 6-326.

b. Jurisdiction of bill.

Jurisdiction of trial court after appeal. — After a decree in equity has been reversed by an appellate court and the cause remanded for further proceedings, the trial court has discretionary jurisdiction to entertain a bill of review based upon newly discovered material evidence. *Safe Deposit, etc., Co. v. Gittings* (Md.), 5-941.

Normally, a bill of review is addressed to the court where the final decree is entered and which is proceeding with its execution, and although such final decree has been ordered by an appellate court, the lower court, when freed by the appellate court from its obligation to execute the decree as ordered, should ultimately pass upon the merits of an application for leave to file a bill of review. *Novelty Tufting Machine Co. v. Buser* (U. S.), 14-192.

After a decision has been rendered by an appellate court and the cause remanded to the court below, the latter court has no authority to entertain a bill of review for error of law apparent on the face of the judgment. The proper remedy of the party alleging error in such a case is by direct application to the appellate court for an amendment of the judgment. *Hunter v. Nelson* (N. Car.), 18-721.

c. Grounds of bill.

In general. — The grounds of a bill of review stated. *Watkinson v. Watkinson* (N. J.), 6-326.

If upon a petition to a federal Circuit Court of Appeals for leave to file in the Circuit Court a bill of review in a cause in which a decree has been entered upon the direction of the Court of Appeals, it appears strongly to the court that the decree is probably contrary to the justice and right of the case, and there has been no negligence or other fault on the part of the party aggrieved, the appellate court will release the lower court from its obligation to observe the former's mandate to the extent of allowing the lower court to entertain the application and decide upon its merits; but not otherwise, as the decree of the appellate court ought not, for light reasons, to be disturbed. *Novelty Tufting Machine Co. v. Buser* (U. S.), 14-192.

Newly discovered evidence. — Facts reviewed in a petition for leave to file a bill to review, on the ground of newly-discovered evidence, a decree in equity which had been

reversed and remanded on appeal, and held to show that the trial court exercised sound discretion in refusing such leave, since the petition was filed by executors and was based upon evidence which was known to their testator, but which he merely failed to remember when testifying on the original hearing. *Safe Deposit, etc., Co. v. Gittings* (Md.), 5-941.

Where in a suit for the infringement of letters patent the defense that there had been a prior public use by the defendant of substantially the same invention more than two years before the supposed invention or inventions for which the patents were granted, is sustained by the Circuit Court of Appeals upon the production of an evidently old machine, and of photographs which were shown to have been taken of it many years before, while it was in the possession of the defendant, and the testimony of witnesses who while then in the employment of the defendant used the machine in his business, a bill of review will not be granted for newly discovered evidence consisting of the testimony of witnesses who were at different times in the employment of the defendant and are expected to testify that during the times they were so employed they did not see or know of such a machine, especially where it appears that if the same effort had been made to secure the testimony of these witnesses before the hearing of the cause as has been displayed since the decision, there would have been as good a chance to secure it then as later. *Novelty Tufting Machine Co. v. Buser* (U. S.), 14-192.

EQUITY OF REDEMPTION.

See **MORTGAGES AND DEEDS OF TRUST**, 12.
Liability to execution, see **EXECUTIONS**, 4.
Right to dower in, see **DOWER**, 1.

ERASURES.

Revocation of will by erasure, see **WILLS**, 6 b (6).

ERROR.

See **APPEAL AND ERROR**.
Erroneous exercise of jurisdiction as ground for collateral attack on judgment, see **JUDGMENTS**, 10.
Error of judgment as negligence, see **MASTER AND SERVANT**, 3 c (1); **STREET RAILWAYS**, 8 a (6).

ESCAPE, PRISON BREAKING, AND RESCUE.

Arrest of escaped prisoner without warrant, see **ARREST**, 2 a.
Proof of participation in escape, see **ACCOMPLICES**.
Right to speedy trial waived by escape, see **CRIMINAL LAW**, 6 c (1).

Reconfinement for remainder of term. — The Wisconsin statutes in reference to a prison breach and escape do not change but are declaratory of the common law that a prisoner escaping while serving sentence is liable to recapture and reconfinement to serve out his sentence, the time of his voluntary absence not being counted in his favor, and that judicial direction other than that contained in the original judgment is unnecessary. *In re McCauley* (Wis.), 3-414.

Right to trial for escape. — Under the Wisconsin statutes for the offense of escape or prison breach and escape, a trial and sentence are necessary in order to punish the defendant. *In re McCauley* (Wis.), 3-414.

Assisting escape. — On a trial for furnishing prisoners with implements with which they broke out of jail, an objection that there were no persons lawfully committed to and detained in the jail at the time the alleged offense was committed cannot be raised for the first time on appeal. *State v. Ballew* (S. C.), 18-569.

ESCHEAT.

Contest of will by state to enforce right of escheat, see **WILLS**, 7 e (1).

ESCROW.

Verbal condition of escrow, see **FRAUDS**, **STATUTE OF**, 4 a.

Delivery to agent of party. — A delivery in escrow may be made to the agent of the grantee or payee, provided there is nothing inconsistent with the agent's duty to his principal in holding the instrument subject to the conditions agreed on, and rights of third persons do not intervene. *J. I. Case Threshing Mach. Co. v. Barnes* (Ky.), 19-246.

Doctrine of relation back to first delivery. — The doctrine of relation back to the first delivery of a deed deposited in escrow, so as to give the deed effect from that time, is allowed only in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery, and where no injury will result to third parties. Such doctrine cannot be applied to defeat the intervening claims of creditors of the grantor. *May v. Emerson* (Ore.), 16-1129.

Payments to depositary. — Where an escrow agreement requires the vendee of real property to make payments on account of the purchase price to the depositary of the deed, the latter being a mere stakeholder without any personal interest in the fund, the vendee is bound to pay him only so long as the vendor alone is the party in interest, and when a creditor of the vendor has laid hold of the latter's interest in the property, and the vendee has notice of that fact, he is bound by the new conditions. The docketing of a judgment against the vendor, however,

is not constructive notice to the vendee, and the latter is entitled to credit for all payments made to the depositary until he has actual knowledge of the lien. *May v. Emerson* (Ore.), 16-1129.

ESTATES.

See **LIFE ESTATES; REMAINDERS.**

Merger of estates. — While the general rule is that when a life estate is acquired by the owner of the fee it is merged in the fee to the destruction of intervening contingent remainders, merger does not take place in equity if it is opposed to the intention of the parties either actually proved or implied from the fact that merger would be against the interest of the party in whom the several estates or interests have united, and does not take place at law when it is affirmatively proved to be opposed to the intention of the parties. *McCreary v. Coggeshall* (S. Car.), 7-693.

ESTOPPEL.

1. IN GENERAL.
2. BY DEED.
3. EQUITABLE ESTOPPEL OR ESTOPPEL IN PAIS.
4. INCONSISTENT POSITIONS.

Accepting benefit under will as precluding right to contest will, see **WILLS**, 7 e (1).

Application of doctrine of estoppel to infants, see **INFANTS**, 3.

Asserting validity of indictment after dismissal as invalid, see **CRIMINAL LAW**, 5 c.

Assertion of individual interest by administrator, see **EXECUTORS AND ADMINISTRATORS**, 10 e.

Claiming breach of condition of insurance policy, see **INSURANCE**, 3 c (4).

Claiming mechanic's lien, see **MECHANICS' LIENS**, 9.

Claiming public lands withdrawn from sale, see **PUBLIC LANDS**.

Contesting claim of settlement of insolvent building association, see **BUILDING AND LOAN ASSOCIATIONS**, 5.

Dedication by estoppel, see **DEDICATION**.

Denial by agent of principal's title, see **AGENCY**, 2.

Denial by bailee of bailor's title, see **BAILMENT**, 6.

Denial by landlord of tenant's rights to remove crops, see **CROPS**, 3.

Denial of assignability of option to purchase demised premises, see **LANDLORD AND TENANT**, 3 f.

Denial of authority of corporate officers, see **CORPORATIONS**, 7 b.

Denial of consent to surgical operation, see **PHYSICIANS AND SURGEONS**, 6 b.

Denial of existence of partnership, see **PARTNERSHIP**, 1 c.

Denial of forged signature, see **FORGERY**, 2.

Denial of indebtedness of municipality, see **MUNICIPAL CORPORATIONS**, 8 a.

Denial of landlord's title, see **LANDLORD AND TENANT**, 8.

Denial of navigability of water, see **CANALS**, 2.

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1. IN GENERAL.

Application of doctrine to public officers. — No estoppel can grow out of dealings with public officers of limited authority. *State v. Goldthait* (Ind.), 19-737.

Estoppel against estoppel. — Where the plaintiff has sued for a settlement of the partnership, and the defendant has pleaded settlement in bar of the suit, the plaintiff is estopped from thereafter asserting that there has been a settlement, and the defendant that there has not been one. The two estoppels destroy each other, and set the matter at large. *Chretien v. Giron* (La.), 5-845.

Pleading estoppel. — An estoppel must be pleaded in order to enable a party to avail himself of it on the trial, and must be pleaded with particularity in order to constitute either a cause of action or defense. No intendments are indulged in favor of such plea, but it is incumbent upon the party pleading to aver all the facts essential to its existence. *Cooper v. Flesner* (Okla.), 20-29.

2. BY DEED.

To assert paramount title. — One of two grantees of a common grantor may assert as against the other a title different from or paramount to that derived from the common grantor. *Philadelphia Brewing Co. v. McOwen* (N. J.), 16-648.

3. EQUITABLE ESTOPPEL OR ESTOPPEL IN PAIS.

Change of position as a prerequisite. — In order to constitute an equitable estoppel it must appear that the person sought to be estopped has said or done something in reliance on which the person in whose favor

the estoppel is invoked has acted or refrained from acting, to his prejudice. *Maryland Tel., etc., Co. v. Ruth (Md.)*, 14-576.

Application of doctrine in criminal law. — A member of a jury commission, who by his own nonfeasance or active misfeasance in office as a member of such commission has rendered a selection of the jury list so irregular that as to others it might be invalid, cannot take advantage of his own wrongdoing when called upon to answer a charge presented by the grand jury selected from such list. *State ex rel. Clark v. District (Mont.)*, 3-841.

4. INCONSISTENT POSITIONS.

Inconsistent positions — Estoppel to assert truth. — One who acts inconsistently with the truth under such circumstances that, as a reasonable person, he ought to anticipate that another person is likely to change his position in reliance on such conduct, is estopped to assert the truth to the injury of such other person. *Marling v. Nommensen (Wis.)*, 7-364.

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1. JUDICIAL NOTICE.

a. Of legislation.

Judicial notice of foreign laws, see FOREIGN LAWS, 1.

In general. — Courts take judicial notice of the public and private official acts of the legislature. *French v. Senate* (Cal.), 2-756,

Federal statutes in state courts. —

The state courts will take judicial notice of the public acts of Congress, and therefore the plaintiff in an action against an interstate carrier which claims a limitation of liability in the bill of lading may invoke the application of the Carmack Amendment to the Interstate Commerce Act (St. L. 594; Fed. St. Ann. Supp. 1909, p. 273) forbidding such limitation, though the plaintiff does not show in his pleadings that he relies on the Carmack Amendment. Louisville, etc., R. Co. v. Scott (Ky.), 19-392.

Adoption of local option law. — The adoption of the local option law by the voters of a particular county is a fact which must be proved in a prosecution for selling liquor in such county, and it cannot be judicially noticed unless the result of the election is required to be made a matter of record in the court having original jurisdiction of a cause involving the inquiry. Gay v. Eugene (Ore.), 18-188.

Municipal ordinances. — In a trial before a municipal court, the recorder or other presiding judge may take judicial notice of ordinances of the city defining offenses against the same. Hill v. Atlanta (Ga.), 5-614.

Neither the Supreme Court nor any other court than a municipal court can take judicial cognizance of municipal ordinances. Hill v. Atlanta (Ga.), 5-614.

The Circuit, Court, on a writ of review to a municipal court, will take judicial notice of an ordinance of which the municipal court was obliged to take cognizance. Gay v. Eugene (Ore.), 18-188.

Courts will not take judicial notice of municipal ordinances, and the objection that an ordinance is in conflict with a prior ordinance not repealed by it will not be reviewed on appeal where the prior ordinance was not offered in evidence or referred to in the trial court. St. Louis v. Liessing (Mo.), 4-112.

b. Of executive orders.

Under Montana Code of Civil Procedure. — Under the provisions of the Montana Code of Civil Procedure, a court takes judicial notice of executive orders creating the Fort Missoula reservation. State v. Tully (Mont.), 3-824.

c. Of court records.

In other proceedings. — Courts cannot take judicial notice of their own records in other causes pending therein, even between the same parties. Murphy v. Citizens' Bank (Ark.), 12-535.

Judicial notice of records by appellate court, see APPEAL AND ERROR, 12 g.

d. Of public officers.

Surveyor-general. — A state court will take judicial notice of the surveyor-general of the public lands in the district included in such state. Kellogg v. Finn (S. Dak.), 18-363.

e. Of customs.

Abbreviations. — Courts take judicial notice of the meaning of "F. O. B. Cars." Vogt v. Schienebeck (Wis.), 2-814.

Courts will take judicial notice that the initials R. M. L. D., when used in the records of the internal revenue office to designate the business for which a permit has been issued, mean "retail malt liquor dealer." Topeka v. Stevenson (Kan.), 17-491.

Practice of life insurance companies.

— The court will take judicial notice of the uniform and generally known custom of life insurance companies to require as a condition precedent to the issuance of an insurance policy a properly signed and executed application therefor, together with an authenticated medical examination of the applicant. Taylor v. Grand Lodge (Minn.), 11-260.

Customs of traveling salesmen. — A court cannot take judicial notice of a custom among traveling salesmen and their employers of regarding as sales any soliciting of sales which the employer accepts or fills, but where the evidence of such custom is uncontradicted no error is committed by the court in assuming its existence. Schultz v. Ford (Ia.), 12-428.

f. Of the calendar.

Sunday. — In a prosecution against a barber for doing business on Sunday, an information is sufficient if it alleges that on a specified date the defendant carried on the business of barbering on Sunday, though it does not allege in direct terms that the date specified was Sunday, as the court will take judicial notice of that fact. State v. Bergfeldt (Wash.), 6-979.

g. Of geographical facts.

Subdivisions of county, see VENUE, 2 d.

Location of town. — A court will take judicial notice of the location of a well-known town of the state, especially of a county seat, and of the distance from such town to a prominent business centre of another state, and will also take notice of the accessibility of such places to connecting railroads and the time between them by the usual routes and method of travel when such facts are sufficiently notorious to make their assumption safe and proper. Harper Furniture Co. v. Southern Express Co. (N. Car.), 12-924.

City streets. — The court cannot take judicial notice that an alleged street in which the plaintiff's decedent is claimed to have been injured is one of the public streets of the defendant city or within its corporate limits. Woodson v. Metropolitan St. R. Co. (Mo.), 20-1039.

Distance between towns. — Judicial notice will be taken that fourteen days is too long a time for the transportation of matter by express from the city of Erie, Pa., to the town of Lenoir, N. C., and the con-

sumption of so much time in the transportation of express matter between the two points shows *prima facie* that there is actionable negligence by the express companies in the performance of the contract of carriage. *Harper Furniture Co. v. Southern Express Co.* (N. C.), 12-924.

National military reservation. — A state court will take judicial notice that a national military reservation is situated in a certain county. *State v. Tully* (Mont.), 3-824.

Government land. — In a criminal prosecution defended on the ground that if any offense was committed it was on land exclusively under the jurisdiction of the United States, the court will take judicial notice of the fact of a conveyance to the United States for military purposes of land upon which a certain fort is situated, and the exclusion of a deed designed to show that fact is immaterial. The court cannot judicially know, however, in such a case, the precise metes and bounds of the land, and the defendant is entitled to introduce evidence to show the exact locality of the line as run on the ground. A fence or wall enclosing the land does not conclusively establish the correct boundary or show that the United States has abandoned possession of the land outside the enclosure. *Baker v. State* (Tex.), 11-751.

h. Of scientific facts.

Medical dictionary. — It is not error to receive a standard medical dictionary in evidence as an aid to the memory and understanding of the court. *State v. Wilhite* (Ia.), 11-180.

Vaccination. — While a court will not decide that vaccination is a preventive of smallpox, it will take judicial notice of the fact that this is a common belief. *Viemeister v. White* (N. Y.), 1-334.

A court will take judicial notice of the fact that there are opposing theories with regard to the propriety of vaccination. *Jacobson v. Massachusetts* (U. S.), 3-765.

Effect of loss of one eye. — The court will judicially notice that the destruction of the sight of one eye impairs the power of vision, but not that it impairs the sight of the other eye. *Gordon v. Northern Pacific R. Co.* (Mont.), 18-583.

i. Matters of common experience or public importance.

Judicial notice of abbreviations, see **ABBREVIATIONS**.

Matters of public policy, see **CONTRACTS**, 7 f. Meaning of "noon," see **TIME**.

Unhealthfulness of occupation, see **LABOR LAWS**, 1 a.

Value of money. — Courts take judicial cognizance of the value of money. In a prosecution for the larceny of certain United States treasury notes and national bank notes, where the particular bills which it is

claimed were stolen are offered in evidence, proof of their value is unnecessary. *State v. Pigg* (Kan.), 18-521.

Peace between United States and foreign country. — A state court will take judicial notes that the United States and Italy are at peace, so that the rule applicable to alien enemies will not defeat the right to recover for the wrongful death of an unnaturalized Italian resident of the state. *Trotta v. Johnson* (Ky.), 12-222.

2. RELEVANCY AND ADMISSIBILITY IN GENERAL.

Facts having rational value. — All facts having rational value are admissible unless some specific rule forbids. *Kirchner v. Smith* (W. Va.), 11-870.

Facts not in issue. — In an action for damages for personal injuries culminating in the amputation of a limb, no error is committed by the exclusion of testimony of a physician offered by the defendant, that the witness was present when the amputation was performed, the defendant not offering to prove by the witness any fact in issue in the case. *Smart v. Kansas City* (Mo.), 13-932.

Health of plaintiff suing for personal injuries. — In an action to recover damages for personal injuries, evidence of personal appearance and conduct, as indicating good health or the lack of it, is relevant, and such ordinary indications may be testified to by any competent person who was in a situation to have knowledge thereof. Such appearance, and the ability to labor before and after the injury, are ordinarily proper to be considered in determining the extent of such injury. *Federal Betterment Co. v. Reeves* (Kan.), 15-796.

Where it is claimed that the disability resulting from such injury is a continuing one, the period of time covered by such evidence must depend upon the circumstances of the case and the probability of intervening changes, and the determination thereof must be left to the sound discretion of the trial judge. *Federal Betterment Co. v. Reeves* (Kan.), 15-796.

Threats made to procure attendance of witness. — Evidence of threats made by a party to an action, or his agent, for the purpose of inducing a witness to attend and testify at the trial, is not admissible on behalf of the adverse party, where there is nothing to show that the party making the threats intended thereby to dissuade the witness from adding the adverse party, or attempted to induce him to testify to any particular state of facts. *Garrett v. St. Louis Transit Co.* (Mo.), 16-678.

Evidence relevant but too remote. — Relevant evidence may be so remote in its character as to justify the trial court in excluding it. *Lambert v. Hamlin* (N. H.), 6-713.

Evidence not material but leading to material inquiry. — An objection to a question which is not material to the issue but which, if answered in the affirmative,

would lead to a material inquiry, should be overruled. *Coburn v. State* (Ala.), 15-249.

Direct testimony as to intent.—Where, in an action for goods sold, it is material whether the buyer intended to accept the goods, he is competent to testify to his own intent, though his testimony is not conclusive and may be overcome by the circumstances attending the transaction. *Jarrell v. Young, etc., Co.* (Md.), 12-1.

Wife's testimony of nonaccess to prove illegitimacy.—A wife's testimony of nonintercourse with her husband cannot be admitted to bastardize her issue born after their marriage. *Godfrey v. Rowland* (Hawaii), 7-993.

3. HEARSAY EVIDENCE.

a. In general.

Circumstances of accident related to witness.—Where one is ejected from a railroad train as a trespasser, it is at least within the discretion of the court to refuse to allow a witness to testify to statements made to him by a stranger at the time and place of the accident as to the manner in which it occurred. *Dixon v. Northern Pac. R. Co.* (Wash.), 2-620.

Acts not in presence of witness.—A witness who was in San Francisco at the time of a certain person's death in New York cannot be asked whether such person committed suicide in New York, such testimony being hearsay. *Estate of Dolbeer* (Cal.), 15-207.

Statements by witness to third person.—A witness cannot be asked whether she had not said to her sister that a certain person had committed suicide, such testimony being hearsay. *Estate of Dolbeer* (Cal.), 15-207.

A witness cannot be asked whether she had not told another that a certain person had attempted to commit suicide while on a certain trip, the witness not having accompanied the latter on such trip, because such testimony is hearsay. *Estate of Dolbeer* (Cal.), 15-207.

Entries in books of account.—In an action by a bookkeeper against his employer to recover for services rendered, where the defendant pleads payment and supports his plea by evidence that he assigned a note to the plaintiff, the plaintiff cannot introduce in evidence his entry on the defendant's books containing statements made to the plaintiff by a third person concerning the transaction, as these statements are mere hearsay. *Mattingly v. Shortell* (Ky.), 8-1134.

Family history.—A witness may testify to such facts of family history as marriage, kinship, name, and death, where his knowledge of the subject is derived from intimate acquaintance with the family. *Hoyt v. Lightbody* (Minn.), 8-984.

Report made by witness.—Where a witness testifies that he made a correct report of a matter to another person but does not remember exactly what that report was, the testimony of the latter as to the fact re-

ported is admissible. *Hart v. Atlantic Coast Line R. Co.* (N. Car.), 12-706.

Striking out.—Hearsay evidence should be stricken out, though it was elicited on cross-examination by the parties objecting thereto. *State v. Osborne* (Ore.), 20-627.

When it becomes apparent in the course of a witness's examination that he has been giving hearsay testimony, it is proper for the court to order such testimony stricken from the record. *Lambert v. Hamlin* (N. H.), 6-713.

b. Testimony on former trial.

Foundation for such testimony.—The testimony of a witness on a preliminary examination cannot, in the absence of the witness, be proved at the trial of the defendant, unless a foundation therefor is laid by showing that the absent witness is dead, beyond the jurisdiction of the court, etc. *Maloney v. State* (Ark.), 18-480.

Before the testimony of a witness given at a former trial can be read in evidence by the state against a defendant in a criminal prosecution, over his objection, it must be made to appear that the witness who gave such testimony cannot, by the exercise of reasonable diligence, be produced. *State v. McClellan* (Kan.), 17-106.

In such a case the mere production of a subpoena which has been issued for the absent witness, with a return of *non est* thereon, without any further showing as to the residence or whereabouts of such witness or of the extent of the search made for him, is insufficient, and the introduction of such evidence under such circumstances is error. *State v. McClellan* (Kan.), 17-106.

Witness not found.—Oral testimony given by a witness on the trial of a cause may be given in evidence on a subsequent trial of the same cause, if it is shown that after diligent search the witness cannot be found, even though it is not proved that at the time of the second trial he is without the jurisdiction of the court. *Cuff v. Frazee Storage, etc., Co.* (Ont.), 8-466.

Proof of search for absent witness.—Where it is sought to prove an unsuccessful search for a witness in order to lay a foundation for the introduction of evidence given by him on a former trial of the same cause, answers to inquiries made as to his whereabouts are competent for that purpose, and are not to be treated as hearsay. *Cuff v. Frazee Storage, etc., Co.* (Ont.), 8-466.

Proof by stenographer's transcript.—On the second trial of an action the testimony given by witnesses at the first trial who are absent or deceased cannot be proved by a transcript of the testimony taken down and reduced to writing by a stenographer at the former trial, there being no proof other than the certificate of the stenographer that the transcript is a correct copy of the testimony of the witnesses. *Williams v. Sleepy Hollow Mining Co.* (Colo.), 11-111.

Proof by bill of exceptions.—Under the Missouri statute providing that "when-

ever any competent evidence shall have been preserved in any bill of exceptions in a cause, the same may be thereafter used in the same manner and with like effect as if such testimony had been preserved in a deposition in said cause," the testimony of a witness on a former trial, whose absence is not due to any other cause authorizing the admission of depositions, cannot be read from the bill of exceptions unless it appears that such witness is a resident of a county other than the one in which the trial is held. *O'Brien v. St. Louis Transit Co. (Mo.)*, 15-86.

4. CHARACTER OR REPUTATION.

General reputation for honesty. — In a civil action, evidence of the general reputation of one of the parties for honesty is not admissible, unless the proceeding is such as to put the character of the party for honesty directly in issue. *Mattingly v. Shortell (Ky.)*, 8-1134.

In an action by a bookkeeper against his employer to recover for services rendered, where the defendant pleads payment, which plea he supports by evidence that he assigned a note to the plaintiff, and the plaintiff denies that the note was given to him in payment of his claim, and supports his denial by evidence of his entries on the defendant's books concerning the transaction, and the defendant claims that such entries were made without his knowledge or consent, the character of the plaintiff is not in issue, and therefore he cannot introduce witnesses to testify as to his general reputation for honesty. *Mattingly v. Shortell (Ky.)*, 8-1134.

Particular instances of misconduct. — In an action for injury to a person's character and reputation, particular instances of misconduct on his part are not admissible in evidence, especially when the specific acts offered to be proved were committed after the happening of the wrongs giving rise to the action. *Columbia Nat. Bank v. MacKnight (D. C.)*, 10-897.

5. SECONDARY EVIDENCE.

In absence of foundation therefor. — Parol evidence of a letter written by one person to another, and of what was printed on the stationery used, is properly excluded, in the absence of any foundation being laid therefor. *Bush v. W. A. McCarty (Ga.)*, 9-240.

Writing innocently altered or destroyed. — Where a writing has been innocently altered or destroyed, and there is no suspicion of evil motive, and no doubt of the proof of its contents, there can be no danger in admitting secondary evidence of such contents and no reason for a rule excluding such evidence, though the alteration or destruction was voluntary. *Gibbs v. Potter (Ind.)*, 9-481.

Documents out of jurisdiction of court. — Secondary evidence of documents out of the jurisdiction of the court is not admissible merely upon proof of that fact,

even though the documents are the papers of a third party not interested in the pending controversy. It ought at least to appear that some effort has been made to procure the original documents. *Roll v. Everett (N. J.)*, 17-1196.

Secondary evidence of the contents of a written contract is not admissible, even when such instrument is in the possession of one who is not a party to the suit and who lives in another state, unless it is first shown that such instrument is lost or is beyond the control of the party wishing to prove the terms thereof. *Pringey v. Guss (Okla.)*, 8-412.

Telegram received by addressee. — In an action against a telegraph company, brought by the addressee of a telegram to recover damages for delay in its delivery, where there is no claim that there was any mistake in the transmission of the message or that the message delivered was not the very message received by the defendant from the sender, the presumption is that the message delivered is a correct reproduction of that received, and it is admissible in evidence in support of the complaint, notwithstanding the fact that the plaintiff has not produced or accounted for the absence of the written message delivered for transmission. *Collins v. Western Union Tel. Co. (Ala.)*, 8-268.

Carbon copies. — The different numbers or impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are duplicate originals, and either may be introduced in evidence without accounting for the non-production of the other. *International Harvester Co. v. Elfstrom (Minn.)*, 11-107.

6. EXPERIMENTAL EVIDENCE.

See also *ARSON*, 4.

Preliminary question for court. — Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court. *Spire v. State (Fla.)*, 7-214.

Discretion of court. — It is within the judicial discretion of the trial court to permit experiments relevant to the issue to be made before the jury during the trial, or to refuse to permit them, such court having first to determine whether or not such similarity of circumstances and conditions has been made to appear as to render said evidence competent; and the appellate court should decline to interfere with the ruling unless abuse of this official discretion is made to appear clearly. *Spire v. State (Fla.)*, 7-214.

Necessity that conditions be unchanged. — Evidence of an experiment whereby to test the truth of testimony that a certain thing occurred is not admissible where the conditions attending the alleged occurrence and the experiment are not shown to be similar. *Spire v. State (Fla.)*, 7-214.

Experiments in presence of jury. — The making of experiments by or in the presence of the jury is not favored by the courts. Evidence of this kind should be received with caution, and should be admitted only where it is obvious to the court, from the nature of the experiments, that the jury will be enlightened rather than confused. *Spire v. State* (Fla.), 7-214.

7. REAL OR OBJECT EVIDENCE.

Identity of object offered. — In an action to recover the price of hay sold, where the defendant claims that the hay was of a grade inferior to that required by the contract, it is not erroneous to refuse to permit him to exhibit to the jury two bales of hay, in the absence of evidence identifying such bales as part of the hay purchased by him from the plaintiff. *Whaley v. Vannatta* (Ark.), 7-228.

Paternity of infant. — Where the paternity of an infant is in issue, it is not improper to produce the infant and point out to the jury its resemblance to the putative father, though it would be better and more regular to have the likeness testified to by witnesses. *Rex v. Hughes* (Can.), 19-534.

Effect of such evidence on appeal. — Impressions made on the minds of the jurors in an appropriation case by a view of the premises are not of themselves evidence in the cause. Hence, a bill of exceptions which contains all the evidence given in court at the trial is, with the record otherwise complete, sufficient to present to the reviewing court the question of the weight of evidence. *Zanesville, etc., R. Co. v. Bolen* (Ohio), 10-658.

8. EXPERT AND OPINION EVIDENCE.

a. Opinions of witnesses in general.

Cross-examination of experts, see WITNESSES, 4 b.

Genuineness of mark made as substitute for written signature, see SIGNATURE.

Locomotive engineer as expert witness, see FIRES, 6.

Proof of age, see RAPE, 2 d (2).

Proof of foreign laws, see FOREIGN LAWS.

Proof of insanity, see INSANITY, 1; WILLS, 4 e (2).

Proof of intoxication, see DRUNKENNESS AND INTOXICATION, 2.

General rule. — The opinion of a witness is not admissible in evidence when all the facts and circumstances are capable of being clearly detailed and described so that the jurors may be able readily to form correct conclusions therefrom. *Central of Georgia R. Co. v. Goodwin* (Ga.), 1-806; *McCray v. State* (Ga.), 20-101.

The opinion of a witness has no place in a judicial investigation unless he possess, with regard to the particular subject of inquiry, a knowledge not acquired by ordinary persons. *State v. Maioni* (N. J.), 20-204.

In an action for negligence, opinion evidence held improperly admitted, the facts

being within the comprehension of the jury. *Coe v. Van Why* (Colo.), 3-552.

A witness cannot state his mere conclusion that others than himself knew the fact. *Bush v. W. A. McCarty Co.* (Ga.), 9-240.

Presumption in favor of trial court's ruling. — The question as to the admissibility of opinion evidence lies in the field of competency, and the action of a trial court in admitting such evidence should not be disturbed on appeal, except in case of a clear showing of error. *Hamann v. Milwaukee Bridge Co.* (Wis.), 7-458.

In an action tried before the court without a jury, the allowance or exclusion of questions calling for the opinion or conclusion of a witness is a matter which rests largely in the discretion of the trial court, and the exercise of such discretion will not be reviewed on appeal unless it is made plain that the court's ruling in admitting the evidence has worked an injury. *Nolan v. Nolan* (Cal.), 17-1056.

As to competency of employee. — Opinion evidence is not admissible to prove the competency of an employee to superintend the work of drilling holes for blasting and charging and exploding the blasts. *Johnson v. Caughren* (Wash.), 19-1148.

b. Expert evidence.

(1) In general.

Existence of facts as basis. — Expert testimony must be based upon supposed facts, of the existence of which there is evidence before the court. *Goken v. Dalugge* (Neb.), 9-1222.

Questions calling for the opinions of experts, on mere abstract matters of science, not predicated on or related to the facts established by the proofs in the cause, are incompetent. *State v. Maioni* (N. J.), 20-204.

Opinion based on personal knowledge. — Where a question under examination, and to be decided by the jury, is one of opinion, an expert witness may give his opinion thereon, based on the facts which he himself knows and has observed. *Yates v. State* (Ga.), 9-620.

Testimony as to grounds of opinion. — The jury are entitled to the facts on which an insanity expert bases his opinion, if the same are sought by the prosecution or the accused. *People v. Faber* (N. Y.), 20-879.

While a witness called to testify as to the value of land must confine his testimony to the market value of the land as a whole, he may take into account everything which goes to make up such value, and after he has given an opinion as to the value may be asked on his examination-in-chief to state the grounds of his opinion. *Neppach v. Oregon, etc., R. Co.* (Oregon), 7-1035.

Invading province of jury. — In an action against the owners of a mine to recover damages for negligence in using an unsuitable hoisting plant, where there is a conflict of evidence as to the state of repair of the hoisting machinery, questions put to

expert witnesses which allow them to assume that the machinery was not in good repair, when that question is solely for the jury, are improper. *Coe v. Van Why* (Colo.), 3-552.

In an action for damages for a personal injury followed by the amputation of a limb, where an issue of fact is raised as to whether the amputation was rendered necessary by the injury in question or by other causes, a hypothetical question put to a physician as an expert witness should be limited to the inquiry as to whether the injury complained of was a sufficient cause to require the amputation at the time it became necessary, and the jury must be left to determine whether such injury or other causes in fact necessitated the amputation. To allow the expert to state that "the injury precipitated the amputation" invades the province of the jury. *Smart v. Kansas City* (Mo.), 13-932.

Matters not relevant to case. — It is erroneous to admit expert testimony as to matters which are not relevant to the facts of the case. *Welch v. Carlucci Stone Co.* (Pa.), 7-299.

Hypothetical questions. — A hypothetical question need not embrace all of the evidence relating to the matter on which the opinion of the expert is desired. *State v. Crowe* (Mont.), 18-643.

In propounding hypothetical questions to expert witnesses, it is allowable for each party to the controversy to submit such questions upon the theory of the case contended for by the side propounding them. A question is not improper simply because it includes only a part of the facts testified to. If facts are testified to which are not believed to be true, or which are believed to be immaterial to the issue, there is no rule of law requiring that they be included in the question. *Hamblin v. State* (Neb.), 16-569.

It is not prejudicial error to exclude a question asked an expert where the question is hypothetical in form and includes some facts not in evidence. *Taylor v. Modern Woodmen* (Wash.), 7-607.

(2) Qualifications of Experts.

Medical witnesses, in general — A sufficient foundation is laid to entitle a medical witness to testify as to whether, in his judgment, a disease from which a certain person suffered was of recent origin, where the physician qualifies as an ordinary medical witness, it being the privilege of the opposing party to examine the witness subsequently as to his specific qualifications and experience concerning the treatment of the disease in question. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Physician not present when death occurred. — In an action on a policy of life insurance, the physician who attended the insured may testify as to the cause of his death, notwithstanding the fact that he was not present when the death occurred. *Chadwick v. Phoenix Accident, etc., Assoc.* (Mich.), 8-170.

Insanity expert. — An insanity expert who has observed a person may state his opinion without first stating his observed data; but the party offering the expert, for the purpose of showing the strength of the opinion, may require him to specify in detail the observations upon which it is based, and the opposite party also, in cross-examination, may call for the observations and probe the underlying facts to affect the strength of the opinion. *People v. Faber* (N. Y.), 20-879.

Value of services. — A physician cannot testify as to the value of medical services in a certain locality, when he admits that he does not know the customary charges for such services in that locality. *Duggar v. Pitts* (Ala.), 8-146.

Previous acquaintance with handwriting. — Under the Rhode Island statute, an expert witness called to prove a disputed signature need not have a previous acquaintance with the person's handwriting. *Municipal Court v. Kirby* (R. I.), 13-736.

Carpenter as expert witness. — A carpenter of thirty years' standing who has had experience in setting and repairing plate glass is competent as an expert witness to testify to his opinion as to the cause of a break in a plate glass window for which the landlord seeks to hold the tenant liable. *Drouin v. Wilson* (Vt.), 13-93.

Right to cross-examine. — In every case where a witness is called to give an opinion as evidence for the consideration of the jury, the opposing counsel should be allowed to cross-examine him concerning his competency and qualifications before he is permitted to give his testimony in chief. *Davis v. Pennsylvania R. Co.* (Pa.), 7-581.

Necessity that witness hear all testimony. — In an action for damages for a personal injury followed by the amputation of a limb, where an issue of fact is raised as to whether the amputation was rendered necessary by the injury in question or by other causes, a physician who has heard all of the testimony in the cause except for about ten minutes during his absence from the court when evidence not material to the question was being introduced is not incompetent by reason of such absence to express an opinion, as an expert, as to the cause of the amputation of the plaintiff's limb, in response to a hypothetical question based on all the evidence. *Smart v. Kansas City* (Mo.), 13-932.

Qualifications of witness as question for court. — The qualifications of a person presented as an expert witness raise a question of fact for the trial court whose decision upon the question will not be disturbed unless clearly shown to be based upon some error of law or grossly wrong upon the evidence. *Municipal Court v. Kirby* (R. I.), 13-736.

There is no fixed and invariable rule established by which a trial judge shall determine the exact degree and amount of knowledge, experience, and skill an expert shall possess before permitting him to testify before the jury. His competency to testify must be

determined by the court. *Carscallen v. Cœur D'Alene, etc., Transp. Co. (Idaho), 16-544.*

(3) Subjects of expert testimony.

Expectancy of life. — In an action for death by wrongful act, a physician who testifies that he is familiar with tables of mortality, having been examining physician for insurance companies for a number of years, may testify as to the expectancy of life of the deceased. *Kansas City Southern R. Co. v. Morris (Ark.), 10-618.*

Amount of damages to property. — In an action for injury or loss of baggage, it is not erroneous to permit the plaintiff to introduce opinion evidence to establish the amount of his damages. *Withey v. Pere Marquette R. Co. (Mich.), 7-57.*

In an action against a railroad to recover for injuries to property by smoke, vibration, etc., caused by the operation of the road, expert testimony is admissible to the effect that the smoke and vibration have caused a diminution in the value of the plaintiff's property, but such evidence is inadmissible to show the amount or extent of the damage. *Baltimore Belt R. Co. v. Sattler (Md.), 3-660.*

Character of weather. — The officer in charge of an observation station of the Weather Bureau may give his opinion as to what constitutes extraordinary precipitation, but he may not testify that a particular flood was extraordinary. *Hufnagle v. Delaware, etc., Co. (Pa.), 19-850.*

That particular situation was perilous. — It is competent to introduce opinion evidence that a particular situation was perilous, where the jury, after having all the facts presented to them as clearly as practicable, cannot form an opinion as reliable as that of an expert. *Hamann v. Milwaukee Bridge Co. (Wis.), 7-458.*

Dangerous condition of machinery. — In an action to recover damages for personal injuries sustained by the plaintiff while working in a sawmill, witnesses who are experts in the construction and operation of sawmills and who helped to construct the mill in question may be allowed to express their opinion as to the dangerous condition of the machinery which caused the injury. *Comer v. W. M. Ritter Lumber Co. (W. Va.), 8-1105.*

Whether manner of moving machine was proper. — It is not competent to introduce expert or opinion evidence as to whether a particular manner of moving a machine was proper, where the jury, when put in possession of all the facts, can form as reliable an opinion on the question as an expert, and where the jury can be put in possession of such facts. *Hamann v. Milwaukee Bridge Co. (Wis.), 7-458.*

As to substitute for butter. — Whether or not a substance sold as a substitute for butter bears the yellow color of true butter is not a matter of expert evidence. *State v. Armour Packing Co. (Ia.), 2-448.*

As to distance within which car could be stopped. — Where a witness states

the experience that he has had in operating and observing the operation of electric cars, it is discretionary with the court to permit him to testify as to the distance within which an electric car could be stopped under certain circumstances. *Yergy v. Helena Light, etc., Co. (Mont.), 18-1201.*

(4) Weight and Credibility.

As to the weight of evidence in general, see section 20, *infra*.

Question for the jury. — The weight and credibility of the evidence of an expert witness given to the jury is to be judged solely by them, and such weight and credence will be given it by the jury as they think it justly entitled to, and if it runs counter to their convictions as to the truth of the matter in the exercise of their own judgment, they may disregard it entirely. *Carscallen v. Cœur d'Alene, etc., Transp. Co. (Idaho), 16-544.*

c. Nonexpert opinion.

Mental capacity, in general. — It is in the discretion of the court, in view of all the circumstances, to permit a nonexpert witness to give his opinion as to the sanity of a person. *State v. Crowe (Mont.), 18-643.*

The rule that a lay witness may testify as to whether certain acts or conversations of a person whose sanity is in issue impressed him at the time as being rational or irrational, but may not give an opinion on the question of mental capacity, is technically violated by the answer by such witness, to a question proper in form, that the person was "irrational, I thought." *Matter of Myer (N. Y.), 6-26.*

Mental capacity to make contract. — Though witnesses may give their opinion, formed from facts within their knowledge as to which they have testified, of the mental soundness or unsoundness of a party to a contract, whose mental capacity to contract is denied, it is not competent for them to express an opinion as to whether such party had sufficient mental capacity to make the contract, as that is a mixed question of law and fact which it is the province of the court and the jury to determine. *Nashville, etc., R. Co. v. Brundige (Tenn.), 4-887.*

Temperance or intemperance. — Upon the question of the falsity of a representation in an application for life insurance, that the insured had never been intemperate in the use of intoxicating liquors, persons previously acquainted with the insured and his habits are competent to testify that he was temperate, for such testimony is not, strictly speaking, opinion evidence. *Taylor v. Security Life, etc., Co. (N. Car.), 13-248.*

Existence of disease. — Where the state of health of a person is in issue, a witness who is not a medical expert cannot be asked whether at a specified time he saw any conduct or action on the part of such person that would indicate to the witness that the person had a certain disease, though he may be asked as to the facts he did observe, leaving

the conclusions to be drawn by the jury. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Elocutionary ability. — The ability of a neophyte or of a professor in elocutionary work may be shown by the opinions of those qualified to testify, and a father is *prima facie* qualified to pass an opinion upon the elocutionary ability of his own daughter. *Cleveland, etc., R. Co. v. Hadley* (Ind.), 16-1.

Value of personal property. — While it is difficult to lay down a general rule as to the qualification of the owner of personal property to testify to its value further than to say that some knowledge of the value is a necessary qualification, it is erroneous to permit the owner of articles of jewelry, which have a commercial value, to give his estimate of their value, if it is not shown that he has any knowledge of the value of such articles. *Motton v. Smith* (R. I.), 8-831.

Stating results of measurements. — It is competent for a nonexpert to testify, as the result of measurements made by him, that one rail of a railway was an inch higher than the other, though he did not use a level in making his measurements. Such testimony is not a statement of opinion, but of a fact which the witness has observed, or thinks that he has observed. *Gardner v. Metropolitan St. R. Co.* (Mo.), 18-1166.

Identity of animal. — In an action to recover possession of a horse where the identity of the animal is in issue, the plaintiff and the defendant making conflicting assertions as to its breed and pedigree, it is competent to receive in evidence the opinions of persons who are familiar with the respective reputed sires and dams and their colts, even though such persons are not experts in the technical sense of the word. *Brady v. Shirley* (S. Dak.), 5-972.

Evidence as to mode of conducting pool room. — The testimony of one who has never tried the experiment, that a pool room cannot be successfully conducted a few squares away from the heart of a city, is not expert evidence and does not prove the fact. *Shreveport v. Schulsinger* (La.), 2-69.

9. DOCUMENTARY EVIDENCE.

a. Records and public documents.

Original public records. — The Texas statute authorizing proof of records by certified copy does not render the records themselves inadmissible in evidence to prove the contents. *Manning v. State* (Tex.), 3-867.

Certified copies. — A certified copy of an instrument which is required by law to be recorded proves itself as *prima facie* evidence of all the circumstances necessary to give it validity. *Hartman v. Thompson* (Md.), 10-92.

Certified copies of deeds should not be admitted in evidence until the party offering them makes it to appear that the original deeds are not within his custody or control. *Florida Finance Co. v. Sheffield* (Fla.), 16-1142.

Judicial opinions. — A judicial opinion is not admissible as evidence of the facts

therein recited as against a party to a suit in another court, where such party was not in any way concerned with the proceeding in which the opinion was rendered, as a party or otherwise. *State v. Butler* (N. Car.), 19-402.

Proof of court records. — The record of a court cannot be proved by the deposition of a witness into which he copies excerpt from the record, but it can be shown only by a copy of the record properly certified. *Letcher v. German Nat. Bank* (Ky.), 20-815.

Public record of another state. — A public record kept pursuant to the law of a sister state, when properly proved, is admissible in evidence in the courts of this state as *prima facie* proof of the facts therein recorded. *Miller v. Northern Pacific R. Co.* (N. D.), 19-1215.

Records of weather bureau. — The records of the weather bureau are admissible in evidence for the purpose of showing the amount of rainfall and other data concerning the weather during a given time, but they are not admissible to show collateral fact noted by the weather observer, such as the effect of a storm. *Hufnagle v. Delaware, etc., Co.* (Pa.), 19-850.

Authentication of baptismal record. — A baptismal record may be authenticated for evidential purposes by proving the handwriting of the person who made the entry though such person is alive and no effort has been made to produce him as a witness. *Godfrey v. Rowland* (Hawaii), 7-993.

Certification of municipal record. — An extract from the minutes of a municipal corporation certified by a "clerk of council" is admissible in evidence over the objection that the extract is not certified by the person holding the office of clerk to the corporate authorities, who are described in the charter as the "mayor and council" of the city. *Anderson v. Blair* (Ga.), 2-165.

Contradiction of record. — Presumptions indulged to sustain a record against collateral attack can only be made to supply the record in matters regarding which it is silent, and cannot be permitted to contradict the record in matters in which it speaks for itself. *Cizek v. Cizek* (Neb.), 5-464.

Admissibility to contradict admitted facts. — In an action of ejectment to recover land sold under execution on a judgment, a certified copy of the judgment properly refused admission in evidence for the purpose of showing that the judgment was not final, where under the issues tendered by the defendants and conceded by the plaintiffs, the judgment was alleged to be final one. *Kessner v. Phillips* (Mo.), 1-1005.

b. Private documents.

(1) In general.

Telegrams as evidence, see TELEGRAPHS AND TELEPHONES, 9.

Proof of signature. — The rule of evidence requiring the production of the best evidence obtainable is not violated by pe

mitting the genuineness of a signature to an unattested instrument to be proved by a witness who is familiar with the handwriting of the person by whom it purports to have been made, without introducing the testimony of such person, though he may be easily accessible at the time such proof of the signature is offered. *McCray v. State* (Ga.), 20-101.

Unofficial map or drawing. — An unofficial map or drawing, indicating the location of objects under investigation, and shown by the testimony to be reasonably accurate, is properly admitted in evidence, in connection with the testimony, as an aid to the court and jury. *Spokane v. Patterson* (Wash.), 13-706.

Historical works. — Upon the question as to whether a certain island in the state of Maine is within a certain grant executed between 1620 and 1635, the three historical works, Williamson's History of Maine, Williamson's History of Belfast, and Farrow's History of Islesboro, locating the island within the grant in question, are admissible in evidence, though they are entitled to but little weight. *Lazell v. Boardman* (Me.), 13-673.

Market reports. — Standard price lists and market reports, shown to be in general circulation and relied on by the commercial world and by those engaged in the trade, are admissible in evidence to show loss by reason of delay in the transportation of a car load of live stock, although the contract did not require the carrier to deliver the stock in time for any special market. *St. Louis, etc., R. Co. v. Pearce* (Ark.), 12-125.

Medical books. — Error in permitting counsel to read from a medical book and to ask the witness under examination (a physician) if he has ever read it is not cured by sustaining an objection to the question. *Etzkorn v. Oelwein* (Ia.), 19-999.

Account books of decedent. — In an action on a claim for services alleged to be due a deceased person, a memorandum book purporting to contain the account between the plaintiff's intestate and the defendant is not made admissible by the Colorado statute, where it is not shown that the entries were made by the deceased in the due course of business or at or about the time the services were rendered or payments made. *Davie v. Lloyd* (Colo.), 12-75.

But under the rules of the common law a memorandum book shown to contain entries in the handwriting of a deceased person and to have been found among the private papers of the deceased is admissible. *Davie v. Lloyd* (Colo.), 12-75.

Memorandum on telegram showing time of transmission. — On an issue as to whether a certain telegram was transmitted after having been left for transmission, a notation or memorandum on the telegram is competent as evidence of the past recollection of the witness who made it, where the witness testifies that he did not send the message himself and has no present recollection that it was sent, but states, from a memorandum appearing in his handwriting,

that he knew when he made it that the message had been sent. *St. Louis Southwestern R. Co. v. White Sewing Machine Co.* (Ark.), 8-208.

(2) Ancient documents.

Deed more than thirty years old. — A deed which is more than thirty years old at the time it is offered in evidence is an ancient document and therefore proves itself. *Ford v. Ford* (D. C.), 7-245.

Letter nearly seventy years old. — A letter found among the papers of the addressee nearly seventy years after it was written is admissible in evidence as an ancient document without proof of its genuineness. *McCreary v. Coggeshall* (S. Car.), 7-693.

Instrument not properly executed. — An instrument not valid upon its face because of a want of due execution cannot be admitted in evidence as an ancient document without proof of execution. *O'Neal v. Tennessee Coal, etc., R. Co.* (Ala.), 1-319.

(3) Contradiction of documentary evidence.

By party introducing. — A party offering in evidence a written instrument is not absolutely bound by the terms of such document so as to prevent him from introducing such further testimony relating thereto as may be necessary to show its connection with the matter in dispute which he is seeking to establish. *Hoffman v. Henricks* (Okla.), 17-379.

10. DECLARATIONS AND ADMISSIONS.

a. In general.

See **ADVANCEMENTS; BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, 9 b.

Declarations of agent generally, see **AGENCY**, 1 c.

Declarations of agent as evidence of authority, see **AGENCY**, 3 b (2).

Proof of partnership, see **PARTNERSHIP**, 1 b.

As to parentage. — Declarations of a deceased man may be competent to prove that he was the father of his illegitimate son, but they are not competent to prove that a woman to whom the declarant was in no way related, and who was never a member of the same family with the declarant, was the mother. *Champion v. McCarthy* (Ill.), 10-517.

In a jurisdiction wherein the common-law rule that an illegitimate is *filius nullius* has been abrogated by statute, it is competent, for the purpose of proving the relationship between the mother and her illegitimate son, to introduce in evidence declarations of such deceased persons as the mother and brothers of the illegitimate, and the husband of the sister of the illegitimate, where it appears that the illegitimate was born before the marriage of his mother, or that she never married. *Champion v. McCarthy* (Ill.), 10-517.

As to relationship. — Declarations of a deceased person as to his relationship with

an illegitimate brother are not rendered inadmissible in evidence by the fact that he was weak-minded to such an extent that when he became the owner of property a conservator was appointed to manage it for him, where it appears that he had sufficient intelligence to take care of himself and to know and remember his friends, relatives, and acquaintances. *Champion v. McCarthy* (Ill.), 10-517.

As to age of deceased person. — On an issue as to the age of a deceased person, declarations of the decedent and of his deceased father are admissible in evidence. *Travelers Ins. Co. v. Henderson Cotton Mills* (Ky.), 9-162.

Exclamations showing pain. — Where the bodily condition of a person who claims to have been injured is a subject of inquiry, exclamations of present pain or suffering, which appear to be natural and spontaneous expressions of present feeling, made by such person, may be received in evidence in connection with his appearance and conduct. *Federal Betterment Co. v. Reeves* (Kan.), 15-796.

In an action for personal injuries it is erroneous to permit a witness to testify as to declarations by the plaintiff expressive of pain and suffering in explanation of the plaintiff's conduct on a certain occasion after the accident. *Etzkorn v. Oelwein* (Ia.), 19-999.

Conversation with deceased person. — In foreclosure proceedings brought by a banking corporation against the mortgagor, and a suit by another banking corporation against the mortgagor and the first bank to set aside or postpone the operation of the mortgage, both of which suits by agreement are heard as one, testimony by the mortgagor or by the vice-president of the latter bank as to a private conversation had with the deceased president of the former bank, the tendency of which would be to invalidate the mortgage, is competent under the Michigan statutes. *People's Nat. Bank v. Wilcox* (Mich.), 4-465.

Declarations of parties in collusion to defraud. — The rule that declarations made by one in collusion with another to defraud are binding on all the parties to the collusive agreement has no application where the proof fails to show any collusive agreement. *Chappell v. John* (Colo.), 16-854.

b. When competent as part of *res gestæ*.

In general. — Evidence and circumstances surrounding the introduction of rebuttal evidence on second trial reviewed and held to show that the plaintiff had not offered in evidence statements which were inadmissible because not a part of the *res gestæ*. *King v. Phoenix Ins. Co.* (Mo.), 6-618.

To explain partial failure to perform. — In an action by a seller for breach of a contract for sale of cordwood to a railroad company, where it appears that the wood was to be delivered on the railroad's right of way, the plaintiff may introduce

evidence to show that after part of the wood had been delivered according to the contract the president of the road told him that he need not deliver the balance on the right of way, and ordered that the balance should be paid for as it then stood, as this declaration is part of the very transaction involved in the action. *Ives v. Atlantic, etc., R. Co.* (N. Car.), 9-188.

Manner in which accident occurred. — In an action for death by wrongful act statements as to the manner in which an accident occurred, made by the deceased or a third person, are admissible in evidence where it appears that they were made within a few feet of where the deceased was mortally injured, and within a few minutes after the occurrence of the accident, as they are so connected with the cause of the injuries as to preclude any idea that they were the product of a calculated policy. *Kansas City Southern R. Co. v. Morris* (Ark.), 10-618.

Declarations of infant incompetent to testify. — Notwithstanding a statute providing that infants under ten years of age are incompetent to testify, the declaration of an infant under that age made immediately after the happening of an accident in his presence, and having an important bearing on the responsibility for the accident, is admissible as part of the *res gestæ*. *Beal Doyle Dry Goods Co. v. Carr* (Ark.), 14-48

c. Declarations of agent.

Declarations as to past transactions. — The declarations or admissions of an agent not made at the time of the transaction to which they relate, are not competent evidence against a principal unless so immediately connected with the transaction in the point of time and circumstance as to constitute a part thereof. *Havens v. Rhode Island Suburban R. Co.* (R. I.), 3-617.

The rule permitting the admission in evidence of declarations as to a past transaction made by a general agent when transacting business for his principal within the scope of authority held not to apply to the declarations of the general manager of a street railway company as to the competency of the motorman made on the morning after the accident to the car in charge of such motorman. *Havens v. Rhode Island Suburban R. Co.* (R. I.), 3-617.

As to intention. — The declaration of a street car conductor that he would assault some one on the car before he got through is not competent against the street car company in an action against it for an assault made by the conductor on a person who was not on the car when the declaration was made and to whom the declaration had no reference. *Conklin v. Consolidated R. Co.* (Mass.), 13-857.

Not within scope of employment. — The mere declaration of a servant or agent not within the scope of his employment or authority, is not admissible against his employer or principal except when it accompanies an act which is competent and material to the transaction.

terial to be proved and which the declaration tends to qualify, characterize, or explain, or when the declaration itself is a part of the transaction under investigation. *Conklin v. Consolidated R. Co.* (Mass.), 13-857.

In an action against a master to recover for medical services rendered his servants, where the plaintiff has introduced in evidence a conversation over a telephone with a person in the defendant's office, the plaintiff, though he has offered no evidence that the person telephoning was the agent of the defendant, may introduce evidence of a statement made out of court by that person that the defendant would pay for the care of injured servants; such statement being admissible, not as evidence of a promise made by the defendant through his agent, but as a link in a chain of circumstances establishing a liability on the part of the defendant not founded on his direct promise. *General Hospital Soc. v. New Haven Rendering Co.* (Conn.), 9-168.

d. Admissions.

(1) Admissibility in general.

Declarations of predecessor in title.

— In the trial of an action involving the title to real estate, the declarations of a predecessor in title of either of the parties, made while in possession and against his interest, are generally admissible in evidence when such declarations relate to matters which must be proved or disproved by parol, such as the nature, character, or extent of the declarant's possession, the identity or location upon the face of the earth of boundaries and monuments called for in the deed, or in regard to any material matter concerning the physical condition or use of the property. *Phillips v. Laughlin* (Me.), 2-1.

But such declarations made out of court by the predecessor in title of a party to an action in court, as to the invalidity of a deed which appears to be sufficient in all respects, which bears all the insignia of genuineness and which had been duly recorded, are not admissible. *Phillips v. Laughlin* (Me.), 2-1.

Admissions as to age. — It seems that a witness is competent to testify as to his own age. And even if the rule were otherwise as to a witness not a party to the action, the admissions of a party on that point would still be competent when offered in behalf of the adverse party. *Koester v. Rochester Candy Works* (N. Y.), 16-589.

Where the age of the plaintiff becomes a material issue on the trial of an action, it is error to exclude evidence offered by the defendant as to declarations made by the plaintiff regarding his age. *Koester v. Rochester Candy Works* (N. Y.), 16-589.

Statement of party to arbitrator. —

An admission by a son to an arbitrator selected to determine his claim to a note given by his mother, that he is not entitled to retain the note because he has not done what he agreed to do as the consideration therefor, is an admission against interest and admissible against him in a proceeding involving

the validity of the note. *Sullivan v. Sullivan* (Ky.), 13-163.

As to contents of writing. — In a libel by a wife for a divorce, it is competent for a witness for the defendant to testify that after the plaintiff's marriage to the defendant the witness carried numerous letters from the plaintiff to another man and the plaintiff often read aloud to the witness the contents of letters written by such third person to her and by her to the third person, as such statements assume the form of admissions by the person holding the letters and testimony as to the admissions is primary evidence. *Purinton v. Purinton* (Me.), 8-205.

Report of accident to casualty company. — On the trial of an action for injuries caused by a negligently driven team, a report signed by the defendant and submitted to a casualty company, in which he states that he is the owner of the team, is competent evidence in the nature of an admission tending to prove his ownership of the team, and it is within the discretion of the trial court to permit the exhibit to be taken by the jury to their room. *Sibley v. Nason* (Mass.), 12-938.

(2) Admissions by attorneys.

Statements on former trial. — An admission of fact by the attorney of a party in one trial is binding on the party in a subsequent trial if the admission was made as a general admission without limitation, but the rule is otherwise if the admission was only for the purpose of the pending trial and was so understood; and what weight if any is to be given to the admission in the subsequent trial is properly left to the jury. *Moynahan v. Perkins* (Colo.), 10-1061.

The admission in evidence on a subsequent trial of an admission made by an attorney in a former trial, even if improper, is not prejudicial error where the matters covered by the admission are merely cumulative. *Moynahan v. Perkins* (Colo.), 10-1061.

(3) Admissions by agents or employees.

Not within scope of employment. —

A statement by the superintendent of a street railway company, made some time after an accident for which the company is sought to be held liable on the ground that an incompetent and overworked motorman was in charge of the car causing the accident, that he, the superintendent, should have known better than to place the motorman in question on the car, is an admission not within the scope of the superintendent's employment, or a part of the *res gestæ*, and its reception in evidence constitutes reversible error. *Ft. Wayne, etc., Traction Co. v. Crosbie* (Ind.), 14-117.

Report of motorman as to street car accident. — In an action for injuries to a passenger on a street car a written report of the accident made by the motorman of the car is not admissible as evidence of any facts therein stated as to the cause of the

injury. *Gardner v. Metropolitan St. R. Co. (Mo.)*, 18-1166.

By agent of municipal corporation.

— In an action against a municipality for personal injuries caused by a defective highway, a service of notice of the injury on the municipality as required by the Wisconsin statute cannot be proved by evidence of verbal admissions made, after the expiration of the period allowed by the statute for service, by the municipal officer to whom it was addressed, as such admissions are not part of the *res gestæ*. *Garske v. Ridgeville (Wis.)*, 3-747.

(4) Admissions in pleadings.

Corporate existence of defendant. —

A railroad company seeking to enjoin the construction of an interurban electric railway across its tracks cannot contend that there is no statute under which the interurban railway can be incorporated, and that therefore it has no right to cross the complainant's track, where both the complaint and the answer allege that the interurban company "is a corporation organized under the laws of the state." *South East, etc., R. Co. v. Evansville, etc., R. Co. (Ind.)*, 14-214.

As against infant codefendants. —

Admissions in the answer of adult defendants do not bind infant codefendants. *Holderby v. Hagan (W. Va.)*, 4-401.

Withdrawn pleading. — In an action in a Circuit Court of the United States by the nonresident beneficial owner of a promissory note executed by a resident maker to a resident but nominal payee, it is proper for the court to exclude from evidence a complaint, drawn and sworn to by the plaintiff's attorney, containing admissions tending to show that the nominal payee was the actual one, which was filed in a prior action in a state court on the same note, and which was withdrawn and dismissed before appearance by the defendant. *Kirven v. Virginia-Carolina Chemical Co. (U. S.)*, 7-219.

Dismissed pleading. — Where a plaintiff files a petition in an action, to which the defendant files an answer and cross petition, which is afterward dismissed, such pleading may be used by the plaintiff as evidence upon the trial, if it contains statements which amount to admissions of the defendant material to the plaintiff. *Arkansas City v. Payne (Kan.)*, 18-82.

Subsequent action between other parties. — Where a litigant as a part of his cause of action or defense, asserts that he is indebted to a third person, not a party to the litigation, such assertion is not conclusive upon him when subsequently sued by such person. *First National Bank v. Duncan (Kan.)*, 18-78.

(5) Weight as evidence.

As to the weight of evidence in general, see section 20, *infra*.

Uncorroborated admissions. — Where in an action for damages for personal in-

juries it appears that the plaintiff, who was employed as an ordinary shoveler in the construction of a building, was directed to assist in taking heavy timbers from the first floor to the second floor of the building, that he was standing on some small boards, and that a few hours thereafter he was found in the basement seriously injured, and the plaintiff's wife testifies to donations and promises of future assistance by the defendant, and admissions by the defendant that the accident was due to his fault and not the plaintiff's but there is no direct testimony as to how the accident happened or what caused it, the plaintiff's memory having been destroyed, a verdict is properly directed for the defendant. *Binewicz v. Haglin (Minn.)*, 14-225.

Indefinite or equivocal admissions. —

While an admission tending to show negligence not based on personal knowledge of the facts may be admissible in evidence, such an admission, if indefinite or equivocal or not elucidated by further proof, will have little or no weight. *Binewicz v. Haglin (Minn.)*, 14-225.

Admission by intoxicated person. —

An admission made by a person while intoxicated is not conclusive. *Bruner v. Seelbach Hotel Co. (Ky.)*, 19-217.

11. HANDWRITING.

a. Proof by nonexpert.

Competency of witness to testify concerning. — A witness, although not a handwriting expert, who has seen a person write or who knows his signature, is ordinarily competent to express an opinion as to the genuineness of such person's signature. *Ware v. Burch (Ala.)*, 12-669.

Knowledge derived from correspondence only. — In a criminal prosecution, where the authenticity of letters offered in evidence against the defendant is denied, the prosecutrix, if she has never seen the defendant write and is not an expert on handwriting, is not competent to testify that the letters are in the handwriting of the defendant; and this is so though she claims that the defendant acknowledged having written the letters to her, and though the letters themselves are admissible in evidence. *State v. McBride (Utah)*, 8-1030.

b. Standards for comparison.

Signature to pleading. — In an action on a promissory note which the defendant denies having signed or executed, the plaintiff is entitled to introduce in evidence, for use as a standard for comparison with the disputed signature to the note in controversy, the answer filed by the defendant in the case and bearing his admitted signature. *Mississippi Lumber, etc., Co. v. Kelly (S. Dak.)*, 9-449.

Indorsements on checks. — In an action on a promissory note, the signature and execution of which are denied by the defendant, the plaintiff cannot introduce in evi-

dence, for use as a standard for comparison with the disputed signature to the note, checks which were drawn by a witness in favor of the defendant and which were subsequently returned to the witness with the purported signature of the defendant indorsed thereon, where it appears that the witness has never seen the defendant write and that he has no knowledge of the defendant's signature other than the fact that his name purported to be indorsed on the checks when they were returned to the witness from the bank. *Mississippi Lumber, etc., Co. v. Kelly* (S. Dak.), 9-449.

Weight of evidence. — Writings admitted to prove carvings on a barn door by similarity in punctuation being competent, that the evidence afforded by the comparison is inconclusive does not affect its relevancy, but only its weight. *State v. Kent* (Vt.), 20-1334.

12. PHOTOGRAPHS AS EVIDENCE.

a. Admissibility in general.

Purpose of such evidence. — A photograph is competent evidence for the purpose of giving to the jury the representation of the object or subject concerning which an inquiry is made, and to enable them better to understand the issues on trial. *McKarren v. Boston, etc., R. Co.* (Mass.), 10-961.

Photographs, duly verified, are admissible in evidence as an aid to the jury in arriving at an understanding of the evidence or of the situation, condition, or location of objects or premises material and relevant to the issues. *Higgs v. Minneapolis, etc., R. Co.* (N. D.), 15-97.

In action for injuries resulting in death. — In an action to recover for the death of an infant from injuries inflicted by a railroad train, photographs of the infant taken before the injury and thereafter but before the death are admissible in evidence. *Davis v. Seaboard Air Line Ry.* (N. Car.), 1-214.

b. Proof of accuracy.

Necessity of. — Before a photograph can be admitted in evidence there must be a verification of the accuracy of the representation, and this is the preliminary inquiry to be made by the trial judge whose decision is final. *McKarren v. Boston, etc., R. Co.* (Mass.), 10-961.

A court will take judicial notice of the fact that by the ordinary photographic process a representation may be secured which will be sufficiently truthful and reliable to be considered as evidence with reference to objects which are in a condition to be photographed, without regard to whether such objects have been actually observed by any witness. *State v. Matheson* (Ia.), 8-430.

Testimony of photographer. — The testimony of a photographer who made the photograph is not essential to its verification where there is other evidence which satisfies the judge that the photograph is a

substantially accurate representation. *McKarren v. Boston, etc., R. Co.* (Mass.), 10-961.

Effect of testimony as to accuracy. — To constitute a foundation for the introduction of an X-ray photograph in evidence it need not appear that it was taken by a competent person nor that the condition of the apparatus and the circumstances were such as to insure accurate pictures, where it appears by competent witnesses that it truly represents the object claimed. *Carlson v. Benton* (Neb.), 1-159.

In case of photograph of animate object. — No higher degree of verification is required to be made of a photograph of an animate object than of a photograph of an inanimate object. *McKarren v. Boston, etc., R. Co.* (Mass.), 10-961.

c Discretion as to admission or exclusion.

Where evidence as to accuracy is conclusive. — The discretion of the trial judge as to the reception in evidence of an X-ray photograph should not be exercised arbitrarily, and where evidence as to its accuracy leaves no room for a difference of opinion it is an abuse of discretion to exclude the photograph on the ground that a sufficient foundation has not been laid. *Carlson v. Benton* (Neb.), 1-159.

When exclusion not prejudicial error. — In an action for death by wrongful act, photographs of the scene of the accident, if proved to be correct, are admissible in evidence, but their exclusion is not prejudicial where the testimony of the witnesses is sufficiently full and explicit to enable the jury to understand what the photographs were intended to show. *Kansas City Southern R. Co. v. Morris* (Ark.), 10-618.

d. Weight as evidence.

As to the weight of evidence in general, see section 20, *infra*.

Not conclusive. — Photographs do not conclusively establish the existence of the objects they represent. The weight to be given to photographs as evidence depends upon the accuracy with which and the manner in which they are taken and the skill of the person taking and developing them, and their reliability is to be determined by the tests used in weighing other evidence. *Higgs v. Minneapolis, etc., R. Co.* (N. Dak.), 15-97.

13. PHONOGRAPHIC RECORD AS EVIDENCE.

Admissibility. — In a condemnation proceeding instituted by a railroad company to determine the necessity for laying its tracks along a city street, and to assess the damages to an adjoining owner, it is proper to permit a phonograph to be operated in the presence of the jury to reproduce the sounds claimed to have been made in the operation of trains in proximity to the respondent's hotel, where proper proof has been made that the instrument is a substantially accurate and trustworthy reproducer of the sounds

actually made and testified to. *Boyne City, etc., R. Co. v. Anderson* (Mich.), 10-283.

14. PAROL EVIDENCE TO VARY WRITTEN INSTRUMENTS.

a. Admissibility in general.

Aiding construction of will, see *WILLS*, 8 a (9).

Explaining abbreviations, see *ABBREVIATIONS*.

Explaining warehouse receipt, see *BAILMENT*, 3.

Explaining writings generally, see *DEEDS*, 3 a.

Parol evidence regarding contents of books, see *BENEVOLENT OR BENEFICIAL ASSOCIATIONS*, 9 b.

Proof that deed absolute in form was intended as mortgage, see *DEEDS*, 3 i; *MORTGAGES AND DEEDS OF TRUST*, 3.

Varying warehouse receipts, see *WAREHOUSES*, 2.

Statement of rule. — When a contract has been reduced to writing, evidence of what occurred between the parties in respect thereto at the time thereof or prior thereto is inadmissible. *Vogt v. Schienebeck* (Wis.), 2-814.

Operation of rule in favor of persons not parties to instrument. — The rule that a written agreement cannot be varied by parol operates in favor of those not parties to the instrument as fully as in favor of the parties, where it appears that the instrument was executed by the parties as a final embodiment of their agreement, and where parol evidence is offered to vary the legal effect of the terms in which the instrument is expressed. *Allen v. Ruland* (Conn.), 8-344.

As to interpretation of contract in other jurisdictions. — A party to a written contract cannot introduce parol evidence of the interpretation put upon the language of such contracts in jurisdictions other than that in which it is to be interpreted, to show that he intended to employ the language in accordance with the interpretation given to it in such other states and that the other party had reason to know he was doing so. *Inman Mfg. Co. v. American Cereal Co.* (Ia.), 12-387.

Meaning of word "satisfactory." — A written contract for the sale of machinery requiring, in plain and unambiguous terms, that the machinery shall be "satisfactory" to the buyer, cannot be varied by parol evidence that the buyer stated to the seller that the machinery would be satisfactory if it would do a certain amount of work in a specified manner, and that the buyer knew it to be the understanding of the seller that the seller was required by the contract only to furnish machinery meeting the stated requirements as to the amount and quality of work. *Inman Mfg. Co. v. American Cereal Co.* (Ia.), 12-387.

Such evidence is not rendered admissible by a statute providing that "when the terms of an agreement have been intended in a dif-

ferent sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it," as that provision does not authorize the introduction of parol evidence to show that the intent of the parties to a written contract was different from that implied in the language used. *Inman Mfg. Co. v. American Cereal Co.* (Ia.), 12-387.

Bills of sale. — A bill of sale sent to and received by the purchaser before the receipt of the goods and reciting an absolute sale is within the rule as to the modification of a written agreement by parol evidence, and therefore the purchaser, in an action for the price of the goods, will not be permitted to show it was agreed between the parties that if the purchaser was unable to dispose of the goods, the seller would exchange them for other goods to be selected by the purchaser. *R. M. Davis Photo Stock Co. v. Photo Jewelry Mfg. Co.* (Mass.), 19-540.

In action on written subscription for book. — In an action on a signed contract of subscription for a certain book, evidence that the book does not conform to certain verbal representations made by the person taking the subscription is properly excluded, in the absence of any claim that artifice or fraud was used to induce the signing of the contract, as the offer of such evidence is merely an attempt to vary by parol the terms of a written instrument. *Williams v. Gottschalk* (Ill.), 12-376.

b. To define or identify subject-matter

Evidence not contradicting instrument. — Parol evidence, if it does not contradict the terms of a written contract, is admissible to identify the subject-matter thereof. *Little Rock Cooperage Co. v. Gunnels* (Ark.), 12-293.

Description insufficient on its face. — Parol evidence is admissible to identify the land described in a contract of sale and to apply the description to the premises, but not to complete and perfect a description on its face insufficient and incapable of application. *Allen v. Kitchen* (Idaho), 18-914.

A description of land in a contract of sale merely as "lot 11 in block 13, Lemp's Addition," without disclosing the city, town, county, or state in which the contract was made or the property was situated, and without referring to any record, natural object, locality, or other matter or thing, is incomplete, and parol evidence is not admissible to complete it. *Allen v. Kitchen* (Idaho), 18-914.

c. To prove collateral parol agreement.

Proof that writing never took effect as contract. — Parol evidence is admissible to show that a writing in form of a contract between the parties was signed conditionally by the defendant and never became operative. Such evidence does not vary a writing, but only goes to show that the writing is not a contract. *J. I. Case Threshing Mach. Co. v. Barnes* (Ky.), 19-246.

Where only part of transaction reduced to writing. — The rule that where a written contract is made as a mere part execution of a verbal contract, the portion not embodied in the paper may be shown by parol, applies only where such portion is itself a distinct complete contract, and not where it is a mere stipulation varying the terms of the written contract. *Vogt v. Schienebeck* (Wis.), 2-814.

Sham contract executed to deceive. — Oral evidence is not admissible to show that a written contract purporting to fix the rights of the parties in respect to the subject-matter of the suit is a mere sham which the defendant induced the plaintiff to sign for the purpose of deceiving others. *Graham v. Savage* (Minn.), 19-1022.

In action for purchase money. — In an action for the purchase price of lands, parol evidence is admissible to show that when the deeds were executed it was verbally agreed that the consideration should not be paid until the grantor had perfected his title to the lands. *Johnson v. McClure* (Minn.), 2-144.

In action on promissory note. — In an action against the makers of a promissory note executed and delivered in payment of the first premium on a policy of life insurance for which they had applied, the defendants may set up the defense and prove by parol evidence that the note was executed and delivered on condition that it should not be binding unless the policy, when it arrived, was satisfactory to and accepted by them. *Graham v. Remmel* (Ark.), 6-167.

Assumption of debts on sale of business. — Testimony that the defendant had assumed debts incurred by the plaintiff in running a business purchased by the plaintiff from the defendant does not vary or contradict written contracts whereby the plaintiff sold the business to a third person, in consideration of which the third person agreed to pay to the defendant the balance of the purchase money remaining unpaid on account of the sale by the defendant to the plaintiff, and the defendant agreed to release the plaintiff from all liability for such unpaid purchase money; but such testimony tends to show a separate and independent verbal contract between the plaintiff and the defendant, and is admissible for that purpose. *Burgie v. Bailey* (Ark.), 18-389.

Agreement collateral to lease. — In an action for the conversion of a building alleged to be the personal property of the plaintiff, but which is situated on land belonging to the defendant, where it appears that the land was leased by the defendant's predecessor in title to a third person, oral evidence of conversations and circumstances tending to show that the lessee erected the building for the plaintiff, and that there was an agreement or understanding between the owner of the land at the time of the erection of the building, and the lessee, representing both himself and the plaintiff, that the building was to remain the personal property of the lessee until the plaintiff had fully paid

for its erection, but that after such payment it was to be the personal property of the plaintiff, is not incompetent as varying the terms of the lease, *Searle v. Roman Catholic Bishop* (Mass.), 17-340.

d. To prove consideration.

For sale of land or deed to railroad company. — Parol evidence is admissible to show that a contract for the sale of land to a railroad company was based upon the additional consideration that the company should fence in the land and erect suitable gates thereon. *Windsor v. St. Paul, etc., R. Co.* (Wash.), 3-62.

Where one by deed conveys to a railroad company absolutely and unconditionally a right of way for the construction of its railroad, it cannot afterwards be shown by parol evidence that a part of the consideration of the deed was a contemporaneous agreement that the grantor was to have a permanent right of way over the land conveyed, and that the railroad company was to erect and maintain permanently crossings on the right of way for that purpose. *Louisville, etc., R. Co. v. Willbanks* (Ga.), 17-860.

For promissory note. — Proof by the maker of a note that an amount in excess of the sum due was recited at the request of the payee to enable him to use the note as collateral does not violate the rule against parol evidence to vary a writing, but is merely showing the real consideration for the note. *Campbell v. Davis* (Miss.), 19-239.

e. To disprove recital of receipt of consideration.

Recital in deed. — A recital in a deed acknowledging the payment of the consideration is merely a receipt and may be contradicted by parol. *Fowkes v. Lea* (Miss.), 2-466.

f. To remove ambiguity.

Contract for sale of land. — A contract for the sale of a tract of land held to be ambiguous as to whether it was a contract of sale in gross or a sale by acre, and parol evidence held to be admissible to aid in its interpretation. *Newman v. Kay* (W. Va.), 4-39.

Parol evidence held insufficient to prove that a contract of the sale of land was by acre, the deed being ambiguous on its face as to this point. *Newman v. Kay* (W. Va.), 4-39.

g. To prove fraud.

Evidence of contemporaneous acts, etc. — In the absence of misrepresentation, fraud, or deceit, a party to a transaction is bound by the writing evidencing the agreement, though he is in fact ignorant of its contents; but where his signature to the agreement was induced by the misrepresentations of the other party as to its contents, and the signer was ignorant thereof, he may introduce parol evidence of contemporaneous acts, declarations, and conversations to show

the true nature of the agreement. *T. and H. Smith & Co. v. Thesmann* (Okla.), 15-1161.

h. To prove subsequent parol agreement.

As to time of payment. — Where a written contract contains no stipulation as to the time of payment, evidence is admissible of a subsequent parol agreement fixing such time. *Putnam Foundry, etc., Co. v. Canfield* (R. I.), 1-726.

i. To show illegality of contract.

General rule. — Parol evidence is always competent to show that a written contract, fair and lawful on its face, is in truth contrary to law, morals, or public policy. *Muskogee Land Co. v. Mullins* (U. S.), 16-387.

Contract affecting Indian lands. — In an action against a lessee of lands belonging to allottees of the Creek Nation, to recover rent under a written lease of such lands for a term of more than one year, it is competent for the defendant to show by parol evidence, that the lease, although purporting on its fact to be for agricultural purposes only, is in fact for grazing purposes only, and hence in violation of section 17 of the Act of Congress of June 30, 1902, which prohibits Creek citizens from renting their allotments for grazing purposes only for a longer period than one year. *Muskogee Land Co. v. Mullins* (U. S.), 16-387.

j. To prove meaning of terms used.

Perch "measured in wall" — Parol evidence — Explaining trade meaning of words. — A contract to pay for masonry at a certain rate per perch "measured in wall" is not so plain that only one conclusion can be drawn as to the method of measurement, and therefore parol evidence is admissible to explain the trade meaning of the words quoted. *Miller v. Wiggins* (Pa.), 19-942.

15. PAROL EVIDENCE TO ADD TO RECORD.

Where record is silent. — Where the record of proceedings of a city's park commission contains nothing whatever to show whether the commission took any action concerning a certain matter, parol evidence is admissible to show that such action was taken, unless there is a statutory or charter provision declaring either expressly or by implication that nothing but a recorded vote or written document shall bind the city or be received as evidence. *Denver v. Spencer* (Colo.), 7-1042.

16. PRESUMPTIONS.

Acceptance of dedication, see **STREETS AND HIGHWAYS**, 2 a.

Acceptance of gift, see **GIFTS**, 2 b.

Agent's authority, see **AGENCY**, 3 b (1).

Authority to receive payment, see **BILLS AND NOTES**, 10.

Chastity of prosecutrix in seduction case, see **SEDUCTION**, 2 c (3).

Common law of foreign state, see **COMMON LAW**.

Constitutionality of statutes, see **CONSTITUTIONAL LAW**, 25 c; **STATUTES**, 2.

Correctness and propriety of instructions, see **APPEAL AND ERROR**, 14 g.

Correctness of judgment, see **JUDGMENTS**, 2.

Death by suicide, see **SUICIDE**, 2.

Death presumed from absence, see **DEATH**.

Dedication, see **STREETS AND HIGHWAYS**, 2 b.

Enforcement of order excluding public from criminal trial, see **CRIMINAL LAW**, 6 c (2).

Foreign laws, see **FOREIGN LAWS**, 2.

Inequality of gifts as raising presumption as to advancements, see **ADVANCEMENTS**.

Innocence of persons accused of crime, see **CRIMINAL LAW**, 6 q (3).

Intent to defraud presumed from unlawful acts, see **POST OFFICE**.

Jurisdiction, see **COURTS**.

Knowledge and intent of legislature in enacting statutes, see **STATUTES**, 4 a.

Legality of testator's intent, see **WILLS**, 8 a (1).

Locating negligence as between connecting carriers, see **CARRIERS**, 4 i (1).

Negligence, see **CARRIERS**, 6 l (4).

Negligence as to fire caused by locomotive, see **FIRES**, 5.

Negligence presumed from fact of railroad collision, see **RAILROADS**, 7 c (4).

Official capacity of constable, see **ARREST**, 2 b.

Ownership of fee in street, see **STREETS AND HIGHWAYS**, 6.

Ownership of structures on land, see **PROPERTY**.

Payment of taxes, see **TAXATION**, 6.

Physical capacity to commit rape, see **RAPE**, 2 d (1).

Place of indorsement of note, see **BILLS AND NOTES**, 11 h.

Prejudice from misconduct of jurors in capital case, see **JURY**, 7 d (2).

Presence of accused during trial, see **CRIMINAL LAW**, 6 c (4).

Presumptions as to evidence and rulings thereon, see **APPEAL AND ERROR**, 14 f.

Presumptions on appeal, see **APPEAL AND ERROR**, 14.

Prosecutions for abortion, see **ABORTION**.

Rebutting presumption of payment arising from lapse of time, see **PAYMENT**, 2 b.

Regularity of judicial proceedings, see **CRIMINAL LAW**, 6 c (4); **EMINENT DOMAIN**, 9 a.

Regularity of official acts, see **ACKNOWLEDGMENTS**.

Statutory presumptions, see **FRAUDULENT CONVEYANCES**, 3 b.

Testamentary capacity, see **WILLS**, 4 e (1).

Testamentary intent, see **WILLS**, 2.

Undue influence, see **WILLS**, 5 c (1).

Validity of marriage, see **BIGAMY**, 4; **MARRIAGE**, 2 b.

Validity of police regulations, see **CONSTITUTIONAL LAW**, 5 a.

Validity of railroad ticket, see **CARRIERS**, 6 c (3).

Validity of statute, see **CARRIERS**, 2 j.

Validity of tax deed, see **TAXATION**, 10 c.

Nature. — A legal presumption is to be regarded as a piece of evidence to be weighed in favor of the party for whom it operates and to be overcome by evidence of the other party; and it is immaterial whether the presumption exists without evidence or arises from the evidence. *In re Cowdry* (Vt.), 3-70.

Presumptions of law distinguished from presumptions of fact. — In Colorado the courts recognize presumptions of fact as distinguished from presumptions of law, and hold it reversible error to charge as to the effect of a presumption of law when the presumption involved is one of fact. *White, J.*, disapproving the distinction and holding that a "presumption of fact," so called, is not a presumption at all, but is a mere inference, while a presumption strictly speaking is a rule of law and not an inference. *Ausmus v. People* (Colo.), 19-491.

Regularity of judicial proceedings. — Every presumption must be indulged in favor of the regularity of the proceedings of a court of record, and the burden is upon the party who would impeach that regularity to do so by the best evidence obtainable. *Johnson v. State* (Okla.), 18-300.

Presumption as basis of presumption. — In an action for damages by the administrator of a deceased person who was killed while driving a team over a railway crossing, where there is no testimony showing what the deceased did immediately before and at the time he went upon the crossing, it is presumed that he was in the exercise of proper care and that before going upon the crossing he both looked and listened for the approaching train, and from this presumption the jury may so find; but in the absence of any testimony showing what happened the jury are not warranted in assuming, in order to account for his going upon the crossing, that his team became frightened and that he lost control of them. One presumption of fact cannot, in law, become the basis of another presumption of fact. *Atchison, etc., R. Co. v. Baumgartner* (Kan.), 10-1094.

As to knowledge of law. — There is no presumption that every one knows the law. *Per Straup, J. State ex rel. Utah Savings, etc., Co. v. Salt Lake City* (Utah), 18-1130.

As to law of another state. — In the absence of any allegation or proof to the contrary, the courts of Connecticut will presume that the common law of Massachusetts is the same as that of Connecticut. *Hoxie v. New York, etc., R. Co.* (Conn.), 17-324.

As to receipt of letter mailed. — The mailing of a letter countermanding an order for goods raises a *prima facie* presumption that it was duly received by the person to whom it was properly addressed and places upon him the burden of showing that it was not so received. *Merchants' Exchange Co. v. Sanders* (Ark.), 4-955.

The mailing of a letter postpaid and properly addressed does not create a presumption that the letter reached its destination, but is merely a fact from which may be inferred the

further fact that the letter was received, and such inference may be rebutted by proof that the letter was not received by the person addressed. *Campbell v. Gowans* (Utah), 19-660.

Evidence held insufficient to rebut the presumption of the receipt of a letter canceling a contract. *Merchants' Exchange Co. v. Sanders* (Ark.), 4-955.

As to authenticity of letter. — Where a letter has been received by the due course of mail in answer to a prior letter sent by the receiver, with his name signed thereto, a presumption arises that it is the letter of the person whose name is signed thereto. *American Bonding Co. v. Ensey* (Md.), 11-883.

17. PRIVILEGED COMMUNICATIONS.

See WITNESSES, 3 d.

18. TELEPHONE CONVERSATIONS.

Testimony of bystander. — It appeared in evidence that there were communications by telephone, on a given day, at a given time, between one of the plaintiffs and one of the defendants in regard to the matters in question in the action; but what was said by one was denied by the other. It was sought to elucidate what was said by the defendant by calling witnesses who heard his words as spoken into the telephone receiver, though the witnesses could not affirm to whom he spoke or that he was in fact speaking to any person: Held, that the evidence of the proposed witness was relevant, and therefore admissible, though the value of it might be little or nothing. *Gzowski & Co. v. Frost & Co.* (Can.), 20-704.

Where the plaintiff in an action has testified to a conversation had by him with the defendant over the telephone, a witness may testify to what he heard the plaintiff say as a part of such conversation, though the witness does not know of his own knowledge that the other party thereto was the defendant, or that there was any other party, or that the defendant heard what was said, it being a question of fact for the jury whether the conversation took place or was fictitious. *McCarthy v. Peach* (Mass.), 1-801.

Admissibility of conversation by telephone with some person in place of business of party. — While the weight to be given to such evidence is to be determined by the jury, it is competent to introduce in evidence a conversation had by telephone between a witness and some person in the place of business of a party to the action. *Godair v. Ham National Bank* (Ill.), 8-447.

Evidence of a conversation by telephone between an agent of the plaintiff at the plaintiff's office and a person in the defendant's office speaking for the defendant is *prima facie* admissible for any purpose that personal conversation would be admissible, even though it is unaccompanied by evidence that the person speaking for the defendant was authorized to use the defendant's telephone for the purpose of communicating messages from the defendant's office. *General Hospi-*

tal Soc. v. New Haven Rendering Co. (Conn.), 9-168.

Failure to identify party with whom conversation took place as rendering testimony inadmissible. — Evidence of a conversation over a telephone is not necessarily rendered inadmissible by the fact that the identity of the other person telephoning was not recognized by the witness. *General Hospital Soc. v. New Haven Rendering Co.* (Conn.), 9-168.

19. OBJECTIONS AND EXCEPTIONS.

Effect of failure to object on first trial. — Failure to object to evidence on the first trial of a cause does not preclude the party from objecting thereto on a new trial after a reversal on appeal. *Belskis v. Der- ing Coal Co.* (Ill.), 20-388.

The fact that evidence was admitted without objection on the first trial of a cause does not preclude the party from objecting to it on a second trial. *State v. Kelleher* (Mo.), 19-1270.

Effect of general objection. — An objection to evidence as incompetent, irrelevant, and immaterial is too general to suggest the objection that the evidence is incompetent as relating to a transaction with a deceased person, whose executor and heirs at law are parties to the action. *First National Bank v. Warner* (N. Dak.), 17-213.

Motion to strike out evidence, some of which is competent. — A motion to exclude the entire testimony of a witness, some of which is clearly competent, is properly overruled. *Schultz v. Ford* (Ia.), 12-428.

20. WEIGHT AND SUFFICIENCY OF EVIDENCE.

As to the weight of expert testimony, see section 8 b (4), *supra*.

As to the weight of admissions as evidence, see section 10 e (6), *supra*.

As to the weight of writings admitted to prove carvings on a barn door by similarity in punctuation, see section 11 b, *supra*.

As to the weight of photographs as evidence, see section 12 d, *supra*.

a. In general.

Positive and negative testimony. — The testimony of witnesses that they did not hear the ringing of the bell on a locomotive as it approached a crossing, without proof that the witnesses listened for the bell, or that their attention was in any way directed to it, or that they probably must have heard the bell if it did ring, cannot prevail against the positive testimony of other credible witnesses that the bell did ring at the time in question. *Foley v. New York Central, etc., R. Co.* (N. Y.), 18-631.

As against positive affirmative evidence, by credible witnesses, that warning of the approach of a railroad train to a highway crossing was given by the ringing of the bell or the blowing of the whistle, there must be something more than the testimony of wit-

nesses who, by reason of their surroundings, would be unlikely to notice the giving of such warning, that they heard neither a bell rung nor a whistle blown, in order to justify the submission to the jury of the question whether such warning was given. *Holmes v. Pennsylvania R. Co.* (N. J.), 12-1031.

In an action by a bank against a surety on promissory notes, where the defense, supported only by the testimony of the defendant, is that after the notes became due he served notice on the plaintiff's cashier to bring suit on the notes and the plaintiff failed to do so, and the plaintiff's cashier testifies that he had no remembrance of any such action, the issue is for the jury. *Skilern v. Baker* (Ark.), 12-243.

. In civil action based on criminal act.

— In a civil action for the recovery of damages where the defendant is charged incidentally with the commission of crime, the rule that the defendant is presumed innocent until proven guilty does not apply, the plaintiff being required to sustain his case only by a preponderance of evidence. *Kurz v. Doerr* (N. Y.), 2-71.

Circumstantial evidence. — Flat contradiction in oral testimony, as to intent and purpose, obscuring the truth and rendering it impossible to ascertain the same from such evidence with reasonable certainty, justifies resort to the circumstances as the safer guide, and their value and weight are determined by their intrinsic character and tendency to produce mental conviction rather than their number. *Berry v. Colburn* (W. Va.), 17-1018.

Pleading in prior suit. — In an action to recover for work and labor, a bill of particulars in a prior action brought by the same plaintiff against another party to recover for the same services, but which was never tried and in which no judgment was ever rendered, being a *quasi*-admission, is competent as evidence, but does not constitute an estoppel, and, consequently, a refusal by the court to charge that such prior action works an estoppel to plaintiff's prosecution of the action on trial, is proper. *Chicago, etc., R. Co. v. Mashore* (Okla.), 17-277.

Presumption from failure to testify.

— Where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, the presumption arises that his testimony if introduced would be adverse to his contentions. *Kirchner v. Smith* (W. Va.), 11-870.

When a party to a cause can, by his own testimony, throw light upon the matter in issue and fails to go upon the witness stand, and, when called as a witness by the opposing party, refuses to answer questions calculated to elicit the truth, a strong presumption arises that the facts of the case are unfavorable to his contention. *Aragon Coffee Co. v. Rogers* (Va.), 8-623.

Unreasonable testimony. — If the testimony of a witness is opposed to laws of nature that lie within the court's judicial knowledge it should be rejected as being false. But where the facts testified to by

the witness may convey the idea that a street car which struck the plaintiff's intestate was proceeding down grade at a speed not greater than thirty-six miles an hour, it cannot be said, in the absence of definite knowledge of the car's speed, that the testimony is so improbable as to be unworthy of belief, especially where the testimony of other witnesses places the speed at about twenty-six or thirty miles. *Wolf v. City, etc., R. Co. (Ore.)*, 15-1181.

Contradictory testimony. — Evidence and circumstances surrounding the introduction of rebuttal evidence on second trial reviewed and held to show that the plaintiff had not testified in contradiction of one of his own witnesses. *King v. Phoenix Ins. Co. (Mo.)*, 6-618.

Incompetent evidence received without objection. — A fact may be established by incompetent evidence, if the evidence is material and is received without objection. *Lindquist v. Dickson (Minn.)*, 8-1024.

Fence or wall as locating boundary. — A fence or wall on land conveyed to the United States for military purposes does not conclusively establish the correct boundary or show that the United States has abandoned possession of the land outside the enclosure. *Baker v. State (Tex.)*, 11-751.

Proof of mailing letter. — The mailing of a letter from the defendant to the plaintiff is not proved by the testimony of the defendant that the letter was placed in a tray on his desk to be mailed by a clerk, and that the regular course of business in the defendant's office was to place all letters for mailing in such tray, and that the letters were periodically taken from the tray by a clerk whose duty it was to mail them. It is necessary to show further by some clerk or employee that the letters were customarily taken by him from the tray and mailed. *William Gardam & Son v. Batterson (N. Y.)*, 19-649.

Demurrer to evidence. — A demurrer to the plaintiff's evidence should be sustained when, taking the evidence as a whole, it would not support a judgment in favor of the plaintiff. *Pringley v. Guss (Okla.)*, 8-412.

Sufficiency to establish defense. — Evidence in a materialmen's lien case held to fail to establish a defense, and a verdict in favor of the plaintiff held not to be contrary to the law or the evidence. *Prince v. Neal-Millard Co. (Ga.)*, 4-615.

Satisfactory evidence under California statute. — The California statute declares that that evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind, and provides that "such evidence alone will justify verdict." *Estate of Dolbeer (Cal.)*, 9-795.

b. Positive and uncontradicted testimony.

General rule. — Positive and uncontradicted testimony, not inherently improbable, is *prima facie* evidence of the fact which it

seeks to establish, and as against a mere suspicion of its falsity, justifies a directed verdict, since the jury would not be at liberty to disregard the testimony. *Brown v. Petersen (D. C.)*, 4-980.

Where a disinterested witness, who is in no way discredited by other evidence, testifies from knowledge to a fact which is not in itself improbable or in conflict with other evidence, the witness is to be believed, and the fact testified to is to be taken as legally established. *Miller's Will (Ore.)*, 14-277.

Where witness is interested in event of suit. — The general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and no circumstance is shown from which an inference against the fact testified to can be drawn, the fact may be taken as established and a verdict directed on such evidence, is subject to an exception where the witness is interested in the result of the suit, or facts are shown from which an unfavorable inference as to his testimony may be drawn. *Skillern v. Baker (Ark.)*, 12-243.

c. Instructions.

Interested and disinterested witnesses. — In an action against a carrier of passengers to recover damages for personal injuries sustained by a passenger, the defendant cannot predicate error of the trial court's failure to explain to the jury the relative value and weight of the testimony of interested and disinterested witnesses, unless it requests an instruction on that point. *Stan-den v. Pennsylvania R. Co. (Pa.)*, 6-408.

As to effect to be given to number of witnesses. — An instruction on the weight of evidence from which the jury may infer that the number of witnesses upon any given question is of no consequence and is not to be considered, is erroneous, but the error is not misleading if such instruction is followed by another and correct instruction as to the same matter. *Garske v. Ridgeville (Wis.)*, 3-747.

Invading province of jury. — An instruction which tells the jury "that when witnesses are otherwise equally credible and their testimony otherwise entitled to equal weight, greater weight and credit should be given to those whose means of information were superior, and also to those who swear affirmatively to a fact, rather than to those who swear negatively or to a want of knowledge or recollection," is erroneous, as invading the province of the jury to determine the weight of evidence. *Muncie Pulp Co. v. Keesling (Ind.)*, 9-530.

21. BURDEN OF PROOF.

Agent's authority, see AGENCY, 3 b (1).

Delivery of deed, see DEEDS, 1 c (1).

Impeaching certificate of acknowledgment, see ACKNOWLEDGMENTS.

Negligence of bailee, see BAILMENT, 2.

Offer to arbitrate, see ARBITRATION AND AWARD, 2.

Payment, see BILLS AND NOTES, 10.

Matters in avoidance. — When the answer in an action for tort does not controvert the allegations of the petition, but pleads matters in avoidance, the burden of proof is on the defendant. *Dovey v. Lam* (Ky.), 4-16.

22. LEGISLATIVE POWER OVER RULES OF EVIDENCE.

See also WITNESSES, 3 b (2).

Validity of statute prescribing rules of evidence, see INTOXICATING LIQUORS, 3 d.

Power of Congress to prescribe rules for state courts. — The federal Congress is not authorized to prescribe rules governing the admissibility of evidence in state courts. *Sulpho-Saline Bath Co. v. Allen* (Neb.), 1-21.

Statute making certain facts prima facie evidence. — The legislature has power to make certain acts or facts *prima facie* evidence of other facts necessary to be established in a legal proceeding. *Rose v. State* (Ind.), 17-228.

The Alabama statute providing that the refusal or failure of an employee, who has obtained money or other personal property from his employer by virtue of his employment, to perform the required service or to refund the money or to pay for the property so obtained, shall be *prima facie* evidence of intent on his part to injure or defraud his employer, is valid. *State v. Thomas* (Ala.), 6-744.

Statute making certain facts conclusive evidence. — The provision of the Ohio statute that the character of an alleged trust or combination "may be established by proof of its general reputation as such," is unconstitutional and void, in that it prescribes a rule of evidence which is violative of the guaranty contained in the Constitution of the United States, that no person shall be deprived of "life, liberty, or property, without due process of law." *Hammond v. State* (Ohio), 14-732.

Statute requiring production of documents. — The statute of Vermont requiring corporations to produce their books and papers does not violate any provision of the state constitution. *In re Consolidated Rendering Co.* (Vt.), 11-1069.

Statute regulating proof of instruments. — The South Dakota statutes prescribing the method of proving the execution of instruments in order that they may be recorded have no application to instruments not required to be recorded, and therefore do not furnish the rule of proof in an action on a promissory note, the execution of which is denied by the defendant. *Mississippi Lumber, etc., Co. v. Kelly* (S. Dak.), 9-449.

Under the South Dakota statute providing that "the execution of witnessed instruments, except wills, may be proved in the same manner as the execution of unwitnessed instruments," the plaintiff in an action on a promissory note witnessed by two persons, the execution of which is denied by the defendant, is not absolutely required to produce both of the subscribing witnesses, or account for his

failure to do so, but may prove the execution of the note in the same manner as he might prove it if there were no subscribing witnesses. *Mississippi Lumber, etc., Co. v. Kelly* (S. Dak.), 9-449.

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Cross-examination of witnesses in criminal cases, see CRIMINAL LAW, 6 m (8).

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Of bankrupt, see BANKRUPTCY, 6.

Of jurors, see JURY, 6 c.

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Physical examination of prosecutrix in rape case, see RAPE, 2 d (2).

Right of counsel in criminal case to examine papers, see CRIMINAL LAW, 6 m (11).

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EXCHANGES.

Membership in stock exchange as asset in bankrupt's estate, see **BANKRUPTCY**, 11.

Transfer of membership. — Where the rules of a stock exchange provide that a transfer of membership may be made only when it is approved by the exchange's committee on admissions, a paper whereby a member purports to transfer his membership to another person works no change in membership whatever until the transfer is approved in the manner prescribed by the exchange's rules. *O'Dell v. Boyden* (U. S.), 10-239.

Requirements as to continuous quotations. — The requirement of a board of trade that every applicant for its continuous quotations, as a condition precedent to receiving them, obligate himself not to use them in conducting a bucket shop or in supplying them to one engaged in a bucket-shop business, is a proper and reasonable regulation. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.* (Ind.), 6-880.

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1. ISSUANCE, FORM, AND VALIDITY OF WRIT.

Right to issue. — The assignee of a part of a judgment will not be allowed to issue execution for so much of the judgment debt as was assigned to him. *Forster v. Baker* (Eng.), 19-462.

Effect of error as to interest on debt. — An execution is not avoided and the proceedings based upon it invalidated by the fact that through an error of the clerk it commands the officer to collect interest from the time of judgment instead of from thirty days thereafter, the time fixed for payment in the decree, if there is sufficient in the execution, when taken in connection with other facts, to identify it with the judgment upon which it is based. *Hamant v. Creamer* (Me.), 8-165.

2. THE RETURN.

Signature of officer not part. — Under the statutes of Virginia, the signature of the officer who makes return of an execution is not intended as a part of the return proper, but merely as an authentication of the memorandum as a true return by the proper officer. *Slingluff v. Collins* (Va.), 17-456.

Validity when made before return day. — An officer's return to an execution, reading, "No effects known to me this 8th day of November, 1889," is not invalid because made before the return day has arrived, in a case where it is admitted that the judgment debtors were insolvent at the time when the execution was placed in the officer's hands. *Slingluff v. Collins* (Va.), 17-456.

3. AMENDMENT OF EXECUTION OR RETURN.

Right to amend, in general. — In furtherance of justice, an execution may be amended when no rights of innocent third persons have intervened except those which will be protected by the amendment. *Hamant v. Creamer* (Me.), 8-165.

In a proper case, leave to amend an officer's return to an execution, so as to make it speak the truth, ought to be and usually is liberally granted, the only limitation upon the right to amend being that the amendment shall be in furtherance of justice. *Slingluff v. Collins* (Va.), 17-456.

In collateral proceeding. — The court may of its own motion order amendment of an execution to be made, and, in collateral

proceedings concerning amendable execution, the writ will be treated as having been actually amended. *Hamant v. Creamer* (Me.), 8-165.

Addition of officer's signature to return. — A return to an execution which is sufficient under the statute so far as the body thereof is concerned, but from which the signature of the officer has been omitted, may be amended by the addition of such signature. *Slingluff v. Collins* (Va.), 17-456.

Effect of amendment. — Where an officer's return to an execution is amended, the same effect is to be given to the return, as amended, as though it had originally been made in the amended form. *Slingluff v. Collins* (Va.), 17-456.

Delay in application for amendment. — There is no specific limitation of time within which the power to amend an officer's return to an execution may be exercised, but after a considerable lapse of time the power should be exercised with caution. An application to amend a return by adding the officer's signature thereto should not be refused, however, merely because nineteen years have elapsed since the return was made, where it is shown that the judgment debtors were notoriously insolvent at the time of the return, that there was no opportunity to enforce it, and that no rights of third parties have intervened in the meantime. *Slingluff v. Collins* (Va.), 17-456.

4. PROPERTY SUBJECT TO EXECUTION.

Equitable estates or interests. — A judgment is not a lien on a mere right or interest which can be asserted and enforced in a court of equity only, nor can such an interest be seized and sold under an execution at law. *Pogue v. Simon* (Oregon), 8-474.

An equitable asset of a debtor can be reached only by proper proceedings in a court of equity, and is not subject to levy and sale under an execution at law issued upon a judgment recovered against such debtor or upon a deficiency decree rendered against him in a suit for the foreclosure of a mortgage, and such levy and sale and deeds executed thereunder by the sheriff are nullities, and vest no title in the purchasers. *Thalheimer v. Tischler* (Fla.), 15-863.

Lessee's option to purchase. — A lease of real estate for a term of years wherein the lessee is given the option at any time after the expiration of a certain period to purchase the leased property for a certain stipulated price, and, in the event he fails to exercise such option to purchase, the right, at the expiration of the term, to receive one-half of the valuation of the improvements he has placed on the leased premises as fixed by three disinterested persons, does not give the lessee such an interest in the leased premises as can be subjected to sale under an execution at law. This contemporaneous intermixture and mingling of legal and equitable interests creates an amalgam that can be properly disposed of and sold only under

a decree in equity. *Thalheimer v. Tischler* (Fla.), 15-863.

Right to redeem leasehold. — A statutory right to redeem a leasehold sold under foreclosure proceedings is not such an interest as is subject to levy and sale under execution, and therefore the rendition of a judgment against the lessee subsequent to the foreclosure sale fixes no lien on the leasehold interest. *Commerce Vault Co., Use of McWilliams, r. Barrett* (Ill.), 6-652.

Interest of purchaser at execution sale. — The estate or interest of a purchaser at an execution sale may, after the time for redemption has expired, be seized and sold under an execution issued against him, even though no sheriff's deed has been executed or delivered to him. *Pogue v. Simon* (Oregon), 8-474.

Goods of stranger mingled with those of debtor. — Where a person mingles his own goods with those of a debtor, and refuses to separate them at the request of an officer having an execution against the debtor, the whole mass is subject to sale under the execution. *McCauley v. Hoek* (Mich.), 18-945.

Intoxicating liquor. — In Kansas intoxicating liquor is not subject to seizure on execution, because the statute forbids its sale except by certain persons, for restricted purposes, and upon affidavit of the buyer showing the occasion for his purchase. *Hines v. Stahl* (Kan.), 17-298.

5. PROPERTY EXEMPT FROM EXECUTION.

a. In general.

Horses used solely for pleasure. — Horses used solely for driving for the convenience and pleasure of the owner and his family are not "work horses" within the meaning of the Mississippi statute exempting "work horses" from execution. *Tishomingo Savings Institution v. Young* (Miss), 6-776.

Wages. — Under the Arkansas statutes the only mode of claiming the exemptions allowed by law is by filing the statutory schedule; and wages becoming due subsequent to the filing of such schedule are not exempt from seizure under garnishment proceedings or other legal process issued before the filing of such schedule. *Baxley v. Laster* (Ark.), 12-332.

Personal property of railroad company. — The personal property of a railroad corporation, kept in stock for emergency purposes, is necessary to enable the company to perform its duties to the public, and is exempt from levy and sale under the ordinary writ of fieri facias. *Margo v. Pennsylvania R. Co.* (Pa.), 5-511.

Where judgment is for costs only. — Costs recovered independent of any other judgment are purely statutory and are not a debt founded upon contract or within a constitutional provision that personal property in a certain amount "shall be exempt from seizure on attachment or sale on execution, or other process from any court issued for

the collection of any debt by contract." *Buckley v. Williams* (Ark.), 13-258.

b. Moneys accruing from life insurance.

As to debts of beneficiary. — The statute exempting from execution all moneys, etc., accruing from life insurance, exempts such moneys not only as to the debts of the insured, but also as to the debts of the beneficiary after the death of the insured. *Holmes v. Marshall* (Cal.), 2-88.

Where the estate of an insured person is the beneficiary, the proceeds of the insurance are properly set apart for the use of the surviving husband or wife and are exempt from execution under the statute. *Holmes v. Marshall* (Cal.), 2-88.

Insurance money deposited in bank.

— The deposit of insurance money in a bank by the beneficiary does not cause the same to lose its identity as money exempt from execution. *Holmes v. Marshall* (Cal.), 2-88.

c. Pension money.

In general. — Under the Revised Statutes of the United States (§ 4747, 5 Fed. St. Ann. 667) as construed by the Federal Supreme Court, pension money is exempt from claims of a pensioner's creditor only while it is "due, or to become due, to any pensioner." By such construction the words of the statute, "shall inure wholly to the benefit of such pensioner," relate to the words "due or to become due," and have no force after the public obligation has been discharged by delivery of the money to the pensioner or his agent. *Estate of Ferguson* (Wis.), 17-1189.

Money paid and converted into other property. — Pension money, under the federal statute, is not exempt from the claims of creditors of the pensioner after the money has been paid to the pensioner and converted into other property. If *Folschow v. Werner*, 51 Wis. 85, holding that pension money is exempt so long as it can be identified as a fund, is to be followed at all, it will not be extended to cover such a case. *Estate of Ferguson* (Wis.), 17-1189.

d. Property in custodia legis.

Leave of court. — Property in custodia legis cannot be levied upon and sold without leave of court first obtained. If so sold, the sale is void. *Cobb v. Camden Sav. Bank* (Me.), 20-547.

Surplus in hands of sheriff after sale. — A surplus remaining in the hands of the sheriff after an execution sale is not subject to levy and sale under other executions against the debtor, and therefore executions in the hands of the sheriff at the time of such sale will not become liens on the surplus. *Commerce Vault Co., Use of McWilliams, v. Barrett* (Ill.), 6-652.

e. Method of claiming exemption.

Filing schedule of property. — Under a statute requiring an execution debtor who

desires to claim exemption to file a schedule setting out his property and specifying that which he claims to be exempt, the debtor's claim that specific articles are exempt may be denied if his schedule fails to make a full disclosure of all his property. *Farris v. Gross* (Ark.), 5-616.

Successive exemption under Ohio statute. — Every judgment debtor entitled to the exemption from execution allowed by the Ohio statute may at all times keep in possession and hold exempt from levy and sale real or personal property to be selected by such debtor not exceeding \$500 in value in addition to the amount of chattel property otherwise by law exempt. *Hart & Co. v. Cole* (Ohio), 4-217.

A judgment debtor who has once claimed exemption from execution under the Ohio statute and has had the same set off and allowed, may thereafter again claim exemption against the same judgment out of other property, subject to the limitation that a judgment debtor may not at one time hold exempt, in lieu of homestead, property in excess of \$500 in value, in addition to the chattel property otherwise by law exempted. *Hart & Co. v. Cole* (Ohio), 4-217.

Effect of selection as to creditors. — Creditors who were not parties to a selection of exempt property by the debtor are not bound thereby, but may levy execution on such property, subject to the debtor's right to have his exemptions set off to him. *McCausey v. Hoek* (Mich.), 18-945.

Claim by debtor's assignee. — Property selected by a debtor *ex parte* as his exemption is subject in the hands of a third person to levy under an execution against the debtor, but such third person may set up the debtor's claim of exemption, and failure to do so is a waiver of the right. *McCausey v. Hoek* (Mich.), 18-945.

6. EFFECT OF SUPERSEDEAS UPON EXECUTION.

Restoration of possession. — The Florida statute providing that the allowance and perfection of supersedeas shall suspend all further proceedings in relation to the judgment is in derogation of the common law and therefore must be strictly construed. It changes the common-law rule requiring or permitting a sale of property levied on under an execution prior to the perfecting of the supersedeas, but does not restore the personal property previously levied on to the possession of the defendant in execution or impair the lien thereon created by the levy of the execution. *Thalheim v. Camp Phosphate Co.* (Fla.), 5-784.

7. REPLEVIN FOR GOODS SEIZED.

Execution as evidence. — Where a sheriff seizes personal property under an execution, and a stranger to the process deprives him of his possession by a writ of replevin, the execution, though produced by the officer at the trial of the suit in replevin, is not competent evidence of the officer's pos-

sessory rights without proof of the judgment on which such execution was issued. *Hoover v. Jones* (Neb.), 18-1126.

8. SALE UNDER EXECUTION.

Leave to sell. — The denial of a motion for an order to restrain the execution sale is not a granting of leave to sell. *Cobb v. Camden Sav. Bank* (Me.), 20-547.

Validity of sheriff's deed. — A sheriff's deed of property sold on an execution levied on the homestead held not to be insufficient because of the absence of a recital that the defendant had opportunity to choose the land he would hold as a homestead. *Kessner v. Phillips* (Mo.), 3-1005.

Construction and operation of conveyance. — The right of a purchaser at a sale under an execution aided by an attachment levied before the execution of a mortgage on the attached premises is not postponed to the mortgage merely because the sheriff's certificate recites that the sale was of the interest which the execution debtor had at the time the sale was made. *Beyer v. Dobeas* (Wis.), 18-1019.

Title passing by sheriff's deed. — A sheriff's deed passes the same title which a deed or bargain and sale, executed by a judgment debtor, would pass. *Brady v. Carteret Realty Co.* (N. J.), 3-421.

An execution sale of the whole of a parcel of real estate conveys all the right, title, and interest, of every nature, that the debtor has, and is not invalidated by the fact that he owns only an undivided interest in the land. *Hamant v. Creamer* (Me.), 8-165.

Avoidance for fraud. — While mere inadequacy of the bid at an execution sale is not alone sufficient to invalidate the sale and to furnish cause for setting it aside, a levy may be so excessive as to furnish ground for avoiding the sale for fraud. *Fortin v. Sedgwick* (Iowa), 12-337.

Such an enormous disproportion between the value of property sold under execution and the amount to be raised as the sale of a tract of land having a market value of \$30,000 for about forty dollars, the amount of the judgment and costs, is in itself legitimate ground for an inference of fraud. *Fortin v. Sedgwick* (Iowa), 12-337.

Avoidance of sale because officer deducts excessive fees. — An execution sale is not avoided by the fact that the officer making it taxes, and causes to be satisfied out of the proceeds of the sale, fees not authorized by law. *Hamant v. Creamer* (Me.), 8-165.

Defective title as excuse for refusal to complete purchase. — A bidder at a sheriff's sale has no right to refuse to pay the amount of his bid and take the property on the ground that the sale will convey no title. *Dickson v. McCartney* (Pa.), 18-500.

Setting aside sale. — A plaintiff in execution is not generally a necessary party to proceedings to set aside a sale under execution. *White-Diamond v. Hightower & Co.* (Ga.), 5-260.

9. REDEMPTION.

Lien of deficiency judgment on property redeemed. — Under the Montana statute where real estate is sold under execution and bid in by the judgment creditor for less than the amount of the judgment, the judgment debtor has an interest in the property during the period of redemption, which, when transferred to a third person and redeemed by the latter from the execution sale, is free from the lien of the deficiency judgment. *McQueeney v. Toomey* (Mont.), 13-316.

Complaint in action to enjoin levying of deficiency judgment. — In an action by the purchaser of land from a judgment debtor after execution sale and during the period of redemption to enjoin the levying of a deficiency judgment on the land, the complaint, alleging in substance that the judgment debtor sold and conveyed the land in question to the plaintiff by a good and sufficient deed by which the plaintiff became the owner and entitled to the possession of the premises, sufficiently alleges that the grantor was the owner, although it does not allege that fact in set terms. *McQueeney v. Toomey* (Mont.), 13-316.

Application of statute extending time to sale under judgment rendered prior to enactment. — A law extending the time for redemption of property sold under an execution has no application to an execution sale made upon a judgment rendered before its enactment, since if so applied it would impair the obligation of the contract in violation of the state and federal constitution. *Welsh v. Cross* (Cal.), 2-796.

10. TRESPASS FOR WRONGFUL LEVY.

Levy in ignorance of satisfaction. — Trespass will lie against a solicitor and his client for suing out execution and causing it to be levied after the judgment had been satisfied, though neither the solicitor nor his client knew that fact; but an action on the case will not lie in the absence of malice. *Clissold v. Cratchley* (Eng.), 19-366.

11. CLAIMS OF THIRD PERSONS.

Notice by claimant before sale. — Where a third person claims property sold under execution, and it appears that on the day of the sale the claimant gave a written notice of claim to the officer who had made the levy, but it does not appear whether the sale was before or after such notice, it will be assumed that the notice was given in due time to stop the sale, as the law does not recognize fractions of a day in the absence of evidence showing the priority of events on the same day; and in such case the fact that the levying officer gave notice of the claim to the court which had issued the execution, and the further fact that the auctioneer retained possession of the articles sold, will be regarded as corroborative evidence that the claim was received in due time to stop the sale. *Brown v. Peterson* (D. C.), 4-980.

12. APPOINTMENT OF RECEIVER IN AID OF EXECUTION.

An order for the appointment of a receiver, by way of execution, of all rents, profits, and moneys receivable in respect to a judgment debtor's interest in patents of which he is the registered owner, cannot be made on proof that such judgment debtor is resident abroad, and has no property within the jurisdiction available for the purposes of a *fieri facias* or other ordinary process of execution, where it is not shown that he is in receipt of any profits from the patents in question by way of royalties or otherwise. *Edwards v. Picard* (Eng.), 17-387.

EXECUTIVE.

See STATES, 2; STATUTES, 1 e; UNITED STATES.

Powers of, see EXTRADITION.

Power of executive to remit fines, see FINES, 3.

EXECUTIVE OFFICERS.

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EXECUTORS AND ADMINISTRATORS.

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1. WHEN ADMINISTRATION IS NECESSARY OR PROPER.

a. In general.

Death of party as prerequisite. — A grant of letters of administration on the estate of a living person, as if he were dead, is absolutely void. *Selden v. Kennedy* (Va.), 7-879.

As prerequisite to devolution of personalty. — As a general rule administration is a prerequisite to the devolution of the personal estate of the deceased. *McBride v. Vance* (Ohio), 4-191.

Estates of minors. — An administrator may be appointed to administer upon the estate of a deceased minor. *Bowden v. Jacksonville Electric Co.* (Fla.), 7-859.

When unnecessary under Idaho statutes. — Under the statutes of Idaho it is not absolutely necessary that administration be had of the estate of an intestate, when there are no debts against the estate and the heirs have made a satisfactory distribution of the assets among themselves. *Gwinn v. Melvin* (Idaho), 2-770.

b. Estates of persons presumed to be dead.

Power of state to authorize administration. — A state has power to provide for the administration of the estates of persons who are absent for such a length of time as gives rise to a reasonable presumption of death. *Cunnius v. Reading School District* (U. S.), 3-1121.

A state legislature, in the exercise of its jurisdiction over property within the state, may provide by statute that after the absence of the owner unheard of for a specified period his property may be administered upon in the same form of proceeding as is provided for administration upon the estate of a deceased person, and such administration will be valid as against the absentee and all persons interested, although he is in fact not dead. *New York Life Ins. Co. v. Chittenden* (Ia.), 13-408.

Due process of law. — The Pennsylvania statute authorizing administration upon the estate of a person presumed to be dead by reason of absence, held not to deny the absentee due process of law in contravention of the United States Constitution. *Cunnius v. Reading School District* (U. S.), 3-1121.

If a state statute which provides merely that a person absent from the state for more than seven successive years shall be presumed to be dead, can be construed as authorizing the granting of letters of administration upon the estate of an absentee who is in fact alive, it is void as violating the "due process of law" clause of the Fourteenth Amendment to the Federal Constitution, as it makes no provision for notice of administration proceedings. *Selden v. Kennedy* (Va.), 7-879.

Reasonableness of statute. — A statute under which the distribution of the estate of an absentee can be made fourteen years after his disappearance, at which time all his rights in the property are barred, is not unreasonable as to the length of time given the owner in which to recover his property, and is not in conflict with the constitutional guaranties of property rights. *Nelson v. Blinn*, (Mass.), 14-147.

2. APPOINTMENT.

a. Who may apply for.

Simple contract creditors. — A simple contract creditor may apply for the appointment of an administrator of an estate by the surrogate. *De Coppet v. Cone* (N. Y.), 20-841.

b. Persons who may be appointed.

Nonresident. — The right to be appointed and act as an executor is not one of the rights secured by the Constitution of the United States or of Illinois, and the Illinois statute providing that no nonresident shall be appointed or act as executor is a valid exercise of legislative power. *In re Mulford* (Ill.), 3-986.

A person held not to be a resident of the state within the Illinois statute providing that no nonresident shall be appointed or act as executor. *In re Mulford* (Ill.), 3-986.

The provision of a state statute "that no nonresident of this state shall be appointed or act as administrator or executor" does not make the appointment of a citizen of another state subject to collateral attack upon a plea by such appointee to the jurisdiction of a United States court. *Patch v. Wabash R. Co.* (U. S.), 12-518.

Person convicted of crime. — A conviction of an attorney by a federal court of the statutory offense of receiving an excessive fee for the prosecution of a pension claim is not a conviction of an infamous crime, within the meaning of the Maryland statute disqualifying any person from acting as executor who has been "convicted of any crime rendering him infamous according to law." *Garitee v. Bond* (Md.), 5-915.

Under a state statute disqualifying from acting as executors persons convicted of infamous crimes, the state courts will not regard as disqualified a person convicted by a federal court, sitting within the state, of a federal statutory offense rendering him infamous, as the federal jurisdiction is considered *quoad hoc* as foreign to the state jurisdiction. *Garitee v. Bond* (Md.), 5-915.

Waiver by next of kin in favor of stranger. — Under the statutes of Iowa relative to the administration of decedents' estates, a brother of the decedent has no standing to object to the action of the decedent's surviving son in waiving his right to administer upon the estate in favor of a stranger, and in procuring the appointment of such stranger as administrator. In such a case the brother of the decedent is not a

next of kin within the meaning of the statutes, and in the absence of proof that there are any creditors of the deceased, or that the interests of the estate as a whole or the rights of some beneficiary thereof have been prejudiced by the appointment of the stranger as administrator, such appointment should not be set aside on the brother's petition. *In re Estate of Weaver* (Ia.), 17-947.

c. Joint administrators.

Power of court to appoint. — Under the District of Columbia statute providing for administration in the case of an intestate leaving a widow and a child or children, the probate court may appoint a widow and child, or a widow and two or more children, as joint administrators if the appointees agree thereto, but the court may not make such joint appointment against the consent of the parties entitled to administration. *Williams v. Williams* (D. C.), 4-549.

d. Jurisdiction to appoint.

Proof of assets within county. — In Massachusetts the Probate Court of a county has jurisdiction to grant administration of the estate of a person who at the time of his decease was an inhabitant of or resident in the county, without proof that such person left an estate to be administered within the county. *Connors v. Cunard Steamship Co.* (Mass.), 17-1051.

e. Notice of appointment.

Public administrator. — Under the Wisconsin statute authorizing the county court having jurisdiction of the estate of an intestate person leaving no surviving widow, husband, or next of kin to grant, upon its own motion, administration of such estate to the public administrator, the grant of letters to the latter may be made properly without notice. *Jordan v. Chicago, etc., R. Co.* (Wis.), 4-1113.

f. Validity of appointment.

Collateral attack. — The County Court having jurisdiction of a petition filed in a proceeding *in rem* to determine whether a deceased person left property in the state of Wisconsin so as to authorize the appointment of an administrator of his estate, the determination of the court and its appointment of an administrator, although erroneous, is not a nullity or open to collateral attack. *Jordan v. Chicago, etc., R. Co.* (Wis.), 4-1113.

A finding of fact made by the Probate Court upon the grant of letters of administration on the estate of a decedent, that the decedent was at the time of his death an inhabitant of or resident in the county where the letters are granted, cannot be attacked collaterally in an action brought by the administrator in the Superior Court upon a cause of action belonging to the estate. *Connors v. Cunard Steamship Co.* (Mass.), 17-1051.

3. JURISDICTION OVER.

Executor in one state residing in another. — One may occupy the two relations of individual and executor, and as individual he may be subject to the laws of one state, and in his official capacity he may be subject to the laws of another state, and he may as executor have the legal ownership of property over which the courts of the state in which he resides have no jurisdiction. *Com. v. Peebles* (Ky.), 20-724.

4. BONDS.

Bankruptcy of surety, see **BANKRUPTCY**, 9.
Liability of sureties on executors' bonds, see **SURETYSHIP**, 3 b.

Bond conditioned to pay debts and legacies. — Where an executor has given a bond making himself personally liable to pay legacies, the amounts of which are fixed by his testator's will, the obligation to pay is absolute, and therefore no suit is required to establish the duty. *Probate Court v. Adams* (R. I.), 8-1028.

In an action on a bond making an executor personally liable for the debts and legacies of his testator, it is no defense that the executor is ready and willing to appropriate for payment of legacies such assets of the estate as are in his possession. *Probate Court v. Adams* (R. I.), 8-1028.

Personal liability of representative. — The Rhode Island statute providing that neither the person nor the property of an executor, other than an executor of his own wrong, shall be liable for the debts and legacies of his testator, except upon suggestion of waste, does not require that there shall be a suggestion of waste in an action on a bond which by its terms makes an executor personally liable for the payment of debts and legacies. *Probate Court v. Adams* (R. I.), 8-1028.

Liability on bond for property not assets of estate. — The sureties on the bond of an executor who has received among the assets of the estate a fund in which his testator has only a life estate are not liable therefor to the remaindermen of the fund, because it is not an asset of the testator's estate. *Probate Court v. Williams* (R. I.), 19-554.

Verdict in action on bond. — A verdict in an action on an executor's bond is not responsive to the issues where it finds merely that the bond is the obligation of the parties and awards the penal sum thereof to the plaintiff, without finding that there has been a breach of the condition of the bond. *Probate Court v. Williams* (R. I.), 19-554.

5. TITLE TO ESTATE.

Devolution of title in general. — Real estate passes primarily on the death of the owner, to the heirs and devisees, while the personal property primarily passes to the executor or administrator, who holds the legal title thereto until the heirs or legatees receive

it through process of administration. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

The personal property of a deceased person does not vest in the heirs, but is in abeyance until administration is granted and is then vested in the administrator by relation from the time of death, and no right of action on a promissory note belonging to a deceased person lies in favor of the sole heir of the decedent who has possession of the note. *McBride v. Vance* (Ohio), 4-191.

Real estate acquired by administrator. — Real property acquired by an administrator in obtaining satisfaction of judgments forming a part of the assets of the estate in his hands for settlement is to be treated, for purposes of administration, as personal property. *Weir v. Bagby* (Kan.), 7-702.

Where an administrator has acquired real property in obtaining satisfaction of judgments forming part of the assets of the estate in his hands for settlement, the intestate's heirs do not take title to such property by descent, nor can they dispossess the administrator until the Probate court has exhausted its authority over the property by an order of distribution, either general or special, which is final in character. *Weir v. Bagby* (Kan.), 7-702.

Unexpired lease of real property. — An unexpired lease of real property for twenty years or any longer term is "personal property," both at common law and under the statutes of Missouri, and therefore, on the death of the lessee, passes to his administrator, except as to the interest of the widow, under the statute (Rev. St. Mo. 1899, § 2933; Ann. St. 1906, p. 1690), giving her dower in a leasehold. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

6. ASSETS OF ESTATE.

Property exempt from administration. — A finger ring and a watch and chain worn by a person during his lifetime are embraced in the term "all the wearing apparel of the decedent," as used in a statute exempting such wearing apparel from administration and the payment of debts. *Phillips v. Phillips* (Ala.), 15-157.

A silver card receiver used on a hat rack is embraced in the term "household furniture necessary for the use and comfort of the family" as used in such a statute. *Phillips v. Phillips* (Ala.), 15-157.

A piano and piano stool which are necessary for the use and comfort of the family, as when they are a mother's means of supporting her minor children, are likewise embraced in the term "household furniture necessary for the use and comfort of the family" as used in such a statute. *Phillips v. Phillips* (Ala.), 15-157.

Right of next of kin to sue for. — The next of kin of a decedent have no standing in a court of law or equity to maintain an action for the recovery of property alleged to belong to the estate of their deced-

ent. Such actions can be brought only by the duly appointed personal representative of the deceased, except that the next of kin may sue where the personal representative of the deceased, by reason of collusion with the defendant or otherwise, is derelict in the performance of his duty, but the administrator must be joined as a party defendant. *Buchanan v. Buchanan* (N. J.), 20-91.

Effect of release by sole distributee. — A claim for damages for the sufferings of a deceased person resulting from personal injuries sustained by him a short time before his death, belongs technically to his estate; but where his sole surviving heir at law settles the claim prior to the appointment of an administrator, and the settlement is freely and fairly made, and the asset involved in the settlement is not needed by the administrator for creditors or for expenses of administration, and the assets if recovered by the administrator would go to the heir, the settlement will be binding upon the administrator subsequently appointed. *McKeigue v. Chicago, etc., R. Co.* (Wis.), 10-554.

7. POWERS.

Powers dependent on grant of letters.

— As a will is the only source of an executor's power, and letters testamentary are the only evidence of his authority, it follows that where the former is never established and the latter are never issued, he who assumes to act as executor is merely a volunteer, and runs the risk of having his acts repudiated by the courts of competent jurisdiction. *Dodd v. Anderson* (N. Y.), 18-738.

Private sale of personal property. — Under the Missouri statute (Rev. St. 1899, §§ 112, 113; Ann. St. 1906, p. 376), empowering an administrator to sell personal property when necessary to pay debts or legacies, without an order of court, at public sale, an administrator has no power in any case to sell personal property at private sale, except on an order of a Probate Court directing a private sale and prescribing the terms thereof, as required by section 117 of the statute. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

There being no statute in Missouri directing an administrator to make a report to the court of a sale of personal property at private sale, or empowering the Probate Court to approve or confirm such a sale, the court's approval and confirmation of such a sale adds nothing to its validity, and does not cure any defects in the order authorizing it. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

Effect of testamentary power to sell land. — A direction to an executor to sell the decedent's property and pay the proceeds to the widow gives the executor full power over the realty, and the right to maintain any action necessary to carry out the direction and to protect the interests charged, including the power to maintain a bill to remove a cloud on the title. *Sears v. Scranton Trust Co.* (Pa.), 20-1145.

Power to complete contract for sale of land. — The executor of the vendor in an executory contract to sell land is authorized to convey the land to the purchaser where the will provides that the executor shall "have full and complete power and authority over my entire estate, real, personal, and mixed," and directing him to sell the real estate. *Stewart v. Griffith* (U. S.), 19-639.

To make oil and gas lease. — Under a clause of a will providing that the executor and trustee shall take charge of certain premises and lease and maintain the same without permitting a deterioration in value, such executor and trustee is not authorized to execute an oil and gas lease granting the lessee all the oil and gas under the said premises and binding the legatees thereby, where the premises had never been leased for other than agricultural purposes. *Lanyon Zinc Co. v. Freeman* (Kan.), 1-403.

An executor and trustee who has executed an unauthorized oil and gas lease is estopped to deny the validity of the same as to his own interest in the premises acquired from certain legatees. *Lanyon Zinc Co. v. Freeman* (Kan.), 1-403.

8. DUTIES AND LIABILITIES.

a. In general.

Status of representative as trustee. — The duties of an executor or administrator are trust duties, and in all essential respects he is regarded in courts of equity as a trustee. *McKeigue v. Chicago, etc., R. Co.* (Wis.), 10-554.

Duty to offer will for probate. — While a person who is nominated as executor in an instrument purporting to be the will of a decedent, and who desires to qualify, rests under a moral obligation to offer the instrument for probate, it is not his imperative legal duty to do so, since the instrument may be offered for that purpose by a devisee, legatee, creditor, or other person interested in the estate. *Dodd v. Anderson* (N. Y.), 18-738.

Investments beyond jurisdiction of court. — As a general rule executors or trustees have, in the absence of express authority, no power to invest trust funds beyond the jurisdiction of the appointing court, a provision in a will giving the executors or trustees "full authority to invest the trust property in such manner as they shall deem best" conferring no such power. *Pabst v. Goodrich* (Wis.), 14-824.

b. Liability for funeral expenses.

Credit extended to third person. — The administrator of a deceased person is not liable for the latter's funeral expenses where the credit therefor is extended to a third person on the express promise of such person to pay the bill. *Kenyon v. Brightwell* (Ga.), 1-169.

c. Individual liability.

Attorney's fees. — Attorneys employed by an administrator to assist him in admin-

istering his trust, or to prosecute or defend an action for or against him in his official capacity, have no claim they can enforce directly against the estate. The administrator is individually liable for such services, and upon settlement of his accounts he may be reimbursed out of the estate for attorney's fees necessarily paid out as expenses of administration. *Brown v. Quinton* (Kan.), 18-290.

Liability for interest on funds. — It is not improper to charge interest on a fund in the hands of an administrator, from the date of his *ex parte* settlement made more than two years after his appointment and the appraisal of the estate, showing by far the greater part thereof to have been in his hands in the form of money and notes within a few days after his appointment, although the report of the commissioner in the cause states that the administrator received the fund with which he is chargeable "as of" the date of the *ex parte* settlement. *Taylor v. Taylor* (W. Va.), 19-414.

Contract founded on new consideration. — The executrix of an estate is liable individually upon a contract made by her before her appointment by which she agreed for a consideration to pay to the legatees after her appointment their respective proportions of moneys coming into her hands in excess of a certain sum. *Painter v. Kaiser* (Nev.), 1-765.

Liability for expenses of will contest. — Where a person who is nominated as executor in an instrument purporting to be the will of a decedent offers the instrument for probate and is met with a contest, he may cast the burden of such contest upon those who are to be benefited by the probate of the paper, or may demand indemnity from them, or he may assume the burden himself. If he pursues the latter course and is defeated, he becomes personally liable for the expenses of the contest. *Dodd v. Anderson* (N. Y.), 18-738.

A person who is nominated as executor in an instrument which, in the court of first instance, is judicially declared to be invalid as a will, cannot maintain an action at law against the administrator of the decedent to recover the moneys expended in the unsuccessful attempt to procure the probate of the invalid instrument; and this rule applies even though such person has no pecuniary interest in the probate of the instrument, and acts in good faith in offering it for probate, and the expenses of the proceeding are reasonable in view of the extent of the decedent's estate. *Dodd v. Anderson* (N. Y.), 18-738.

It seems that the rule making a person who is nominated as executor personally liable for the expenses of an unsuccessful attempt to probate the putative will where the instrument is rejected by the court of first instance does not apply where the validity of the will, in whole or in part, is upheld in the court of first instance, and the executor duly qualifies as such, but the decree admitting the instrument to probate is afterwards re-

versed by an appellate court. *Dodd v. Anderson* (N. Y.), 18-738.

9. PRESENTMENT AND PROOF OF CLAIMS.

Failure to present claim on note of deceased maker as discharging surviving joint maker, see **BILLS AND NOTES**, 10.

Prospective operation of statute limiting time for filing claims against estate, see **LIMITATION OF ACTIONS**, 1 c.

Running of statute of nonclaim against infants, see **LIMITATION OF ACTIONS**, 6 h (2).

Debt expressly recognized by will. — Where a codicil to a will expressly recognizes a claim as a debt and a charge on the estate, it is unnecessary to probate such claim, because an express trust to pay it is saddled on the executor. *O'Reilly v. McGuiggan* (Miss.), 15-623.

Breach of warranty by deceased. — Although a claim for unpaid taxes on property owned by a decedent at the time of his death and passing to his executor or administrator need not be presented, a claim for unpaid taxes arising from the breach of the decedent's warranty against incumbrances on property conveyed in his lifetime must be presented to his executor or administrator within the time required by statute. *Clayton v. Dinwoodey* (Utah), 14-926.

Incorrect description of promissory note. — In presenting to an administrator a copy of a note against the deceased, the fact that, by oversight, the note presented is incorrectly described as signed by the deceased individually when it was signed with the name of the deceased "& Co." does not make the presentation invalid. *Sears v. Howe* (Conn.), 12-809.

Commencement of action as presentation of claim. — The commencement of an action against executors or administrators on a claim against the decedent within the time in which a claim could under the statute be properly presented, and the service on them of a copy of a verified complaint containing substantially all the averments required in a regularly presented claim, operate as a compliance with statutory requirement as to presentation of claims. *Clayton v. Dinwoodey* (Utah), 14-926.

Claim to partnership assets in hands of administrator of deceased partner.

— The Arizona statutes providing that every executor or administrator must publish notice requiring creditors of the decedent to present their claims, and that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, do not apply to a claim to partnership assets in the hands of an administrator of a deceased partner, and such a claim need not be filed with the administrator before suit thereon is brought. *Franklin v. Trickey* (Ariz.), 11-1105.

Parol testimony. — In a proceeding to enforce a claim against a decedent's estate, where it is not claimed that there is or has

been any writing in existence evidencing indebtedness, the law does not presume the existence of better evidence than parol testimony. *Schell v. Weaver* (Ill.), 8-339.

Admissions by decedent. — In a proceeding to establish a claim against a decedent's estate, the rule preventing the claimant from testifying in his own behalf does not preclude the introduction of admissions made to third persons by the decedent in his lifetime. *Schell v. Weaver* (Ill.), 8-339.

10. SALES OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS.

a. Jurisdiction of courts.

In Tennessee. — The Tennessee statute giving the County Courts of the state concurrent jurisdiction with the Chancery and the Circuit Courts to sell realty belonging to the estates of decedents was not intended by the legislature to break down the special system of legislation contained in the code for the administration of insolvent estates, or to interfere with the jurisdiction of the subject as distributed between the Chancery and the County Courts. *Key v. Harris* (Tenn.), 8-200.

b. What may be sold.

Realty to which decedent had claim or title. — The only realty which can be sold to pay the debts of a decedent, upon petition of the executor or administrator, is real estate to which the decedent "had claim or title" at the time of his decease. *Sifford v. Cutler* (Ill.), 18-36.

Realty fraudulently conveyed by decedent. — Land which has been conveyed in fraud of creditors cannot be reached after the death of the grantor by a proceeding to sell his real estate for the payment of his debts. As to such real estate the decedent had no claim or title at the time of his death. *Sifford v. Cutler* (Ill.), 18-36.

Lease of realty. — The Missouri statute (Am. St. 1906, p. 1807) providing that every lease of lands for an unexpired term of three years or more "shall be subject to execution and sale as real property" is not limited to execution sales, but includes all judicial sales; and therefore such a leasehold is within the statute (Ann. St. 1906, p. 386) providing for the sale of the real estate of decedents. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

c. Petition for order of sale.

Sufficiency of petition. — A petition to sell the real estate of a decedent for the payment of debts will not, on appeal, be held insufficient as to the allegation of indebtedness to give the surrogate jurisdiction because it stated merely that the decedent was indebted to the petitioner in a certain sum, where no application was made to have the claim made more specific, or to have stated the facts out of which it arose, *Matter of Pirie* (N. Y.), 19-672.

d. Public or private sales.

Petition asking for private sale. — An order directing an administrator's sale of a leasehold, but failing to authorize a private sale, is not cured, so as to validate a private sale, by the fact that the petition asked for a private sale. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

Order not authorizing private sale. — Where a probate order directing an administrator to sell a leasehold belonging to the estate, to pay debts, does not contain a direction to sell at private sale, it will be construed to require a public sale, especially where the lease itself provides that, in case of default by the lessee or his legal representatives or assigns in the payment of rent, the lease may be sold at public auction after two weeks' published notice. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

Order directing private sale. — An order directing a private sale of a leasehold belonging to a decedent's estate is void unless the terms of the sale are prescribed as required by the Missouri statute (Ann. St. 1906, p. 376), which provides that the court, on the application of the executor, may order a private sale and "prescribe the terms thereof." *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

Right of purchaser to have deed made to another. — A purchaser of land at an executor's sale has a right to have the deed to the property executed to any person whom he may designate. *West v. Burgie* (Ark.), 5-706.

e. Sales under void orders.

Collateral attack. — Where a probate order directing an administrator's sale of a leasehold is void, it was subject to collateral attack, and a sale thereunder conveys no title to the purchaser. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

Right of heirs to recover land. — The heirs of a decedent cannot recover land which the administrator has sold under a void order of court without refunding to the grantees so much of the purchase money paid by them as has been used to pay the decedent's debts. *Millican v. McNeill* (Tex.), 20-74.

Estoppel of administrator to assert individual interest. — A deed executed by an administrator in his representative capacity conveying realty forming part of the decedent's estate estops the administrator afterwards to assert an individual interest in the property so conveyed. *Millican v. McNeill* (Tex.), 20-74.

f. Cancellation of deed for fraud.

Evidence held not to show fraud. — Evidence reviewed in an action to cancel, on the ground of fraudulent procurement, the deed to land sold at an executor's sale and conveyed by an executor to a person other than the purchaser, and held to show that the deed was executed at the request of the purchaser and not at the fraudulent procure-

ment of the grantee. *West v. Burgie* (Ark.), 5-706.

11. ACCOUNTING.

Doctrine of prescription. — Where it appears that an executor has within twenty years filed a statement of his accounts, from which it appears that at the time of the filing thereof he recognized the trust as continuing, the doctrine of prescription does not apply so as to preclude a compulsory accounting by such executor. *Salmon v. Wynn* (Ala.), 15-478.

Laches as bar to application. — Irrespective of the doctrine of prescription, a complainant's laches may preclude him from invoking the aid of an equity court to compel an accounting by an executor where it appears that the slumbering by the complainant on his rights for a long time, the death of parties, the extreme doubt whether he would be entitled to anything on a fair settlement of the estate, and the uncertainty whether a proper account can be stated, create a danger of doing injustice by compelling such accounting. *Salmon v. Wynn* (Ala.), 15-478.

Personal debt of executor to decedent. — By statute in Oregon an executor is charged on final settlement with the amount of his personal debt to the decedent as so much money in his hands, irrespective of his ability to pay at the time of or subsequent to his appointment. *United Brethern First Church v. Akin* (Ore.), 2-353.

Debt due from heir, legatee, or creditor. — A debt due from an heir, a legatee, or a creditor to an estate is an asset of such estate, and where the distributive portion of such heir or legatee or the claim of such creditor is equal to or greater than his debt to the estate, the administrator or executor should charge himself with and account for the full amount of the same. *Lambright v. Lambright* (Ohio), 6-807.

Ex parte settlement of account. — An attack, by appropriate and sufficient allegations, upon an allowance to an administrator, in his *ex parte* settlement, of commission to which he is not entitled, according to the allegations of the bill, is a sufficient specification of an improper charge against the estate, in a bill to surcharge and falsify such settlement. *Taylor v. Taylor* (W. Va.), 19-414.

12. DISTRIBUTION.

a. To creditors.

Order of liability of assets. — Rule in Virginia stated as to the order of liability of the assets of a decedent's estate to the payment of debts. *French v. Vradenburg* (Va.), 8-590.

Demand for whole or part of estate. — A demand for the whole or a part of the estate is not a "claim" against it, within the meaning of the statutes. *Knutson v. Krook* (Minn.), 20-852.

A "claim" against the estate of a deceased person, within the meaning of the Minnesota statutes, is a demand of a pecuni-

ary nature which could have been enforced against the decedent in his lifetime. *Knutson v. Krook* (Minn.), 20-852.

Duty of creditor to bring suit. — In the ordinary administration of a decedent's estate, creditors are not obliged to put their claims in judgment unless they are rejected by the administrator, but the validity and amount of such claims may, by consent of the parties, be adjudicated by the surrogate. *De Coppet v. Cone* (N. Y.), 20-841.

Recovery of excess paid to creditors. — An administrator who pays a debt of his intestate in full under the mistaken belief that the estate is solvent may, on the recovery of the fact of insolvency, recover the amount paid in excess of the creditor's *pro rata* share. *Woodruff v. H. B. Clafin Co.* (N. Y.), 19-791.

b. To heirs, legatees, and next of kin.

Time of distribution. — An executor is not compellable to pay general legacies within one year after the death of the testator. But he may lawfully pay and discharge them within the year, if the estate is such as to enable him to do so. *Palmer v. Palmer* (Me.), 19-1184.

Distribution under foreign will. — While, in giving effect to a foreign will, courts are governed by the law of the domicile of the testator, the estate within the control of the court is administered according to the law of the forum, and such estate embraces all property originally within the state and brought into it by the executor, and whatever sum the executor pays to bring the property within the state reduces the amount within the control of the court. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Retention of amount due from distributee. — The administrator or executor of a decedent's estate has the right and it is his duty to retain out of the distributive share of an heir or legatee, or out of the sum due a creditor, an amount equal to the debt owing by such heir, legatee, or creditor to the estate; and this right and duty exists though the heir, legatee, or creditor is the administrator himself and whether he was indebted to the deceased before his death or contracted the liability to the estate thereafter. *Lambright v. Lambright* (Ohio), 6-807.

Except where the indebtedness may be held an advancement, the distributive share of an heir in the real property of his intestate is not chargeable with the heir's indebtedness to the intestate's estate, either as against the land itself or the proceeds of the sale thereof in the hands of the administrator, but the indebtedness must be collected in the same manner as any other indebtedness due the estate. *Marvin v. Bowlby* (Mich.), 7-559.

c. Appeals from orders of distribution.

Review on appeal from final decree of Probate Court. — The validity of a demand for the whole or part of an estate, formally allowed by the Probate Court, though

no appeal from the order allowing the same was taken, may be determined upon an appeal from the final decree of the Probate Court. *Knutsen v. Krook* (Minn.), 20-852.

Right to appeal. — An administrator has no pecuniary or personal interest or property right which can be affected by a decree of distribution of funds shown by his account to be in his hands, and he is not aggrieved by the decree directing him to pay to the legatee rather than to the heir. *Stilphen, Appellant* (Me.), 4-158.

As the assignee of the distributive share of one of the heirs at law, an administrator has a pecuniary interest and property rights which may be directly affected by a decree of distribution, and therefore under the Maine statutes may appeal from the decree. *Stilphen, Appellant*, (Me.), 4-158.

Appeal from allowance to widow. — An appeal lies from the judgment of the Probate Court granting or refusing an allowance to the widow out of the estate of her deceased husband. *Rieger v. Schaible* (Neb.), 16-700.

d. Right of subrogation.

Use of executor's own funds. — An executor who uses his own funds to pay debts and pecuniary legacies, is entitled to be subrogated to the rights of the creditors and legatees. *Earle v. Coberly* (W. Va.), 17-479.

13. COMMISSIONS.

Executor appointed in foreign state. — An executor appointed in another state held not to be entitled to a commission as an executor in the state of his residence. *Porter v. Long* (Mich.), 4-177.

Discretion to allow. — Though there may be discretion in a court of equity to allow commission to a fiduciary in his settlement, when he has failed to make it, or render a statement of the money in his hands to the parties entitled thereto, or lay his accounts before a commissioner in a pending suit, within the time prescribed by section 7 of chapter 87, section 3299, Code 1906, a question not here decided, it is error to allow commission, under such circumstances, in the absence of any fact, disclosed by the record, that could call upon the court for the exercise of such discretionary power. *Taylor v. Taylor* (W. Va.), 19-414.

14. ADMINISTRATORS DE BONIS NON.

Appointment after final settlement of estate. — Under the Alabama statute authorizing the appointment of an administrator *de bonis non*, if the estate has been finally wound up and the administrator discharged an administrator *de bonis non* cannot be appointed. *Hickey v. Stallworth* (Ala.), 5-496.

15. ADMINISTRATORS CUM TESTAMENTO ANEXO.

Appointment. — The Kentucky statute (St. 1909, §§ 3891, 3896, 3897) regulating

the appointment of administrators does not contemplate that the failure of an executor to qualify until the second term of the County Court after the probate of the will shall authorize the court to appoint a creditor or some other person in its discretion as administrator with the will annexed. *Adams v. Readnour* (Ky.), 20-833.

Where an executor fails to qualify before the convening of the second term of the County Court, such fact does not justify the appointment of an administrator with the will annexed until after the executor has been cited to appear and show cause why he should not accept or decline the trust. *Adams v. Readnour* (Ky.), 20-833.

Under the Kentucky statute (St. 1909, § 3891) which declares that if there is no executor appointed by the will, or if all the executors therein named die, or refuse the executorship, or fail to give bonds as required by law, which shall amount to such refusal, the court may grant administration with the will annexed to the person who would have been entitled to such administration if there had been no will, the court has no power to grant administration where the executor appointed by the will merely fails to qualify at or before the term of court following that at which the will is proved. *Adams v. Readnour* (Ky.), 20-833.

Powers. — What an executor may do, an administrator *c. t. a.* may also do. *Sears v. Scranton Trust Co. (Pa.)*, 20-1145.

16. ADMINISTRATORS PENDENTE LITE.

Appointment without notice. — It is within the sound discretion of the New Jersey Orphans' Court to appoint an administrator *pendente lite* on its own motion, without notice to the parties to the cause, and an appointment so made will not be reviewed on appeal except for abuse of discretion. *Davenport v. Davenport* (N. J.), 6-261.

Appeal from order appointing. — If there is a wrongful exercise of the power of appointing an administrator *pendente lite*, no doubt an appeal will lie, but no such appeal will lie because the appointee is objectionable to either party, or because of the amount of the bond required by the court. *Davenport v. Davenport* (N. J.), 6-261.

17. EXECUTORS DE SON TORT.

Validation of acts by subsequent appointment. — The acts of an executor *de son tort* are validated, by relation, by the subsequent issuance of letters testamentary to him. *Nance v. Gray* (Ala.), 5-55.

18. ACTIONS.

a. In general.

Right of personal representative to sue for death by wrongful act, see DEATH BY WRONGFUL ACT, 6 d.

Right to maintain ejectment, see EJECTMENT, 2.

Jurisdiction of action for accounting. — In an action by the creditor of an insolvent estate against the administratrix and the county judge for an accounting, the court is not deprived of jurisdiction because the plaintiff might have moved to retax the costs in the County Court or brought an action on the bond of the administratrix, or sued to recover a statutory penalty for taking illegal fees. *McGlave v. Fitzgerald* (Neb.), 2-867.

In jurisdiction other than that of decedent's domicile. — Where a foreign testator has died leaving assets and debts in New York, New York creditors are not bound to resort to the jurisdiction of the foreign administration for the collection of their claims, but are entitled to proceed against the assets in New York. *De Coppet v. Cone* (N. Y.), 20-841.

Where a nonresident testator has died leaving property in New York, but it is impossible to prove his will there and obtain letters of administration, so that New York creditors have no means of obtaining payment of their demands through the ordinary procedure for administration, equity will entertain a suit on behalf of all the creditors for a ratable distribution of the New York estate in satisfaction of their respective claims. *De Coppet v. Cone* (N. Y.), 20-841.

Where the will of a foreign testator cannot be proved in New York, and he died leaving both debts and assets in that state, a New York creditor is not bound to reduce his claim to judgment before maintaining a suit in equity in New York to administer the New York assets for the benefit of creditors. *De Coppet v. Cone* (N. Y.), 20-841.

Action in forma pauperis. — An executor or administrator who sues in his own right and is therefore individually liable for costs, may be allowed by the court to begin an action *in forma pauperis* upon a proper allegation of his personal inability to give bond. *Christian v. Atlantic, etc., R. Co.* (N. Car.), 1-803.

Action to establish trust. — A trust should not be declared against the insolvent estate of a deceased person on the ground that the proceeds of the property held in trust by the decedent went into the general assets and thereby increased the amount in the hands of the administrator, nor should the administrator be compelled to use the general assets of the estate to redeem trust property pledged by the trustee during his lifetime for his individual use. *Lowe v. Jones* (Mass.), 7-551.

Action pending against decedent. — The Indiana statute prohibiting the bringing of an action against an executor or administrator by complaint and summons and requiring all claims against a decedent's estate to be filed in the clerk's office, has no application to actions pending against the deceased at the time of his death. *Newman v. Gates* (Ind.), 6-649.

Specific performance of testator's contracts. — An executor may sue for the specific performance of a contract for the

purchase of land from his testator where it is provided by statute (Code Md. 1888, art. 93, § 81) that the executor of a vendor in an executory contract may convey the land to the purchaser. *Stewart v. Griffith* (U. S.), 19-639.

Claim of remainderman to fund held by decedent as life tenant. — The remainderman of a fund which has passed into the hands of the life tenant's executor is not a creditor of the life tenant's estate within the provisions of the probate law relating to actions by creditors of deceased persons. *Probate Court v. Williams* (R. I.), 19-554.

b. Parties.

Substitution of personal representative as party on appeal, see **APPEAL AND ERROR**, 5 c.

In action against estate of nonresident testator. — In a suit by a New York creditor to administer the assets in that state of a nonresident testator, either the foreign executor or the person interested in the estate as legatee or next of kin is a necessary party. *De Coppet v. Cone* (N. Y.), 20-841.

c. Pleading.

Sufficiency of complaint in general. — In an action by a creditor suing in behalf of all the creditors of an insolvent estate against the administratrix and the county judge for an accounting, a petition alleging collusion between the defendants and a fraudulent payment of illegal fees is sufficient as against a demurrer. *McGlave v. Fitzgerald* (Neb.), 2-867.

Allegation of refusal by representative to sue. — In an action by a creditor of an insolvent estate against the administratrix and the county judge for an accounting, allegations of collusion and fraud by the defendants are sufficient to entitle the bringing of an action without showing a technical refusal by the administratrix to sue. *McGlave v. Fitzgerald* (Neb.), 2-867.

Allegation of appointment of administrator. — Under the Florida constitution, a county judge has general power to grant letters of administration, and as such letters can be granted lawfully on the estate of a deceased minor, an allegation in the declaration in an action for death by wrongful act of a minor, that the plaintiff was duly appointed administrator of the estate of the deceased, is a sufficient allegation of the granting of such letters, and the regularity of the grant cannot be attacked collaterally. *Bowden v. Jacksonville Electric Co.* (Fla.), 7-859.

In an action by an administrator, an allegation in the declaration that the plaintiff was "duly appointed" administrator of the estate of his intestate means that he was appointed according to law. *Bowden v. Jacksonville Electric Co.* (Fla.), 7-859.

Allegation of detention of money. — Though, in charging an administrator in respect to a debt made by his decedent, it is

usual to allege that he detains, or owes and detains, the money, the omission of the word "detains" and use of the word "owes" only, do not vitiate a declaration, charging the defendant as administrator and setting forth facts, imposing liability in a representative capacity only. *Cameron v. Hicks* (W. Va.), 17-926.

Amendment of pleadings. — In an action by an administrator *de bonis non*, where duly authenticated copies of his official bond and letters testamentary have been filed with the clerk of the court in compliance with the Colorado statute (Mills's Ann. St. Rev. Supp., §§ 4733, 4734), the proper practice being to incorporate copies of those documents in the petition itself, which has not been done, he should be allowed to amend in this particular. *Berkey v. Board of Com'rs* (Colo.), 20-1109.

Construction of pleadings in action against executor. — A purpose to impress a trust in a testatrix's estate in the hands of the executor, and not to establish a debt against the estate, is disclosed by a bill which states no fact from which an indebtedness would arise, but merely alleges that the defendant's testatrix was the wife of one S., of whose estate the plaintiff was administrator *de bonis non*; that S. had bequeathed all his property to his wife for life, with the right to use so much of the principal thereof as might be necessary for her support, and directed that any balance undisposed of at her death should be divided among his children; that the property of S. was held by the defendant's testatrix in trust for the children of S., and had come into the hands of the defendant as executor; that it was the duty of the defendant to turn over such property to the plaintiff; that the plaintiff could not make his inventory as administrator *de bonis non* without a statement or account as to the assets of the estate of S. in the defendant's hands; and praying that an account be taken as to such assets. *Probate Court v. Williams* (R. I.), 19-554.

Action to set aside void sale. — The Kansas statute requiring actions brought by the heirs of a deceased person for the recovery of real property descending to them, but sold by the administrator of the estate of the decedent under an order of court directing such sale to be commenced within five years after the date of recording of the deed made in pursuance of the sale, applies to sales which are void for want of notice to the heirs, of the proceedings upon which the deed is based. *O'Keefe v. Behrens* (Kan.), 9-867.

d. Limitation of actions.

Action for funeral expenses, see **LIMITATION OF ACTIONS**, 3.

Neglect of attorney to begin action. — Under a statute limiting the time for prosecuting claims against decedents' estates, but providing that a creditor may sue on his claim after the time limited if he is not chargeable with "culpable neglect," it is no excuse for delay that the creditor placed the

claim in the hands of an attorney who neglected to prosecute it. It must be shown that the neglect of the attorney was not culpable, as the neglect of the attorney is equivalent to neglect of the party himself. *Beale v. Swasey* (Me.), 20-396.

e. Evidence.

Decree adjudging estate insolvent. — A decree adjudging an estate insolvent is not competent evidence of that fact in an action by the administrator against a creditor whose claim has been paid in full, to recover the amount paid in excess of the creditor's *pro rata* share, where the creditor was not a party to the proceeding resulting in the adjudication of insolvency. *Woodruff v. H. B. Clafin Co.* (N. Y.), 19-791.

f. Judgment.

Wrongful entry against executors personally. — A judgment in an action against executors, on a claim against the decedent, which is entered against the defendants personally, will be modified so as to make the defendants liable in their capacity as executors. *Clayton v. Dinwoodey* (Utah), 14-926.

EXECUTORY CONTRACTS.

Assignability, see **ASSIGNMENTS**, 1 b.

EXECUTORY LIMITATIONS.

Limitation over as affecting operation of rule in Shelley's case, see **SHELLEY'S CASE**.
RULE IN.

Executory devises, see **WILLS**, 8 c (10).

EXEMPLARY DAMAGES.

See **DAMAGES**, 4.

EXEMPTIONS.

See **EXECUTIONS**, 5; **TAXATION**, 12.

Contract exempting railroad from liability for fires, see **FIRES**, 3.

Compensation of personal representatives, see **EXECUTORS AND ADMINISTRATORS**, 13.

Exemption from arrest on civil process, see **EXTRADITION**, 5.

Exemption from jury duty, see **JURY**, 3.

Gas companies exempt from license tax as manufacturers, see **GAS AND GAS COMPANIES**, 3.

Homestead exemptions, see **HOMESTEAD**.

Liability to civil process, see **SUMMONS AND PROCESS**, 3.

Necessity of setting up exemption in garnishment proceedings, see **GARNISHMENT**, 4.

Operation of license laws, see **HAWKERS AND PEDDLERS**, 4.

Particular officers exempted from civil service rules, see **PUBLIC OFFICERS**, 3 a (3).
Property exempt from administration, see **EXECUTORS AND ADMINISTRATORS**, 6.

Right of nonresident defendant to exemptions under domestic statute, see **GARNISHMENT**, 3 a.

Succession taxes, see **TAXATION**, 13 b (2) (c).
Taking testimony of absent witness, see **DEPOSITIONS**, 3.

Taxation of corporations, see **TAXATION**, 11 g.
Veterans of civil war exempted from license taxes, see **LICENSES**, 3.

EXHIBITIONS.

See **THEATRES AND PUBLIC RESORTS**.

State fairs, see **STATES**, 11.

Suppression of awards, see **EQUITY**, 2 f.

EXHIBITS.

Reference to exhibits in pleading, see **PLEADING**, 3 e.

Taking exhibits to jury room, see **JURY**, 7 d (3).

Variance between pleading and exhibits, see **PLEADING**, 10.

EXIT.

Duty of carrier to provide safe exits from stations, see **CARRIERS**, 6 e (3).

EXONERATION.

See **BAIL**, 8.

Effect of exoneration clause in mortgage, see **LIMITATION OF ACTIONS**, 4 a (2) (a).

EX PARTE.

Appeal from *ex parte* orders, see **APPEAL AND ERROR**, 4 a.

Nature of condemnation proceedings, see **EMINENT DOMAIN**, 9 b.

EXPECTANCY OF LIFE.

Proof by expert testimony, see **EVIDENCE**, 8 b (3).

EXPENSES.

Allowance to guardian ad litem, see **INFANTS**, 3 f (3).

Duty of county judge to keep account of expenses, see **JUDGES**, 3 a.

Payment of expenses of jurors, see **JURY**, 4 e.
Right of public officers to incur expenses, see **PUBLIC OFFICERS**, 5 c.

EXPERIENCE.

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EXPERIMENTS.

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EXPLOSIONS AND EXPLOSIVES.

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1. **STORING OR KEEPING EXPLOSIVES**.

a. In general.

Negligence in storing or keeping. — Independent of the question of nuisance, negligence in the storing or keeping or allowing or causing an explosion of dangerous explosives makes one liable for the resulting damages. *Whaley v. Sloss Sheffield Steel, etc., Co. (Ala.)*, 20-822.

Limitation of rule. — The rule that one handling dangerous articles must respond in damages for the injuries occasioned thereby is limited to articles essentially dangerous and calculated from their nature to cause injury to property or persons. *Means v. Southern Cal. R. Co. (Cal.)*, 1-206.

Sulphuric acid. — Sulphuric acid in tanks is not inherently a dangerous substance so as to require a railroad company

to take extra precautions in handling the same. *Means v. Southern Cal. R. Co. (Cal.)*, 1-206.

Injury to licensee. — The owner of premises is under no duty to a mere licensee to have the premises in a safe condition, and a railroad company in whose freight house a tank of acid explodes is not liable for the resulting injury to a person upon the premises for a private purpose. *Means v. Southern Cal. R. Co. (Cal.)*, 1-206.

Injury to trespassing children. — Rule stated as to the degree of care required of persons having possession and control of dangerous explosives, as respects young children and others. *Mattson v. Minnesota, etc., R. Co. (Minn.)*, 5-498.

b. When possession constitutes nuisance.

Character of explosives. — The keeping or storing of a quantity of different kinds of explosives may be a nuisance when it would not be were there the same quantity of any one of the different kinds. *Whaley v. Sloss Sheffield Steel, etc., Co. (Ala.)*, 20-822.

Place or locality of storage. — The place or locality may determine the question of nuisance in keeping or storing explosives. *Whaley v. Sloss Sheffield Steel, etc., Co. (Ala.)*, 20-822.

Storage in city. — Whether the storing or keeping of explosives in a city constitutes a nuisance depends on the quantity and kind of explosives kept, the purpose and length of time for which they are kept, the kind and character of the magazine or house in which they are kept, and what protection is afforded by the mode of keeping. *Whaley v. Sloss Sheffield Steel, etc., Co. (Ala.)*, 20-822.

A count for the explosion of dynamite merely alleging the storing or keeping of large quantities of dynamite or other explosives in a thickly settled portion of a city, in proximity to many buildings and persons, does not show a nuisance *per se*. *Whaley v. Sloss Sheffield Steel, etc., Co. (Ala.)*, 20-822.

Storage near dwelling house. — The mere possession of explosives by a person who is using them in his business is not unlawful, but no person can store them so near to a dwelling house as to endanger its occupants without being guilty of maintaining a nuisance, private or public. *H. S. Kerbaugh v. Caldwell (U. S.)*, 10-453.

The keeping of explosives in large quantities in the vicinity of a dwelling house is a nuisance *per se*, and may be abated by an action at law or an injunction in equity, and if an actual injury results therefrom the person keeping the explosives is liable therefor, even though the injury is not chargeable to his personal negligence. *K. S. Kerbaugh v. Caldwell (U. S.)*, 10-453.

Storage on island. — The storage on an island in a navigable river, the title to which island is in the state and the riparian owners, of a large quantity of dynamite by a United States government contractor, to be used in deepening the channel of the river, and which according to past experience is

liable to explode to the damage of adjacent property and boats plying near by, constitutes a nuisance, and will be enjoined. *Henderson v. Sullivan (U. S.)*, 14-590.

Liability where storage constitutes nuisance. — Where explosives are stored or kept in such quantities, of such kinds, in such locations, for such time, and for such purposes, as to constitute *per se* a nuisance, the one so creating or continuing the nuisance is liable for damages resulting, independent of the question of negligence. *Whaley v. Sloss Sheffield Steel, etc., Co. (Ala.)*, 20-822.

Where the storing of large quantities of explosives in a magazine near a private dwelling constitutes a nuisance, the person maintaining the nuisance is liable for personal injuries sustained by the occupant of the dwelling in consequence of an explosion. *H. S. Kerbaugh v. Caldwell (U. S.)*, 10-453.

Question of nuisance for jury. — In an action to recover damages for personal injuries sustained by the plaintiff in consequence of an explosion, where the evidence shows that before the explosion the defendant had stored large quantities of highly explosive materials within a thousand feet of the plaintiff's dwelling house, and that the force of the explosion was so great that the plaintiff was thrown from the chair in which he was sitting in his dwelling, it is for the jury to determine whether the act of the defendant in so storing the explosives constituted a nuisance. *H. S. Kerbaugh v. Caldwell (U. S.)*, 10-453.

Injunction to prevent storage. — Where it appears that a highly important public work in deepening the channel of a navigable river cannot be carried on by the contractor without the storage of dynamite on a certain island in the river, and that a reasonable amount of dynamite can be stored there without injuring persons or property in the vicinity, and to the great interest of the public in improving the river, an injunction at the suit of an adjacent property owner against the storage of any dynamite at that point will be refused, but an injunction will be granted against the storage of dynamite there in such quantities as to create danger to the complainant or his family or to the real or personal property owned by him. *Henderson v. Sullivan (U. S.)*, 14-590.

2. SALE OF EXPLOSIVES.

Liability for injury to third person.

— In an action against the manufacturer of champagne cider to recover for injuries received by an employee of the purchaser due to the explosion of a bottle of the cider, as no contractual relation existed between the manufacturer and the injured person, in order to warrant a recovery by him for such injuries the defendant must have had knowledge of the dangerous character of the article sold. *O'Neill v. James (Mich.)*, 5-177.

In an action to recover for injuries caused to an employee of the purchaser by the explosion of a bottle of champagne cider, where

it appears that the plaintiff knew that the champagne cider, as ordinarily manufactured and sold, was charged with a gas, and there is no evidence from which it may be inferred that the defendant had knowledge that the bottle was improperly charged, and it appears by the evidence that the apparatus used in charging the bottle was a proper one, it is the duty of the court to direct a verdict in favor of the defendant. *O'Neill v. James* (Mich.), 5-177.

Liability of manufacturer to retail purchaser. — A manufacturer who knowingly makes and puts upon the market a highly dangerous article not containing intrinsic evidence of its dangerous character, without notice by label or otherwise of its dangerous nature, fails in his duty to such persons as purchase it, and is liable jointly with a retailer who sells the article knowing but not disclosing the dangerous nature, to a person injured thereby. Accordingly, a declaration in an action against the manufacturer and retailer jointly is not demurrable for misjoinder of actions and parties. *Clement v. Crosby & Co.* (Mich.), 12-265.

3. SHIPMENT OF EXPLOSIVES.

Duty of shipper to disclose nature. — It is the duty of a shipper who delivers explosives or other dangerous goods to a carrier for transportation to disclose fully to the carrier the nature of the goods before the shipment is made, and if he fails to do so he will be liable in damages for resultant injuries to the vessel or its cargo. *International Mercantile Marine Co. v. Fels* (U. S.), 18-18.

What constitutes sufficient disclosure. — In such an action, evidence examined and held to show a sufficient disclosure by the shipper of the nature of the goods prior to the shipment, so as to relieve him from liability: *International Mercantile Marine Co. v. Fels* (U. S.), 18-18.

4. BLASTING.

What constitutes. — In a prosecution for the violation of a municipal ordinance requiring blasts to be securely covered so as absolutely to prevent all danger to persons or property, the technical distinction between a blast and what is called a "spring" shot is immaterial, as the ordinance is intended to protect against the danger of all discharges of powder commonly understood as blasting. *Spokane v. Patterson* (Wash.), 13-706.

When blasting constitutes a nuisance. — Blasting operations carried on continuously for a year or more upon lots platted for city purposes, and resulting, from the quantity of explosives used, in injuries to other property, constitute *prima facie* a nuisance, and those maintaining the same will be held liable, even though no negligence on their part be alleged or proved, for damages to the premises of another occasioned by the vibrations of the earth or concussions of the air resulting from the blasting. *Longtin v. Persell* (Mont.), 2-198.

Damages from concussion. — A property owner may recover for damages resulting from concussion or vibration of the earth or air caused by blasting on adjoining premises, though no physical substances are thrown on the plaintiff's property and the defendant is not guilty of negligence. *Hickey v. McCabe* (R. I.), 19-783.

Injunction to restrain. — An injunction will issue to restrain blasting on the defendant's premises in the construction of a canal, by which rocks are continuously thrown upon the plaintiff's premises, although there is no proof that the blasting is negligently done, and none of the occupants of the plaintiff's premises have been hurt, and the defendant gives a warning signal before every blast. *Central Iron, etc., Co. v. Vandenheuk* (Ala.), 11-346.

Acts of independent contractor. — One who employs an independent contractor to construct a wagon road through an uninhabited and practically untraveled mountainous region, the contractor having full control of the work, is not liable for the negligent manner in which the employees of such contractor blow out a stump in the course of the projected road, which causes the death of a person who happens to be in the vicinity of the explosion. *Houghton v. Loma Prieta Lumber Co.* (Cal.), 14-1159.

Liability of railroad company for throwing rock on adjoining land. — A landowner who sells to a railroad company a right of way through his land cannot recover for injuries to the land, or to crops, fences, or buildings thereon, caused by rock thrown on the land in consequence of necessary blasting done in a prudent and proper manner; but he may recover for the failure of the railroad company to remove such rock in the shortest time in which it can be removed, and with the least injury to the land. *Hord v. Holston River R. Co.* (Tenn.), 19-331.

Measure of damages for failure to remove rock. — The measure of damages for the failure of a railroad company to remove from land through which the road runs rock thrown thereon in blasting is the cost of such removal with interest on the amount from the time that the rock should have been removed. The owner is not entitled to recover as for a taking of the land on the theory that it would cost as much to remove the rock as the land is worth, nor is he entitled to the rental value for the time that he was deprived of the use of the land by reason of the rock so thrown on it. *Hord v. Holston River R. Co.* (Tenn.), 19-331.

5. DISCHARGE OF FIREWORKS.

When a nuisance. — The discharge of fireworks in a street of a densely populated city may well constitute a nuisance *per se*; but it is not necessarily illegal to exhibit a display of fireworks in an open space like a park, where the exhibition, if conducted with care, involves no serious danger to persons or property. *Crowley v. Rochester Fireworks Co.* (N. Y.), 5-538.

A display of fireworks, in celebration of a public occasion, given by permission of the city of New York, in a wide street bordering on a park seven acres in extent, by skilled experts under the control of the maker of the fireworks, who is a manufacturer of high repute, and for a great number of years has given similar displays without an accident, may be found by the jury to be a nuisance as a matter of fact, but is not a nuisance *per se*, rendering the city liable for injuries caused by the explosion of a mortar used to send up bombs, and which was carefully tested prior to use and found to be in sound condition. *Melker v. New York* (N. Y.), 13-544.

Negligence a question of fact. — In an action to recover damages for personal injuries sustained through the setting off of fireworks, the question of negligence in conducting the exhibition held to be for the jury. *Crowley v. Rochester Fireworks Co.* (N. Y.), 5-538.

6. ACTIONS FOR INJURIES CAUSED BY EXPLOSIVES.

a. Pleading.

Allegation as to kind of explosive. — As it might be safe to keep one hundred or one thousand pounds of one explosive and dangerous to keep fifty pounds of another explosive, a complaint for explosion should not allege, in the alternative, the keeping of dynamite "or other explosives." *Whaley v. Sloss Sheffield Steel, etc., Co.* (Ala.), 20-822.

Failure to allege negligence or nuisance. — A count for the explosion of dynamite, not alleging any negligence or actionable wrong in the storing, keeping, or explosion thereof, and not alleging sufficient facts to show that the storing or keeping of it was a nuisance *per se*, is insufficient. *Whaley v. Sloss Sheffield Steel, etc., Co.* (Ala.), 20-822.

Allegation of defendant's duty. — In an action against a manufacturer of stove polish for injuries caused by an explosion of the polish while being used, a declaration alleging that it was the duty of the defendant to know the properties of the polish manufactured by it, and that it should not manufacture and sell a dangerous and highly inflammable substance of such composition and character as to be liable to ignite, explode, or spontaneously burn, and should not deceitfully withhold information of such dangers from the public, is a sufficient allegation of the defendant's duty although it does not allege that all of the defendant's product was of such dangerous character. *Clement v. Crosby Co.* (Mich.), 12-265.

Allegation of scienter. — If in such an action an allegation of scienter is necessary, it is necessarily implied by the allegation of deceitful and artful withholding from the public of knowledge of the dangerous character of the substance. *Clement v. Crosby & Co.* (Mich.), 12-265.

Allegation of failure to give warning. — In such an action, a want of warning by the defendant as to the dangerous character of the stove polish is sufficiently

pleaded by an allegation that the defendant placed it upon the market, at the same time deceitfully and wilfully concealing from the public its dangerous elements and properties, and that these properties are such as to make the substance liable to spontaneous combustion and explosion. *Clement v. Crosby & Co.* (Mich.), 12-265.

b. Evidence and burden of proof.

Evidence of negligence on prior occasions. — In an action to recover damages for personal injuries sustained by the plaintiff in consequence of an explosion, where the plaintiff charges that the defendant was guilty of maintaining a nuisance in the storing of the explosives, it is competent for the plaintiff to introduce evidence to show that the stove in one of the magazines was red hot on a date a few days prior to the explosion and on a date in the month preceding the month of the explosion. The plaintiff may also introduce evidence relating to the quantity and character of the explosives stored in the magazines. *H. S. Kerbaugh v. Caldwell* (U. S.), 10-453.

Sufficiency to show negligence. — In an action to recover damages for personal injuries to children caused by an explosion on the defendant's premises, evidence held sufficient to justify the jury in finding the defendant negligent and the children free from contributory negligence. *Mattson v. Minnesota, etc., R. Co.* (Minn.), 5-498.

Effect of explosion on surrounding objects. — In an action for damages caused to a building by an explosion, it is competent to show the effect of the explosion on another building in the immediate neighborhood. *Linforth v. San Francisco Gas, etc., Co.* (Cal.), 19-1230.

Burden of proof on plaintiff. — Each count of the complaint in an action for damages for injuries caused by an explosion being based on some actionable negligence of the defendant, a charge that the burden of proof is on the plaintiff to show that the explosion occurred because of the defendant's negligence is proper. *Whaley v. Sloss-Sheffield Steel, etc., Co.* (Ala.), 20-822.

Burden of proving failure to disclose. — In an action in admiralty by the owner of a vessel to recover damages for injuries to the vessel alleged to have been caused by the explosion of goods shipped by the defendant, where the libel alleges that the defendant failed to inform the libellant of the dangerous character of the goods, as required by the common law and by provisions in the bill of lading, the burden of proving that allegation is upon the libellant. *International Mercantile Marine Co. v. Fels* (U. S.), 18-18.

c. Charge of court.

Explosion which could not have been averted. — Each count in an action for damages for injuries caused by an explosion having attributed it to some kind of negligence, it is proper to instruct the jury to

find for the defendant if they believe from the evidence that the explosion could not have been anticipated or averted by human foresight. *Whaley v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 20-822.

An instruction, in an action for damages for injuries caused by an explosion, to find for the defendant if the jury believe from the evidence that the explosion would probably have occurred regardless of whatever means might have been employed, and that the magazine was located at a "proper" place, is proper, the location of the magazine and the manner of storing being material inquiries, and the use of the word "proper" being better than "not an improper." *Whaley v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 20-822.

Cause of explosion in doubt. — Where in an action for damages for injuries caused by an explosion each of the counts alleges some one or other cause for the explosion, an instruction to find for the defendant if from all the evidence the jury find that the cause of the explosion "lies wholly within the realm of conjecture and doubt" is proper. *Whaley v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 20-822.

Direction of verdict for defendant. — In an action against a vendor by a third person injured by the explosion of an article sold, evidence held to warrant the trial court in directing a verdict for the defendant. *O'Neill v. James (Mich.)*, 5-177.

EXPOSITIONS.

State fairs, see **STATES**, 11.
Suppression of awards in equity, see **EQUITY**, 2 f.

EX POST FACTO LAWS.

Change of punishment after conviction, see **CRIMINAL LAW**, 7 c (1).
Statutes providing for increased punishment of habitual criminals, see **CRIMINAL LAW**, 7 a.

EXPOSURE.

Exposing goods for sale, see **HAWKERS AND PEDDLERS**, 2.

EXPRESS COMPANIES.

Combination of railroad and express companies as violation of anti-trust law, see **MONOPOLIES AND CORPORATE TRUSTS**, 3 b.
Duty to servants respecting cars and tracks not under its control, see **MASTER AND SERVANT**, 3 b.

EXPRESS MESSENGER.

Express messenger as passenger, see **CARRIERS**, 6 d (11).

EXPRESS TRUSTS.

See **TRUSTS AND TRUSTEES**, 1 a (1).

EXPRESSIO UNIUS EXCLUSIO EST ALTERIUS.

Application to construction of statutes, see **STATUTES**, 4 b.
Application of statutes of limitation, see **LIMITATION OF ACTIONS**, 1 c.

EXPROPRIATION.

See **EMINENT DOMAIN**.

EXPULSION.

Members of legislatures, see **STATES**, 3.
Members of societies, see **SOCIETIES AND UNINCORPORATED ASSOCIATIONS**, 2.
Pupils in public schools, see **SCHOOLS**, 8 b.

EXTENSION.

Extending term of lease, see **LANDLORD AND TENANT**, 3 e.
Time of payment extended by agent, see **AGENCY**, 3 a (2).
Time to appeal, see **APPEAL AND ERROR**, 7 a.

EXTINGUISHMENT.

See **EASEMENTS**, 3.
Purchase of fee by owner of ground rent, see **GROUND RENTS**, 2.

EXTORTION.

Threats to extort money, see **THREATS**.

Collection by officer of fees not due. — At common law the collection by an officer of a fee before it is due and payable is extortion. *State v. Cooper (Tenn.)*, 15-1116.

The Tennessee statute prohibiting officers from demanding or receiving fees or compensation further than is expressly allowed by law refers not only to the amount of the fees but to the time when they are legally due. *State v. Cooper (Tenn.)*, 15-1116.

But even if such statutory provision does not prohibit the collection of fees before they are due, an officer who collects fees before they are due is guilty of extortion, as there is nothing in the Tennessee statutes changing the common-law rule in this particular. *State v. Cooper (Tenn.)*, 15-1116.

EXTRA ALLOWANCES.

See **COSTS**, 7.

EXTRADITION.

1. IN GENERAL, 775.
2. INTERNATIONAL EXTRADITION, 775.
3. INTERSTATE EXTRADITION, 775.
 - a. Who is fugitive from justice, 775.
 - b. Right of asylum, 775.
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 - a. Indictment or affidavit as basis for proceeding, 775.
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 - c. Review by courts of executive action, 776.
 - d. Proof of identity of fugitive, 776.
 - e. Arrest and deportation of fugitive, 776.
5. PRIVILEGES OF PERSON EXTRADITED, 776.
6. TRIAL AFTER EXTRADITION, 776.
 - a. For offense other than that for which extradited, 776.
 - b. Right to question validity of extradition, 777.

1. IN GENERAL.

Application of habeas corpus act. — The English Habeas Corpus Act does not apply to extradition proceedings. *In re Harsha* (Ont.), 6-496.

Res judicata, former jeopardy, and autrefois acquit. — The doctrines of *res judicata*, former jeopardy, and *autrefois acquit* are not applicable to extradition proceedings. *In re Harsha* (Ont.), 6-496.

2. INTERNATIONAL EXTRADITION.

Tribunal for interpretation of treaty. — Where it is sought to extradite a person from Canada to the United States under the British Extradition Convention, the question whether the crime comes within the provisions of the treaty is a matter for the decision of the Dominion authorities, and by the express terms of the treaty itself such decision is final. *Johnson v. Browne* (U. S.), 10-636.

Repeal of treaty by implication. — The provisions of the Webster-Ashburton treaty with Great Britain concerning extradition have not been repealed by implication by the Extradition Convention with that nation. *Johnson v. Browne* (U. S.), 10-636.

3. INTERSTATE EXTRADITION.

- a. Who is fugitive from justice.

Person leaving state after indictment. — A person charged by indictment or by affidavit before a magistrate, with the commission within a state of a crime covered by its laws, and who after the date of commission of such crime leaves the state, becomes, from the time of such leaving, a fugitive of justice within the meaning of the Federal Constitution and laws concerning extradition, no matter for what purpose he leaves the state. *Appleyard v. Massachusetts* (U. S.), 7-1073.

Person leaving state with consent of authorities. — A person who is in a state when a crime is committed, and, after an indictment against him for such crime has been dismissed without trial, leaves the state, even with the knowledge or with the consent of the state authorities, is a fugitive from justice within the meaning of the Constitution and laws of the United States, and subject to extradition for such crime. *Bassing v. Cady* (U. S.), 13-905.

Person not consciously fleeing from justice. — A person may be a fugitive from justice within the meaning of the provisions of the Federal Constitution and laws, though at the time he left the demanding state he had no belief that he had violated its criminal laws, and though he did not consciously flee from justice in order to avoid prosecution for the crime with which he is charged. *Appleyard v. Massachusetts* (U. S.), 7-1073.

Question for executive. — Where the requisition papers in interstate extradition proceedings show that the accused is regularly charged by indictment with a crime committed in the demanding state, and is a fugitive from the justice of that state, the governor of the extraditing state is entitled to accept such papers as being *prima facie* sufficient for a warrant of arrest, and his failure to require independent proof that the accused is a fugitive cannot be regarded as an infringement of any right secured to the accused by the Constitution or laws of the United States. *Pettibone v. Nichols* (U. S.), 7-1047.

- b. Right of asylum.

Nature and source of right. — A fugitive from justice never acquires a personal right to an asylum anywhere, but all such rights as he may claim in this respect flow entirely out of the rights of the sovereign in whose territory he has taken refuge to furnish an asylum and to refuse to surrender the criminal except upon such terms as it pleases to impose. *Knox v. State* (Ind.), 3-539.

4. EXTRADITION PROCEEDINGS.

- a. Indictment or affidavit as basis for proceeding.

Necessity under federal statute. — The federal statute relative to interstate extradition makes it essential to the right to arrest an alleged fugitive from justice, under a warrant of the executive of the state where he is found, that such executive shall be furnished, before issuing his warrant, with a copy of an indictment found or an affidavit made before a magistrate in the demanding state, charging the fugitive with crime committed by him in such state. *Compton v. Alabama* (U. S.), 16-1098.

Affidavit made before notary public. — The word "magistrate," as used in the statute above mentioned has reference to any person who is regarded as a magistrate under the law of the state where the alleged crime is committed. *Compton v. Alabama* (U. S.), 16-1098.

As notaries public in the state of Georgia

are *ex officio* justices of the peace, it follows that an affidavit made before a notary public in that state is an affidavit made before a magistrate, within the meaning of the statute above mentioned. *Compton v. Alabama* (U. S.), 16-1098.

Affidavit upon information and belief. — An affidavit for arrest in extradition proceedings is sufficient though it is made upon information and belief only. *In re Harsha* (Ont.), 6-496.

b. Duty and authority of executive.

No duty to afford judicial hearing. — No judicial hearing is required in extradition proceedings before the governor of the state upon whom the demand is made. *Farrell v. Hawley* (Conn.), 3-874.

c. Review by courts of executive action.

Power to review. — Under the Constitution and laws of the United States relating to interstate extradition, the obligation of the executive of a state to deliver up a fugitive from justice on demand of the executive of another state arises only where the fugitive is legally charged according to the usual course of law with the commission of crime within the state demanding his surrender; and upon habeas corpus by such person demanding his release from custody under executive warrant issued in pursuance of a requisition, the court will go back of the requisition, and pass upon the sufficiency of the indictment upon which the defendant is sought to be extradited, and by which he is restrained of his liberty, and in case the indictment is fatally defective, will discharge the prisoner. *In re Waterman* (Nev.), 13-926.

Presumption in favor of findings. — The finding of the governor in extradition proceedings that a person whose extradition is requested is a fugitive from justice from the demanding state and was within such state when the crime was committed, will be presumed to have been made on sufficient evidence; and where the return in habeas corpus proceedings sets up the order for extradition, a reply merely stating that the accused was not in the demanding state at the time the alleged crime was committed is demurrable. *Farrell v. Hawley* (Conn.), 3-874.

Inquiry into motives of executive. — The Supreme Court of the United States in inquiring into the validity of interstate extradition proceedings will not inquire into the motives which induced the governor of the extraditing state to honor the requisition. *Pettibone v. Nichols* (U. S.), 7-1047.

d. Proof of identity of fugitive.

Burden of proof. — Where a person arrested for extradition under an executive warrant seeks to be discharged on habeas corpus on the ground that he is not the person against whom the warrant is issued, the burden of proving his identity is on the state seeking his deportation. *Barnes v. Nelson* (S. D.), 20-544.

Return to warrant as proof. — Where the relator in habeas corpus to test the validity of an extradition proceeding states his true name and denies that he is the person named in the proceeding as "H. alias S.," the return of the officer that he "arrested the above-named relator designated in said warrant 'H. alias S.'" is insufficient to establish the relator's identity as the persons named in the warrant. *Barnes v. Nelson* (S. D.), 20-544.

e. Arrest and deportation of fugitive.

Duty of agent of demanding state. — In an interstate extradition proceeding, no obligation is imposed by the Federal Constitution or the laws upon an agent of the demanding state so to time the arrest of the accused and conduct his deportation as to afford him a convenient opportunity to test, before some court sitting in the extraditing state, the question whether he is a fugitive from justice and as such liable to be conveyed to the demanding state for trial. *Pettibone v. Nichols* (U. S.), 7-1047.

Rearrest in subsequent proceeding. — Where a person arrested in extradition proceedings for forgery is released on habeas corpus on the ground that there is no proper evidence showing the commission of the alleged offense or identifying the alleged forged document, he may be rearrested in subsequent extradition proceedings for the same offense upon the discovery of further and new evidence to supply the deficiencies. *In re Harsha* (Ont.), 6-496.

5. PRIVILEGES OF PERSON EXTRADITED.

Exemption from arrest on civil process. — A fugitive from justice whose return to the state whence he fled has been procured by extradition proceedings based on a criminal charge, cannot be arrested on civil process while within the state by virtue of such extradition and before he has had any opportunity to depart therefrom. An attachment for contempt is an arrest on civil process within the foregoing rule, and, consequently, a person who has been extradited from a foreign state on a criminal charge, and who is arrested for contempt immediately after being released on bail, without an opportunity to leave the state, is entitled to be discharged. *State v. Boynton* (Wis.), 17-618.

Admission to bail pending appeal. — If, in habeas corpus proceedings issued to secure the release of a person ordered to be extradited, the trial court has power to release the person on bail pending an appeal from an order remanding the person, the action of the court in refusing bail is discretionary. *Farrell v. Hawley* (Conn.), 3-874.

6. TRIAL AFTER EXTRADITION.

a. For offense other than that for which extradited.

Interstate extradition. — A fugitive from justice when extradited to answer a specific crime may be required to answer a

different criminal charge before being afforded an opportunity to return to the state from which extradited. The principles governing international extradition in this respect have no application to cases of extradition between the states of the Union. *Knox v. State* (Ind.), 3-539.

In trying a rendition fugitive against his objection for an offense other than that specified in the requisition, no right secured to him by the Constitution and laws of the United States is denied. *Knox v. State* (Ind.), 3-539.

International extradition. — Under the Webster-Ashburton treaty with Great Britain, and the Extradition Convention with that nation, and the federal statutes, a person who has been extradited from Canada to the United States for a specific offense cannot be punished for an entirely different offense; and this is so though the treaties contain no positive language prohibiting such punishment, and though some of the treaties between the United States and other nations than Great Britain do contain such language. *Johnson v. Browne* (U. S.), 10-636.

b. Right to question validity of extradition.

Habeas corpus in federal court. — The Circuit Court of the United States when asked, upon habeas corpus, to discharge a person held in actual custody by a state for trial in one of its courts under an indictment charging crime against its laws, cannot properly take into account the methods whereby the state obtained such custody; and therefore the Circuit Court will not discharge a petitioner on the ground that by means of a fraudulent conspiracy he was extradited from another state as a fugitive from justice, when he was not in fact such fugitive and consequently was not liable to extradition. *Pettibone v. Nichols* (U. S.), 7-1047.

A federal court will not, after the interstate extradition of a person accused of crime, order the discharge of the accused from the custody of the demanding state on the ground that the arrest and deportation were fraudulently so arranged and carried out as to deprive him of an opportunity to establish before the executive or a court of the extraditing state that he was not a fugitive from justice, where it appears that it was not shown by proof before the governor of the extraditing state that the petitioner, who was alleged in the requisition papers to be a fugitive from justice, was not one, and it further appears that the accused did not invoke the jurisdiction of any court sitting in the extraditing state to prevent his deportation, notwithstanding it also appears that the accused had no reasonable opportunity to appeal to the courts for relief before being deported. *Pettibone v. Nichols* (U. S.), 7-1047.

EXTRA HAZARDOUS EMPLOYMENT.

Liability of master for injuries to servant, see MASTER AND SERVANT, 3 a.

EXTRAORDINARY EMERGENCY.

Construction of exception in labor law, see LABOR LAWS, 2.

EXTRA SERVICES.

Compensation, see MASTER AND SERVANT, 1 d.

EXTRATERRITORIALITY.

Effect of foreign decree for divorce, see DIVORCE, 6 b.

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Operation of decree of adoption, see ADOPTION OF CHILDREN.

Operation of statutes, see CONFLICT OF LAWS.

EXTRA WORK.

Validity of provisions in building contracts, see CONTRACTS, 4 o.

EYESIGHT.

Judicial notice of impairment of eyesight by loss of one eye, see EVIDENCE, 1 h.

EYEWITNESSES.

Necessity of calling all eyewitnesses in criminal case, see CRIMINAL LAW, 6 m. (6).

FACILITIES.

Duty of railroad to furnish reasonable and necessary shipping facilities, see RAILROADS, 5 e.

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FACTORIES.

Employment of children in factories, see INFANTS, 4 b.

Tobacco factory as nuisance, see NUISANCES, 1 b.

Validity of statute providing for inspection of factories, see LABOR LAWS, 1 a.

FACTORS.

1. WHO ARE FACTORS, 778.

2. POWERS, 778.

3. DUTIES AND LIABILITIES, 778.

4. ADVANCES BY FACTOR, 778.

5. LIEN, 778.

1. WHO ARE FACTORS.

Agent for delivery. — One who receives a consignment of goods not for sale, but after they have been sold, for the purpose of delivering them to the purchaser, is not a factor either at common law or under the Maryland statute giving a lien on goods in favor of any person to whom they are intrusted "for the purpose of consignment or sale." *Rowland v. Dolby* (Md.), 3-643.

Under English Factors' Act. — A retail jeweler who has been accustomed to receive articles of jewelry from a manufacturing jeweler for sale, under a course of business regulated by a letter written by him to such manufacturing jeweler, which letter, after acknowledging that the writer has from the addressee "on sale or return" the goods entered up to date in a book in possession of the addressee, and that he is liable to account to the addressee for such goods, states that the "goods referred to in that book mentioned are your property, and to remain so until sold or paid for, they being only left with me for the purpose of sale or return, and not to be kept as my own stock," and that the "goods I receive from you are to be entered at cost price, and my remuneration for selling them is agreed at one-half the profit," is employed as an agent for sale, and is a mercantile agent within the English Factor's Act of 1889. *Weiner v. Harris* (Eng.), 18-87.

2. POWERS.

Authority to pledge goods. — A person who is a mercantile agent within the English Factors' Act of 1889 has, as such, implied authority to pledge the goods intrusted to him, and, consequently, the principal cannot recover goods pledged by such agent without express authority. *Weiner v. Harris* (Eng.), 18-87.

3. DUTIES AND LIABILITIES.

Duty to insure goods. — Unless a factor is instructed by his principal to insure the goods consigned, or unless an agreement or course of dealing between the parties or a general usage or custom imposes such a duty on the factor, the latter is under no obligation to insure the goods of his principal. *B. F. Sturtevant Co. v. Dugan* (Md.), 14-675.

Where an agreement by correspondence, made between thirty and forty years before the destruction of a consignment by fire, requires the factors to pay merely the freight on consignments received by them, the agreement, which during all that time has been acted on without modification, being silent as to insurance, a notice stating "stock to be kept covered by insurance for the benefit of the consignor," which the consignor claims has been printed in small type at the bottom of invoices sent at long intervals to the factors, does not, in the absence of evidence of assent by the factors to the terms of such notice, have the effect of modifying the original agreement so as to impose on the factors liability for a failure to insure

the goods consigned to them. *B. F. Sturtevant Co. v. Dugan* (Md.), 14-675.

Liability for failure to follow instructions. — A factor is not liable for a departure from his principal's instructions unless such instructions are clear and distinct. *B. F. Sturtevant Co. v. Dugan* (Md.), 14-675.

4. ADVANCES BY FACTOR.

Reimbursement on insolvency of principal. — A factor who has made advances on goods consigned to him cannot, upon the insolvency of the principal, claim the entire amount of the advances, but must first credit the proceeds of the goods consigned, and is not entitled to interest on the balance due him. *Estate of Murphy* (Pa.), 6-308.

5. LIEN.

Waiver by surrender of possession. — One, who has the possession of goods loses his factor's lien by storing them with a warehouse company, taking a warehouse receipt in his own name, and delivering the receipt unpindorsed to the owner of the goods, thus depriving himself of both actual and constructive possession. *Rowland v. Dolby* (Md.), 3-643.

FACTS.

Examination of facts on appeal, see **APPEAL AND ERROR**, 12 h.

FAIRS.

Expressing subject of statute in title, see **STATUTES**, 3 b.

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FALSE IMPRISONMENT.

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3. DEFENSES, 779.

4. EVIDENCE, 779.

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See **MALICIOUS PROSECUTION**.

Principal's liability for act of agent, see **AGENCY** 3 c.

1. WHAT CONSTITUTES.

Arrest for misdemeanor without warrant. — One who is arrested for a misdemeanor without a warrant does not waive the irregularity, and preclude recovery for false imprisonment by failing to object to the manner of arrest and pleading guilty to the

charge. *McCullough v. Greenfield* (Mich.), 1-924.

Arrest caused or consented to by plaintiff. — The arrest of a person in possession of goods alleged to have been stolen is not justified by his refusal to surrender the goods until his title thereto has been lawfully determined, and he does not consent to being arrested by saying to an officer who unlawfully demands the goods (copper wire), "No, you take me, but you can't take the wire." The court, therefore, in an action for false imprisonment in making the arrest, may properly refuse to charge that the plaintiff cannot recover if he caused, consented to, or acquiesced in his arrest. *Grimes v. Greenblatt* (Colo.), 19-608.

Delay in taking before magistrate. — When an officer arrests a person under a warrant, the law charges him with the duty of carrying the person arrested before a committing magistrate with reasonable diligence; but the officer will not be liable to the person arrested, for a breach of this duty, when the delay is occasioned by the conduct of the person arrested. *Blocker v. Clark* (Ga.), 8-31.

Absence of probable cause. — In an action for false imprisonment no allegation or proof that the imprisonment complained of was without probable cause is necessary. *Southern Ry. v. Shirley* (Ky.), 12-33.

Effect of discharge without trial. — Where one guilty of a felony is lawfully arrested therefor by an officer without a warrant, and is discharged before his detention has become unlawful through an unreasonable delay to procure a warrant or to present him before a magistrate, such discharge does not operate to make the original arrest unlawful, nor does it afford conclusive proof in an action for false imprisonment that the prosecution was not begun in good faith. *Achison, etc., R. Co. v. Hinsdell* (Kan.), 13-981.

2. PERSONS LIABLE.

Person making complaint to magistrate. — As to the liability for false imprisonment of a person making a complaint to a magistrate upon which a warrant is issued without jurisdiction, see *Rush v. Buckley* (Me.), 4-318.

Judge issuing warrant in excess of jurisdiction. — As to the liability for false imprisonment of a judge who issues a warrant in excess of jurisdiction, see *Rush v. Buckley* (Me.), 4-318.

Officer making arrest on void warrant. — As to the liability for false imprisonment of an officer who makes an arrest on a void warrant or a warrant issued in excess of jurisdiction, see *Rush v. Buckley* (Me.), 4-318.

Officer arresting wrong person. — As to the liability of an officer for arresting the wrong person under a valid warrant or for detaining such person in custody after knowledge of the mistake, see *Blocker v. Clark* (Ga.), 8-31.

Officer assisting in wrongful arrest. — Where an arrest is wrongful in its incep-

tion all other officers who assist, even by the mere display of force and without laying their hands on the prisoner, in the continuance of the wrongful imprisonment, are liable for the full amount of the damages caused, although they have no knowledge of the unlawfulness of the imprisonment and intend to act in the discharge of their duty. *Cook v. Hastings* (Mich.), 13-194.

Officer and instigator as joint tortfeasors. — The liability of one who procures the wrongful arrest of another is not affected by the fact that the officer acts wrongfully in making the arrest. He is a joint tortfeasor with the officer, and the person arrested may sue either or both of them for false imprisonment. *Grimes v. Greenblatt* (Colo.), 19-608.

Ratification of arrest. — The wrongful arrest, on a charge of larceny, of a person having stolen goods in his possession, though not procured by the owner of the goods, is yet ratified by him so as to make him liable for false imprisonment, where he afterwards, with full knowledge of the lack of any incriminating circumstances, endeavors to prevent the person so arrested from giving bail and makes a complaint charging him with burglary and larceny. *Grimes v. Greenblatt* (Colo.), 19-608.

3. DEFENSES.

Ignorance that commitment was illegal. — It is no defense to an action for false imprisonment that the defendants intended only to secure a legal restraint of the plaintiff, and that they did not know that he was confined without a legal commitment, if he was so in fact confined. *Allen v. Ruland* (Conn.), 8-344.

Refusal of plaintiff to disclose name and business. — The refusal of a person waiting behind a tree on a public street to make an explanation of his presence there, or to state his name and business to a police officer seeking for a person who had committed a misdemeanor, is not a breach of the peace in the presence of the officer justifying an arrest without a warrant, or a defense to an action for false imprisonment for such arrest. *Cook v. Hastings* (Mich.), 13-194.

Effect of plea of guilty by plaintiff. — In an action for false imprisonment in unlawfully causing the arrest of the plaintiff on a criminal charge, it is no defense that the plaintiff pleaded guilty to the charge. *Knickerbocker Steamboat Co. v. Cusack* (U. S.), 19-968.

4. EVIDENCE.

Circumstantial evidence. — In an action for false imprisonment, direct evidence is not necessary to prove the defendant's participation in the arrest and imprisonment of the plaintiff. It may be inferred from the circumstances of the case. *Grimes v. Greenblatt* (Colo.), 19-608.

Sufficiency to support recovery. — Where one who has committed grand larceny by fraudulently taking goods of which he is a

general owner from the possession of a carrier having a lien thereon is arrested therefor, but is released without having been brought before a magistrate, evidence, in an action for false imprisonment brought by him against the carrier that the carrier's agent in causing his arrest described his offense as running away without paying his bill and said that all the carrier wanted was its money, if accepted as true, does not establish his right to recover. *Atchison, etc., R. Co. v. Hinsdell* (Kan.), 13-981.

5. CHARGE OF COURT.

Abstract instruction as to probable cause. — The defendant in an action for false imprisonment cannot predicate error on an instruction as to probable cause, where there is no evidence of probable cause. *Grimes v. Greenblatt* (Colo.), 19-608.

6. DAMAGES.

Wrongful arrest without warrant. — Where a person is arrested for a misdemeanor without a warrant, damages can be recovered only for the false imprisonment of the person arrested, to the time he is delivered to the officer holding a proper warrant. *McCullough v. Greenfield* (Mich.), 1-924.

Continuation of original wrong. — The act of the defendant in a false imprisonment case in appearing before a magistrate and making an unjustifiable charge against the plaintiff is a continuation of the original wrong in causing the plaintiff to be arrested and taken before the magistrate, and therefore the defendant's liability extends to the detention of the plaintiff under the magistrate's order. *Knickerbocker Steamboat Co. v. Cusack* (U. S.), 19-968.

Additional damages for handcuffing. — In the absence of anything indicating malice on the part of an officer in handcuffing a prisoner, the latter is not entitled to additional damages on that account in an action for false imprisonment. *McCullough v. Greenfield* (Mich.), 1-924.

Newspaper account of arrest. — The publication of an arrest in the newspapers is a probable consequence of the arrest, and the fact is admissible in evidence as bearing on the question of damages. *Grimes v. Greenblatt* (Colo.), 19-608.

Condition of jail. — The plaintiff in an action for false imprisonment may show the condition of the jail in which he was confined, and the treatment he received therein, as an element of the damages that he has sustained. *Grimes v. Greenblatt* (Colo.), 19-608.

FALSE PRETENSES AND CHEATS.

1. WHAT CONSTITUTE, 780.
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Larceny distinguished from false pretenses, see LARCENY, 1.

1. WHAT CONSTITUTE.

a. In general.

Four essential elements. — The offense of obtaining property by false pretenses consists of at least four essential elements. There must be an attempt to defraud, there must be an actual fraud committed, false pretenses must be used for the purpose of perpetrating fraud, and the fraud must be accomplished by the means of the false pretenses made use of for that purpose. *Clawson v. State* (Wis.), 9-966.

Construction of statutes creating offense. — Statutes against false pretenses must be strictly construed, and nothing not within their words will be held within their meaning. *In re Waterman* (Nev.), 13-926.

Necessity of writing. — A false representation made by a purchaser, for the purpose of inducing and by which is induced the sale to him upon credit of a quantity of cloth, to the effect that he has received an order from a well-known jobbing house of strong financial standing for a large number of garments to be made from the particular kind of cloth in question, is not a representation as to the purchaser's means or ability to pay, but is a false representation as to an alleged existing fact, inducing a sale or parting with the possession of personal property, and, therefore, need not be in writing in accordance with the provisions of section 544 of the Penal Code, in order to sustain an indictment for obtaining goods under false pretenses. *People v. Rothstein* (N. Y.), 1-978.

Intent to acquire particular thing obtained. — A false pretense, to be indictable, must be sufficiently proximate to the obtaining of the goods or money to have amounted to a specific intent to acquire the particular thing obtained. *Doxey v. State* (Tex.), 11-830.

Prosecution of beggar for false pretense. — The fact that begging is punishable under the vagrancy law does not prevent the prosecution of a beggar for obtaining money by false pretenses. The only effect of one statute on the other is that a conviction under one will bar a prosecution under the other. *State v. Swan* (Wash.), 19-1129.

b. The false pretense or representation.

False pretense coupled with promise. — The coupling of a future promise with a

false pretense does not relieve the false pretense of its criminal character. *State v. Briggs* (Kan.), 10-904.

The crime of obtaining property or money by false representations and practices is not committed by a mere false promise without an accompanying false statement of a past or present existing fact, but a false statement of such fact may become effective only by being coupled with a false promise; and when this is the case the statement of fact and the promise may be considered as together constituting the false pretense for which a conviction may be had. *Morris v. State* (Fla.), 14-285.

Where the statement of fact and the promise relied on as constituting the crime of false pretenses can be separated, and reliance is placed in part on the former, the promise may be disregarded and the defendant be convicted on the false statement of fact. *Morris v. State* (Fla.), 14-285.

Giving worthless check. — Under the Indiana statute a false pretense cannot be predicated upon the nonperformance of a future promise or the happening of a future event, and therefore the giving of a worthless postdated and postpayable check is not a false pretense. *Brown v. State* (Ind.), 8-1068.

A person who presents his personal check and obtains credit for the amount thereof without any false representation that he has money on deposit in the bank on which the check is drawn, is not guilty of the crime of receiving money by false pretenses, although he has no funds in the drawee bank, and has reasonable ground to believe that the check will not be paid. *Maxey v. State* (Ark.), 14-509.

Under a statute making it a crime to obtain money "by color of any false token or writing or by any other false pretense," no conviction can be had for obtaining money by the mere presentation of a worthless check, where the indictment alleges that the false pretense consisted in that particular act and does not allege that the money was obtained by a false token or writing. *Maxey v. State* (Ark.), 14-509.

Giving worthless mortgage. — A party who falsely and knowingly represents that he owns property that he mortgages to secure a loan of money obtained upon the faith of such representation can be convicted of the crime of obtaining property by false pretenses. *Morris v. State* (Fla.), 14-285.

False representation as to business or occupation. — A representation that a person is in a business or a situation in which he is not, made for the purpose of defrauding another, and by which money or property is fraudulently obtained, is a false pretense. *State v. Briggs* (Kan.), 10-904.

Obtaining money by means of false and fraudulent representations as to business may constitute the offense, under the Missouri statute, of obtaining money by false pretenses, if the representations are made with the intent of deceiving and defrauding and do in fact deceive and defraud the person to

whom they are made, though such person fails to exercise the extreme care and prudence that a shrewd business man would exercise under the circumstances to ascertain the truth or falsity of the representations by an investigation of the business concerning which they are made, provided the representations are neither absurd nor irrational. *State v. Keyes* (Mo.), 7-23.

False representation of poverty. — Obtaining money from another as a charity, by false representations as to property and want, is within the penal provisions of a statute against obtaining money by false pretenses. *State v. Swan* (Wash.), 19-1129.

c. The property obtained.

Promissory note. — A promissory note is "other property" within the meaning of the Wisconsin statute making it an offense to obtain "money, wares, merchandise, or other property," by false pretenses. *Clawson v. State* (Wis.), 9-966.

Real property. — Obtaining real property by false pretenses is not an offense under the Iowa statute making it unlawful to obtain money, goods, "or other property" by false pretenses. *State v. Eno* (Ia.), 9-856.

The Ohio statute (R. S., § 7076) which makes it an offense to obtain by any false pretense, and with intent to defraud, anything of value, applies to a charge of obtaining by false pretense, with intent to defraud, title to real estate situate in the state. *State v. Toney* (Ohio), 18-395.

Property to which party charged is entitled. — A person is not guilty of obtaining property by false pretenses, where the property obtained is only such as the person obtaining it has a perfect and complete legal right to receive. *Clawson v. State* (Wis.), 9-966.

2. JURISDICTION OF OFFENSE.

Money obtained without the state. — The crime of obtaining money by false representations is committed where the money is obtained, and the court has no jurisdiction where it is shown that the defendant procured a draft to be sent to and paid at a bank outside the state. *Bates v. State* (Wis.), 4-365.

3. STATUTE OF LIMITATIONS.

In California. — The provisions of section 801 of the California Penal Code do not apply to a prosecution for obtaining a sum of money less than fifty dollars by false pretenses, commenced by complaint in a police court. *Ex p. Blake* (Cal.), 18-815.

4. SUFFICIENCY OF INDICTMENT OR INFORMATION.

In general. — An indictment for obtaining money or other thing of value under false pretenses is fatally defective which fails to allege that the defendant obtained directly or indirectly from the person alleged to have been defrauded or from any one else, any

money or thing of value by reason of the false representations. *In re Waterman* (Nev.), 13-926.

Definiteness and certainty. — An information charging that the defendant obtained a draft for money as a commission for a loan on a farm by the false and fraudulent pretenses that he was an agent engaged in loaning money on farms, and that he had much property, was financially responsible, and had a large amount of money under his control, is not bad for failing to state whether the application of the borrower for the loan was oral or written; and there is no error in denying a motion to make the information more definite and certain in that respect. *State v. Briggs* (Kan.), 10-904.

Allegation that representation was knowingly false. — In a prosecution for swindling in obtaining money by false representations, under a statute requiring that the property or money must be acquired by some false or deceitful pretense or device or fraudulent representation, an indictment characterizing the representation as "false" and "fraudulent" does not by these words allege in effect that the representation was knowingly false, and in failing to do so is defective. *Doxey v. State* (Tex.), 11-830.

Ownership of property obtained. — An indictment for obtaining property by false pretenses must allege the ownership of the property taken, or state some legal excuse for omitting that averment. *Territory v. Hubbell* (N. Mex.), 13-848.

Character of money fraudulently obtained. — An indictment for obtaining money or other thing of value by false pretenses is fatally defective which nowhere alleges what character of money has been fraudulently obtained. *In re Waterman* (Nev.), 13-926.

An indictment for receiving money under false pretenses must describe the money with the same particularity and certainty as is required in an indictment for larceny. *Maxey v. State* (Ark.), 14-509.

Description of person to whom pretenses were made. — Ordinarily an indictment for obtaining money or property by false pretenses must name the particular individual to whom the pretenses were made, but where the party defrauded is a corporation it is sufficient to allege that the pretenses were made to the corporation, without naming any particular individual. *Bailey v. State* (Ala.), 17-623.

Setting out written instrument. — Where, in a prosecution for swindling, a written instrument is relied on as containing the false representations by which the swindling was accomplished, the entire instrument must be set out in the indictment where that is essential to show the true purpose with which the instrument was written. *Doxey v. State* (Tex.), 11-830.

5. DEFENSES.

Unlawful purpose of person defrauded. — One who obtains money from

another under a false representation that the money is to be used for the unlawful purpose of bribing an officer to dismiss a criminal prosecution against the person paying it, is nevertheless subject to prosecution for theft in obtaining money by a false pretext, under a statute defining the crime as the obtaining of money or property by "any false pretext." *Lovell v. State* (Tex.), 13-561.

6. EVIDENCE.

Value of premises on which loan was made. — In a prosecution for obtaining a loan on certain premises by means of false pretenses, evidence concerning the value of the premises is relevant as showing what was considered by the lender in deciding whether to lend the money. *Bates v. State* (Wis.), 4-365.

Other fraudulent transactions by accused. — In a criminal prosecution for obtaining money by false pretenses, evidence that the defendant had made similar false representations and pretenses to others is admissible to show his knowledge of the falsity of the representations made in the case at bar and his guilty intent in making them. *State v. Briggs* (Kan.), 10-904.

In a prosecution for obtaining a pony and cart by false pretenses on a date specified in the indictment, the admission of evidence that the defendant has on other occasions obtained provender from other persons, by false pretenses different from those alleged in the indictment, is erroneous, since such evidence does not show a systematic course of fraud, but merely that the defendant is of a generally fraudulent disposition, and therefore it does not tend to prove the falsity of the representations alleged in the indictment. Where such evidence has been admitted, a judgment of conviction must be set aside even though there was sufficient evidence of the false pretenses alleged to justify the conviction, since it is impossible to say that the evidence as to the other cases did not influence the jury. *Rex v. Fisher* (Eng.), 17-462.

Proof of one of several false pretenses alleged. — Though an indictment for obtaining money under false pretenses alleges several pretenses, proof of any one of them is sufficient to support a conviction. *State v. Keyes* (Mo.), 7-23.

Proof as to kind of money obtained. — On the trial of an indictment for receiving money under false pretenses, the allegations of the indictment must be sustained by proof as to the kind of money described therein. *Maxey v. State* (Ark.), 14-509.

Sufficiency to sustain conviction. — Evidence reviewed, in a prosecution for obtaining a promissory note by false pretenses, and held sufficient to show that the defendant obtained nothing from the prosecuting witness except what he was entitled to and what should have been given him upon demand without the representations charged in the information to be false, and insufficient to show either that the prosecuting witness was

defrauded or that the representations were made with the intent to defraud. *Clawson v. State* (Wis.), 9-966.

7. QUESTIONS OF LAW OR FACT.

Duty to investigate as to truth of representations. — In a prosecution for obtaining money under false pretenses, it is for the court to determine as a matter of law whether a duty rested upon the prosecuting witness to make an investigation as to the truth or falsity of the representations made to him by the defendant. *State v. Keyes* (Mo.), 7-23.

8. INSTRUCTIONS.

Definition of the offense. — Where an instruction in a prosecution for obtaining money under false pretenses requires the jury to find every essential fact necessary to constitute the offense with which the defendant is charged, there is no necessity of any further definition of the crime, as the terms "false pretenses" and "false representations" are not technical terms. *State v. Keyes* (Mo.), 7-23.

FALSE REPORTS.

Liability of bank officers, see **BANKS AND BANKING**, 3 b.

FALSE REPRESENTATIONS.

See **FALSE PRETENSES AND CHEATS; FRAUD AND DECEIT**.

Bankruptcy as affecting liability for false representation, see **BANKRUPTCY**, 9.

Damages for false representations, see **DAMAGES**, 9 e.

FALSE SWEARING.

See **PERJURY**.

Effect as to insurance policy, see **INSURANCE**, 3 c (3).

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FAMILIARITY.

Lascivious familiarity as evidence in incest case, see **INCEST**, 4 b.

FAMILY.

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Liability of landlord for injury to tenant's family by defective condition of premises, see **LANDLORD AND TENANT**, 5 h (5).

Residence for family as purpose of homestead law, see **HOMESTEAD**.

Right to compensation for services as between members of family, see **WORK AND LABOR**.

FAMILY HISTORY.

Admissibility in evidence, see **EVIDENCE**, 3 a.

FAMILY RECORDS.

Proof of age, see **RAPE**, 2 d (2).

FARES.

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Regulation of ferry fares, see **FERRIES**.

FARM.

Liability of municipality for injuries in operation of farm, see **MUNICIPAL CORPORATIONS**, 9 b (1).

FARM LABORERS.

Breach of contract of employment as crime, see **MASTER AND SERVANT**, 2 c.

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FARM LEASES.

See **LANDLORD AND TENANT**, 5 e.

FARMING.

What constitutes farming within bankruptcy act, see **BANKRUPTCY**, 2.

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Licensing farriers, see **LICENSES**, 5.

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Rights and liabilities in respect to children, see **PARENT AND CHILD**.

FEAR.

Plea of guilty induced by fear, see **CRIMINAL LAW**, 6 j (1).

Putting in fear, see **ROBBERY**, 1.

FEDERAL COURTS.

See **COURTS**, 2 b.

Power to order physical examination, see **DAMAGES**, 1.

FEDERAL EMPLOYERS' LIABILITY ACT.

Effect as denial of due process of law, see CONSTITUTIONAL LAW, 9 b.

FEE.

Ownership of fee in private way, see PRIVATE WAYS.

Ownership of fee in streets and highways, see STREETS AND HIGHWAYS, 3, 6.

FEEBLE PERSONS.

Duty of carrier in respect to, see CARRIERS, 6 a (3).

FEES.

Amount of fees for railroad charter, see RAILROADS, 1.

Assignability of fees of public officers, see ASSIGNMENTS, 1 b.

Duty of county judge to keep account of fees, see JUDGES, 3 a.

Exaction of fees not due, see EXTORTION.

Fees distinguished from costs, see COSTS, 8.

Fees of public officers, see CLERKS OF COURTS; JUSTICES OF THE PEACE, 5; PUBLIC OFFICERS, 6.

License fees, see LICENSES.

Nonpayment of jury fees as waiver of right to jury, see JURY, 1 e (2).

Requiring prepayment of fees as denial of right to jury trial, see JURY, 1 f.

FELLOW SERVANTS.

See MASTER AND SERVANT, 3 f (2).

Abrogation of fellow-servant rule, see MASTER AND SERVANT, 2 d.

Law governing application of fellow servant doctrine, see CONFLICT OF LAWS, 6.

FELO DE SE.

See SUICIDE.

FELONIOUSLY.

Meaning of word "feloniously" as invalidating information, see RAPE, 2 a.

FELONY.

Bailable offenses, see BAIL, 3.

Classification of crimes, see CRIMINAL LAW, 1. Fixing punishment as classification of offense, see CRIMINAL LAW, 2 a.

Killing felon to effect arrest, see ARREST, 1 a. Right to jury trial in felony cases, see JURY, 1 b (1).

FEMALES.

Imputing unchastity to females as libelous, see LIBEL AND SLANDER, 1 f.

Statutory regulation of employment of females, see LABOR LAWS, 1 a.

FEME COVERT.

See HUSBAND AND WIFE.

FEME SOLE.

Validity of judgment against married woman sued as *feme sole*, see JUDGMENTS, 2.

FENCES.

1. FENCES INCLOSING LANDS.

- a. Statutory regulation.
- b. Malicious erection.

2. DIVISION FENCES.

3. RAILROAD FENCES.

Compensation for destruction of fences, see EMINENT DOMAIN, 7 c (3).

Duty of railroad to fence depot grounds, see RAILROADS, 5 d, 7 a.

Duty of railroad to fence track as affecting liability for injuries to persons, see RAILROADS, 8 a.

1. FENCES INCLOSING LANDS.

- a. Statutory regulation.

Effect of failure to comply with statute. — The Colorado statute providing that no person shall be allowed to recover damages for any injury to crops, grass, etc., unless they were inclosed by a legal and sufficient fence at the time of the injury, does not preclude the owner of uninclosed land from recovering for damages done by a herd of sheep which were wilfully and unlawfully driven and pastured on his land by their owner. *Bell v. Gonzales* (Colo.), 9-1094.

Construction of exception in statute.

—The proviso in a fence statute, that the provisions of the act shall not apply to any hedge fence protecting either an orchard or a building, refers only to hedges which are actually within the terms of the exception to the statute at the time the proviso is invoked, and does not include hedges which are not then, but may at some future time be within such terms. *Hill v. Tohill* (Ill.), 8-423.

- b. Malicious erection.

Right to enjoin. — A landowner cannot maintain a bill for an injunction against the owner of the adjoining land to restrain the defendant from maintaining a fence of unusual height on his land, on the sole ground that such a fence deprives a building on the plaintiff's land of the light and air coming laterally from such adjoining land. *Koblegard v. Hale* (W. Va.), 9-732.

Action for damages. — It is an actionable nuisance for a person to erect on his own premises a high board fence for the sole purpose and with the result of injuriously affecting his neighbor by cutting off light and air from the neighbor's windows. *Barger v. Barringer* (N. C.), 19-472.

2. DIVISION FENCES.

Location. — A partition fence constructed of stumps and about five to five and a half feet wide is a lawful and proper fence, but where such a fence occupies a disproportionate share of the land of one of the proprietors he is entitled to relief. *Rose v. Linderman* (Mich.), 11-198.

Remedy for wrongful erection. — An action of ejectment will lie for the unlawful occupancy of land by building and maintaining a partition fence upon it. *Rose v. Linderman* (Mich.), 11-198.

Covenant running with land. — A covenant by a grantee in a deed "to perpetually maintain" a fence of a particular character between the land granted and the remaining land of the grantor is a covenant running with the land, and the grantee of the covenantor is bound to perform such covenant. *Sexauer v. Wilson* (Ia.), 15-54.

The covenantor in a deed containing a covenant "to perpetually maintain" a division fence is, after parting with the title to the land, not liable for the failure of his grantee to perform the covenant. *Sexauer v. Wilson* (Ia.), 15-54.

Substitution of fence for hedge. — Where fence viewers have assigned a hedge to a landowner to be maintained by him as his portion of a division fence, the owner has a right to remove the hedge and substitute therefor a lawful fence of other material without the consent of the adjoining owner. *Hill v. Tohill* (Ill.), 8-423.

A landowner is not entitled to an injunction restraining the adjoining owner from removing a hedge used as a division fence and substituting a lawful fence of other material, where the only benefit, enjoyment, or advantage which the complainant derives from the hedge is no greater than that which would be derived from any other lawful division fence. *Hill v. Tohill* (Ill.), 8-423.

Constitutionality of statute regarding maintenance. — The Illinois statute giving fence viewers the power to assign division fences between adjoining owners to maintain, is a valid exercise of the state's police power, and is not unconstitutional as taking private property without due process of law, notwithstanding the fact that under its provisions the fence built by one owner may be assigned to another owner to maintain. *Hill v. Tohill* (Ill.), 8-423.

3. RAILROAD FENCES.

Validity of statute requiring cattle guards. — The Mississippi statute making it the duty of railroads to maintain cattle guards is a legitimate exercise of the police power of the state and is not obnoxious to

the provision of the Federal Constitution prohibiting the taking of property without due process of law. *Yazoo, etc., R. Co. v. Harrington* (Miss.), 3-181.

Construction of statute requiring cattle guards. — The primary object of the Mississippi statute making it the duty of railroads to maintain cattle guards is the protection of crops from the depredations of cattle, and a guard which is ineffective to shut out stock will not be judicially declared a compliance with the statute because it is less dangerous to the traveling public than another kind of guard. *Yazoo, etc., R. Co. v. Harrington* (Miss.), 3-181.

Duty to fence at side track. — Negligence cannot be predicated of the failure of a railroad company to fence its tracks at a point which is left unfenced for the purpose of giving shippers access to the side tracks. *Chicago, etc., R. Co. v. Campbell* (Colo.), 7-987.

In an action against a railroad company to recover for the negligent killing of an animal, where it appears that the killing occurred at a point at which the defendant was not required to fence its tracks, and the evidence shows that the engineer of the train did everything within his power to avoid injuring the animal, after discovering that it was on the track, a verdict for the plaintiff is unwarranted. *Chicago, etc., R. Co. v. Campbell* (Colo.), 7-987.

Duty of railroad to keep in repair. — The obligation of a railroad to construct a right-of-way fence as required by statute is absolute, but, when once constructed in compliance with law, the company is bound only to the exercise of reasonable care in maintaining it. *Coe v. Northern Pacific R. Co.* (Minn.), 11-429.

The liability of a railroad company for failure to maintain its right-of-way fence in good repair is measured by the rules of ordinary care and prudence. *Coe v. Northern Pacific R. Co.* (Minn.), 11-429.

Duty to fence against children. — A statute requiring every railroad corporation to erect and maintain fences on both sides of its road suitable and sufficient to prevent cattle, horses, sheep, hogs, and other stock from getting on its track, does not require the construction of a fence sufficient to keep children off the track, and no liability against a railroad company for the killing of a child of tender years while on the company's tracks can be predicated on noncompliance with such statute. *Bischof v. Illinois Southern R. Co.* (Ill.), 13-185.

FERÆ NATURÆ.

Ownership of wild animals, see **ANIMALS**, 1 a.

FERRIES.

1. FERRY FRANCHISES, 786.
2. FERRIES BETWEEN STATES.
3. LIABILITY FOR INJURIES TO PASSENGERS, 786.

License to sell liquor on interstate ferry boat, see **LICENSES**, 2 a.

1. FERRY FRANCHISES.

Transfer. — A ferry franchise may be voluntarily transferred as any other incorporeal hereditament. *Evans v. Kroutinger* (Idaho), 2-691.

Construction of bridge as infringement. — The franchise of a ferry is not a grant of an exclusive right to carry across a stream by all means whatsoever, but only a grant of the exclusive right to carry across by means of a ferry; and the construction of a bridge by private enterprise connecting the same highways as the ferry, and causing the ferry owner to lose all the income he formerly received from tolls, is not a disturbance of the ferry, and the ferry owner has no remedy. *Dibden v. Skirrow* (Eng.), 12-252.

Transporting employees and teams. — One who employs a flat-boat or other means of transporting his employees and his wagons and teams across a stream to and from his sawmill, and does not transport any part of the public for hire or compensation, is not engaged in operating a ferry and therefore does not infringe an exclusive franchise owned by another to operate a public ferry in that locality. *Futch v. Bohannon* (Ga.), 19-1032.

2. FERRIES BETWEEN STATES.

Right to regulate fare. — The state of Ohio may establish ferries on its side of the Ohio river and fix charges for the ferries to West Virginia, and the latter state cannot punish one acting under such ferry franchise for charging a person coming from Ohio more than is allowed by the West Virginia law for ferriage over the Ohio river. *State v. Faudre* (W. Va.), 1-104.

The validity of the resolution passed by the board of chosen freeholders of Hudson county in 1905, fixing the rates to be charged by certain ferries in Hudson county for the transportation of foot passengers from that county to New York, must be regarded as established in the New Jersey Court of Errors and Appeals by the decision of that court in *Chosen Freeholders v. State*, 24 N. J. L. 718. *New York Central, etc., R. Co. v. Board of Chosen Freeholders* (N. J.), 16-858.

The line of later cases decided by the federal Supreme Court ending with the case of *St. Clair County v. Interstate Sand and Car Transfer Co.*, 192 U. S. 454, has not definitely decided that a state cannot fix rates for ferriage from itself to another state; and therefore it cannot be regarded as finally decided in the federal court that the decision in 24 N. J. L. 718 is in conflict with, and is therefore superseded by, the federal decisions. *New York Central, etc., R. Co. v. Board of Chosen Freeholders* (N. J.), 16-858.

Construction of resolution fixing fares. — The rates fixed by the resolution above mentioned apply only to the passage of foot passengers from Hudson county over technical ferries; and the resolution does not in-

clude a fixing of rates chargeable by a railroad company for a passage by a railroad passenger over its road and over ferries which, under the Act of 1903, it is operating as an appendage or extension of its road. *New York Central, etc., R. Co. v. Board of Chosen Freeholders* (N. J.), 16-858.

Effect of Interstate Commerce Act. — The Interstate Commerce Act of 1887 does not strip a state of any power to fix rates of ferriage which it theretofore possessed. *New York Central, etc., R. Co. v. Board of Chosen Freeholders* (N. J.), 16-858.

Effect of treaty between states. — The treaty between New York and New Jersey, by which New York has exclusive jurisdiction over the waters of the Hudson river, does not affect the question of power to fix ferriage rates involved in this case. *New York Central, etc., R. Co. v. Board of Chosen Freeholders* (N. J.), 16-858.

3. LIABILITY FOR INJURIES TO PASSENGERS.

Entering wagon gangway as contributory negligence. — A passenger who voluntarily enters a ferry boat by what is known as the horse or wagon gangway, that is, the space in the centre of the boat reserved for the accommodation of horses and wagons in transport, and who passes along such gangway for the purpose of reaching the front of the boat, although there is nothing to prevent him from passing through the part of the boat intended for passengers, must be held to assume the risk of injury incident to such a dangerous place, and if he is injured by falling down a coal hole in the gangway, the ferry company is not liable. *Hopkins v. West Jersey, etc., R. Co.* (Pa. St.), 17-370.

Coal hole in wagon gangway. — In an action for personal injuries received by falling into a coal hole on a ferry boat, where the evidence shows that the accident occurred in the day time, as the plaintiff was passing across the wagon gangway of the boat immediately behind a cart, and that there was nothing to hide the hole except the cart, which had been standing at one side of it, but which moved forward as plaintiff started to cross the gangway, a judgment of nonsuit on the ground of contributory negligence is proper, the necessary inference being that the plaintiff's failure to observe the hole was due to his failure to look where he was going. *Hopkins v. West Jersey, etc., R. Co.* (Pa. St.), 17-370.

FERTILIZERS.

Fertilizer plant as nuisance, see **NUISANCES**, 1 b.

FETTERS.

Requiring convict to be fettered as cruel and unusual punishment, see **CRIMINAL LAW**, 7 a (1).

FICTITIOUS GRANTEE.

See **DEEDS**, 2 b.

FICTITIOUS NAMES.

Use of, see **FORGERY**, 1 a.

FIDELITY BONDS.

See **BONDS**.

FIDUCIARIES.

See **AGENCY**; **EXECUTORS AND ADMINISTRATORS**; **GUARDIAN AND WARD**; **RECEIVERS**; **TRUSTS AND TRUSTEES**.

Consanguinity as creating fiduciary relation, see **FRAUD AND DECEIT**, 4.

Descriptive words appended to signature to check as notice of trustee character of drawer, see **CHECKS**, 1.

Presumption of undue influence from fiduciary relation, see **WILLS**, 5 c (1).

Sales between persons in fiduciary relation, see **SALES**, 1.

Tax collector as trustee, see **TAXATION**, 7.

FIGHTING.

See **ASSAULT AND BATTERY**, 2 b; **DUELING**.

Bull fighting as nuisance, see **NUISANCES**, 1 b.

Killing in mutual combat, see **HOMICIDE**, 5 b.

FIGURES.

Omission of recital of amount in note supplied by marginal figures, see **BILLS AND NOTES**, 1.

FILIATION.

See **BASTARDY**.

FILING.

Claims for mechanics' liens, see **MECHANICS' LIENS**, 6 a.

Depositions, see **DEPOSITIONS**, 5.

Indictments and informations, see **INDICTMENTS AND INFORMATIONS**, 1, 2.

FILLING BLANKS.

Effect of, see **ALTERATION OF INSTRUMENTS**, 3.

FILUM FLUMINUS.

Extent of ownership of land bounded by watercourse, see **WATERS AND WATERCOURSES**, 3 b (2).

FINALITY.

Finality of judgment as affecting conclusiveness, see **JUDGMENTS**, 6 c.

Finality of judgment or decree necessary to support action, see **JUDGMENTS**, 12.

FINANCIAL CONDITION.

As affecting damages for assault and battery, see **ASSAULT AND BATTERY**.

As evidence in various actions and proceedings, see **BREACH OF PROMISE OF MARRIAGE**; **CHECKS**; **EMBEZZLEMENT**; **PHYSICIANS AND SURGEONS**.

Excuse for nonperformance of contract, see **CONTRACTS**, 5 b (3).

Financial irresponsibility as ground for injunctive relief, see **INJUNCTIONS**, 1 c.

FINDINGS.

Actions to enforce mechanic's lien, see **MECHANICS' LIENS**, 10.

Aider of defects in pleading, see **PLEADING**, 11.

Commissioners' findings as *res judicata*, see **JUDGMENTS**, 6 d (2).

Conclusiveness of findings by master, see **MASTER IN CHANCERY**.

Failure of court to make findings as ground for collateral attack on judgment, see **JUDGMENTS**, 10.

Presumptions as to, see **APPEAL AND ERROR**, 14 h.

Request to find, see **COURTS**, 7 b.

FINDING LOST PROPERTY.

See **LOST PROPERTY**.

FINES.

1. **ACTIONS TO RECOVER FINES**, 788.

a. Collection of fine, 788.

b. Security for fine, 788.

c. Appeal, 788.

2. **RECOVERY OF FINE ILLEGALLY IMPOSED**, 788.

3. **REMISSION BY EXECUTIVE**, 788.

4. **DEATH OF DEFENDANT PENDING WRIT OF ERROR**, 788.

5. **DISPOSITION OF FINES COLLECTED**, 788.

Compelling employer to pay fine to labor union, see **LABOR COMBINATIONS**, 6.

Excessive fines for violating railroad rate law, see **CARRIERS**, 2 j.

Fine and imprisonment under statute authorizing fine or imprisonment, see **CRIMINAL LAW**, 7 b (6).

Imposition of fine as deprivation of property without due process of law, see **CONSTITUTIONAL LAW**, 9 b.

Imposition of fine as punishment for crime, see **CRIMINAL LAW**, 7 b (6).

Power of governor to remit fine imposed for violation of municipal ordinance, see PARDON, REPRIEVE, AND AMNESTY, 1.
Review of order canceling fine, see APPEAL AND ERROR, 2 b.

1. ACTIONS TO RECOVER FINES.

a. Collection of fine.

Duty of sheriff to collect. — The Arkansas statute makes it the duty of sheriffs to collect all fines, penalties, and forfeitures adjudged against defendants in Circuit Courts, and county clerks are required to charge sheriffs with all of such fines. *Wilson v. White* (Ark.), 12-378.

b. Security for fine.

Bond not complying with statute. — Under the Arkansas statute authorizing a person convicted of a misdemeanor to give to the sheriff or other officer security for the payment within thirty days of the fine and costs, and providing that the note or bond taken as security when filed with the court rendering the judgment shall have the force and effect of a judgment, a note not made payable to the state and not payable within thirty days does not have the force and effect of a judgment under the statute, but is valid as a common-law obligation and binds the principal and surety for the payment of the amount named therein. *Wilson v. White* (Ark.), 12-378.

A sheriff who takes for a fine and costs a bond not in conformity with statutory requirements is not acquitted of liability for such fine and costs even though the bond taken is valid as a common-law obligation, and he is properly compelled to pay the same by the County Court. *Wilson v. White* (Ark.), 12-378.

c. Appeal.

Jurisdiction under Louisiana Constitution. — The word "fine" as used in the Louisiana constitution (art. 85) limiting the jurisdiction of the Supreme Court to cases where, *inter alia*, "a fine exceeding \$300 . . . is actually imposed," is used in its ordinary acceptation, and not synonymously with "penalty" or "punishment," and therefore the Supreme Court cannot entertain an appeal from a sentence fining the defendant \$300 and permanently depriving him of the privilege of keeping a barroom, as provided by the statute (Acts 1908, p. 236). *State v. Price* (La.), 18-881.

Costs imposed on a defendant who has been sentenced to pay a fine are not a part of the fine, and cannot be considered in determining whether the amount of the fine is sufficient to give the Supreme Court jurisdiction. *State v. Price* (La.), 18-881.

2. RECOVERY OF FINE ILLEGALLY IMPOSED.

Conviction under void indictment. — A fine paid by a person convicted under an indictment which is void, for the reason that

it charges no offense against the laws of the state, cannot be recovered by rule against the sheriff who collects the same. *McDonald v. Sowell* (Ga.), 12-701.

3. REMISSION BY EXECUTIVE.

Extent of power to remit. — In Kentucky, the power conferred upon the governor, by section 77 of the state constitution, of remitting fines and forfeitures, extends only to the state's part of judgments for fines and forfeitures, and not to the statutory fees of the clerk, sheriff, commonwealth's attorney, and other court officers in penal or criminal cases, or to the penalty, in the shape of damages equal to ten per cent. of the judgment appealed from, which is imposed by statute upon unsuccessful appellants; and, consequently, where a judgment imposing a fine for contempt is affirmed on appeal, with damages, a pardon subsequently granted by the governor, remitting all of the judgment except commissions, fees, and costs, constitutes no defense to a proceeding by the state to collect the damages. *Commonwealth v. French* (Ky.), 17-601.

4. DEATH OF DEFENDANT PENDING WRIT OF ERROR.

Where the defendant in a criminal case dies pending a writ of error taken by him from a judgment that he be fined and imprisoned, and the appellate court, on suggestion of death, dismisses the writ of error and remands the cause to the trial court for such proceedings as "ought to be had," the trial court has jurisdiction to make an order declaring the cause abated and canceling the fine. *United States v. Dunne* (U. S.), 19-1145.

A judgment imposing a fine and imprisonment in a criminal case abates on the death of the defendant pending a writ of error and the fine cannot be enforced against his estate. *United States v. Dunne* (U. S.), 19-1145.

6. DISPOSITION OF FINES COLLECTED.

The provisions of the Florida statute (Acts 1909, c. 6005, § 11) relating to the disposition of fines collected, are controlled by section 9 of article 16 of the constitution, as amended, which requires fines collected to be paid into the fine and forfeiture fund of the county. *Harper v. Galloway* (Fla.), 19-235.

FIREARMS.

See WEAPONS.

FIRE COMPANIES.

Exemption of members from jury duty, see JURY, 3.

FIRE DEPARTMENT.

Law of the road as applicable to fire engines, see STREETS AND HIGHWAYS, 5 b.

- Liability of municipality for acts of fire department, see MUNICIPAL CORPORATIONS, 9 a.
- Liability of municipality for negligence of firemen, see MUNICIPAL CORPORATIONS, 9 c.
- Maintenance by municipality, see MUNICIPAL CORPORATIONS, 15.
- Negligence of driver of hose cart imputable to firemen riding on cart, see NEGLIGENCE, 7 e (2).

FIRE ESCAPES.

- Duty of owner of building to provide fire escapes, see NEGLIGENCE, 2.
- Liability of innkeeper for failure to provide fire escapes, see INNS, BOARDING HOUSES, AND APARTMENTS, 6.
- Statutory regulation of inns, see INNS, BOARDING HOUSES, AND APARTMENTS, 3.

FIRE INSURANCE.

- See INSURANCE, 5.

FIRE INSURANCE PATROL.

- Charitable purpose, see CHARITIES, 1.

FIRE LIMITS.

- See MUNICIPAL CORPORATIONS, 15.

FIREMEN.

- Duty of driver of fire engine to stop, look, and listen before crossing railroad track, see RAILROADS, 8 b (8) (b).

FIRES.

1. RIGHT TO SET FOR PURPOSE OF CLEARING LAND, 789.
2. LIABILITY FOR NEGLIGENCE, 789.
 - a. In general, 789.
 - b. Fires set by railroads, 790.
3. CONTRACT EXEMPTING FROM LIABILITY, 790.
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5. PRESUMPTION OF NEGLIGENCE, 790.
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8. INVESTIGATIONS BY INSURANCE COMMISSIONERS, 792.
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See ARSON.

- Assignability of cause of action for destruction of personalty by fire, see ASSIGNMENTS, 1 c.

- Burden of proof in action for loss of goods by fire, see CARRIERS, 4 j (1) (b).
- Contracts with water companies for fire protection, see WATERS AND WATERCOURSES, 4 c.
- Duty of master of vessel to provide protection against fire, see SHIPS AND SHIPPING, 5.
- Extinguishing fire as salvage service, see SALVAGE.
- Fire escaping from garbage dumping ground, see HEALTH, 2 a (3).
- Interference with extinguishment of fires, see RAILROADS, 7 b.
- Liability of carrier for loss of goods by fire, see CARRIERS, 4 b (4).
- Liability of municipality for failure to furnish water for fire protection, see MUNICIPAL CORPORATIONS, 9 a.
- Liability of railroad to persons injured in extinguishing fires set by locomotive, see RAILROADS, 8 h.
- Liability of railroads for fires from locomotives, see RAILROADS, 3 a (2), 7 c.
- Liability of water company for fire losses, see WATERS AND WATERCOURSES, 4 c.
- Members of fire companies exempt from jury duty, see JURY, 3.
- Statutory liability of railroad company for fires communicated by locomotive, see RAILROADS, 3 a (2).
- Termination of lease by destruction of premises, see LANDLORD AND TENANT, 3 g.
- Validity of ordinance requiring attendance of firemen at theatres, see THEATRES AND PUBLIC RESORTS, 1.
- Validity of statute providing for investigation of fires by insurance commissioner, see STATUTES, 2, 3 b.

1. RIGHT TO SET FOR PURPOSE OF CLEARING LAND.

Liability for damages to adjacent land. — Under the statutes of Michigan it is not unlawful for the owner of land to set fires thereon for the purpose of clearing the land and fitting it for cultivation, nor is he liable for injuries to the land of an adjoining owner by the escape of fires set for that purpose, unless such escape was wilfully or negligently permitted. *Rogers v. Parker* (Mich.), 18-753.

2. LIABILITY FOR NEGLIGENCE.

a. In general.

Necessity of notice. — The liability of a landowner for negligently permitting fire to escape from his land to the injury of land of an adjoining owner is predicated upon his knowledge of the existence of the fire on his own land, or, at least, upon knowledge of facts sufficient to charge him with notice that the danger of such fire breaking out thereon is imminent. *Rogers v. Parker* (Mich.), 18-753.

Negligence of independent contractor. — The rule exempting the owner of premises from liability for injuries caused by the negligence of an independent con-

tractor, applies to cases of damage by fire, subject to the same exceptions as in other cases. *Rogers v. Parker* (Mich.), 18-753.

Liability to owner of insured property. — In an action for the loss of property by fire due to the defendant's negligence, the recovery cannot be reduced by showing that the property was insured and that the insurer has paid the loss, but the assured stands as a trustee to the insurer to the extent of the loss paid. *Cushman, etc., Co. v. Boston, etc., R. Co.* (Vt.), 18-708.

b. Fires set by railroads.

Obligation of landowner to anticipate negligence. — The owner of premises is not bound to anticipate the negligence of a railroad and by way of prevention make provision against communication by fire. *Phillips v. Durham, etc., R. Co.* (N. Car.), 3-384.

Degree of care required from railroad company. — A railroad company discharges its duty to avoid setting fires if it exercises reasonable care in providing its engines with the most approved appliances and contrivances in general use by railroads for the prevention of the escape of sparks, and keeps such appliances and contrivances in a good condition. *St. Louis, etc., R. Co. v. Coombs* (Ark.), 6-151.

Property not immediately adjoining railroad. — In an action for damages sustained by fire alleged to have been negligently set by a railroad on the right of way and which extended across the lands of intervening proprietors, the fact that the plaintiff's land did not immediately adjoin the defendant's right of way does not *per se* absolve the defendant from liability, but is a circumstance, with the probability that intervening and independent causes might have stopped or extended the fire, to be weighed in considering whether the defendant's negligence was the proximate cause of the plaintiff's damage. *Phillips v. Durham, etc., R. Co.* (N. Car.), 3-384.

3. CONTRACT EXEMPTING FROM LIABILITY.

Validity. — Where a railroad company grants a person a license to erect a mill on its right of way, it is competent for the parties to stipulate that the licensor shall not be liable to the licensee for the loss of the "mill and contents by fire from any cause whatever," as such stipulation is not contrary to public policy. *Cincinnati, etc., R. Co. v. Saulsbury* (Tenn.), 5-744.

A stipulation in a lease made by a railroad company that the lessee is to exonerate it from all liability for damages by fire to any property or structure on the demised premises, which in the operation of the railroad may be accidentally or negligently communicated to it, is not void as against public policy. *Mansfield Mutual Ins. Co. v. Cleveland, etc., R. Co.* (Ohio), 6-782.

Construction as regards property included. — Where a railroad company negligently sets fire to a building upon its right

of way which it has leased with the proviso that no liability shall attach to the company for loss by fire of property on the rented premises, it will be held liable for the destruction of other property not upon the right of way to which the fire so started is communicated. *Kansas City, etc., R. Co. v. Blaker* (Kan.), 1-883.

Where a railroad company grants a person a license to erect a mill on its right of way and stipulates that it shall not be liable to the licensee for the loss of the mill and contents by fire or from any cause whatever, if the railroad company sets a fire it is not liable for the destruction of the raw material and finished product on the right of way outside of the mill building, but is liable as a common carrier for the destruction of the finished product loaded in freight cars and ready for shipment. *Cincinnati, etc., R. Co. v. Saulsbury* (Tenn.), 5-744.

Under a lease made by a railroad company exempting the lessor from liability for damages by fire to the demised premises caused by the operation of its railroad, the railroad company is not liable to the lessee or his insurers for damages done to a building and its contents by fire communicated by one of its locomotives, though only a part of the building is located on the leased premises, if the fire is communicated to that part. *Mansfield Mutual Ins. Co. v. Cleveland, etc., R. Co.* (Ohio), 6-782.

4. CONTRIBUTORY NEGLIGENCE.

Erecting building near railroad. —

The placing of structures on the right of way of a railroad company which permits them to remain there until they are negligently set on fire by a locomotive, which fire burns other adjoining property, is not contributory negligence on the part of the owner and he is not deprived of the remedy given by law for the negligent burning of property not on the right of way. *Kansas City, etc., R. Co. v. Blaker* (Kan.), 1-883.

The action of a landowner in erecting a building on his own land within a few inches of the right of way of a railroad does not render him guilty of contributory negligence which will preclude him from recovering for an injury by fire due to the negligence of the railroad company. *Southern R. Co. v. Paterson* (Va.), 8-440.

5. PRESUMPTION OF NEGLIGENCE.

Setting of fire by locomotive, in general. —

In an action against a railroad company to recover damages for the destruction of a building by fire, evidence that the fire was set by one of the defendant's engines raises a presumption of negligence which it is necessary for the defendant to overcome. *St. Louis, etc., R. Co. v. Coombs* (Ark.), 6-151.

The fact that a fire is communicated to property along the line of a railroad by sparks from the engine raises an inference of negligence sufficient to make out a *prima facie* case against the railroad in the absence

of other evidence as to the manner in which the engine is constructed, equipped, or operated. *Dyer v. Maine Cent. R. Co. (Me.)*, 2-457.

Under Kansas statute. — The Kansas statute makes causing a fire by the operation of a railroad *prima facie* evidence of negligence on the part of the company, and, this being shown, it is a question for the jury to determine whether such *prima facie* case is overcome by evidence that the engine which set the fire was equipped with the latest devices, was in good repair, and was being managed by competent employees. *Atchison, etc., R. Co. v. Geiser (Kan.)*, 1-812.

The fact of the setting of a fire by the operation of a railroad is evidence, not merely presumption, of negligence, and as such must be met and overcome by evidence to the satisfaction of the jury. *Atchison, etc., R. Co. v. Geiser (Kan.)*, 1-812.

Sufficiency of evidence to rebut. — In an action against a railroad company to recover damages for the destruction of a building by fire, the evidence held to justify the jury in finding a presumption of negligence on the part of the defendant not overcome. *St. Louis, etc., R. Co. v. Coombs (Ark.)*, 6-151.

6. EVIDENCE.

Circumstantial evidence of cause. — The fact that a fire which destroyed property originated in sparks from a passing locomotive may be shown by circumstantial evidence. *Kansas City, etc., R. Co. v. Blaker (Kan.)*, 1-883.

Locomotive engineer as expert witness. — A person who has been employed as a locomotive engineer for a long time and is qualified by experience to understand the operation of spark arresters in locomotives may testify whether a spark arrester in first-class condition would prevent the escape from a locomotive of fire sufficient to burn property on or near the right of way. *Kansas City, etc., R. Co. v. Blaker (Kan.)*, 1-883.

Negligence of independent contractor. — In an action by one landowner against another to recover damages for the alleged negligence of the defendant in permitting fire to escape from his land to that of the plaintiff, where the defense interposed was that the fire was set on defendant's land by an independent contractor who was clearing the land under a contract with the defendant, evidence examined and held to call for the direction of a verdict in the defendant's favor. *Rogers v. Parker (Mich.)*, 18-753.

Interference by railroad with extinguishment. — Evidence reviewed in an action against a railroad company to recover damages for the interference of its train with the extinguishment of a fire, and held insufficient to entitle the plaintiff to have submitted to the jury the question whether the defendant was guilty of tortious conduct in failing to stop its train before reaching the scene of the fire. *American Sheet, etc., Co. v. Pittsburgh, etc., R. Co. (U. S.)*, 6-626.

Evidence reviewed in an action against a

railroad company to recover damages for the interference of its train with the extinguishment of a fire, and held insufficient to show that after the train had been brought to a stop at a point which prevented the carrying of fire hose across the track, and the person in charge of the train had been informed for the first time of the situation, there was anything in the conduct or management of the train to justify the jury in finding a verdict for the plaintiff. *American Sheet, etc., Co. v. Pittsburgh, etc., R. Co. (U. S.)*, 6-626.

Sufficiency to show cause of fire. —

In an action against a railroad company to recover damages for the destruction of a building by fire, the evidence held sufficient to justify the jury in finding that the fire was communicated by sparks from the engine. *St. Louis, etc., R. Co. v. Coombs (Ark.)*, 6-151.

Sufficiency to show negligence. — In an action against a railroad company to recover damages for the destruction of the plaintiff's building by a fire negligently set by the defendant, where it appears that the source of the fire was a red-hot clinker of unusually large size, which the jury would be warranted by the evidence in inferring was withdrawn by the fireman from the fire-box of the engine, and either negligently thrown off the tender by him or suffered to fall from the foot board and roll down the embankment to a point from which it communicated fire to the building, the evidence, in the absence of any explanation or denial by the fireman, is sufficient to establish the negligence of the defendant as against a demurrer to the evidence. *Southern R. Co. v. Patterson (Va.)*, 8-440.

On moving for a new trial in a suit for negligently causing a fire, on the ground that a verdict for the defendant was against the evidence, the plaintiff must not only show a strong preponderance of evidence of negligence, but must show that there was no other reasonable inference from all the evidence on which the jury could act. *Linn v. Barker (Me.)*, 20-697.

In an action for damages caused by fire, evidence held sufficient to show that the fire was communicated from the defendant's premises, but not sufficient to show that the loss was caused by the defendant's negligence. *Linn v. Barker (Me.)*, 20-697.

Burden of proof. — The burden is on one suing for damages caused by a fire communicated from the defendant's premises to show the defendant's negligence. *Linn v. Barker (Me.)*, 20-697.

7. INSTRUCTIONS.

Conclusiveness of uncontradicted testimony. — In an action against a railroad company to recover damages for the destruction of a building by fire, it is not erroneous to instruct the jury that they are not bound to accept as conclusive uncontradicted statements of witnesses that the engine was in good order and carefully operated, but that they shall consider all the circumstances and evidences bearing upon the

condition of the engine, the mode of operating it, and the circumstances under which the fire took place. *St. Louis, etc., R. Co. v. Coombs* (Ark.), 6-151.

Meaning of term "right of way." — In an action against a railway company to recover damages for injury to the plaintiff's property resulting from a fire originating on the defendant's right of way, where the plaintiff's action is based upon the defendant's failure to comply with a statute requiring it to keep its right of way free from combustible matter, the court should explain to the jury the meaning of the term "right of way," and an instruction is erroneous which is calculated to leave the impression that any space wherein the trees have been cut by the defendant, under a statute empowering it to fell trees standing within a specified distance of either side of its right of way for the protection of its line, may be treated as being included within the right of way. *Red Mountain R. Co. v. Blue* (Can.), 9-949.

8. INVESTIGATIONS BY INSURANCE COMMISSIONERS.

Place of investigation. — As there is nothing in the Tennessee statute which either expressly or by implication requires the insurance commissioner to conduct his investigation of a fire in the county where the property was destroyed, it follows that he may lawfully conduct such investigation at his office in another county. *Rhinehart v. State* (Tenn.), 17-254.

Compelling attendance of witnesses. — As the insurance commissioner is vested by statute with all the powers of a justice of the peace for the purpose of summoning and compelling the attendance of witnesses at an investigation conducted by him under the act, and as such investigation is more in the nature of a criminal proceeding than a civil action, it must be held that the commissioner has the power conferred upon justices of the peace in criminal proceedings of issuing subpoenas for witnesses to any part of the state, and, consequently, a subpoena issued by him to a county other than that in which the investigation is held is valid. *Rhinehart v. State* (Tenn.), 17-254.

Punishment for disobedience of subpoena. — The statutes denouncing penalties against witnesses for failure to appear in obedience to the service of a subpoena apply to investigations conducted by the insurance commissioner under the Tennessee statute, and the fact that the attendance of witnesses at such an investigation may be compelled by attachment does not prevent the enforcement of the penalty prescribed by the statute against a defaulting witness, the remedies by attachment and by enforcement of the penalty being alternative. *Rhinehart v. State* (Tenn.), 17-254.

As the state is the party prejudiced by the failure of a witness to appear in an investigation conducted by the insurance commissioner under such statute, the proceeding to punish the delinquent witness by enforcement of the statutory penalty should be

brought in the name of the state without the intervention of the insurance commissioner as relator, but the use of the commissioner's name as relator, being mere surplusage, does not affect the validity of the proceeding. *Rhinehart v. State* (Tenn.), 17-254.

Excuse for disobedience of subpoena. — In a proceeding against a defaulting witness to recover the statutory penalty for disobedience of a subpoena issued by the insurance commissioner in an investigation under the fire marshal law, it is no defense that the commissioner was exceeding his authority in investigating matters not pertinent to the fire in question, and that the failure of the witness was due to the advice of counsel. *Rhinehart v. State* (Tenn.), 17-254.

9. RIGHT OF OWNER OF INSURED PROPERTY TO SUE WRONGDOER.

Where an insurance company pays to the assured a loss occasioned by the wrong of a third person, and the value of the property destroyed by the fire exceeds the amount paid by the insurance company, the assured may bring an action in his own name against the wrongdoer, and recover the full amount of the loss. *Kansas City, etc., R. Co. v. Shutt* (Okla.), 20-255.

FIREWORKS.

Liability for injuries caused by discharge of fireworks, see EXPLOSIONS AND EXPLOSIVES.

FIRM.

See PARTNERSHIP.

FISH AND FISHERIES.

Fish market as nuisance, see NUISANCES, 1 b.
Right of owner of oyster bed to compensation for injuries in improving navigation, see WATERS AND WATERCOURSES, 3 b (2).

Right to take fish, see GAME AND GAME LAWS, 1.

Taking right to fish under power of eminent domain, see EMINENT DOMAIN, 5.

Right to shellfish. — A grantee of tide lands from the state requires the right to exercise dominion and ownership over things upon such lands, especially over things so closely related to the soil as clams. *Sequim Bay Canning Co. v. Bugge* (Wash.), 196.

A lessee of tide lands from the state for the purpose of cultivating and digging for clams may have other persons enjoined from repeatedly removing clams from such lands without his consent. *Sequim Bay Canning Co. v. Bugge* (Wash.), 196.

2. STATUTORY REGULATION.

a. In Canada.

Power of dominion parliament to regulate fisheries. — Under the British

North America Act of 1867, the Parliament of the Dominion of Canada has the exclusive right to make or authorize the making of regulations respecting the fisheries of Canada. *Ship "North" v. King* (Can.), 3-806.

The legislature may provide for the protection of fish and may declare nets set or used contrary to law a public nuisance which may be destroyed by the proper officials. *State v. French* (Ohio), 1-948.

FIXTURES.

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1. NATURE AND REQUISITES.

a. In general.

A "fixture" is an article which was once a chattel, but has become a part of the realty by physical annexation thereto. The requisites are actual annexation to the realty or something appurtenant thereto, application to the purpose to which that part of the realty is appropriated, and intention of the annexing party to annex it permanently. *Gasaway v. Thomas* (Wash.), 20-1337.

b. Intention of parties.

The intention of the parties in affixing chattels to the freehold and the relation of the parties must be looked to in ascertaining

whether the chattels were affixed as fixtures. *Union Bank, etc., Co. v. Fred W. Wolf Co.* (Tenn.), 4-1070.

The purpose and intent of the party annexing personalty is a controlling circumstance in determining whether it has become a fixture. *Gasaway v. Thomas* (Wash.), 20-1337.

2. WHAT LAW GOVERNS.

In an action for the conversion of property which the defendant claims as a fixture to realty placed thereon by the purchaser of mining claims, whether the property is a fixture must be decided with reference to the law of the province of British Columbia, where the property is situated, if that law is shown by competent proof. *Gasaway v. Thomas* (Wash.), 20-1337.

3. CHARACTER OF ARTICLE ANNEXED.

Mining mill. — A mining mill erected on waste lands of the Crown held not to be a fixture, but a chattel or trade fixture, and liable to seizure and sale under an execution against the goods of the owner. *Liscombe Falls Gold Min. Co. v. Bishop* (Can.), 2-735.

Sugar-cane mill and boiler. — A sugar-cane mill, erected by the owner of a farm thereon, by placing four large lightwood posts firmly in the ground and fastening the mill to them by spokes driven through holes in the mill and into the posts, and a "sugar-cane boiler," which is placed by him in a brick furnace, which is on the ground, and the chimney of which runs up through and above the roof of the sugar-mill house, become a part of the realty. The same is true as to an old, partially broken "sugar-cane boiler" which the owner puts down, under a building, in a large horse stable, and from which he runs a gutter to a well on the lot, and which he uses as a watering place for farm stock. *Brigham v. Overstreet* (Ga.), 11-75.

Shelving, counters, meat box, etc. — Where one erects on his land a storehouse, and places therein shelving which he nails and fastens to the walls, and large and cumbersome counters, tables, and a large meat box, to carry out the obvious purpose for which the building was erected, to increase its value for such purpose, and to be permanently used in connection with it, such articles become part of the realty, even though they might be removed from such house without being injured and without injury to the building. Such fixtures, consequently, pass as part of the realty, under a conveyance by the owner of the land to a purchaser thereof, when they are not excepted from the operation of the same. *Brigham v. Overstreet* (Ga.), 11-75.

Ice house. — Evidence held to show that an ice house built on leased premises was a fixture subject to the law as to removal by a tenant. *Phelps v. Ayers* (Wis.), 20-788.

Movable ice chest. — An ice chest in a saloon building, which is not attached to either the wall or floor of a building by

screws or otherwise, is not a trade fixture. *Bush v. Havird* (Idaho), 10-107.

Saloon furniture fastened to wall. — Property consisting of a front and back bar, an ice chest, etc., placed in a saloon building by the lessee and fastened to the wall and floor, constitutes trade fixtures, and may be removed by the tenant during the continuance of his term. *Bush v. Havird* (Idaho), 10-107.

Mirrors attached to wall of dwelling. — Mirrors attached to the wall of a dwelling house which have been treated as personality by the owners both of the realty and of the personality, are personal property though the frames are painted in the same style as the woodwork of the room. *Cranston v. Beck* (N. J.), 1-686.

Storm windows and doors. — Storm windows and doors which are made for a house and specially fitted to it for the purpose of rendering the house more comfortable as a dwelling in the winter time, and which, when in use, are attached to the house with screws, are fixtures, and pass by a deed of the premises, though at the time of the conveyance such windows and doors have been detached from the house and placed in an outbuilding for the summer. *Roderick v. Sanborn* (Me.), 20-469.

Machinery not adapted to permanent use. — Where the purchaser of mining claims under an agreement to develop them, his rights to be forfeited on failure to perform any condition of the contract, installs certain machinery in order to prospect the claims and to determine whether he will be justified in making further payments or expenditures, and such machinery is not suitable for permanent working of the mines, it does not become a fixture, so as to belong to the vendor on forfeiture of the purchaser's rights under the contract. *Gasaway v. Thomas* (Wash.), 20-1337.

4. AGREEMENT AS TO CHARACTER OF ARTICLE ANNEXED.

Hotel building as personality. — A hotel building, affixed to land and conveyed therewith as real estate, cannot by agreement of the parties become personal property and encumbered with a chattel mortgage until after its severance from the land. *Beeler v. C. C. Mercantile Co.* (Idaho), 1-310.

Effect as to third persons. — The effect as to third persons of a secret agreement that the chattels affixed to the freehold shall remain personal property. *Union Bank, etc., Co. v. Fred W. Wolf Co.* (Tenn.), 4-1070.

5. FIXTURES AS BETWEEN LIFE TENANT AND REMAINDERMAN.

When chattels belong to life tenant. — Where a tenant for life fixes chattels to a freehold with the right to remove them during his term and without intent to give them to the remainderman, the chattels do not become part of the freehold, and upon the death of the tenant pass to his executor instead of

to the remainderman. *In re Hulse* (Eng.), 2-404.

6. FIXTURES AS BETWEEN LANDLORD AND TENANT.

a. Right of removal generally.

A fixture may be removed by a tenant only when it will cause no material injury to the estate. *Squire & Co. v. Portland* (Me.), 20-603.

b. Trade fixtures.

"Trade fixtures" is a term usually used to describe property which a tenant has placed on rented real estate to advance the business for which the realty is leased, and may, as against the lessor and those claiming under him, be removed at the end of the tenant's term. *Squire & Co. v. Portland* (Me.), 20-603.

Trade fixtures substituted for essential parts of the leased premises, and not additions thereto, are not removable and are presumed to be permanent additions. *Squire & Co. v. Portland* (Me.), 20-603.

c. Time of removal and loss of right.

(1) Right independent of agreement.

Trade fixtures must be removed by a tenant prior to his surrender of possession to the landlord, and if not so done, and there is no agreement to the contrary, the right of the tenant to re-enter the premises and sever the fixtures from the realty and remove them will be deemed lost and abandoned. *Bush v. Havird* (Idaho), 10-107.

If a lessee before the removal of a fixture surrenders possession of the premises without an express reservation of the right of removal, he loses such right. *Phelps v. Ayres* (Wis.), 20-788.

If a fixture placed on leased premises is not removed during the tenant's possession, and there is no agreement reserving a right to remove it thereafter, the law implies that the lease and the use and occupation thereunder are the compensation for the cost of adding the fixture to the land, and can afford no relief if the tenant sustains pecuniary loss by omitting to remove it. *Phelps v. Ayres* (Wis.), 20-788.

(2) Right of removal as affected by agreement.

If the right to remove a fixture from leased premises is reserved without specification of the time for its removal, the law limits it to the term of the lease, or while the lessee remains in possession. *Phelps v. Ayres* (Wis.), 20-788.

Where machinery installed on a mining claim by the purchaser under a contract which is subject to forfeiture on nonpayment of the instalments of the purchase price remains personality of the purchaser, he may remove it at least at any time before possession of the claims is surrendered to the vendor on forfeiture of his rights under the contract, and a failure to remove it until after nonpayment of an instalment will not prevent its

subsequent removal before surrender of possession. *Gasaway v. Thomas* (Wash.), 20-1337.

In an action by a lessee against the purchaser of the demised premises for the conversion of a building alleged to have been erected by the plaintiff under an agreement with the lessor that he (plaintiff) should have the right to remove it on the expiration of the lease, where all of the successors in title of the lessor, including the defendant, had actual notice of the circumstances under which the building was erected and of the plaintiff's claim of ownership; and that the defendant, after his purchase of the land, recognized the plaintiff's tenancy as subsisting, and gave him no intimation that his right of removal of the building must be exercised promptly, the jury is justified in finding in favor of the plaintiff on the issue as to the latter's ownership of the building and his right to remove the same from the premises. *Searle v. Roman Catholic Bishop* (Mass.), 17-340.

In such a case, a warranty in the deed under which the defendant acquired the land cannot avail him, if the evidence shows that he had actual notice of the plaintiff's rights at the time when he took such deed. *Searle v. Roman Catholic Bishop* (Mass.), 17-340.

(3) Right of persons claiming under tenant.

Mortgagee. — The mortgagee of trade fixtures acquires no greater rights in and to property than those enjoyed by the tenant, and when the tenant's right to re-enter and sever and remove the fixtures ceases, the right of the mortgagee also ceases. *Bush v. Havird* (Idaho), 10-107.

(4) Effect of new lease.

Where a tenant annexes trade fixtures to the realty and at the end of the term, without having removed them, enters into a new lease which is not a renewal of the old one, and which reserves to him no rights as to the fixtures, the latter becomes a part of the realty and the tenant is not entitled to remove them thereafter. *Wadman v. Burke* (Cal.), 3-330.

Movable trade fixtures owned by a tenant, in connection with a store, are not abandoned to the landlord by the tenant accepting a new lease, containing no reservation of a right to remove the fixtures at the end of the term, or mention of any claim thereto. *Thomas v. Gayle* (Ky.), 20-766.

d. Tenant formerly owning premises.

A tenant of land, although he may have placed fixtures thereon while he was the former owner of the premises, has no right to remove them. *Brigham v. Overstreet* (Ga.), 11-75.

7. FIXTURES IN CONNECTION WITH MORTGAGE OF REALTY.

a. What passes under mortgage.

In general. — As between mortgagor and mortgagee, annexations affixed to an estate

by the owner before mortgage, of such character as are apparently calculated to be for the permanent use and enjoyment of the realty, are presumed to be intended to constitute the realty and pass with it by a mortgage. *Young v. Hatch* (Me.), 2-374.

Hot-water heating apparatus. — A hot-water heating apparatus set up by the owner of the premises in a dwelling house will pass by the mortgage to the mortgagee. *Young v. Hatch* (Me.), 2-374.

Finishing materials not annexed to house. — Finishing materials, deposited in a dwelling in the course of construction for the purpose of annexation thereto but not so annexed, which were not especially designed for such dwelling but are capable of being utilized in any dwelling, are personal property, and not fixtures, and do not pass under a mortgage sale of realty. *Blue v. Gunn* (Tenn.), 4-1157.

b. As between mortgagee and vendor in conditional sale.

In general. — A mortgage of real estate, though in terms covering future additions to the premises, does not attach to chattels affixed to the premises under a contract of conditional sale to the mortgagor, and it is immaterial that the transaction is without notice to the mortgagee. *Cox v. New Bern Lighting, etc., Co.* (N. Car.), 18-936.

Where a freehold laundry is mortgaged in the usual form, with a covenant by the mortgagor not to remove from the premises any fixtures without the written consent of the mortgagee, trade machinery placed upon the premises by a third person, under a hire and purchase agreement with the mortgagor subsequent to the date of the mortgage, passes to the mortgagee as a part of the freehold and cannot be removed by the owner on the failure of the mortgagor and hirer to pay an instalment of the purchase price according to agreement. *Ellis v. Glover* (Eng.), 13-666.

Knowledge of intention to affix chattels to mortgaged realty. — The title of a vendor in a conditional sale of chattels, as against a prior mortgagee of premises to which the chattels are affixed, is not affected by the fact that the vendor knew that the chattels were to be affixed to the premises or were to become additions thereto or substitutes for other apparatus then in use, though the mortgage provided that it should cover all "additions" to the mortgaged property. *Cox v. New Bern Lighting, etc., Co.* (N. Car.), 18-936.

Delay in recording sale. — Delay in recording a conditional sale of chattels which are affixed to mortgaged land does not affect the rights of the conditional vendor as against the mortgagee. *Cox v. New Bern Lighting, etc., Co.* (N. Car.), 18-936.

When vendor loses title. — The vendor, in a conditional sale of chattels, who permits them to be so affixed to mortgaged land that they cannot be removed without impairing the security of the mortgage will not be allowed to assert his title as against

the mortgagee. *Cox v. New Bern Lighting, etc., Co.* (N. Car.), 18-936.

When right to remove ceases. — In the absence of an express stipulation to the contrary, a mortgagor in possession has the right to permit trade fixtures to be put up and removed from the mortgaged premises, provided they are removed before the mortgagee takes possession, but the right of removal ceases when the mortgagee takes possession. *Ellis v. Glover* (Eng.), 13-666.

FLAG.

Use of flag for advertising purposes, see CONSTITUTIONAL LAW, 9 b, 10.

FLAGMEN.

Duty of railroad to maintain flagmen at crossings, see RAILROADS, 8 b (4).

Duty to stop, look, and listen at crossings protected by flagmen, see RAILROADS, 8 b (8) (b).

FLAG STATION.

Duty of carrier to stop train, see CARRIERS, 6 a (5).

FLIGHT.

Flight of accused as corroboration of prosecutrix in rape case, see RAPE, 2 c (2).

Flight of accused as evidence of guilt, see CRIMINAL LAW, 6 n (4).

Instructions as to flight by accused, see CRIMINAL LAW, 6 q (1).

FLOODS.

See WATERS AND WATERCOURSES.

Liability of railroad for obstructing flow of water, see RAILROADS, 7 e.

Prescriptive right to flood lands, see WATERS AND WATERCOURSES, 3 b (4).

FLOW.

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FOG.

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FOOD.

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Regulating manufacture and sale of imitation of butter, see CONSTITUTIONAL LAW, 5 c.

Singleness of subject of statute providing for meat and milk inspection, see STATUTES, 3 b.

Validity of statute requiring license to sell milk, see LICENSES, 1.

1. REGULATION OF SUBJECT IN GENERAL.

Policy and construction of statute. —

The pure food law of Indiana was enacted as a means of protecting the people against the fraud and imposition of manufacturers and vendors of inferior and unwholesome food and medicinal products. Such statute is of great public interest, and should be so interpreted, if possible, within sound canons of construction, as to secure to the public the benefit intended by the general assembly. *Groff v. State* (Ind.), 17-133.

2. OCCUPATION TAXES.

A registration fee and occupation tax exacted by a milk inspection ordinance for conducting the milk business held not unreasonable and oppressive. *St. Louis v. Liessing* (Mo.), 4-112.

3. INSPECTION.

The provision in a milk inspection ordinance that the inspection shall be in charge of a city chemist is not an unconstitutional delegation of arbitrary power to him, it being the privilege of one prosecuted for vending impure milk to contest the analysis; nor does such a provision of the ordinance constitute a deprivation of due process of law. *St. Louis v. Liessing* (Mo.), 4-112.

Provisions in a milk inspection ordinance for the removal of the city chemist held not to render the ordinance unconstitutional. *St. Louis v. Liessing* (Mo.), 4-112.

4. SEIZURE AND DESTRUCTION OF UNWHOLESOME OR ADULTERATED ARTICLES.

Due process of law is not denied by the seizure and destruction by municipal officers

of food which is alleged to be unfit for human consumption without giving to the owner or custodian thereof notice or an opportunity to be heard, because such owner or custodian may have the question whether such food is actually unfit for use determined by a subsequent judicial proceeding. *North American Cold Storage Co. v. Chicago* (U. S.), 15-276.

The fact that articles which have become unfit for human consumption may have some value for other purposes does not deprive the municipal authorities of the right of seizing and destroying such articles when they are kept to be sold as food. *North American Cold Storage Co. v. Chicago* (U. S.), 15-276.

In the exercise of its police power a city may without warrant seize milk for the purpose of examination to determine whether it conforms to the requirements of the milk inspection ordinance. *St. Louis v. Liessing* (Mo.), 4-112.

5. REGULATION OF PARTICULAR ARTICLES.

a. Bread.

Regulation of manufacture and sale.

—A municipality, in the exercise of its police power, may regulate the sale of bread and its weight in the loaf. *Chicago v. Schmidinger* (Ill.), 17-614.

The ordinance of the city of Chicago which establishes a loaf of one pound as the standard loaf of bread in that city, and provides that bread may be made and sold in eight specified kinds of loaves, varying from one-half a pound to six pounds in weight but in no other way, and which requires each loaf to be labeled with its weight and the business name and address of the maker, baker, or manufacturer, is constitutional and valid. *Chicago v. Schmidinger* (Ill.), 17-614.

Special legislation. — As such ordinance is general in its terms and applies to all persons in the city of Chicago engaged in the making and sale of bread by the loaf, it does not constitute special legislation within the constitutional inhibition. *Chicago v. Schmidinger* (Ill.), 17-614.

Reasonableness of ordinance. — Such ordinance cannot be held unreasonable because it limits the loaves to the weights specified, or because it does not permit loaves of other weights to be made for sale by special contract, or because it can be complied with only by making the loaves of greater weights than those specified in order to allow for loss of weight by evaporation, or because it expressly exempts the sale of stale bread from its provisions. *Chicago v. Schmidinger* (Ill.), 17-614.

As such ordinance does not attempt to regulate the price of bread, the fact that the elements which enter into the composition of bread may fluctuate in value, and thereby necessitate a change in the price of the loaf sold, does not make the ordinance unreasonable and void. *Chicago v. Schmidinger* (Ill.), 17-614.

The provision of the ordinance that a label shall be placed upon each loaf of bread, stating the size of the loaf and the name of the

manufacturer, cannot be considered so unreasonable as to render the ordinance void. *Chicago v. Schmidinger* (Ill.), 17-614.

b. Milk.

Adulterated and unwholesome milk.

—The New York statute prohibiting the sale of adulterated or unwholesome milk is not unconstitutional, though it does not permit nonproducing vendors of milk to exempt themselves from certain actions or penalties from which producing vendors may exempt themselves. *St. John v. New York* (U. S.), 5-909.

Regulating percentage of elements.

—An ordinance prohibiting the sale of milk showing an analysis of less than a specified per cent. of ash is not unconstitutional as being unreasonable or oppressive, but is a valid exercise of the police power. *St. Louis v. Liessing* (Mo.), 4-112.

In a prosecution under a statute (Rev. Laws Mass., c. 56, §§ 56, 57, as amended by St. 1908, c. 643) forbidding the sale of milk containing less than a certain per cent. of solids, it is no defense that the defendant did not know that the milk was below the standard. *Commonwealth v. Wheeler* (Mass.), 18-319.

A statute making it an offense to sell or to have for sale milk containing less than a certain per cent. of solids and fat is a valid exercise of the police power for the prevention of fraud and the promotion of the public health. *Commonwealth v. Wheeler* (Mass.), 18-319.

In a prosecution under the Massachusetts statute forbidding the sale of milk containing less than a certain per cent. of solids and fat, it is no defense that the milk sold was not injurious to health. *Commonwealth v. Wheeler* (Mass.), 18-319.

The Massachusetts statute forbidding the sale of milk containing less than a certain per cent. of solids and fats applies to all milk below the standard though it is without adulteration and just as it comes from properly fed cows in sound health. *Commonwealth v. Wheeler* (Mass.), 18-319.

Indicating capacity of bottles. — An ordinance imposing a penalty on persons who sell or offer for sale milk or cream in bottles or glass jars which have not the capacity thereof indicated thereon, or which are of a less capacity than that indicated thereon, is within the police power of a municipality, and is not obnoxious to any of the provisions of the Illinois constitution or of the Federal Constitution. *Chicago v. Bowman Dairy Co.* (Ill.), 14-700.

The fact that such ordinance does not apply to all persons who sell substances in liquid form or to all persons who sell milk or cream, does not render the ordinance void as special legislation. *Chicago v. Bowman Dairy Co.* (Ill.), 14-700.

Nor is one who, at the time such ordinance goes into effect, owns bottles, the use of which the ordinance prohibits, deprived of his property without due process of law, the owner of property destroyed in the exercise

of the police power being remediless. *Chicago v. Bowman Dairy Co.* (Ill.), 14-700.

c. Oleomargarine and imitations of butter.

The Illinois statute regulating the manufacture and sale of oleomargarine and other substitutes for butter (Hurd's St. 1908, p. 713), which prohibits the use of any coloring matter in such substitutes to make them resemble genuine dairy butter, is a valid exercise of the police power, and does not violate any constitutional right of manufacturers of or dealers in such substitutes. The purpose of the act is not only to protect the public health, but also to prevent fraud on purchasers of butter, and its provisions are reasonably adapted to that purpose. *People v. Freeman* (Ill.), 17-1098.

The Nebraska act forbidding the sale or keeping for sale of imitation butter is constitutional. *Beha v. State* (Neb.), 2-846.

The Iowa statute regulating the manufacture and sale of imitation butter prohibits not only the coloration of a substance intended as a substitute for butter so as to cause it to resemble the true dairy product, but also the sale of imitation butter bearing the yellow color of real butter. *State v. Armour Packing Co.* (Ia.), 2-448.

6. CRIMINAL PROSECUTIONS.

a. Liability for acts of employees.

The principle announced by the Supreme Court of Indiana in certain liquor cases, that a saloon keeper is not liable for unlawful sales made by his barkeeper, or other person, in his absence and without his knowledge or consent, or in violation of his instructions, will not be extended to cases under the pure food law. *Groff v. State* (Ind.), 17-133.

The sale of oleomargarine in an adulterated form, or as a substitute for butter, is a crime against the public health. Whoever engages in its sale, or in the sale of any article interdicted by law, does so at his peril, and impliedly undertakes to conduct such sale with whatever degree of care is necessary to secure compliance with the law. He may conduct the business himself, or by clerks or agents, but if he chooses the latter the duty is imposed on him to see to it that those selected by him to sell the article to the public obey the law in the matter of selling; otherwise he, as the principal and responsible proprietor of the business, is liable for the penalty imposed by the statute. *Groff v. State* (Ind.), 17-133.

In a prosecution under the Indiana pure food law for selling oleomargarine as butter, it is no defense that the sale was made by a clerk of the defendant, who had been instructed to sell everything for what it was, and to sell nothing as a substitute for something else. *Groff v. State* (Ind.), 17-133.

b. Intent.

The offense of selling adulterated or misbranded food, created by the pure food law,

belongs to that class of offenses in which knowledge or guilty intent is immaterial and need not be shown in order to justify a conviction. The distribution of impure or adulterated food for consumption is an act perilous to human life and health, and hence an act which cannot be made innocent or harmless by want of knowledge or by the good faith of the seller. *Groff v. State* (Ind.), 17-133.

c. Evidence.

In an action to recover the penalty imposed for the violation of an ordinance forbidding the sale of milk in bottles which have not the capacity thereof indicated thereon, evidence that the defendant had in its possession bottles for use in its business holding less than the capacity indicated thereon is sufficient to establish a violation of the ordinance, and the fact that the defendant had neglected to inform itself of the size of such bottles is immaterial. *Chicago v. Bowman Dairy Co.* (Ill.), 14-700.

d. Defenses.

Purchase of milk under warranty of quality. — On the trial of an information under the English Sales of Food and Drugs Act for selling milk of inferior quality, a written warranty as to the quality of the milk given to the vendor by the producer of the milk is not a good defense in the absence of any evidence in writing connecting the particular milk sold with the warranty. *Watts v. Stevens* (Eng.), 6-109.

FOOTBALL.

Power of school board to prohibit playing of football, see **SCHOOLS**, 5 a.

FOOTPRINTS.

Evidence in burglary cases, see **BURGLARY**, 4. Identification of accused by footprints, see **HOMICIDE**, 6 a (4).

Opinion evidence as to similarity of footprints, see **CRIMINAL LAW**, 6 n (7).

Using shoes of accused to identify tracks, see **CRIMINAL LAW**, 6 n (1).

FORBEARANCE.

Forbearance to sue as consideration for promise, see **GAMING AND GAMING HOUSES**, 3 b.

FORCE.

See **TRESPASS**.

Element of burglary, see **BURGLARY**, 1.

Element of trespass, see **TRESPASS**, 1.

Intercourse accomplished by force as constituting incest, see **INCEST**, 1 b.

Right to take possession of public office by force, see **PUBLIC OFFICERS**, 5 a.

Use of force in robbery, see **ROBBERY**, 1.

FORCIBLE ENTRY AND DETAINER.

1. WHAT CONSTITUTES FORCIBLE ENTRY.
2. WHEN ACTION LIES.
3. PLEADING AND PRACTICE.

1. WHAT CONSTITUTES FORCIBLE ENTRY.

Entry during absence of person in possession. — Where a person in the peaceable possession of a building containing furniture and other goods locks the doors and leaves the premises for a few hours, and during his absence and against his will a number of men acting for the owner of the building invade the premises, unlock the doors, detach and remove the articles with which the building is furnished, carry them to and store them in another building, and then forcibly maintain the possession so gained, such acts are sufficient to constitute a forcible entry. *Wilson v. Campbell* (Kan.), 12-766.

Ejection of tenant holding over. — A tenant in peaceable possession of real property may not be turned out unlawfully or by force, even by an owner entitled to possession; and if he is forcibly dispossessed he may maintain forcible entry and detainer to recover the premises. *Wilson v. Campbell* (Kan.), 12-766.

The owner or one entitled to the possession of real estate may not forcibly dispossess a tenant who is in peaceable possession after the expiration of the tenancy, and where he forcibly enters on the premises during the absence of the tenant and removes the buildings and goods of the tenant, he is liable in an action for all damages occasioned by the unlawful and forcible entry. *Whitney v. Brown* (Kan.), 12-768.

Necessity of actual violence. — To constitute a forcible entry within the meaning of the Michigan statute it is not necessary that the defendant should use force in getting into the house occupied by the plaintiff. If the defendant, although he enters peaceably, subsequently evinces his purpose in entering to have been the expulsion of the plaintiff, and actually expels him by means of threats, violence, or superior force, the defendant's conduct amounts to a forcible entry. *McIntyre v. Murphy* (Mich.), 15-802.

If a person, evicting an occupant of land is accompanied by a number of persons, a display of force, calculated to intimidate and terrify the inmates of such occupant's house, who are terrified thereby, the entry is a forcible one notwithstanding the fact that no actual violence is used toward such inmates. *McIntyre v. Murphy* (Mich.), 15-802.

2. WHEN ACTION LIES.

Recovery of easement. — An action of forcible entry and detainer does not lie to recover an easement. *Moye v. Thurber* (Ala.), 9-1175.

Action by landlord against tenant. — Under the Oregon statute providing that a tenant shall be deemed as holding unlawfully

by force when, after a written notice to quit has been served upon him a specified time before the commencement of an action of forcible entry and detainer, he continues in the possession of the leased premises at the expiration of the time limited in the lease, the notice is not an essential part of the procedure for forcible entry and detainer, but is intended for the absolute termination of contractual relations between the landlord and tenant, and therefore the notice may be waived, and when the tenant waives notice he will be deemed as guilty of a wrong by holding thereafter as if the notice had been given. *Wolfer v. Hurst* (Ore.), 8-725.

Action by landlord against stranger.

— A landlord whose tenant is in possession of leased premises is not an "occupant" of the premises within the meaning of the Washington statute giving the occupant of real property the right to maintain an action of forcible entry and detainer, as the word "occupant" refers only to the person in actual possession or occupation. *Chezum v. Campbell* (Wash.), 7-921.

3. PLEADING AND PRACTICE.

Process. — A summons in forcible entry and unlawful detainer proceedings in the Municipal Court of St. Paul is returnable on the first day of a regular weekly term, being not less than three nor more than ten days from the date of its issuance. *Kenny v. Lun* (Minn.), 11-60.

Trial of title to land. — In Alabama, in an action of forcible entry and detainer before a justice of the peace, neither the question of title nor the question of the right of entry or of possession is in issue, the gist of the action being the entry and detainer by force and violence, and the ousting from a peaceable possession, contrary to law; but by virtue of statute, when the suit is removed from the justice's court to the Circuit Court, it is converted into statutory ejectment, and the plaintiff must recover upon the strength of his legal title, "unless he can prove that the defendant, or those under whom he claims, entered on said lands under some contract or agreement between plaintiff, or those under whom he claimed, or by use of force." *Moye v. Thurber* (Ala.), 9-1175.

Amendment of complaint. — A complaint in an action of forcible entry and detainer which alleges an "unlawful entry" may be amended so as properly to aver an "unlawful and forcible entry." *Wilson v. Campbell* (Kan.), 12-766.

Instructions. — In an action of unlawful detention it is erroneous to instruct the jury that the plaintiff claims that the land was rented to the defendant for a certain year, but that the contract was conditional, and that if that is so he must show a compliance with the conditions, where the plaintiff has alleged and testified that he agreed to rent the land only in the event he failed to sell it, that he did sell it, and that he did not rent it. *McElvaney v. Smith* (Ark.), 6-458.

In an action of unlawful detainer where

the defendant claims that he has been evicted unlawfully, if there is nothing to show that the rental value of the land was greater than the price the defendant agreed to pay, an instruction as to damages is erroneous which tells the jury that they may consider the rental value, but does not tell them that there is no room for any damages in respect of the difference between the rental value and the price the defendant agreed to pay. *Elvanev v. Smith* (Ark.), 6-458.

Damages to personal property. —

Though in an action of forcible entry and detainer the plaintiff cannot recover damages for being deprived of the possession of the land, he may recover the damages resulting to himself and to his personal property. *McIntyre v. Murphy* (Mich.), 15-802.

Recovery for personal injuries. — In such an action it is not error for the trial court to refuse to compel a physician who treated the plaintiff on the day of the attempted eviction, the plaintiff having been ill and her illness having been aggravated by such eviction, to state what medicine he gave her, because even if such treatment had something to do with her subsequent condition, the defendant's liability is not lessened or affected thereby. *McIntyre v. Murphy* (Mich.), 15-802.

FORECLOSURE.

See CHATTEL MORTGAGES, 8; MORTGAGES AND DEEDS OF TRUST, 13.

FOREIGN CONSULS.

See CONSULS.

FOREIGN CONTRACTS.

See CONFLICT OF LAWS, 3.

Limitation of actions on foreign contracts, see LIMITATION OF ACTIONS, 2.

FOREIGN CORPORATIONS.

See CORPORATIONS, 13.

Applicability of domestic statute, see CORPORATIONS, 3 d.

Right to hold stock in domestic corporations, see CORPORATIONS, 8 g (2) (b).

Right to sue, see INTERSTATE COMMERCE, 4.

FOREIGN GARNISHMENT.

See GARNISHMENT.

FOREIGN JUDGMENTS.

See JUDGMENTS, 18.

Actions on foreign judgments, see JUDGMENTS, 12.

Effect of foreign decree of divorce, see DIVORCE, 6 b.

Enforcement of foreign decree for alimony, see ALIMONY AND SUIT MONEY, 4 h.

Extraterritorial effect of adoption, see ADOPTION OF CHILDREN.

Limitation of action on foreign judgment, see LIMITATION OF ACTIONS, 2 a.

Operation and effect of foreign decree for alimony, see ALIMONY AND SUIT MONEY, 4 i.

FOREIGN LANGUAGE.

Latin words in instructions, see CRIMINAL LAW, 6 q (1).

Words spoken in foreign language as libelous, see LIBEL AND SLANDER, 4 e (1).

FOREIGN LAWS.

1. JUDICIAL NOTICE.

2. PRESUMPTIONS.

3. PLEADING.

4. PROOF.

See CONFLICT OF LAWS.

Presumption as to common law of foreign state, see COMMON LAW.

1. JUDICIAL NOTICE.

Under Arkansas statute. — Under the Arkansas statute providing that judicial notice shall be taken of the laws of other states, it is unnecessary, in an action to foreclose a chattel mortgage executed in another state, to prove the laws of such state upon the subject of recording chattel mortgages. *Creelman Lumber Co. v. Lesh* (Ark.), 3-108.

2. PRESUMPTIONS.

That common law is in force. — In the absence of averment and proof of the law of another state, it must be assumed on a common-law question that the common law is in force in that state. *Forsyth v. Barnes* (Ill.), 10-710.

Similarity to law of forum. — In an action on a contract entered into in a foreign state, where no evidence is introduced as to the law of the foreign state it will be assumed that it is the same as the law of the forum. *Farmers National Bank v. Venner* (Mass.), 7-690.

In an action on a promissory note secured by a mortgage, where it appears that the note and mortgage were executed in a foreign state and were made payable there, but the law of that state is not pleaded or introduced in evidence, it will be presumed that such law is identical with the law of the forum on the question of the effect of a contract of extension between the mortgagee and the mortgagor's grantee as a release of the mortgagor from liability for the debt. *Iowa Loan, etc., Co. v. Schnose* (S. Dak.), 9-255.

Statute law as to usury. — There is no presumption that the law of another state upon the subject of usury is the same as that of the home state, and in the absence of proof as to the law of the foreign state, the presumption is that the common law prevails there and that there is no legal limitation to the rate of interest. *Columbian B. & L. Assoc. v. Rice* (S. Car.), 1-239.

3. PLEADING.

Necessity of pleading foreign statute. — The existence and terms of the statutes of other states cannot be proven unless pleaded. *Columbian B. & L. Assoc. v. Rice* (S. Car.), 1-239.

Amendment to allege foreign statute. — The trial court may permit a complaint to be amended so as to allow a foreign statute under which the right of action arises, and such amendment is not open to the objection that it sets up a new cause of action, though the period of limitation prescribed by the foreign statute has elapsed. *Lassiter v. Norfolk, etc., R. Co.* (N. Car.), 1-456.

4. PROOF.

Whether made to court or jury. — In an action against a master to recover damages for personal injuries sustained in a foreign state by a servant during the course of his employment there, it is not erroneous to permit the defendant to introduce in evidence before the court, during the absence of the jury, the statutes and the reported decisions of the courts of the foreign state, as, while a foreign law must be proved as fact, the proof should be made to the court and not to the jury. *Christiansen v. William Graver Tank Works* (Ill.), 7-69.

Testimony of attorney. — A member of the bar of a foreign jurisdiction may be examined as an expert to prove the construction of the statutes and the common law of such jurisdiction. *Dimpfel v. Wilson* (Md.), 15-753.

Conclusiveness of opinion. — The opinion of a lawyer called to prove the law of fixtures of a foreign country, where he does not testify to any statute or judicial decision on the subject, but merely gives his opinion on the general law, the authorities being conflicting, which opinion is based on facts not in the record, is not controlling, and the appellate court will presume that the foreign law on the subject is the same as the law of the forum. *Gasaway v. Thomas* (Wash.), 20-1337.

FOREIGN MARRIAGE.

Annulment of foreign marriage, see **MARRIAGE**, 3 c.

Effect as constituting bigamy, see **BIGAMY**.

Marriage of divorced persons, see **MARRIAGE**, 1 b.

FOREIGN NOTARY.

Authority to take affidavits, see **AFFIDAVITS**.

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FOREIGN PRODUCTS.

Discrimination against foreign products, see **HAWKERS AND PEDDLERS**, 2.

FOREIGN RECEIVERS.

See **RECEIVERS**, 5.

FOREIGN WILLS.

Probate of foreign wills, see **WILLS**, 7 c.

FOREIGNERS.

See **ALIENS**; **NATURALIZATION**.

Competency as witnesses, see **WITNESSES**, 3 b (7).

FOREMAN.

Signing indictment by foreman of grand jury, see **INDICTMENTS AND INFORMATIONS**, 8.

FORESTS.

See **LOGS AND LUMBER**; **WOODS AND FORESTS**.

FORFEITURES.

See **PENALTIES AND PENAL ACTIONS**.

Abatement of nuisances by summary forfeiture of property, see **NUISANCES**, 5.

Acceptance of rent as waiver of forfeiture of lease, see **LANDLORD AND TENANT**, 3 g.

Bail bonds, see **BAIL**, 9.

Devise or legacy to be forfeited on contest of will, see **WILLS**, 9 g.

Franchise of railroad, see **RAILROADS**, 3 b.

Law governing enforcement of forfeitures, see **CONFLICT OF LAWS**, 7.

Membership in benevolent association forfeited by failure to pay assessments, see **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, 6 b.

Option to purchase demised premises, see **LANDLORD AND TENANT**, 3 f.

Provisions in fraternal benefit certificates, see **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, 3.

Right of tenants to crops growing at time of forfeiture, see **CROPS**, 3.

Right to homestead, see **HOMESTEAD**, 6.

Right to renewal of lease, see **LANDLORD AND TENANT**, 3 b (4).

Stipulation for forfeiture in contract of sale, see **VENDOR AND PURCHASER**, 2.

Waiver of forfeiture in insurance policy, see **INSURANCE**, 3 c (4).

Waiver of forfeiture, see **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, 5 b, 6 b.

Weapons carried unlawfully, see **WEAPONS**.

Strict construction. — "A clause stipulating for the forfeiture of a contract should not be aided or given effect by construction

in a case where the plain meaning of the language used does not require it." *Jensen v. Palatine Ins. Co.*, 81 Neb. 523; *Haas v. Mutual Life Ins. Co.* (Neb.), 19-58.

Rule applied to insurance. — "Forfeitures are looked upon by the courts with ill favor, and will be enforced only when the strict letter of the contract requires it; and this rule applies with full force to policies of insurance." *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338; *Haas v. Mutual Life Ins. Co.* (Neb.), 19-58.

FORGERY.

1. WHAT CONSTITUTES.
 - a. In general.
 - b. Uttering forged instruments.
2. CIVIL RIGHTS AND LIABILITIES ARISING OUT OF FORGERY.
3. INDICTMENT.
4. EVIDENCE.

Liability of bank for payment of forged check, see CHECKS, 6.

Liability of telegraph company for delivery of forged message, see TELEGRAPHS AND TELEPHONES, 7 c (1) (b).

Liability on forged notes, see BILLS AND NOTES, 11 f.

Payment of forged check by saving bank, see BANKS AND BANKING, 8 b.

Recovery of payment made on forged instrument, see PAYMENT, 4 a.

1. WHAT CONSTITUTES.
 - a. In general.

Elements of offense at common law.

— To constitute the offense of forgery at common law, the three following elements must exist: (1) There must be a false writing or alteration of an instrument; (2) the instrument as made must be apparently capable of defrauding; (3) there must be an intent to defraud. *People v. Pfeiffer* (Ill.), 17-703.

Statutory definition in Illinois. — The definition of forgery given in paragraph 105 of the Criminal Code of Illinois is, in substance, the common-law definition extended to take in some instruments which were not known to the common law. *People v. Pfeiffer* (Ill.), 17-703.

Forgery in third degree under New York statute. — Under the New York Penal Code the crime of forgery in the third degree is committed whenever a person wilfully misrepresents the sentiments, opinions, conduct, or character of another by means of a false, forged, or counterfeit writing. The statute is intended to cover cases in which the mere representation is the gist of the offense as well as other cases in which the act injuriously affects the person whose name is improperly used. *People v. Abeel* (N. Y.), 3-287.

Fraudulently procuring genuine signature. — Under the statutes of Illinois,

forgery and obtaining the signature of a person to a written instrument by false representations or false pretenses are separate and distinct offenses, and, consequently, a person who induces another to sign an antedated promissory note, by false representations to the effect that a note previously executed for the same amount has been lost and that the antedated note is intended to take its place, is not guilty of forgery. *People v. Pfeiffer* (Ill.), 17-703.

Falsification of account books. — A company incorporated for the purpose of pecuniary profit, although having no power to engage in banking, or in loaning money, or in writing insurance, is a "moneyed corporation" within the meaning of that phrase as used in the section of the crimes act (Gen. St. 1909, § 2621) declaring one guilty of forgery who fraudulently makes false entries in the account books of an association of that description. *State v. Chance* (Kan.), 20-134.

Use of fictitious name. — Forgery may be committed by signing a fictitious name to an instrument. *Maloney v. State* (Ark.), 18-480.

Name incorrectly written. — Where one affixes to a note a signature which he intends shall be regarded as that of another person, the act is not prevented from being forgery by the circumstance that the name is not correctly written, as where the name Henry Heinis is signed to a note with the intention that it shall be supposed to be the signature of Henry Hein. In such a case it cannot be said as a matter of law that the difference is so great as to prevent the deception of any person of ordinary prudence. *State v. Chance* (Kan.), 20-114.

Use of typewriter. — Forgery may be committed by means of a typewriting machine. *State v. Bradley* (Tenn.), 8-86.

Injury as necessary element. — It is one of the essential elements of an indictable forgery that the alleged forged instrument must show on its face that it would if it were genuine, be of some apparent legal efficacy for an injury to a person other than the alleged forger. *State v. Cordray* (Mo.), 9-1110.

The provisions of the alleged forged instrument considered, in a prosecution for forgery, and held to show that the instrument, if it were genuine, would have no legal efficacy whatever. *State v. Cordray* (Mo.), 9-1110.

- b. Uttering forged instruments.

What constitutes. — The uttering of a forged instrument consists in offering it to another with knowledge of its falsity and with intent to defraud, regardless of whether the instrument is received as genuine by the person to whom it is offered, or whether the attempt to defraud is successful. *Maloney v. State* (Ark.), 18-480.

Tendering undorsed forged check. — Since an equitable title to a check may be acquired without indorsement by the payee, one who knowingly and with intent to defraud offers a forged check to another is

guilty of uttering a forged instrument, though the check has not been indorsed by the payee. *Maloney v. State* (Ark.), 18-480.

Forging and uttering as single offense. — The making of a forged written instrument and uttering it by the same person at the same time as one transaction constitute but one offense. *State v. Klugherz* (Minn.), 1-307.

Distinction between making and uttering forged instruments abolished. — Under the Illinois statute, there is no distinction between making, altering, or counterfeiting an instrument with intent to prejudice, and uttering, publishing, and passing as true and genuine any such forged instrument with an intent to damage or defraud, knowing the same to be false, altered, forged, or counterfeited. Every person who is guilty either of making and forging, or uttering and passing, or attempting to utter and pass, under the conditions named in the statute, is deemed guilty of forgery. *People v. Pfeiffer* (Ill.), 17-703.

[See note, 1 Ann. Cas. 308.]

2. CIVIL RIGHTS AND LIABILITIES ARISING OUT OF FORGERY.

Effect of promise to pay forged note. — When a promise to pay a forged note creates no liability on the part of the promissor. *Barry v. Kirkland* (Ariz.), 2-295.

Estoppel to deny forged signature. — Where the ostensible makers of a note, having been notified by the bank that the same has been discounted, abstain from repudiating the same as a forgery for several months, they will be estopped thereafter to deny their signatures. *Dominion Bank v. Ewing* (Ont.), 1-178.

3. INDICTMENT.

Sufficiency in general. — Allegations of an indictment considered, in a prosecution for the felonious making of false and fraudulent affidavits for the purpose of procuring a contract from the United States for the surveying of unsurveyed public lands, and held sufficient to show that the indictment charges the offense. *Meldrum v. United States* (U. S.), 10-324.

Setting out forged instrument. — In the absence of any statutory provision to the contrary, an indictment for forgery must, on its face, profess to set out an exact copy of the forged instrument, unless such instrument is in the possession of the accused, or is destroyed, or for some other reason is not accessible to the grand jury, in which case the excuse for not setting it out must be distinctly averred. An indictment which professes to give the words and figures of the forged instrument in substance only is insufficient, even though the copy set out would otherwise appear to be complete. Not only must an exact copy be set out, but the indictment must profess to set out such a copy. *People v. Tilden* (Ill.), 17-496.

Alleging injury to third person. — In a prosecution for forgery, where the indictment

sets forth the alleged forged instrument in full, and the instrument shows on its face that if it were genuine it would have no legal efficacy, and there is no averment showing that the instrument could have been made to act injuriously or fraudulently, the indictment is insufficient to support a conviction. *State v. Cordray* (Mo.), 9-1110.

4. EVIDENCE.

Self-serving declarations and hearsay. — In a prosecution for uttering a forged note, the defendant cannot testify as to statements made by the president of a bank to the effect that a clerk in the employ of the defendant had admitted to the president that he had executed the note in question, even though the bank president has since died, as such evidence consists of self-serving declarations and hearsay statements. *People v. Dolan* (N. Y.), 9-453.

Proof of other offenses. — On a prosecution for the crime of uttering a forged instrument knowingly, with intent to defraud, proof of similar offenses of forgery is admissible only as bearing on the intent with which the act for which the accused is informed against was done. *State v. Murphy* (N. Dak.), 16-1133.

Proof of similar offenses is such a case is admissible as having a bearing on the intent, although the accused admits at the opening of the trial that he signed to the instrument the name of the person whose name is claimed to have been forged, and knew when he uttered the instrument that he had signed the name of such person to such instrument. *State v. Murphy* (N. Dak.), 16-1133.

Proof of similar offenses in such a case is admissible as bearing on the intent, although the jury would be justified in finding a fraudulent intent without such proof, if they found that the accused was not authorized to sign the name of the person whose name is claimed to have been forged. *State v. Murphy* (N. Dak.), 16-1133.

In a prosecution for uttering a forged note with intent to defraud, knowing it to be forged, where the defendant contends that he did not know that the note was a forgery, the people, for the purpose of showing guilty knowledge on the part of the defendant, may prove the uttering by him of other forged notes, especially where it appears that all the notes referred to in the evidence were made at about the same time, that in each case the note was made payable to the defendant and was indorsed by him, that during the period covered by all the notes the defendant was endeavoring to raise sufficient funds to meet his obligations, and that in each case he used the name of some person with whom he had done business and with whose affairs he was familiar. *People v. Dolan* (N. Y.), 9-453.

It is a general rule that where it is sought to give evidence of other forgeries, the forged documents upon which the evidence is predicated must be produced; but in a prosecution for uttering a forged note, where, for the

purpose of showing guilty knowledge on the part of the defendant, it is sought to prove the uttering by him of several other forged notes, and the defendant fails to obey an order served on him to produce other notes at the trial, and there is evidence justifying the conclusion that the other notes were all returned to the possession of the defendant in the ordinary course of business, the action of the trial court in permitting the prosecution to give secondary evidence of the contents of the other notes will not be reviewed on appeal. *People v. Dolan* (N. Y.), 9-453.

On the trial of an employee on the charge of uttering a note payable to his employer, which he had forged for the purpose of covering up a shortage, evidence that he had forged other notes for the same purpose is competent. *State v. Chance* (Kan.), 20-164.

Proof of fictitious character of name used. — The fictitious character of the drawer of a check is not established by evidence merely that no person of that name had an account with or appeared on the books of the bank at the time the check was drawn, there being nothing to show that the bank had never had such a depositor or that diligent inquiry for a person of that name had been made without success in the territory in which the bank had business relations. *Maloney v. State* (Ark.), 18-480.

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Assignment. — The franchise granting power retains the same control over the franchise in the hands of the assignee as in the hands of the original grantee. *Evans v. Kroutinger* (Idaho), 2-691.

The franchise granting power alone can question the right of the assignee of the franchise to exercise its rights and privileges. *Evans v. Kroutinger* (Idaho), 2-691.

Taxation as personalty. — A franchise granted to a waterworks company to construct its plant in the city and to use the city streets for that purpose is subject to taxation as personal property. *Adams v. Bullock* (Miss.), 19-165.

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1. WHAT CONSTITUTES.

Expressions of opinion. — Statements by the agent of one bidding for a contract, that his bid for the work is as low as the work can be done and that there is no profit in it at that price, are mere expressions of opinion, or dealer's talk, and do not constitute such false representations as will avoid the contract. *Worrell, etc., v. Kinnear Mfg. Co. (Va.)*, 2-997.

Opinions as to the value or quality as false representations. *J. H. Clark Co. v. Rice (Wis.)*, 7-505.

Misrepresentations of price paid by vendor. — Misrepresentations of the price paid for property by the vendor or others do not constitute actionable deceit, in the absence of fiduciary relations between the parties or of other facts or circumstances giving rise to an express or implied agreement that the price paid shall determine the price in the contract. *Beare v. Wright (N. Dak.)*, 8-1057.

Misrepresentation as to area of land. — Where a seller of real estate shows upon the face of the earth its true boundaries to the purchaser, and does not fraudulently dissuade him from making full examination and measurement, and the estate is not so extensive or of such character as to be reasonably incapable of inspection and estimate, and there is no relation of trust between the parties, the purchaser has no cause of action for a misrepresentation as to the area alone. *Mabardy v. McHugh (Mass.)*, 16-500.

Intended use of realty. — A statement of a grantee inducing the execution of a deed to him of a lot, that he intends to erect a dwelling thereon, while in fact he intends at the time to erect a garage thereon, which he immediately proceeds to do, is a statement of a material existing fact justifying the setting aside of the deed, though such grantee's intention is subject to change in good faith at any time. *Adams v. Gillig (N. Y.)*, 20-910.

Nonperformance of promise. — False representations, in order to be fraudulent, must relate to a present or past state of facts, and relief as for deceit cannot be obtained for nonperformance of a promise looking to the future. *J. H. Clark Co. v. Rice (Wis.)*, 7-505.

Inadequacy or excessiveness of consideration. — While the inadequacy or excessiveness of the consideration in a contract may be a circumstance tending to establish the perpetration of fraud, it does not of itself, when good faith is affirmatively shown, constitute such a fraud or imposition as will afford grounds for setting aside the contract. *Cook v. Bagnell Timber Co. (Ark.)*, 8-251.

Necessity that representations be relied on. — In order to be actionable, false representations made by the seller in a sale must be relied upon by the purchaser, and must be of such a character and must be made under such circumstances as to justify the purchaser in relying upon them. *J. H. Clark Co. v. Rice (Wis.)*, 7-505.

Relief will not be granted on the ground of

false representations not shown to have been relied on as an inducement to conduct resulting in injury. *Provident Loan Trust Co. v. McIntosh (Kan.)*, 1-906.

False representations which will constitute the basis of an action, whether for damages or for the rescission of a contract are such only as in some manner actually mislead the party to his damage. *Jakway v. Proudfit (Neb.)*, 14-258.

Necessity that false representation be material. — Where a purchaser receives what he actually purchased, and bases his right to rescind the contract on some false representation as to its quality, conditions, or matter affecting its value, he must show that such representation was material, and that he has been misled thereby to his injury and damage. *Jakway v. Proudfit (Neb.)*, 14-258.

Necessity that representations be believed. — One cannot be said to be deceived by an alleged false representation, when he admits that he had knowledge of its falsity. *Griffin v. Griffin (Ga.)*, 14-866.

Necessity of showing pecuniary injury. — A purchaser of real or personal property is entitled to the benefit of his bargain, by receiving the identical property purchased; and where the vendor, by fraud or false representations, conveys to him or induces him to accept something not contemplated by the contract, he may rescind the sale and recover what he has paid, without showing that he has sustained any pecuniary injury or damage thereby. *Jakway v. Proudfit (Neb.)*, 14-258.

2. REMEDIES.

Fraud inducing release of collateral security. — Remedy of a creditor who has been induced by fraud to release a collateral security held by him. *Hall v. Alabama Terminal, etc., Co. (Ala.)*, 5-363.

Fraud inducing act of duty. — A person who has been induced by false representations to do an act which it was his duty to do cannot be heard to say that he was prejudiced by such false representations. *Musconetcong Iron Works v. D. L. & W. R. Co. (N. J.)*, 20-178.

Jurisdiction of courts of equity. — A court of equity, in cases of actual fraud, has concurrent jurisdiction with a court of law in remedying the fraud; and a remedy in equity is frequently more beneficial than at law, by means of its power to compel discovery and to cancel fraudulent deeds and securities, or to cause conveyances to be made, thus effectually putting an end to future litigation. *Wagner v. Fehr (Pa.)*, 3-608.

A court of equity held to have jurisdiction to set aside a contract for the conveyance of land and to compel a reconveyance under the fraudulent circumstances of the case at bar, the remedy at law being inadequate. *Wagner v. Fehr (Pa.)*, 3-608.

Laches as bar to relief. — Relief on the ground of fraud will not be granted to one who does not seek it promptly after discovery thereof and who with knowledge there-

of retains the fruits of the transaction. *Provident Loan Trust Co. v. McIntosh* (Kas.), 1-906.

Performance of contract as bar to relief. — An owner of corporate stock or other personal property who has been induced by fraud and deceit to enter into a contract for the sale of the property, waives his right to maintain an action for damages for the fraud if, after discovering the fraud, he performs the contract by delivering the property and receiving the purchase price. *McDonough v. Williams* (Ark.), 7-276.

Intent as affecting liability. — In actions for deceit, the intent with which representations are made is not a controlling factor, but a person will be held to the reasonable consequences of his acts. *Hilligas v. Kuns* (Neb.), 20-1124.

3. PLEADING.

Allegation of knowledge and intent. — A complaint in an action at law to recover damages for false representations, which does not allege, either expressly or by implication, that defendant knew the representations to be false, or that he intended them to be acted upon, is demurrable for failure to state a cause of action. *Colorado Springs Co. v. Wight* (Colo.), 16-644.

Facts constituting fraud. — A bill in equity relying on fraud must state specifically the facts constituting such fraud, and not opinions or legal conclusions; and upon demurrer every presumption is against the bill. *McClinton v. Chapin* (Fla.), 14-365.

4. EVIDENCE.

Burden of proof. — On an issue whether a party had been induced to sign a contract by fraudulent misrepresentations, the mere failure to specifically instruct the jury that the burden was on him who attacked the contract to show that it was so procured, was no cause for a new trial when the court charged generally that the burden of proof lies upon the party asserting the fact and to the existence of whose case or defense the proof of such fact is essential. *Central of Ga. R. Co. v. Goodwin* (Ga.), 1-806.

Similar transactions. — In an action on a promissory note, where the defense is set up that its execution was induced by the plaintiff's false representations, it is erroneous to admit evidence of similar transactions between the plaintiff and third persons who are in no way involved in the litigation in question. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Newspaper articles and circulars. — In an action on a promissory note, where the defense is set up that its execution was induced by the plaintiff's false representations, it is erroneous to permit the defendant to introduce in evidence newspaper articles, circulars, pamphlets, etc., which in no way tend to prove that the defendant was induced by the plaintiff's false representations to execute the note in suit. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Statements by plaintiff out of presence of defendant. — In an action on a promissory note, where the defense is set up that its execution was induced by the plaintiff's false representations, it is erroneous to admit evidence of statements made by the plaintiff to third persons, out of the presence and hearing of the defendant, particularly where such statements were made long after the execution of the note. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Sufficiency of evidence. — Evidence considered in an action for fraud and deceit alleged to have been practiced by the defendant upon the plaintiff in the purchase of corporate stock from the plaintiff, and held sufficient to entitle the plaintiff to have the question of the defendant's liability submitted to the jury. *McDonough v. Williams* (Ark.), 7-276.

Evidence considered, in an action against the maker of a promissory note, where the defense of fraud was set up, and held to show that the court erred in finding for the defendant, instead of submitting to the jury for determination, an issue as to whether the defendant, when he negotiated for an extension of the note, had knowledge of the facts and circumstances relied upon by him to establish the alleged fraud. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Proof of fiduciary relation. — The fact that the plaintiff and the defendant are brothers does not of itself create a confidential or fiduciary relation between them. There is no presumption that such relation exists between brothers solely from the fact that they are so related. If a confidential or fiduciary relation exists between brothers, it must be shown by proof, and the burden is on the party asserting the existence of such relationship to affirmatively show the same. *Crawford v. Crawford* (Ga.), 19-932.

5. QUESTIONS OF LAW OR FACT.

Where evidence is conflicting. — Where the evidence is conflicting as to whether one has been fraudulently misled into signing a release of damages for personal injuries, the question is one for determination by the jury. *Bjorklund v. Seattle Electric Co.* (Wash.), 1-443.

Existence of relationship of principal and agent. — In an action for fraud and deceit alleged to have been practiced by the defendant upon the plaintiff in the purchase of shares of corporate stock from the plaintiff, where a sale outright from the plaintiff to the defendant is alleged and proved, but it appears that prior to the sale the defendant had been the plaintiff's agent for the sale of the stock, it is for the jury to determine as questions of fact whether the relation of principal and agent had been dissolved prior to the sale and whether the circumstances and further transactions between the parties were such as to absolve the agent from disclosing to his former principal, at the time of the sale, facts within his knowledge. *McDonough v. Williams* (Ark.), 7-276.

6. INSTRUCTIONS.

Theory of case. — In an action for fraud and deceit alleged to have been practiced by the defendant upon the plaintiff in the purchase of shares of corporate stock from the plaintiff, where a sale outright from the plaintiff to the defendant is alleged and proved, it is erroneous to give an instruction based upon the theory that the defendant acted as agent for the plaintiff in the sale of the stock and that he fraudulently concealed the price received for the stock and failed to account to the plaintiff for the full price received. *McDonough v. Williams* (Ark.), 7-276.

7. MEASURE OF DAMAGES.

Fraudulent purchase of property. — In an action for fraud and deceit alleged to have been practiced by the defendant upon the plaintiff in the purchase of corporate stock from the plaintiff, where a sale outright from the plaintiff to the defendant is alleged and proved, the measure of damages is the difference between the price paid to the plaintiff for his stock and the actual value of the stock at the time of the sale, if the latter exceeded the former, and evidence is competent to show such actual value. *McDonough v. Williams* (Ark.), 7-276.

Where plaintiff has affirmed contract. — In an action to recover damages for false and fraudulent representations which induced the plaintiff to exchange real property for stock in a corporation, where it appears that the plaintiff affirmed the contract after discovering the deceit, the measure of his recovery, in the absence of a claim for special or exemplary damages, is the difference in value between what was received or parted with, as the case may be, and what would have been received or parted with had the representations been true. *Beare v. Wright* (N. Dak.), 8-1057.

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1. OPERATION OF STATUTE.

a. Damages for breach of oral contract.

Contract to convey land. — Title to land cannot be acquired by a parol contract, and part performance will not take such a contract out of the statute of frauds. But upon breach of the parol promise to convey, if it appears that the promisor has received the consideration upon which the promise rests, the value of the land will be estimated and compensation for the breach awarded. *Doty v. Doty* (Ky.), 4-1064.

b. Parol modification of written contract.

Validity, in general. — A written contract cannot be altered except by a contract in writing or by an executed oral agreement. *Halsell v. Renfrow* (Okla.), 2-286.

Contract not within statute. — A contract not within the statute of frauds may be modified by a subsequent parol agreement. *Putnam Foundry, etc., Co. v. Canfield* (R. I.), 1-726.

Contract by agent for undisclosed principal. — The rule that an undisclosed principal may sue in his own name upon a written contract made by an agent in his own name, and that parol evidence is admissible to prove the plaintiff's interest, is not affected by the fact that the contract is one which the statute of frauds requires to be in writing. *Usher v. Daniels* (N. H.), 6-296.

Parol agreement to postpone closing of title. — A party to a contract for the sale of land, who knowingly consents by a parol agreement to a postponement of the performance by the other party at the time specified, of some stipulation for his benefit, cannot, after the other party has acted upon such consent, avail himself of the default, and treat the contract as forfeited, although the performance of the stipulation at the time specified may have been made of the essence of the contract. *Neppach v. Oregon, etc., R. Co.* (Oregon), 7-1035.

Contract partly in writing. — Where there is a contract of employment between a dentist and his assistant, and the contract is partly in writing and partly verbal, it may be shown that there was a parol stipulation binding the assistant not to engage in future competitive practice of dentistry with the employer. *Turner v. Abbott* (Tenn.), 8-150.

Parol evidence to modify lease. — A tenant cannot defend a proceeding for his removal by proving a lease for a longer term, required by the statute of frauds to be in writing, where proof of the length of the term of such lease depends entirely on parol evidence. In such a case the requirement of the statute of frauds cannot be relaxed on equitable grounds and a parol agreement be given effect, where the proceeding is before a tribunal having no equity jurisdiction, and

the subsequent conduct of neither of the parties indicates the alleged lease for a longer term. *Simons v. New Britain Trust Co.* (Conn.), 11-477.

Oral agreement modifying royalties. — Where an oil lease provides that in consideration of the grant therein named, the lessees will yield and pay to the lessors as royalty a certain share of the oil produced and saved from the premises, the parties to the lease may subsequently for a consideration increase or decrease the royalty by a parol agreement, and such agreement is not within the statute of frauds. *Nonomaker v. Amos* (Ohio), 4-170.

c. Contracts partly within statute.

Void as a whole if entire. — No action for damages lies for breach of a verbal contract for the transfer of corporate stock in exchange for stock in another corporation and for an interest in land, as the contract is entire and indivisible, and being void in part is void as a whole. *Todd v. Bettingen* (Minn.), 8-960.

Alternative provision valid. — Though a part of a contract for the sale of land may not be binding under the statute of frauds, another part of it, if in the alternative and distinct from the agreement to purchase, such as a provision that either party will pay to the other a named sum if he does not perform his agreement to sell or purchase, may, on the refusal of either party to perform, be enforced against him by the other party. *Mercier v. Campbell* (Ont.), 10-503.

d. Part performance of contract.

(1) In general.

Acts in contemplation of performance. — Acts which clearly appear to have been such as the performing party would not have performed in the absence of the agreement, or without a direct view to its performance, are indispensable to constitute the part performance which will take an oral agreement out of the statute. *Horton v. Stegmyer* (U. S.), 20-1134.

Contract for services. — If the holder of stock in a corporation agrees verbally to sell the same at a stipulated price, on condition that the purchaser shall give up a lucrative position and enter into the service of the corporation at a fixed salary, and the latter complies with this condition, the contract is taken out of the statute of frauds by such performance on his part. *Hightower v. Ansley* (Ga.), 7-927.

Promise to answer for debt of another. — A mere collateral promise to answer for the debt of another, invalid because not reduced to writing, or because defectively so reduced, is not susceptible of part performance as between the principal contracting parties so as to afford the collateral promisee a right of action in equity to compel the making of a valid guaranty in writing to reform the one defectively made. *Rowell v. Smith* (Wis.), 3-773.

Performance of part not within statute. — Where in a verbal contract for the rendition of services in consideration of a stated sum per day and a certain number of shares of corporate stock to be delivered at a future date, the only feature of the contract within the statute of frauds and unperformed is that which relates to the delivery of the corporate stock, the executed part of the contract which is not within the statute is not such performance of the contract as to take the unperformed part out of the statute. *Franklin v. Matoa Gold Mining Co.* (U. S.), 14-302.

Doctrine purely equitable. — The doctrine of part performance of a contract by the buyer, such as by paying the purchase price, obtains only in equity, and has no place in an action at law for damages for breach of the contract. *Franklin v. Matoa Gold Mining Co.* (U. S.), 14-302.

(2) Contracts for sale of lands.

What sufficient to warrant specific performance. — What constitutes a sufficient part performance to take a contract for the sale of land out of the statute of frauds and to warrant a specific performance. *Cooper v. Colson* (N. J.), 1-997.

When the specific performance of an oral contract for the sale of lands will be decreed for part performance notwithstanding the statute of frauds. *Cooper v. Colson* (N. J.), 1-997.

What part performance sufficient to warrant a decree for specific performance of a parol contract for the sale of lands. *Halsell v. Renfrow* (Okla.), 2-286.

Evidence reviewed in an action by the purchaser to enforce specific performance of a parol contract to sell land and held to show that there was not such part performance by the vendor as would take the contract out of the statute of frauds. *Halsell v. Renfrow* (U. S.), 6-189.

Part payment and transfer of possession. — Part payment and transfer of possession as a sufficient part performance of a parol contract for the sale of lands to warrant a decree for specific performance. *Halsell v. Renfrow* (Okla.), 2-286.

Taking possession of part of property. — Under an entire parol contract for the sale of several parcels of land, the act of the purchaser in taking possession of a part of the property is such part performance as satisfies the statute of frauds. *Tillis v. Folmar* (Ala.), 8-78.

Continuance of prior possession by vendee. — Where the alleged purchaser of land under an oral contract is already in possession as tenant or otherwise, and he merely continues in possession after making the contract, that alone is not sufficient to take the case out of the operation of the statute of frauds. *Phillips v. Jones* (Ark.), 9-131.

Where the mortgagor of land continues in possession after the foreclosure sale, and while in possession he makes a contract with

the foreclosure purchaser to purchase the land for a specified price, and after making such agreement he continues in possession, makes valuable improvements, and pays a part of the purchase price and a portion of the taxes, these transactions, when taken together, constitute such part performance as takes the case out of the statute of frauds, and therefore the mortgagor is entitled to specific performance of the contract. *Phillips v. Jones* (Ark.), 9-131.

Necessity that acts be referable to contract. — In an action by the assignee on an assignment of an interest in mining areas, which assignment is insufficient to satisfy the statute of frauds, where the plaintiff relies upon acts of part performance to take the case out of the operation of the statute, he must prove acts unequivocally referable in their own nature to some dealing with the subject-matter of the agreement sued upon, before he can introduce evidence of an oral agreement for the purpose of explaining those acts. *McNeil v. Corbett* (Can.), 10-98.

(3) Agreement to devise land.

Effect of part performance, in general. — A parol contract to devise land is rendered unenforceable by the statute of frauds, and the contract is not taken out of the operation of the statute by partial performance. *Goodloe v. Goodloe* (Tenn.), 8-112.

When part performance validates contract. — In case of a parol agreement to devise land, part performance of such a character that the court cannot restore the promisee to the situation in which he was when the agreement was made or compensate him in damages is sufficient to take the case out of the statute of frauds. *Best v. Giralapp* (Neb.), 5-491.

Delivery of possession to proposed devisee. — A partial performance of an oral contract to devise real property, by delivery of possession of the property to the proposed devisee, or by the other like acts which are unavoidably referable to the agreement, will except it from the statute. *Horton v. Stegmyer* (U. S.), 20-1134.

(4) Recovery of money paid.

Contract for sale of land. — A vendee is entitled to recover from the vendor, for breach of a parol contract to sell and convey land, so much of the purchase price as has actually been paid. *Durham v. Wick* (Pa.), 2-929.

(5) Contract as measure of damages.

Void contract for personal services. — In an action to recover for personal services under a contract void within the statute of frauds, it is error to instruct the jury that the wage agreed upon by the void contract may be regarded as establishing the rate of the plaintiff's compensation. *Riif v. Riibe* (Neb.), 4-462.

- (6) Whether statute operates upon contract or upon remedy.

Virginia statute. — The Virginia statute of frauds (Code 1904, § 2840, subd. 6) providing that no action shall be brought on a verbal contract for the sale of land does not make such contracts void, but only takes away the remedy by action. *Hurley v. Hurley* (Va.), 18-968.

2. ENFORCEMENT OF ORAL CONTRACTS IN EQUITY.

Contract amounting to trust agreement. — Upon clear proof of the existence of a verbal agreement at the time of a conveyance of realty that the grantee should reconvey the same to certain named parties, a conveyance by the grantee to such parties will be regarded as made in execution of the trust thus created and will be upheld in equity as not affected by the statute of frauds. *Collins v. Collins* (Md.), 1-856.

Reformation of executory contracts, in general. — Courts of equity have power to reform an executory contract which is within the statute of frauds so as to relieve the contract of the effect of fraud or mistake and to make it speak the truth, but not to insert new and essential elements or matter required by the statute of frauds to be reduced to writing in order to make the contract valid and binding. *Allen v. Kitchen* (Idaho), 18-914.

Supplying description in contract to sell land. — A contract to sell land is not subject to reformation by making a complete description of the premises out of an insufficient and void description, because such relief would defeat the statute of frauds by enforcing a contract which is void under the statute. *Allen v. Kitchen* (Idaho), 18-914.

When equity will not grant relief. — The doctrine that a court of equity will enforce a contract within the statute of frauds to prevent the statute being used as an instrument of fraud does not apply if the effect would be essentially to nullify the statute. *Rowell v. Smith* (Wis.), 3-773.

A verbal agreement to make a collateral promise to answer for the debt of another can no more be dealt with in equity to save the collateral promisee from the consequences of noncompliance with the statute of frauds than a written agreement in that regard, which is fatally defective for noncompliance with such statute. *Rowell v. Smith* (Wis.), 3-773.

A cause of action to enforce a supposed valid agreement to answer for the debt of another is different from one based on a circumstance resulting in a supposed valid agreement to compel the specific performance of a verbal agreement to make a valid guaranty, or to reform one defectively written, so as to make the same accord with the intention of the parties. *Rowell v. Smith* (Wis.), 3-773.

3. THE MEMORANDUM.

a. In general.

What sufficient. — A memorandum for the sale of land considered, in a suit for speci-

fic performance, and held sufficient to satisfy the requirements of the statute of frauds. *Crotty v. Effler* (W. Va.), 9-770.

A memorandum of a contract for the sale of lands held sufficient under the Illinois statute of frauds. *Ullsperger v. Meyer* (Ill.), 3-1032.

Vague and indefinite letter. — A letter to the surety on an official bond held to be too vague and indefinite in its expressions to serve as the basis of a contract to indemnify which will satisfy the requirements of the statute of frauds. *Craft v. Lott* (Miss.), 6-670.

A letter whereby the writer agrees to employ the person to whom it is addressed for a period of three years, or for such portion of that period as the employee shall show the ability that he claims to have in performance of the work, does not constitute a sufficient memorandum of the contract of employment within the statute of frauds, there being nothing therein by which the standard of ability required of the employee can be fixed without a resort to parol evidence. *Wagniere v. Dunnell* (R. I.), 17-205.

Necessity that memorandum be complete in itself. — A memorandum to be sufficient under the statute of frauds must be complete in itself and leave nothing to rest in parol. *Halsell v. Renfrow* (Okla.), 2-286.

The memorandum in writing required by the statute of frauds must contain all the material substantive terms of the contract, so that it is not necessary to resort to oral testimony to supply one or more of such terms and to make it complete and definite. *Wagniere v. Dunnell* (R. I.), 17-205.

b. Form.

Copy of resolution at corporate meeting. — Where the directors of a corporation organized for the purpose of buying and selling timber lands pass a resolution authorizing the sale of certain lands of that character, and the resolution is duly entered in the corporation's minute book, a copy thereof signed by the president and secretary of the corporation being delivered to the purchaser, there is a sufficient written memorandum to satisfy the requirements of the statute of frauds. *Western Timber Co. v. Kalama River Lumber Co.* (Wash.), 7-867.

Separate writings, in general. — The sufficiency of separate writings to constitute a complete contract binding under the statute of frauds. *Halsell v. Renfrow* (Okla.), 2-286.

A memorandum to be gathered from several connected writings may be sufficient to satisfy the requirement of the Oklahoma statute of frauds that a contract to sell lands must be subscribed by both parties. *Halsell v. Renfrow* (U. S.), 6-189.

Several writings may be taken together to make the memorandum of a contract sufficient to satisfy the statute of frauds. *Flegel v. Dowling* (Ore.), 19-1159.

Where several writings are relied on as together constituting the memorandum re-

quired by the statute of frauds, parol evidence is admissible to explain and connect them. *Flegel v. Dowling* (Ore.), 19-1159.

Correspondence between parties. — Where a contract sued on is within the statute of frauds, and the counsel for the plaintiff, upon being asked by the court if the plaintiff proposes to offer proof that the agreement was in writing, answers in the negative, the court properly directs a verdict for the defendant, although the counsel suggests to the court that there was a correspondence between the parties. In any event the action of the trial court in proceeding to judgment will not be reviewed on appeal where the bill of exceptions does not disclose what the correspondence contained. *Franklin v. Matoa Gold Mining Co.* (U. S.), 14-302.

Correspondence and shipping receipt. — In an action by the seller to recover for goods sold, the plaintiff cannot contend that his correspondence with the defendant prior to the delivery of the goods to a carrier for shipment, when taken in connection with the shipping receipt, constitutes a sufficient memorandum to satisfy the statute of frauds, where the papers are silent as to the essential element of price. *Kemensky v. Chapin* (Mass.), 9-1168.

c. Delivery.

Undelivered lease. — A signed but undelivered lease may be given in evidence to prove an agreement upon the details of a lease, pursuant to one of the terms of a previously signed memorandum in writing of an oral agreement for a lease, and if said previous memorandum and undelivered lease taken together show a completed agreement upon the terms of a lease, the statute of frauds is satisfied and specific performance may be decreed. *Charlton v. Columbia Real Estate Co.* (N. J.), 3-402.

d. Signature of parties.

(1) In general.

Memorandum signed by vendor only. — Where the vendor in a contract for the sale of land has signed a written memorandum thereof which is sufficient to satisfy the statute of frauds, he cannot defeat specific performance of the contract upon the ground of want of mutuality based upon the mere fact that the memorandum has not been signed by the purchaser. *Western Timber Co. v. Kalama River Lumber Co.* (Wash.), 7-667.

A memorandum containing an offer to sell, and signed only by the party making the offer, is converted into a completed contract by an oral acceptance thereof, and is sufficient within the statute of frauds requiring the memorandum to be signed by the party to be charged. *Bailey v. Leishman* (Utah), 13-1116.

Several writings each signed by one party. — The requirement of the Oklahoma statute of frauds that a contract to sell land

must be subscribed by both parties is not satisfied by several writings, each of which is signed by one party, where the writings, when construed together, show that the minds of the parties failed to meet as to one or more of the essential terms of the contract. *Halsell v. Renfrow* (U. S.), 6-189.

(2) Signature by agent.

Necessity of written authority to sign. — There is no statute in Georgia requiring the authority to make the memorandum required by the statute of frauds to be in writing, and such authority may be conferred by parol. *Brandon v. Pritchett* (Ga.), 7-1093.

An agreement for the sale of real estate is invalid without a memorandum thereof in writing subscribed by the party to be charged or agent, and such agreement if made by the agent is invalid unless the agent has written authority to sign. *Halsell v. Renfrow* (Okla.), 2-286.

The Arkansas statute requiring a written memorandum, signed by the party to be charged in the case of a contract for the sale of goods, is satisfied by a memorandum signed by the agent of the party to be charged, whose authority may be proved by parol. *Fordyce v. Seaver* (Ark.), 4-892.

Parol ratification of agent's act. — A parol ratification of a contract for the sale of land, made by one without authority assuming to act for the owner, is valid and binding upon the owner, providing the person assuming to act as agent in behalf of such owner signed a memorandum which in its terms complied with the provisions of the statute of frauds and which showed upon its face that it was executed on behalf of the owner. *Brandon v. Pritchett* (Ga.), 7-1093.

Principal not disclosed. — Under a statute requiring contracts for the sale of lands to be evidenced by writing, where a written agreement for such a sale shows that one of the two persons by whom it is made incurs no individual liability, but acts merely as the agent of some one else who is not named or described, specific performance thereof cannot be compelled at the suit of the principal if his relation to the transaction can be proved only by parol evidence. *Mertz v. Hubbard* (Kan.), 12-485.

A memorandum of a contract for the sale of goods is not rendered insufficient to satisfy the statute of frauds by the fact that it does not disclose the name of the seller, but is signed by the seller's agent in his own name. *Halsell v. Renfrow* (U. S.), 6-189.

e. Contents.

(1) Names of parties.

Necessity of name or description. — A writing that neither names the parties to a contract nor describes them in such a way that they may be identified is not sufficient as a note or memorandum under the statute of frauds. *Frahm v. Metcalf* (Neb.), 13-312.

Part of corporate name omitted. — A contract for the sale of land, which describes the land as being the same tract previously sold by a specified corporation to a named third person, is not rendered insufficient to satisfy the requirements of the statute of frauds by the fact that it omits part of the name of the corporation, if enough of the name is given to show what corporation is intended and to distinguish it from all other corporations. *Crotty v. Effler* (W. Va.), 9-770.

(2) Description of property.

Errors in spelling. — A memorandum for the sale of land is not rendered insufficient to satisfy the requirements of the statute of frauds by the fact that it describes the land as being "a pice of land sole" to a named person by a specified corporation, as it is evident that the word "pice" was intended for "piece," and the word "sole" for "sold." *Crotty v. Effler* (W. Va.), 9-770.

Failure to specify state or county. — A memorandum for the sale of land is not rendered insufficient to meet the requirements of the statute of frauds by the fact that it fails to specify the state, county, district, or town in which the land is situated, where the land is so described as to be capable of being distinguished from other land. *Crotty v. Effler* (W. Va.), 9-770.

Failure to specify quarter section. — A memorandum of a contract of sale which fails to specify which quarter of a named section of land is intended, and which states the number of the range without specifying whether it is east or west, is not void under the statute of frauds for uncertainty in description if the description is otherwise specific, and the land intended to be sold can be identified from the description with the aid of parol evidence. *Ruzicka v. Hotovy* (Neb.), 9-1058.

Memorandum referring to deed. — A memorandum executed at the same time as a deed whereby the grantee agrees to deed back "said piece of land," shows that it has reference to the land conveyed by the deed, and since the description of the land may be made certain by reference to the deed, the memorandum contains a sufficient description of the land to render it enforceable under the statute of frauds. *Welborn v. Dixon* (S. Car.), 3-407.

Part of tract to be selected by vendor. — The statute of frauds does not prevent the maintenance of an action for the specific performance of a contract by which the defendant, being the owner of a tract of land, agreed to convey a portion of it of a certain size, to be selected by himself, to the plaintiff. *Peckham v. Lane* (Kan.), 19-369.

(3) Terms of sale.

Amount of consideration. — Under the Indiana statute requiring contracts to pay a commission for the sale of real estate to be in writing, the contract must state the amount of the consideration agreed to be

paid, and a statement that the landowner agrees to pay the amount that "has been and now is understood" is not sufficient. *Zimmerman v. Zehendner* (Ind.), 3-655.

Price bid at auction sale. — The printed advertisement of an auction sale of land, which neither contains nor is connected with any writing showing the price bid and the purchaser, is not a sufficient memorandum to satisfy the statute of frauds, as it is neither a contract to convey land nor a note or memorandum of a contract to convey to a particular person. *Dickerson v. Simmons* (N. Car.), 8-361.

Time of closing title. — The Nebraska statute of frauds does not require all of the terms of a contract to sell land to be stated in a written memorandum thereof. If the memorandum fails to state the time for consummating the contract by executing the deed and paying the consideration, or fails to state whether securities are to be given for any deferred payments, these matters may be shown by parol evidence. *Ruzicka v. Hotovy* (Neb.), 9-1058.

4. ESTATES IN LAND.

a. Agreements other than contracts of sale.

Agreement to mortgage land. — The statute of frauds does not affect the validity of the lien of an equitable mortgage on land, which is created by the owner's refusal to fulfil his oral promise to give a mortgage to secure the repayment of money borrowed by him for the purpose of buying the land. *Foster Lumber Co. v. Harlan County Bank* (Kan.), 6-44.

Agreement that deed shall operate as mortgage. — An agreement that a deed conveying land shall operate as a mortgage to secure a debt is not within the statute of frauds, since it is not a contract for the sale of lands or any interest therein. It is a right reserved by the grantor to redeem the land upon the payment of the debt. This right is recognized by the statute and is not required to be evidenced by writing. *De Bartlett v. De Wilson* (Fla.), 11-311.

Agreements as to boundary lines. — Where there is doubt or uncertainty or a dispute as to the true location of a boundary line the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive upon them, although the possession is not for the full statutory period. *Kitchen v. Chantland* (Iowa), 8-81.

Where, in an action by an owner of land against an adjoining owner who has removed a fence erected by the former upon what he claims to be the boundary line, at a distance of eight feet from the defendant's side of an old boundary fence, the only evidence that such strip belongs to the plaintiff is an alleged oral agreement to treat the line on which the plaintiff subsequently erected the fence as the boundary, and it does not appear that there has been such occupancy and acquiescence under the alleged agreement as the law requires, both of which are essential,

the evidence is insufficient to establish the plaintiff's title to such strip of land. *Hooper v. Herald* (Mich.), 16-149.

Agreement as to escrow. — The condition upon which a deed may be delivered in escrow may rest in and be proved by parol. *Manning v. Foster* (Wash.), 16-95.

Where a deed conveying real estate is executed by the vendor and deposited at a bank at the same time that the vendee deposits the money, note, and warrants constituting the consideration for the property, the deposits being accompanied by a written memorandum that the deed, when signed, is to be delivered to the vendee on payment of the consideration, oral testimony is, for the purpose of establishing a valid escrow agreement, admissible to show what the agreement of the parties was as to the delivery of the deed. *Manning v. Foster* (Wash.), 16-95.

Agreement to devise land. — An oral agreement to devise real property, or real and personal property, is void under the statute of frauds. *Horton v. Stegmyer* (U. S.), 20-1134.

Assignment of contract for purchase of land. — Where contracts for the purchase of realty are by statute required to be in writing, a transfer of such a contract must likewise be in writing. An oral transfer of a written contract for the purchaser of realty, accompanied by a delivery thereof, does not effect a valid assignment of such contract, even if both parties are of the opinion that the legal requirements have thereby been met. *Flinner v. McVay* (Mont.), 15-1175.

Abandonment or rescission of contract. — Where, under a written contract for the sale of lands, the right of the purchaser is subject to forfeiture upon a failure or refusal to make the payments required by the contract, he may with the consent of the vendor rescind the contract and abandon all his rights under it, and it is not necessary that such rescission be in writing. *Cutright v. Union Savings, etc., Co.* (Utah), 14-725.

Where the purchaser, under a contract for the sale of land providing for monthly payments and for the forfeiture of any completed payments upon default as to a succeeding instalment, removes from the property and delivers the key to the vendor with the declaration that he will make no more payments, and has decided to quit the premises, and the vendor accepts the key with the intention of releasing the purchaser and takes possession of the property, the rescission and abandonment of the contract is complete and effectual without a rescission in writing. *Cutright v. Union Savings, etc., Co.* (Utah), 14-725.

Statutory right of town to purchase waterworks. — The right of a town to purchase the works of a water company in pursuance of a power conferred by statute and engrafted on the corporation's charter as an incident to the acceptance of the town's subscription to the stock of the corporation is, although contractual in its nature and involving the transfer of real estate, not af-

fectured by the statute of frauds. *Southington v. Southington Water Co.* (Conn.), 13-411.

b. Contracts of sale.

(1) In general.

Revival of expired contract. — A defunct contract for the sale of realty cannot be revived by oral agreement. *Thompson v. Robinson* (W. Va.), 17-1109.

(2) Contracts for sale of growing trees and timber.

In general. — Inasmuch as growing trees or standing timber are a part of the realty, a contract to sell or convey them or any interest in or concerning them is within the statute of frauds. *Ives v. Atlantic, etc., R. Co.* (N. Car.), 9-188.

A sale of standing timber is a contract concerning an interest in land, within the meaning of the statute of frauds. *Richbourg v. Rose* (Fla.), 12-274.

A parol agreement or an executory contract for the sale of growing trees to be severed and taken from the land by the vendee, will amount to a license for the vendee to enter upon the vendor's land for the purpose of making such severance; and if the license is not revoked before the trees are severed, the title to the trees will vest in the vendee, and the license after such severance will become coupled with an interest and irrevocable, and the vendee will have a right to enter and remove the trees thus severed; but if, before the trees are severed, the vendee revokes such license, no title will pass to the vendee and no rights will vest by virtue of such parol agreement or executory contract. *Richbourg v. Rose* (Fla.), 12-274.

Trees branded. — A sale of standing timber, whether to be cut presently, or to remain standing for further growth, is not a sale of an interest in land within the statute of frauds, where the purchaser places his recorded brand on the trees, pursuant to the Virginia statute (Code 1904, § 1906c, subd. 6) providing that the placing of such brand "on a log tree, or other marketable timber shall be deemed and held to be a change of ownership and possession." *Hurley v. Hurley* (Va.), 18-968.

Contract to cut, sell, and deliver cordwood. — A contract to cut, sell, and deliver a specified quantity of cordwood, which provides that some of the wood shall be cut from trees growing on the seller's land, and that the balance shall be cut from trees growing on the buyer's land, does not contemplate a transfer of any title to or interest in the trees as they stand upon the land, and therefore is not within the statute of frauds. *Ives v. Atlantic, etc., R. Co.* (N. Car.), 9-188.

(3) Contracts relating to mines.

Assignment of equitable interest. — An assignment of a portion of the assignor's interest in mining areas held in trust for

him by a third person is an interest in lands within the meaning of the Nova Scotia statute of frauds, and is not merely an interest in the proceeds of the sale as distinguished from an interest in the areas themselves; and therefore where an oral assignment has been made the assignee cannot maintain an action thereon to recover part of the proceeds of the sale of the areas, in the absence of evidence that prior to the making of the assignment there had been such a conversion of the assignor's interest as would take away its character as real property. *McNeil v. Corbett* (Can.), 10-98.

Where a contract for the sale of all the coal in a certain tract of land provides that part of the purchase money shall be paid by a specified day, when the vendor is to execute a deed, and that if not so paid the contract shall be void, and further declares that this provision for payment is of the essence of the contract, if there is a default in payment, no oral extension of time made after the day specified will bind the vendor. *Thompson v. Robinson* (W. Va.), 17-1109.

(4) Partnership contracts.

Partnership lands treated as personality. — Partnership lands are treated as personality in equity and for partnership purposes, and are not affected by the provisions of the statute of frauds relating solely to lands. *Tillis v. Folmar* (Ala.), 8-78.

Partnership agreement to speculate in lands. — An agreement between two persons to purchase, develop, and sell certain lands for their joint account and to share equally the profits and losses of the venture is not within the statute of frauds, as the parties to the agreement are copartners in the transaction. *Morgart v. Smouse* (Md.), 7-1140.

A partnership agreement for the sale and purchase of land for speculation and a division of profits among the partners is not within the statute of frauds, and is valid though not in writing, and the extent of the interest of the partners may be shown by parol. *Miller v. Ferguson* (Va.), 13-138.

(5) Assignment of equitable interest in land.

In general. — An assignment of an equitable interest in lands is within the statute of frauds. *Morgart v. Smouse* (Md.), 7-1140.

(6) Executed contracts.

Statute not applicable. — The statute of frauds does not apply to executed contracts and an action may be maintained for the purchase price of land conveyed and accepted by the purchaser in pursuance of a prior verbal agreement. *Satterfield v. Kindley* (N. Car.), 12-1098.

c. Agreements with agent.

Usual authority of real estate broker. — The usual authority vested in a real estate broker does not empower him to conclude or execute a contract of sale, but is limited to

finding a purchaser and bringing him into negotiation with the principal, and therefore the statute of frauds does not require such an authorization to be in writing. *Flegel v. Dowling* (Ore.), 19-1159.

Appointment of agent to receive deed. — The statute of frauds does not require that the appointment of an agent to receive a deed for a purchaser shall be in writing in order that delivery to him shall be binding on the purchaser. *Dorr Cattle Co. v. Des Moines Nat. Bank* (Ia.), 4-519.

Employment of agent to negotiate purchase. — A contract whereby one employs an agent to negotiate for the purchase of real estate is not a contract for the creation of an estate or interest in land or a trust or power over or concerning lands, within the meaning of the statute of frauds. *Johnson v. Hayward* (Neb.), 12-800.

5. SALES BY EXECUTORS OR ADMINISTRATORS.

Necessity of note or memorandum. — No note or memorandum in writing is necessary to charge either the administrator or purchaser at any administrator's sale. *Green v. Freeman* (Ga.), 7-1069.

6. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.

a. Original and collateral promises.

Intention of parties. — In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded, and in ascertaining such intention, the words of the promise, the situation of the parties, and all the circumstances attending the transaction should be taken into consideration. *Johnson v. Bank* (W. Va.), 9-893.

Promise to pay for services. — An oral promise to pay for services rendered to a third person is not actionable if the services were rendered wholly or partly upon the credit of an independent original promise or liability of such third person. If any credit whatever was given to such third person at the time the services were rendered, so that he was in any degree independently and originally liable, the oral promise of the other party is invalid. *Johnson v. Bank* (W. Va.), 9-893.

Agreement to purchase property or pay debt. — An agreement by a stockholder of an insolvent corporation with the creditors and other stockholders that he will purchase property of the corporation at a public sale thereof under a deed of trust at a sum equal to the indebtedness secured by the deed of trust and pay the same indebtedness in full, is, in effect, an agreement to purchase the property for a sum sufficient to pay the indebtedness and is not a promise to pay the debt of another within the statute of frauds. *Satterfield v. Kindley* (N. Car.), 12-1098.

Promise to subserve purpose of promisor. — Whenever the main purpose and object of a promisor are not to answer for another, but to subserve some purpose of his

own, his promise is not within the statute of frauds, although it is in form a promise to pay the debt of another. *Oldenburg v. Dorsey* (Md.), 5-841.

Question for jury. — When the issue in an action at law involves the question whether an oral promise is original or collateral within the statute of frauds, and the question must be determined from materially conflicting evidence and circumstances and inferences therefrom, and the evidence and circumstances are such that the verdict of a jury for either party could not be set aside because without sufficient evidence to support it, or because plainly against the decided weight and preponderance of evidence, the question is one of fact to be determined by the jury, and therefore instructions which in effect direct the jury to determine such question from a part only of the proper and material evidence and circumstances, excluding other parts thereof in conflict with the part directed to be considered, are erroneous. *Johnson v. Bank* (W. Va.), 9-893.

Agreement to pay debts of business. — An agreement by the seller of a business to pay the debts incurred by the purchaser in running it as part of a transaction by which the business is transferred to a third person who assumes the payment of the purchase money, is not a collateral undertaking to answer for the default of another, but is an original undertaking founded on a valuable consideration. *Burgie v. Bailey* (Ark.), 18-389.

b. Contracts of indemnity.

Promise to reimburse surety on bond. — A promise to reimburse the surety on an official bond for any damages he may incur by reason of his suretyship is within the statute of frauds. *Craft v. Lott* (Miss.), 6-670.

c. Joint liability of promisor and third person.

Joint promise by two for benefit of both. — The statute of frauds does not extend to a joint promise by two persons for the benefit of both of them. *Oldenburg v. Dorsey* (Md.), 5-841.

Joint promise by two for benefit of one. — Where the person to whom goods were sold and delivered, and the person who undertook orally to be bound for the payment of the goods, are sued together as joint original promisors, the action will not be defeated as to the latter by showing that credit for the goods was given partly to one and partly to the other defendant, as the statute of frauds does not extend to a joint promise by two persons for the benefit of one of them. *Oldenburg v. Dorsey* (Md.), 5-841.

d. Oral guaranty by transferor of negotiable instrument.

Original promise. — The payee of a note who transfers the same by delivery merely for a consideration is liable at the suit of the transferee upon his oral guaranty made at the time of the transfer as upon an

original promise not within the statute of frauds, such liability not being predicated upon the instrument itself and the negotiable instruments law not being applicable. *Swenson v. Stolz* (Wash.), 2-504.

7. REPRESENTATIONS AS TO CREDIT OF ANOTHER.

Necessity that representations be acted upon. — Representations concerning the credit of another within the statute providing that no action shall be brought to charge a person upon such representations unless the latter are in writing and signed by the party to be charged, must be limited to representations made to induce the plaintiff to enter into a transaction which will result in a debt due the plaintiff from the third person. *Walker v. Russell* (Mass.), 1-688.

Representations to induce purchase of stock. — Representations as to the financial credit of a corporation made to induce the plaintiff to subscribe to the shares thereof to be paid for in cash are representations bearing upon the value of the shares and are not within the statute of frauds. *Walker v. Russell* (Mass.), 1-688.

In an action to charge the defendant upon representations made by him as to the financial credit of the corporation, whereby the plaintiff was induced to subscribe to the shares thereof, the record of a suit to foreclose a mortgage on the property of the corporation which was in force at the time the representations were made is admissible in evidence upon the value of the stock, where it appears that there was no change in the condition of the company's property, and that it suffered no accident between the time such representations were made and the time the foreclosure suit was instituted. *Walker v. Russell* (Mass.), 1-688.

Good faith not material. — The Missouri statute providing that "no action shall be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized," is a complete bar to an action for damages for false verbal representations made in regard to the credit of a third person, regardless of whether such representations were made in good faith or were made with knowledge of their falsity in order to deceive and defraud the plaintiff or in pursuance of a conspiracy with the person in regard to whose credit the representations were made. *Knight v. Rawlings* (Mo.), 12-325.

8. CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR.

a. Contracts within statute.

(1) In general.

License to use land. — Where a railroad company grants a person the right to con-

struct an elevator on a designated portion of its right of way, and to use such portion of the right of way for a longer period than one year, the agreement is within the statute of frauds, and a contract whereby the grantee transfers his interest to a third person is likewise within the statute. *Todd v. Bettingen* (Minn.), 8-960.

Amount of excess immaterial. — Under the Wisconsin statute of frauds any excess, however short, of one year from the date of a verbal agreement till that of the agreed full performance will defeat it. *Chase v. Hinkley* (Wis.), 5-328.

Provision for termination of contract within year. — A contract for a definite term longer than a year is not excluded from the operation of the statute of frauds because it contains a provision enabling either party to put an end to it within a year. *Wagniere v. Dunnell* (R. I.), 17-205.

(2) One-year contracts to commence in futuro.

Contract void. — The statute of frauds renders void a verbal agreement for one year's personal service, performance of which is to commence in the future. *Chase v. Hinkley* (Wis.), 5-328.

Contract valid. — The requirement of the South Dakota statute of frauds that a lease of real property for a longer period than one year shall be in writing, does not invalidate a parol lease for a term of one year, to commence a day or two in the future, as the provision as to the duration of the lease does not apply "from the making thereof," but only from the beginning of the tenure. *Paulton v. Kreiser* (S. Dak.), 5-827.

An oral lease for one year to commence in futuro is valid, being governed by the provision of the statute declaring void every contract for the leasing of lands for a longer period than one year, and not by the provision which avoids every agreement that by its terms is not to be performed within one year from the making thereof. *Baumgarten v. Cohn* (Wis.), 18-1076.

b. Contracts not within statute.

Assumption of mortgage by grantee. — The obligation of a grantee arising from a clause in a deed reciting that he assumes payment of a mortgage debt is not within the clause of the statute of frauds requiring undertakings not to be performed within one year to be in writing signed by the party sought to be charged, but the obligation arises by implication of law out of the fact that he accepts the deed with such a recital. *Higgins v. Evans* (Mo.), 3-465.

Agreement to repurchase. — In an action to enforce an agreement alleged to have been made at the time of the sale of certain shares of stock, whereby the seller was to have the right to repurchase the same where some of plaintiff's witnesses testify that the defendant promised to repurchase the property "within a year," and others, who speak English imperfectly, testify that the promise

was to repurchase the property "in the time of a year," the jury is warranted in finding that the agreement was to be performed within a year, and, therefore, that the section of the statute of frauds relating to agreements not to be performed within a year has no application. *Vohland v. Gelhaar* (Wis.), 16-781.

Contract performed by one party within year. — A contract which by its terms is capable of being performed by one party within one year from the date of its making and has been fully performed by such party within the year, is not within the provision of the statute of frauds that no suit can be maintained "upon any agreement which is not to be performed within the space of one year from the making thereof." *Tyler v. St. Louis Southwestern R. Co.* (Tex.), 13-911.

9. CONTRACTS FOR SALE OF GOODS, WARES, AND MERCHANDISE.

a. Contracts within statute.

Contract for sale of stock. — A contract for the sale of stock in an incorporated company, at the price of fifty dollars or more, is within the Georgia statute which requires contracts for the sale of goods, wares, and merchandise to the amount of fifty dollars or more, to be in writing. *Hightower v. Ansley* (Ga.), 7-927.

A sale of shares of the stock of a corporation is within the statute of frauds. *Stiff v. Stiewel* (Ark.), 18-597.

Contracts of barter and exchange. — The Colorado statute of frauds requiring "every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more," to be in writing "unless the buyer shall accept and receive part of such goods, or the evidence of some of them, or such things in action; or . . . shall, at the time, pay some part of the purchase money," makes no distinction between contracts of barter or exchange and contracts of sale, and applies to a contract to deliver at a future date stocks of a corporation in consideration of services to be rendered. *Franklin v. Matoa Gold Mining Co.* (U. S.), 14-302.

Contract of sale or for work and labor. — A contract by a manufacturer of chinaware to furnish, at an agreed price, certain dishes decorated in a particular style, is a contract for work and services and not for the sale of chattels within the Michigan statute of frauds (3 Comp. Laws, § 9516), where some of the dishes are to be manufactured specially, though some are in stock, and the decoration of all of them requires special work, the cost of which constitutes a large part of the agreed price. *In re Gies' Estate* (Mich.), 19-1288.

Contract to make tombstone. — A contract to make a tombstone according to a design selected by the buyer from the seller's catalogue, and to place a suitable inscription on the tombstone, is not within the statute of frauds, as it is not a contract for the sale

of goods, wares, or merchandise, but is one for work and labor to be done and materials to be furnished, though the transaction is to result in the sale of the completed article. *Moore v. Camden Marble, etc., Works (Ark.)*, 10-308.

b. Delivery, acceptance, and receipt of goods.

(1) In general.

Right of buyer to reject goods. —

Where an oral contract for the sale of goods is rendered unenforceable by the statute of frauds, the buyer is at liberty to refuse the goods, even though his action is arbitrary and wholly unreasonable. *Kemensky v. Chapin (Mass.)*, 9-1168.

Mere words insufficient. — Mere words *inter partes* will not effect a transfer of possession and title as between buyer and seller so as to satisfy the statute of frauds as regards a verbal sale of personal property exceeding in value the sum of fifty dollars. *J. H. Silkman Lumber Co. v. Hunholz (Wis.)*, 13-713.

Continuance of prior possession by vendee. — In order to effect the transfer of possession necessary to satisfy the statute of frauds, there must be some affirmative act on the part of the purchaser manifesting an intention to accept the property under the sale agreement, and such act is not shown by the mere continuance of prior possession by the buyer as bailee or as owner of the premises on which the property has been placed by his permission. *J. H. Silkman Lumber Co. v. Hunholz (Wis.)*, 13-713.

Intent as element of acceptance. — In an action on a verbal order for merchandise where the plaintiff relies on an acceptance of the merchandise to take the sale out of the statute of frauds, the question of the intention of the defendant as to accepting the goods is material and relevant, and it is error for the court to refuse an instruction requested by the defendant that the plaintiff must establish to the satisfaction of the jury "that the defendant intended to receive the goods sued for and to accept the same as owner," and to instruct instead that the plaintiff must establish "that the defendant received and accepted said goods," the latter instruction being too general and not informing the jury as to what constituted an acceptance. *Jarrell v. Young, etc., Co. (Md.)*, 12-1.

The error in refusing such instruction requested by the defendant is not cured by an instruction that "if the jury shall further find that the defendant did not at any time receive and accept said goods as owner, then the verdict of the jury shall be for the defendant." *Jarrell v. Young, etc., Co. (Md.)*, 12-1.

Acceptance for examination only. —

Where goods are sold by sample, the parties contemplate that the buyer shall have an opportunity to ascertain whether the goods delivered correspond with the sample, and therefore the fact that the buyer receives from the carrier which has transported the

goods the car in which they are loaded does not amount to an act of acceptance which will take the contract out of the statute of frauds, if the buyer receives the goods for the sole purpose of examining them in order to ascertain whether they correspond with the sample. *Kemensky v. Chapin (Mass.)*, 9-1168.

Time for delivery and acceptance. —

A delivery and acceptance at any subsequent time of any part of the goods or chattels which are the subject of an oral agreement and within the statute of frauds takes the contract out of the statute and makes valid the entire contract. *Gabriel v. Kildare Elevator Co. (Okla.)*, 11-517.

Sale with agreement to repurchase. —

Where a sale of shares of stock is accompanied by an agreement on the part of the vendor to repurchase the same at an advanced price on a certain contingency, the agreement of sale and the promise to repurchase are parts of a single and entire contract, and the delivery of the stock to the vendee and the payment of the purchase price by him satisfies the statute of frauds, and makes the contract valid although not in writing. *Vohland v. Gelhaar (Wis.)*, 16-781.

(2) Delivery to carrier as acceptance by buyer.

In general. — The delivery of goods by a vendor to a common carrier for shipment is not a delivery to and acceptance by the vendee so as to remove the contract of sale from the operation of the statute of frauds. *Catiss v. Cyr (Mich.)*, 2-544.

Carrier selected by vendee. — Where goods sold are delivered by the seller to a carrier selected by the buyer, the delivery is a delivery to the buyer; but where the carrier is authorized only to receive the goods for transportation, such delivery does not constitute such an acceptance by the buyer as will take the contract out of the statute of frauds. *Kemensky v. Chapin (Mass.)*, 9-1168.

(3) Receipt and acceptance of samples.

When an acceptance of goods. — In order that the receipt and acceptance of samples shall amount to an acceptance of a part of goods sold in compliance with the Maryland statute of frauds, it is necessary that there be an intention on the part of the vendor and vendee that the samples shall constitute a part of the goods sold and shall reduce, to the extent of the quantity of the samples, the entire quantity covered by the contract. *Richardson v. Smith (Md.)*, 4-184.

(4) Part payment.

Baling of hay by purchaser. — Under the Michigan statute of frauds, the baling of hay by a purchaser thereof, in the seller's presence, pursuant to an oral contract requiring the purchaser to bale such hay, is such a part payment as to validate the contract. *Driggs v. Bush (Mich.)*, 15-30.

Part payment in futuro. — The requirement of the Colorado statute of frauds that the part payment of purchase money, which will take a contract out of the statute, must be made at the time of making the contract, is not complied with by a verbal contract for services thereafter to be rendered in consideration of which it is agreed to deliver, at a future date, certain shares of corporate stock; and after the rendition of the services no action can be maintained on the contract for the nondelivery of the stock. *Franklin v. Matoa Gold Mining Co. (U. S.)*, 14-302.

10. CONTRACTS OF EMPLOYMENT.

Contract between dentist and assistant. — The statute of frauds has no application to a contract whereby a dentist employs an assistant and the latter binds himself not to engage in competition with his employer after the termination of the employment. *Turner v. Abbott (Tenn.)*, 8-150.

Employment of agent to purchase. — The contract of employment of one as agent to obtain by purchase something from a third person is not within the statute of frauds relating to contracts for the "sale of goods." *Wiger v. Carr (Wis.)*, 11-998.

Employment of agent to sell or purchase land. — The authority of an agent for the sale of real estate, if not in writing, is void under the statute of frauds. *Frahm v. Metcalf (Neb.)*, 13-312.

Under the Washington statute of frauds no action can be maintained by an agent or broker for services performed in purchasing real estate unless his contract of employment is in writing as required by the statute. *Keith v. Smith (Wash.)*, 13-975.

The provision of the Washington statute of frauds that an agreement authorizing or employing an agent or broker to sell or purchase real estate for a commission shall be void unless the agreement or some note or memorandum thereof is in writing and signed by the party to be charged or his authorized agent, is not complied with by a memorandum which does not purport to employ or confer authority on the broker, or describe any particular real estate, or mention any terms of purchase or sale, or mention the period for which the broker's authority is to continue or specify the amount of his commission. *Keith v. Smith (Wash.)*, 13-975.

11. WHO MAY INVOKE STATUTE.

Subsequent purchaser of chattels. — When a vendor of chattels by a contract of sale which is voidable by the statute of frauds makes a subsequent sale or pledge and delivery of them to a third person, he thereby repudiates and avoids the former contract, and the subsequent purchaser may invoke the statute for his own protection. *First Nat. Bank v. Blair State Bank (Neb.)*, 16-411.

12. PLEADING AND PRACTICE.

a. Complaint.

Necessity of alleging written contract. — Where a suit is brought for damages growing out of a breach of a contract required to be in writing by the statute of frauds, the petition is not rendered demurrable by the fact that it is not stated whether the contract was in writing or not. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. (Ga.)*, 7-1134.

Contract to convey part of tract. — In an action for specific performance of a contract to convey a portion of a tract of land, such portion to be selected by the defendant (vendor) where the plaintiff asks for the conveyance of a specific parcel, on the ground that the defendant had selected it, although such selection may be ineffective because not made in writing, the petition is not on that account demurrable, for it may state facts sufficient to entitle the plaintiff to a conveyance of some portion of the larger tract, although he may not be entitled to the very part claimed. *Peckham v. Lane (Kan.)*, 19-369.

b. Answer or demurrer.

Sufficiency of general denial. — The statute of frauds may be set up as a defense under a plea of the general issue, as such plea denies the existence of the contract sued on. *Morgart v. Smouse (Md.)* 7-1140.

The objection that a contract sued on is void under the statute of frauds because not in writing may be availed of by a general denial in the answer. *Riif v. Riibe (Neb.)*, 4-462.

When the fact that the contract was oral affirmatively appears on the face of the bill, the objection that it is void under the statute of frauds may be taken by demurrer. When that fact does not thus appear, it must be presented by answer. *Horton v. Stegmyer (U. S.)*, 20-1134.

c. Waiver of defense.

The defense of the statute of frauds is waived if it is not interposed in the trial court before the trial is concluded. *H. P. Moore Lumber Corp. v. Walker (Va.)*, 19-314.

FRAUDULENT CONVEYANCES.

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Ante-nuptial conveyance by husband, see HUSBAND AND WIFE, 2 b.

Grounds for attachment, see ATTACHMENT, 3.
Limitation of action to subject land to judgment lien, see LIMITATION OF ACTIONS, 4 a (2) (d).

1. ELEMENTS OF FRAUDULENT ALIENATION.

- a. Absence of change of possession.

What sufficient to show fraud. — Under the Utah statute which provides that a sale of goods or chattels shall be deemed fraudulent as against creditors unless accompanied by a delivery within a reasonable time, and followed by actual and continued change of possession, a sale of goods which are at the time of the sale in the possession of the vendor and continue to remain in his possession for a period of four months thereafter will be deemed to be fraudulent as there is no immediate delivery and actual continued change of possession as is required by the statute. *Johnson v. Emery* (Utah), 11-23.

- b. Property susceptible of fraudulent alienation.

Choses in action. — Choses in action are "personal property," within the meaning of those words as used in the Alabama statute invalidating conveyances and transfers made with intent to hinder, delay, or defraud creditors. *Hall v. Alabama Terminal, etc., Co.* (Ala.), 5-363.

Corporate Stock. — An arrangement whereby a debtor corporation releases a solvent subscriber to stock and accepts the obligation of an insolvent person is in legal effect a fraudulent and void transfer of its property by the corporation. *Hall v. Alabama Terminal, etc., Co.* (Ala.), 5-363.

- c. Fraudulent intent.

When inferred. — The fact that a sale of goods by an insolvent debtor results in hindering his creditors from collecting their debts does not of itself render the sale fraudulent; but the sale is fraudulent if the hinderance of creditors is a part of the intent with which it is made. And the fraudulent withholding from creditors of the proceeds of a sale justifies the inference that the sale was made with fraudulent intent, though it was made in the usual course of trade. *Farris v. Gross* (Ark.), 5-616.

2. VALIDITY AS BETWEEN PARTIES.

In general. — As between the parties to a fraudulent conveyance the deed is valid and binding and the grantor retains no legal or equitable interest in the property conveyed. It is only creditors who can question the fairness of the transaction. *Siford v. Cutler* (Ill.), 18-36.

Enforcement of agreement to reconvey. — It is no defense to a suit to enforce the specific performance of an agreement to reconvey land that the original conveyance was made for the purpose of placing the land beyond the reach of the grantor's creditors. *Bouton v. Beers* (Conn.), 3-941.

3. SALES IN BULK ACTS.

- a. Constitutionality of particular statutes.

Connecticut statute. — The Connecticut statute providing that a sale by a retail merchant of the whole or a large part of his stock in trade is voidable at the instance of creditors, unless he has previously recorded a written notice of his intention to make the sale, is a valid exercise of the state's police power, and does not conflict with either the federal or the state constitution. *Young v. Lemieux* (Conn.), 8-452.

Illinois statute. — The Illinois "Bulk Sales Law" providing that the sale of any portion of a stock of merchandise in bulk will be presumed to be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall at least five days before the sale make a full and detailed inventory showing the quantity and as far as possible the cost price of each article, and unless such purchaser shall, in good faith, five days before the sale make full inquiries of the seller as to the names and residences of each and all of the creditors of the seller, and shall notify each of such creditors of the cost price of the merchandise to be sold, is unconstitutional and void as singling out and imposing burdens on persons who own stocks of merchandise and persons who purchase such stocks in bulk, thus interfering with the right of contract of the persons affected and depriving them of liberty and property without due process of law. *Charles J. Off & Co. v. Morehead* (Ill.), 14-434.

Michigan statute. — The Michigan sales in Bulk Act held constitutional. *Spurr v. Travis* (Mich.), 9-250.

Minnesota statute. — The Minnesota statute entitled "An act to prevent sales of merchandise in fraud of creditors," which makes sales made without compliance with its provisions presumptively fraudulent, but not absolutely void, is constitutional. *Thorpe v. Pennock Mercantile Co.* (Minn.), 9-229.

Oklahoma statute. — The Oklahoma statute providing that the sale of a stock of merchandise in bulk shall be "presumed to be fraudulent and void, as against the creditors of the seller," is not unconstitutional, either as impairing the right to private property or as being class legislation. *Williams v. Fourth National Bank* (Okla.), 6-970.

New York statute. — The New York statute prohibiting the sale of merchandise in bulk except upon compliance with certain prescribed conditions is unconstitutional, being in restraint of the rights of liberty and property guaranteed by the federal and state constitutions and not being a justifiable exercise of the police power. *Wright v. Hart* (N. Y.), 3-263.

Ohio statute. — A statute prohibiting sales of merchandise in bulk except upon compliance with prescribed conditions is unconstitutional because placing an unwarrantable restriction upon the right of an individual to acquire and possess property and because containing a forbidden discrimination in favor of a limited class of creditors. *Miller v. Crawford* (Ohio), 1-558.

Utah statute. — A statute voiding sales of merchandise in bulk except when made in conformance with prescribed conditions is unconstitutional as abridging freedom of contract, as not a proper exercise of the police power, as class legislation, and because not exempting sales by persons acting in a fiduciary capacity or under judicial process. *Block v. Schwartz* (Utah), 1-550.

b. Effect of acts.

Sale presumptively fraudulent. — The Minnesota statute entitled "An act to prevent sales of merchandise in fraud of creditors," which declares that sales made without compliance with its provisions "will be presumed to be fraudulent and void," does not render the sales so made absolutely void, but merely prescribes a rule of evidence and makes such sales presumptively fraudulent. *Thorpe v. Pennock Mercantile Co.* (Minn.), 9-229.

Where the evidence to support an attachment sued out on the ground of a fraudulent conveyance or disposition of the debtor's property shows a sale in bulk of the stock of goods levied upon, but the court finds that the sale was in fact made in good faith and without actual fraud, the finding overthrows the statutory presumption of fraud, and the attachment should be dissolved. *Williams v. Fourth National Bank* (Okla.), 6-970.

Restoration of possession on avoidance. — Where a trustee in bankruptcy replevies goods sold by his bankrupt in violation of the local sales in bulk law, he is entitled to recover possession of goods placed in stock by the purchaser, if it appears that the purchaser merely replaced goods sold with others purchased with the proceeds of such sales. *Young v. Lemieux* (Conn.), 8-452.

c. Conveyances within meaning of acts.

Sale of separate business. — Where the proprietor of a general store also conducts a drug store as a separate and independent business in another building and under another name, the sale of the drug business is a sale of the proprietor's whole stock in trade, within the meaning of the Connecticut sales in bulk statute making a sale of that

character voidable at the instance of creditors. *Young v. Lemieux* (Conn.), 8-452.

Sale of store fixtures. — As used in the Massachusetts statute prohibiting sales in bulk except when made in the ordinary course of trade, the phrase "stock of merchandise" is applicable only to the articles which the seller keeps for sale in the ordinary course of his business, and is not applicable to a storekeeper's fixtures. *Gallers v. Elmer* (Mass.), 8-1067.

Sale of stock of livery stable. — The horses, wagons, and harness, comprising the stock in a livery stable, are not "stock of goods, wares, or merchandise" within the meaning of the Washington statute regulating sales in bulk. *Everett Produce Co. v. Smith* (Wash.), 5-798.

Sale to reorganized corporation. — Where an insolvent trading corporation, acting in good faith and without intent to defraud, transfers its merchandise and other property to a corporation organized for the purpose of getting new capital into the business, and the partners become stockholders in the corporation, and the corporation, after carrying on the business for a while, becomes insolvent, the creditors of the corporation are entitled to priority over the creditors of the partnership, though the transfer of the property is made without compliance with the provisions of a statute regulating sales of merchandise in bulk and providing that sales made in violation of the statute "will be presumed to be fraudulent and void." *Thorpe v. Pennock Mercantile Co.* (Minn.), 9-229.

Sale to creditor. — The Georgia statute regulating sales of stocks of goods, wares, and merchandise in bulk applies to a sale of a stock of goods in bulk by a debtor to a creditor in extinguishment, total or partial, of his debt; and such a sale, made in disregard of this act, is fraudulent and void as against other creditors of the common debtor. *Sampson v. Brandon Grocery Co.* (Ga.), 9-331.

The Massachusetts statute regulating sales in bulk was intended to prevent a trader from disposing of his stock of merchandise in a manner outside his usual course of business, and it prohibits a transfer by a trader to a creditor by way of accord and satisfaction of a pre-existing debt. *Gallus v. Elmer* (Mass.), 8-1067.

Giving of chattel mortgage. — The giving of a chattel mortgage is not "a sale, transfer, or assignment in bulk" of the property mortgaged, within the meaning of a statute regulating, for the protection of creditors, sales, transfers, and assignments in bulk, of any part of a stock of merchandise, fixtures, etc., pertaining to the conducting of a business. *Hannah v. Richter Brewing Co.* (Mich.), 12-344.

4. AVOIDANCE OF FRAUDULENT CONVEYANCES.

a. Who may avoid.

Executor or administrator of grantor. — An administrator is the proper party to

sue for goods which once belonged to his intestate, but which were disposed of by the latter by a fraudulent transfer or gift. *Wright v. Holmes* (Me.), 4-583.

An executor or administrator of a decedent cannot bring an action to set aside a conveyance made by the decedent on the ground that the same was fraudulent as to creditors. As to such a conveyance the personal representative stands in the shoes of the decedent, who could not have maintained such a suit in his lifetime. Nor can real estate fraudulently conveyed by a decedent in his lifetime be reached in a proceeding by the personal representative for the sale of the decedent's real property for the payment of his debts. *Siford v. Cutler* (Ill.), 18-36.

Surety in bail bond. — A bail in a criminal recognizance against whom an award of execution upon the recognizance has been made, and to whom a bond has been given to indemnify him against all loss or damage which he might sustain on account of having signed the recognizance, may file a bill in equity, before payment of the recognizance debt, to set aside a deed made by the obligor in such indemnity bond as made with intent to defraud him as a creditor. *Carr v. Davis* (W. Va.), 16-1031.

Creditors in general. — Any one who but for a deed made to defraud creditors would have the right to subject the property to his demand, is a creditor entitled to sue in equity to set it aside under chapter 74 of the West Virginia Code. That chapter embraces as creditors, as a general rule, all persons who have a valid cause of action, and protects creditors whose claims are unliquidated or contingent as well as those whose claims are liquidated or certain. *Carr v. Davis* (W. Va.), 16-1031.

Judgment creditor of nonresident. — A conveyance of real property may be attacked as in fraud of the grantor's creditors only by one of the latter; and one who obtains a judgment *in personam* against a nonresident by mere publication of summons is not by virtue of the judgment alone such a creditor as may attack a conveyance made by the nonresident. *First Nat. Bank v. Eastman* (Cal.), 1-626.

b. Necessity that claim be reduced to judgment.

Where debtor is a nonresident. — Generally a creditor must reduce his claim to judgment before beginning an action to set aside a conveyance by the debtor as fraudulent; but where the debtor is a nonresident and a valid personal judgment cannot be obtained against him, such action can be maintained by the creditor without obtaining a judgment. *First Nat. Bank v. Eastman* (Cal.), 1-626.

Trustee in bankruptcy. — A trustee in bankruptcy appointed under the provisions of the National Bankruptcy Act occupies a relation similar to that of a judgment creditor of the bankrupt, and may file a bill in equity to set aside a fraudulent conveyance

of real estate by the bankrupt, although neither the trustee nor any creditor has reduced any claim against the bankrupt to judgment. *Beasley v. Coggins* (Fla.), 5-801.

c. Exhaustion of other remedies.

Garnishment proceeding. — In Alabama a creditor may maintain a bill in equity to subject to satisfaction of his debt choses in action fraudulently transferred by his debtor notwithstanding the fact that he may obtain similar relief at law in a garnishment proceeding. *Hall v. Alabama Terminal, etc., Co.* (Ala.), 5-363.

d. Jurisdiction of court.

Land situated in foreign state. — A court of equity has no jurisdiction to set aside as fraudulent a conveyance, executed within the state by a domestic corporation, of land situate in another state. *West Point Mining, etc., Co. v. Allen* (Ala.), 5-532.

e. Pleading.

Sufficiency of bill by trustee in bankruptcy. — Allegations in a bill by a trustee in bankruptcy to set aside a fraudulent conveyance by the bankrupt held to be sufficient. *Beasley v. Coggins* (Fla.), 5-801.

Averment as to conveyance by corporation. — In a suit by a creditor to set aside a fraudulent conveyance of a corporation, an averment that the execution of the conveyance was never properly authorized by the shareholders of the corporation shows no ground for relief, as that is a matter of which none but the shareholders can complain. *West Point Mining, etc., Co. v. Allen* (Ala.), 5-532.

f. Evidence.

Declarations of vendor. — The declarations of a vendor of goods claiming the goods and inconsistent with an absolute sale, made after the sale and while he remains in the actual possession of the goods, are competent evidence for the purpose of proving fraud in the sale. *Piedmont Savings Bank v. Levy* (N. Car.), 3-785.

Burden of proof. — Where a conveyance or assignment is attacked as fraudulent, the burden of proving the fraud rests upon the party alleging it. *Beaver v. Ross* (Ia.), 17-640.

g. Issues for submission to jury.

Adequacy of consideration. — Under the National Bankruptcy Act of 1898, declaring void all transfers of property by a bankrupt except as to purchasers in good faith and for a fair consideration, an issue submitted to the jury which is limited to the questions of good faith and knowledge of the fraud and which omits entirely the necessary ingredient of a fair price, is not determinative of the real facts at issue. *Piedmont Savings Bank v. Levy* (N. Car.), 3-785.

FREE PASSES.

Prohibition of free passes, see **CARRIERS**, 2 b.
Persons riding on free passes as passengers,
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GAMBLING.

See **GAMING AND GAMING HOUSES**.

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GAME AND GAME LAWS.

1. RIGHT TO TAKE FISH AND GAME, 824.
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 - a. Power to enact game laws, 824.
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- 5. LIABILITY FOR VIOLATION OF REGULATIONS, 825.
- 6. SEIZURE AND DESTRUCTION OF PROPERTY, 825.

Expression in title of subject of statute for protection of game animals, see STATUTES, 3 b.

1. RIGHT TO TAKE FISH AND GAME.

Right of owner of land. — The right of the owner of land to take fish and wild game on his own land inheres in him by reason of his ownership of the soil, and is a property right subject only to the state's ownership and title, held for the purposes of regulation and preservation for the public use. *State v. Mallory* (Ark.), 3-852.

Rights of state. — The state's ownership of fish and game is not such a proprietary interest as will authorize a sale thereof, or the granting of special interests therein, or license to enjoy, but is solely for the purposes of regulation and preservation for the common use, and is not inconsistent with a claim of individual or special ownership by the owner of the soil. *State v. Mallory* (Ark.), 3-852.

Remedy for interference with right. — An action at law furnishes an inadequate remedy for the unlawful interference with the exercise of the right to hunt wild fowl on navigable waters and the threatened continuance of such interference. Consequently persons whose rights are thus interfered with are entitled to equitable relief. *Ainsworth v. Munoskong Hunting, etc., Club* (Mich.), 15-706.

As the injury to such persons is irreparable, such interference may be restrained by injunction. *Ainsworth v. Munoskong Hunting, etc., Club* (Mich.), 15-706.

2. WHAT IS GAME.

Game pheasants. — Pheasants are not the less "game" within the meaning of the English Game Act 1831 (§ 27), because they are live tame birds which have been reared in confinement under barn door hens and have never at any time been at liberty. *Cook v. Treverner* (Eng.), 20-619.

3. STATUTORY REGULATIONS.

a. Power to enact game laws.

(1) In general.

The power to control and regulate the killing and use of game was vested in the colonial governments of America, and passed with the title to game in its natural condition to the several states as they became sovereigns, for the use and benefit of all the people of the states respectively, subject to any provision of the Federal Constitution that may be applicable to such control and

regulation. *Harper v. Galloway* (Fla.), 19-235.

(2) Special or local laws.

The constitution of the state does not forbid the passage of special or local laws on the subject of game, and it contains no express provision relative to game; therefore the legislature may by a duly enacted law make any provision within its discretion for the preservation and conservation of the game in the state for the use and benefit of the people of the state, by regulating the taking or killing and use of certain or all kinds of game in any part of the state and during any periods, where such laws do not deny to any one having rights in the premises the due process of law or the equal protection of the laws that are guaranteed to all persons by the state and federal constitutions. *Harper v. Galloway* (Fla.), 19-235.

The legislature may enact special or local laws within its discretion for the protection of game in the state, and by valid general laws may prescribe punishments for violations of the special or local laws, so as to avoid any real or apparent conflict with the constitutional provision that all laws "for the punishment of crime or misdemeanor" "shall be general and of uniform operation throughout the state." *Harper v. Galloway* (Fla.), 19-235.

b. Constitutionality of statutes.

Unjust discrimination. — The Arkansas statute making it unlawful for a nonresident of the state to shoot, hunt, fish, or trap within the state, in so far as it prevents a nonresident owner of property within the state from enjoying the same property right as a resident landowner, is a denial of the equal protection of the law and is a taking of property without due process of law within the meaning of the Fourteenth Amendment of the United States Constitution. *State v. Mallory* (Ark.), 3-852.

The provisions of section 8 of chapter 6005, Acts of 1909, that require of residents of the state of Florida who are not residents of Marion county, a previous notice of intention to hunt, and the payment of a special license tax for the privilege of hunting game in Marion county, while no notice or license tax is required of residents of Marion county, are in effect a denial to the residents of the state who are not residents of Marion county the equal protection of the laws of the land in violation of the Fourteenth Amendment of the Constitution of the United States, and are inoperative as to residents of this state. *Harper v. Galloway* (Fla.), 19-235.

Classifications of persons may be made in connection with regulations for the protection of game, but such classifications should have some just relation to real differences with reference to the subject regulated, and should not be unjustly discriminatory or merely arbitrary. If this rule is not observed, classifications of persons in connection with the regulation of the hunting of game may deny

to some residents of the state the equal protection of the laws. *Harper v. Galloway* (Fla.), 19-235.

When a statute designed for the protection of game, by its plain terms excludes from its benefits a portion of the residents of the state, or imposes on some of the residents of the state burdens not put on others, and there appear to be no real differences in conditions with reference to the regulation to fairly justify the classification as made, the statute may in effect deny to residents of the state the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution. *Harper v. Galloway* (Fla.), 19-235.

Uniformity as to persons affected. — In exercising its power and discretion to control and regulate the subject of hunting game, the legislature may enact any law it may deem advisable, but regulations should affect alike all persons similarly situated and conditioned with reference to the subject regulated. *Harper v. Galloway* (Fla.), 19-235.

Classification of persons affected. — The discretion of the legislature in classifying those who are to be affected by a regulation for the protection of game will not be disturbed by the courts where the classification has some just, fair, and practical basis in real differences with reference to the subject regulated, and all doubts will be resolved in favor of the validity of a statute. *Harper v. Galloway* (Fla.), 19-235.

Cruel and excessive punishment. — A statute making the possession of certain birds with intent to sell them a misdemeanor and graduating the punishment for the crime according to the number of birds possessed is not unconstitutional as providing for cruel and excessive punishment. *State v. Poole* (Minn.), 3-12.

4. POSSESSION DURING CLOSE SEASON.

Game taken in another state. — The Minnesota statute providing that except during a specified portion of the year no person shall sell to any one at any time any ruffed grouse must be construed as applying to all ruffed grouse, whether killed or captured within or without the state, and when so construed is a valid exercise of the state's police power, and is not unconstitutional, either as taking property without due process of law or as interfering with interstate commerce. *State v. Shattuck* (Minn.), 6-934.

The New York Forest, Fish, and Game Law of 1900 did not apply to imported game. *People v. Bootman* (N. Y.), 2-226.

The New York Forest, Fish, and Game Law of 1900 is not affected by the Act of Congress (31 U. S. St. L., c. 553) providing that foreign game transported into any state shall be subject to the laws of the latter. *People v. Bootman* (N. Y.), 2-226.

The New York Laws 1902, c. 194, amending the Forest, Fish, and Game Law of 1900 so as to apply to the possession of imported game, is not in conflict with either the state

or Federal Constitution. *People v. Bootman* (N. Y.), 2-226.

The provisions of the New York Forest, Fish, and Game Law prohibiting possession during the close season of certain game animals or birds, whether they have been taken within the state or have been imported from without the state, are not unconstitutional as taking property without due process of law. *People ex rel. Hill v. Hesterberg* (N. Y.), 6-353.

The New York Forest, Fish, and Game Law prohibits possession during the close season of fish or game imported from a foreign country as well as that imported from a foreign state, and is a valid exercise of the police power conferred upon the state by Congress by the Lacey Act. *People ex rel. Hill v. Hesterberg* (N. Y.) 6-353.

Animals raised in captivity. — The provision of the Missouri statute for the preservation of doe deer declaring it unlawful for any person "to have in possession or transport at any time the carcass of any deer, or any portion of such carcass, unless the same has thereon the natural evidences of its sex," is applicable to any and all kinds of deer, including those raised in captivity, and as so construed is within the police power of the state as a reasonable regulation looking to the effectual enforcement of the statute, and does not violate any constitutional provision as taking property without due process of law. *State v. Weber* (Mo.), 12-382.

5. LIABILITY FOR VIOLATION OF REGULATIONS.

Defenses. — In a prosecution under the New York Forest, Fish, and Game Law for having possession of imported plover and grouse, it is no defense that the birds are different varieties of plover and grouse from those which are native to the state of New York. *People ex rel. Hill v. Hesterberg* (N. Y.), 6-353.

Evidence. — The admissibility of certain evidence as to the possession of birds in violation of a game law. *State v. Poole* (Minn.), 3-12.

6. SEIZURE AND DESTRUCTION OF PROPERTY.

The Nebraska statute giving the game officers of the state power to seize and destroy all guns, ammunition, dogs, etc., actually used by persons hunting without a license or permit, and which therefore provides for the forfeiture and transfer of title to property without a hearing on the guilt or innocence of its owners, is unconstitutional as depriving the owners of their property without due process of law, inasmuch as the property is susceptible of an innocent use. *McConnell v. McKillip* (Neb.), 8-898.

GAMING AND GAMING HOUSES.

1. WHAT CONSTITUTES GAMING, 826.
 - a. In general, 826.

- b. Betting on horse races, 826.
- c. Bookmaking, 826.
- d. Betting on elections, 827.
- e. Licensed games, 827.
- 2. GAMING HOUSES, 827.
- 3. CIVIL RIGHTS AND LIABILITIES ARISING OUT OF GAMBLING TRANSACTIONS, 827.
 - a. Recovery of money lost at gambling, 827.
 - b. Recovery of gambling debt, 827.
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 - d. Injunction against maintenance of gambling house, 827.
- 4. SEIZURE AND DESTRUCTION OF GAMBLING INSTRUMENTS, 827.
- 5. INDICTMENT, 828.
- 6. EVIDENCE, 828.

See LOTTERIES.

Enjoining use of building for gaming house, see INJUNCTIONS, 2 g.

Gambling paraphernalia as subject of larceny, see LARCENY, 2 e.

Recovery of gambling implements, see REPLEVIN, 1.

1. WHAT CONSTITUTES GAMING.

a. In general.

Gaming and gambling synonymous.— In their criminal sense, the terms "gaming" and "gambling" are synonymous. Opinion of Justices (N. H.), 6-689.

Game defined.— A "game" is a contest for success or superiority in a trial of chance, skill, or endurance. Opinion of Justices (N. H.), 6-689.

Distinction between betting and gaming.— The distinction between "betting" and "gaming" is that gaming always includes a wager, while betting is not gaming unless a wager is laid on the game. Opinion of Justices (N. H.), 6-689.

There has always been observed a distinction between betting and gambling or the maintaining of a house or place to which people could resort to gamble. At common law wagers on different subjects were legal and might be enforced, while a gambling house or a resort for gamblers was a public nuisance. The same distinction obtains in the state of New York where ordinary betting has never been made a crime, while the keeping of a gambling house has been subject to severe punishment. *People v. Langan* (N. Y.), 17-1081.

Playing for price of game.— Playing pool under an agreement that the one losing the game shall pay for the use of the table is betting at a pool table within the Georgia statute making the same a misdemeanor, and the fact that the state imposes a tax on the keeper of the pool table does not affect the question. *Hopkins v. State* (Ga.), 2-617.

Sale for future delivery.— No recovery can be had on a claim against a bankrupt for damages arising out of an alleged breach of

contract by the bankrupt, who was a bucket shop proprietor, in failing to carry out for the claimant, who was a customer, ordinary bucket shop transactions, where the customer understood the nature of the transactions and knew that the bucket shop was not actually carrying the property covered by his orders; and such knowledge will be held to have existed notwithstanding a statement on the confirmation slips that no orders were received except with the understanding that the actual delivery of the property was contemplated, where it appears that the customer was a man of keen intelligence and extensive business experience, and that he was speculating to the amount of one hundred and forty thousand dollars on a margin of one per cent. *In re A. B. Baxter & Co.* (U. S.), 11-437.

Slot machines.— Slot machines where the chances are unequal, with the chances in favor of the machine, are *ejusdem generis* with gambling games specifically mentioned in section 1, chapter 64, Laws of 1907, and are illegal. *Territory v. Jones* (N. Mex.), 20-128.

Slot machines of the kind described in the stipulation filed in this case are banking games and come within the inhibition of section 1, chapter 64, Laws of 1907. *Territory v. Jones* (N. Mex.), 20-128.

b. Betting on horse races.

Under Arkansas statute.— Under the Arkansas statute making it a crime to bet any money or other valuable thing on "any game of hazard or skill," horse racing is not a "game," nor is betting on a horse race a crime. *State v. Vaughan* (Ark.), 11-277.

Under Ontario statute.— The Ontario statute permitting betting on the racecourses of incorporated racing associations under certain circumstances does not preclude the prosecution, under another statute prohibiting common betting houses, for keeping a common betting house on such racecourse, even though the betting therein is confined to the races then in progress upon the course. *Rex v. Saunders* (Ont.), 7-232.

Under New Hampshire statute.— The New Hampshire statute prohibiting gambling applies to pool-selling, book-making, and every other form of betting on the result of a horse race, as the word "game" in the statute includes the racing of horses. Opinion of Justices (N. H.), 6-689.

c. Bookmaking.

Meaning and purpose of New York statute.— The term "bookmaking" originally indicated a collection of sheets of paper or other substances upon which entries could be made, either written or printed. But the term has been used in many ways, and in determining its meaning as used in section 351 of the New York Penal Code it is necessary to consider the evident purpose and intention of the legislature in enacting the statute, giving to the term its ordinary and accepted

meaning as it was understood at that time. *People v. Langan* (N. Y.), 17-1081.

The vice of bookmaking chiefly consists in soliciting and in the inducing the public to take chances in the carefully figured and planned scheme of the bookmaker, and this, in order to be profitable to him, requires the writing out of the list of the odds laid on some paper or material so that they can be seen by those who are solicited to invest. It was this evil which the legislature sought to prevent by the enactment of the statute of 1908, commonly known as the Hart-Agnew law. *People v. Langan* (N. Y.), 17-1081.

Oral laying and publication of odds.

— An offer to bet upon a horse or horses that are about to engage in a race in which the person making the offer lays odds, and the oral announcement of such offer to other persons, without recording or registering any bets or wages, does not constitute bookmaking, within the meaning of the New York statute. *People v. Langan* (N. Y.), 17-1081.

d. Betting on elections.

Common-law rule. — Bets on the result of an election are void at common law as being against public policy. *Motlow v. Johnson* (Ala.), 8-188.

e. Licensed games.

Effect of license. — The effect of paying a tax to engage in the business of buying and selling "futures" upon the right to impose a penalty for gaming. *Miller v. Shropshire* (Ga.), 4-574.

The charter of the New England Breeders' Club authorizing it to hold horse races does not empower it to conduct, license, or permit on its premises pool-selling, bookmaking, or any other form of betting or gambling on the result of such races. Opinion of Justices (N. H.), 6-689.

Constitutionality of licensing statute. — The Kentucky statute licensing and regulating horse racing held constitutional. *Grainger v. Douglas Park Jockey Club* (U. S.), 8-997.

2. GAMING HOUSES.

Movable booth. — A wooden box or booth, moved about on casters from one part to another of the grounds of an incorporated racing association, during the progress of a race meeting and used by bookmakers for the purpose of making and recording bets with the public, is an "office" or "place" within the Ontario statute defining a common betting house as a "house, office, room, or other place opened, kept, or used for the purpose of betting." *Rex v. Saunders* (Ont.), 7-232.

Bucket shop. — The transactions of a bucket shop constitute gaming, consequently, a person who keeps a bucket shop is liable to conviction under the statute which makes it a criminal offense to keep any house, vessel, or place for the purpose of gaming. *Wade v. United States* (D. C.), 17-707.

3. CIVIL RIGHTS AND LIABILITIES ARISING OUT OF GAMBLING TRANSACTIONS.

a. Recovery of money lost at gambling.

Sums paid as margins. — Equity will not aid a party to a gambling contract predicated upon the expected fluctuations of the stock market, in recovering the sums paid as margins, nor enforce an illegal contract by enjoining the withdrawal from the bank by the broker of a sum standing there to his credit upon the ground that it consists of margins so paid. *Baxter v. Deneen* (Md.), 1-147.

Joint liability under Alabama statute. — Under a statute authorizing the recovery of money lost on any game or wager, the loser of an election bet made with two or more persons cannot maintain an action against the winners jointly, but can only recover from each winner the amount won by him. *Motlow v. Johnson* (Ala.), 8-188.

b. Recovery of gambling debt.

Forbearance to sue as new consideration. — An action by a bookmaker for a sum of money admitted by the plaintiff's answer to interrogatories to be gambling debts ought not to be summarily dismissed as frivolous and vexatious where the plaintiff alleges in his answer, as other considerations for the defendant's indebtedness, the plaintiff's forbearance to sue and his giving time to the defendant at the latter's request, inasmuch as the possible apprehension of the defendant of the consequences of not paying the debt, which it would be competent for the plaintiff consistently with the pleadings to prove, might constitute a new and valid consideration for the debt. *Goodson v. Grier-son* (Eng.), 14-247.

c. Recovery of money lent for gaming.

Conflict of laws. — Money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English courts. *Saxby v. Fulton* (Eng.), 17-39.

d. Injunction against maintenance of gambling house.

Pool room. — The maintenance in a quiet and orderly manner of a turf exchange or pool room wherein money is received, won, and lost on horse races, and which is attended by fifteen to thirty persons daily for the purpose of betting on horse races, and the advertisement of such pool room and the furnishing at times of a vehicle to bring patrons to it, although a violation of the criminal laws, present no ground of equity jurisdiction authorizing an injunction. *State v. Vaughan* (Ark.), 11-277.

4. SEIZURE AND DESTRUCTION OF GAMBLING INSTRUMENTS.

Constitutionality of statutes authorizing. — The West Virginia statute author-

izing the seizure and forfeiture of gaming tables is constitutional. *Woods v. Cottrell* (W. Va.), 2-933.

The provisions of the Idaho Anti-gambling Act, which authorizes the summary seizure and destruction of gambling devices, is a constitutional and legitimate exercise of the police power of the state for the suppression and prevention of crime and the protection of the public morals and welfare of the state, and is not in conflict with the state constitution as depriving the citizen of his property without due process of law. *Mullen v. Moseley* (Idaho), 13-450.

Gambling instruments nuisances. — Gambling was a nuisance at common law, and is a crime under the statutes of Idaho, and the machines, instruments, and devices designed and intended for carrying on such nuisance and crime are themselves nuisances. *Mullen v. Moseley* (Idaho), 13-450.

Procedure under statute. — When gaming tables are seized under a warrant from a justice under the West Virginia statute, the justice cannot order them to be burnt. This can be done only upon a conviction of their owner upon a charge of keeping them, in a criminal or circuit court, and under its order. *Woods v. Cottrell* (W. Va.), 2-933.

Prohibition to prevent seizure. — A writ of prohibition will not lie against a justice and a constable to prevent a seizure of a slot machine as a gaming table. *Woods v. Cottrell* (W. Va.), 2-933.

5. INDICTMENT.

Description of gaming table. — There is no merit in the contention that an indictment charging a defendant simply with keeping and maintaining a gambling table is defective because it fails to set forth the nature or kind of table that he is charged with keeping. The statute aims its penalty at the use to which the table is put, or for which it is kept, without reference to the kind or character of such table. Any manner or kind of table kept and maintained for gambling purposes falls within the inhibition of the statute. *Irvin v. State* (Fla.), 10-1003.

6. EVIDENCE.

Sufficiency to sustain conviction. — On a prosecution for keeping a gambling resort, evidence examined and held sufficient to sustain a conviction. *State v. Chase* (N. Dak.), 17-520.

GAMES.

See GAMING AND GAMING HOUSES.

Prohibition of playing of games in streets, see STREETS AND HIGHWAYS, 5 a.

GARAGE.

Effect of restriction against building for shops of any mechanical purpose, see DEEDS, 3 c.

GARBAGE.

Regulating removal and disposal of garbage, see HEALTH, 2 a; MUNICIPAL CORPORATIONS, 4 d (3).

Validity of ordinance forbidding removal of garbage by any but city officials, see MUNICIPAL CORPORATIONS, 5 f (2).

GARNISHMENT.

1. PROPERTY SUBJECT TO GARNISHMENT, 828.

- a. In general, 828.
- b. Property held by executor, administrator, or guardian, 828.
- c. Property in hands of receiver, 829.
- d. Salary of public officer, 829.
- e. Foreign railroad cars, 829.
- f. Joint debts, 829.

2. WHO MAY BE SUMMONED AS GARNISHEE, 829.

3. DEFENSES AVAILABLE TO GARNISHEE, 830.

- a. In general, 830.
- b. Set-off, 830.

4. DUTY OF GARNISHEE TO DEFENDANT, 830.

5. EFFECT OF GARNISHMENT UPON OTHER PROCEEDINGS AGAINST GARNISHEE, 830.

6. PRIORITY AMONG CLAIMANTS, 830.

7. JURISDICTION OF COURTS, 831.

8. PLEADING, 831.

Change of venue in garnishment proceeding, see CHANGE OF VENUE, 1 b.

Effect of garnishment proceedings, as suspending interest, see INTEREST, 3.

Restraining garnishment proceedings, see INJUNCTIONS, 2 e (3).

Right to maintain garnishment proceedings as affecting right to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, 4 c.

1. PROPERTY SUBJECT TO GARNISHMENT.

- a. In general.

Death benefit. — The Michigan statute providing that money or other benefit "to be paid" by a beneficial association shall not be liable to attachment or garnishment applies to money only before it has been paid over to the beneficiary, and therefore does not exempt from garnishment money which has been paid as a benefit to the beneficiary and has been deposited by him in a bank. *Recor v. Commercial, etc., Bank* (Mich.), 7-754.

- b. Property held by executor, administrator, or guardian.

Under Ohio statute. — The Ohio statutes do not authorize a service of process of garnishment on an executor or administrator. *Orlopp v. Schueller* (Ohio), 2-919.

Before order of distribution. — Property held by the executor or administrator in

a representative capacity cannot be reached by attachment or garnishment process in an action against the heir or legatees before an order of distribution. *Orlopp v. Schueller* (Ohio), 2-919.

After assignment by beneficiary. — Garnishment of an administrator for debts due by the decedent's heirs, after the heirs have, in good faith, assigned all their interest in the decedent's estate, accomplishes nothing. *Pugh v. Jones* (Iowa), 13-499.

Property in hands of guardian. — A guardian holding property as an officer of the court is not subject to garnishment. *Pugh v. Jones* (Iowa), 13-499.

c. Property in hands of receiver.

Necessity of leave of court. — Where nothing remains to be done by a receiver except to pay money upon a final decree, a creditor of the person to whom the money is payable may, without leave of court, commence garnishment proceedings to secure such fund. *Robertson v. Detroit Pattern Works* (Mich.), 15-131.

d. Salary of public officer.

Michigan statute. — Under the Michigan statute relative to garnishment proceedings, the salary of an officer or employee of a municipal corporation is subject to garnishment. *Dunkley v. Marquette* (Mich.), 17-523.

e. Foreign railroad cars.

In general. — A car of a foreign corporation sent into a state with freight to be delivered, and then reloaded and returned within a reasonable time, is not liable to an attachment issued in an action in a state court. *Connery v. Quincy, etc., R. Co.* (Minn.), 2-347.

Effect of contract between owner and user. — Where a domestic railroad company receives from a railroad company in another state a car, under a contract by which the domestic company has the right to carry the car loaded to its destination in the domestic state and unload it, and then to reload and return it to the owner beyond the limits of the state, paying for the use of the car, the right of the domestic company to the use of the car is superior to the right of an attaching creditor who, without any other lien, seeks to subject the car to attachment by the service of the summons of garnishment upon the domestic company; and, in the absence of appropriate equitable pleadings in a court with jurisdiction to render affirmatively equitable relief, such car is not subject to process of garnishment. *Southern Flour, etc., Co. v. Northern Pacific R. Co.* (Ga.), 9-437.

Where a domestic railroad company receives from a connecting railroad company of another state a railroad car loaded with freight, consigned from a point in another state to a point in the domestic state, under a prevailing custom among railroads, and under a contract between the two roads at interest, that, instead of unloading and re-

loading at the point of intersection outside of the state, the domestic company, upon payment for the use, shall have the right to bring the foreign car loaded into the state and to the point of destination, there to be unloaded and afterwards reloaded with freight, and then returned in the direction from which it came, to a point beyond the limits of the state, such car, while within the state, is not exempt from attachment sought to be executed by service of summons of garnishment for collection of a debt alleged to be due by the owner, upon the ground that the impounding of the car is such an interference with interstate commerce as to be violative of the Constitution of the United States or of the statutes of the United States. *Southern Flour, etc., Co. v. Northern Pacific R. Co.* (Ga.), 9-437.

f. Joint debts.

Action against one creditor only. — In Wisconsin a debt due jointly to the principal defendant and another cannot be reached by garnishment in an action against the principal defendant alone. *Badger Lumber Co. v. Stern* (Wis.), 3-802.

Debt due to husband and wife. — In Wisconsin a debt due jointly to a husband and wife cannot be reached by garnishment in an action against the husband alone. *Badger Lumber Co. v. Stern* (Wis.), 3-802.

2. WHO MAY BE SUMMONED AS GARNISHEE.

County. — The Florida statute providing for garnishment does not authorize a writ to issue against a county and where such writ has been issued and judgment entered against a county, the judgment is void. *Duval County v. Charleston Lumber, etc., Co.* (Fla.), 3-174.

School district. — The rule of public policy which exempts public municipal corporations from liability to garnishment proceedings at law extends to school districts, and, consequently, a school district which has entered into a contract for the erection of a school building, and which has a fund in the hands of its directors to be devoted to that purpose, is not liable to garnishment by creditors of the building contractor in a court of law. Where, however, the building has been completed, and the purpose consummated for which the fund was raised, there is no rule of public policy which prevents the creditors of the contractor from going into equity and having the funds in the hands of the district subjected to the payment of their claims. *Plummer v. School District* (Ark.), 17-508.

Nonresident. — The validity in a foreign state of a judgment against a nonresident garnishee served with process while temporarily within the domestic state. *Harris v. Balk* (U. S.), 3-1084.

Garnishment of corporation by creditor of stockholder. — A corporation whose stock certificates have been issued and delivered to the stockholder cannot be said to be indebted to the stockholder or to have in

its possession property or effects belonging to him so as to be subject to garnishment in respect to such stock by a creditor of the stockholder under the provisions of section 21 of the Illinois Attachment Act, which provides that when the sheriff or other officer is unable to find property of any defendant sufficient to satisfy the attachment, he shall summon the persons mentioned in the writ as garnishees, and all other persons within his county having any property, effects, choses in action, or credits in their possession or power belonging to the defendant or who are in anywise indebted to such defendant. *Pease v. Chicago Crayon Co. (Ill.)*, 14-263.

3. DEFENSES AVAILABLE TO GARNISHEE.

a. In general.

Statutory exemption of principal defendant. — Where the principal defendant in a garnishment proceeding under the Michigan statute is a nonresident, he is not entitled to an exemption given by the statute. *Kelson v. Detroit, etc., R. Co. (Mich.)*, 10-500.

Evidence reviewed, in a garnishment proceeding, and held sufficient to show that the principal defendant is a nonresident. *Kelson v. Detroit, etc., R. Co. (Mich.)*, 10-500.

Vacation of judgment in principal case. — On appeal by a garnishee from a judgment against him, the appellate court will reverse the judgment and discharge the garnishee if its records show that it has previously reversed a judgment against the defendant in the principal action upon which the garnishment is based. *Chicago Herald Co. v. Bryan (Mo.)*, 6-751.

Bankruptcy of principal defendant. — The adjudication of the defendant is a garnishment proceeding in a state court to be a bankrupt, *ipso facto* dissolves the garnishment where it was commenced within four months before the adjudication, and authorizes the dismissal of the garnishment proceeding on the motion of the garnishee. *Hobbs v. Thompson (Ala.)*, 18-381.

Equities between garnishee and defendant. — A lien acquired by garnishment is, in the absence of some special and superior right in plaintiff, subject to all equities existing between the garnishee and the defendant. *Wunderlich v. Merchants Nat. Bank (Minn.)*, 18-212.

b. Set-off.

Application of equitable doctrine, in general. — The equitable doctrine of set-off may be applied by a court of equity in garnishment proceedings in all cases where the plaintiff presents no superior right. *Wunderlich v. Merchants Nat. Bank (Minn.)*, 18-212.

Unmatured claims. — A bank, summoned as garnishee in an action against one of its depositors, may set off against the depositor's general account unmatured notes held by it at the time of the service of the garnishee

summons, when it appears that the depositor is insolvent. *Wunderlich v. Merchants Nat. Bank (Minn.)*, 18-212.

It need not be shown that the depositor had at the time of the service of the summons been formally adjudged an insolvent in insolvency or bankruptcy proceedings. Insolvency in fact is all that is necessary to entitle the garnishee to the remedy. *Wunderlich v. Merchants Nat. Bank (Minn.)*, 18-212.

Necessity of special plea. — As the sole purpose of a garnishment proceeding under the Mississippi statute is to ascertain what the garnishee owes the defendant, a garnishee may avail himself of the defense of set-off without having specially pleaded such defense. *Melton Hardware Co. v. Heidelberg (Miss.)*, 15-704.

But even if it should be held that in such a proceeding the defense of set-off must be pleaded specially, the right to rely on the garnishee's failure to plead such defense is waived by the plaintiff's failure to object specifically to the introduction of evidence of set-off. *Melton Hardware Co. v. Heidelberg (Miss.)*, 15-704.

4. DUTY OF GARNISHEE TO DEFENDANT.

Notice of institution of proceeding. — The effect of the failure of a nonresident garnishee served within the state to notify his creditor of the institution of garnishment proceedings. *Harris v. Balk (U. S.)*, 3-1084.

Setting up exemption of defendant. — One who owes wages which are exempt from garnishment, upon being garnished, should set up the fact of exemption in his answer, and if he fails to do so and permits judgment to be rendered against himself, and then pays the money due for wages into court, he does so at his peril and will be liable in a suit by the laborer for the amount of the wages. *Southern R. Co. v. Fulford (Ga.)*, 5-168.

5. EFFECT OF GARNISHMENT UPON OTHER PROCEEDINGS AGAINST GARNISHEE.

Action to recover debt. — The pendency of a garnishment action constitutes a defense by way of a plea in abatement in a subsequent action brought against the garnishee by his creditor to recover the debt sought to be reached by the garnishment process, and the proper practice in such case is for the court to order a stay of proceedings in the action to recover the debt, pending the determination of the liability of the garnishee in the garnishment action. *American Hardwood Lumber Co. v. Joannin-Hansen Co. (Minn.)*, 9-477.

6. PRIORITY AMONG CLAIMANTS.

In cases of equitable garnishment. — Equity follows the law as to priority in garnishment proceedings, and the creditor who first files his suit is entitled to preference in the satisfaction of his claim, unless he makes his complaint a general creditor's bill, in

which case he and all subsequent creditors are entitled to share in the fund *pro rata*. *Plummer v. School District (Ark.)*, 17-508.

7. JURISDICTION OF COURTS.

Justice's court. — Where, in an action before a justice of the peace, a writ of garnishment is sued out, the justice has jurisdiction to render a judgment against the garnishee for the amount found due by the principal defendant, though the whole sum due by the garnishee to the principal defendant is in excess of the justice's jurisdiction, as the amount sued for in the principal action is the amount in controversy. *Davis v. Choctaw, etc., R. Co. (Ark.)*, 3-658.

Court in which proceeding is pending. — The proper tribunal to determine whether a garnishee may be charged as such on the facts of his disclosure is the court in which the garnishment action is pending. *American Hardwood Lumber Co. v. Joannin-Hansen Co. (Minn.)*, 9-477.

8. PLEADING.

Averment of joint debt by defendant. — The fact that in a garnishment proceeding the answer of the garnishee states as a conclusion that his indebtedness is to the principal defendant, without mentioning the joint creditor, is immaterial when the conclusion is followed by a statement of the fact that his indebtedness is under a written contract mentioned, whereby he agrees to pay a certain sum to the principal defendant and another. *Badger Lumber Co. v. Stern (Wis.)*, 3-802.

GAS AND GAS COMPANIES.

1. DUTY TO FURNISH GAS, 831.
2. CONTRACTS WITH MUNICIPALITIES, 831.
3. LIABILITY TO TAXATION, 831.
4. REGULATION OF RATES BY STATUTE OR ORDINANCE, 831.
 - a. In general, 831.
 - b. Defenses to enforcement of statutory rate, 832.
 - c. Valuation of franchises, 832.
5. LIABILITY FOR NEGLIGENCE, 833.
6. STATUTORY REGULATIONS TO PREVENT WASTE, 833.
7. RIGHT TO LAY PIPES IN STREETS AND HIGHWAYS, 833.

Character as mineral, see MINES AND MINERALS.

Fixing charges for gas as defining equal protection of laws, see CONSTITUTIONAL LAW, 10.

Illuminating gas as subject of larceny, see LARCENY, 2 a.

1. DUTY TO FURNISH GAS.

Construction of charter. — Where a corporation is formed "for the purpose of

producing, purchasing, and acquiring natural gas" and "of piping and transporting natural gas from the place or places where it is produced, purchased, or acquired" to certain named towns and cities situated in the counties along the line of said company and between the termini thereof, "and to other cities, villages, and places in the counties aforesaid," it is not one of the charter obligations of such corporation to furnish natural gas to consumers in all of such cities, towns, and villages. *East Ohio Gas Co. v. Akron (Ohio)*, 18-332.

Duty to furnish at reasonable price.

— One of the conditions to the exercise of the privilege of conducting a gas business under a legislative grant is, that in the absence of legislative prescription restricting the rate of compensation for service furnished, the grant carries by implication the obligation to furnish the service at a reasonable price. *Madison v. Madison Gas, etc., Co. (Wis.)*, 9-819.

2. CONTRACTS WITH MUNICIPALITIES.

Acceptance of ordinance. — When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract and the rights of the parties thereunder are to be determined by the contract itself. *East Ohio Gas Co. v. Akron (Ohio)*, 18-332.

Intention of parties. — While much regard will be given to the clear intention of the parties, yet where the contract is entirely silent as to a particular matter, the courts will exercise great caution not to include in the contract, by construction, something which was intended to be excluded. *East Ohio Gas Co. v. Akron (Ohio)*, 18-332.

3. LIABILITY TO TAXATION.

Exemption under Louisiana constitution. — Manufacturers, with certain specified exceptions, are exempted by the Louisiana constitution from license taxation. An exception thus expressly made cannot be added to. Hence, a producer of gas is exempt, if shown to be a manufacturer. The exemption cannot by interpretation be restricted to manufacturers of articles of commerce. *State v. New Orleans Lighting Co. (La.)*, 10-667.

4. REGULATION OF RATES BY STATUTE OR ORDINANCE.

a. In general.

Power of state to regulate. — A state statute fixing the rate to be charged for gas is valid, unless such rate is plainly unreasonable to the extent that its enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just

both to the owner and the public, the price fixed failing to yield a fair return upon the value of the property at the time the rate becomes effective. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Power of city to regulate. — A municipal corporation cannot fix the price at which a gas company shall supply its patrons in the absence of express or implied statutory authority. *Richmond v. Richmond Natural Gas Co.* (Ind.), 11-746.

Order of illegal commission. — Where the statute under which a gas commission has been appointed has been held by the highest court of the state to be unconstitutional, a previous order of such commission fixing the price to be charged to consumers of gas must be regarded as invalid. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Application of statute to existing companies. — The Indiana statute which confers authority on a municipal corporation to fix the price of gas by "franchise" does not confer the power to fix the price as a condition upon an existing franchise. *Richmond v. Richmond Natural Gas Co.* (Ind.), 11-746.

Necessity of assent by company. — Under the Indiana statute of 1905, conferring upon towns and cities the power to fix the price of natural gas "by contract or franchise," it is essential to the validity of the "contract" by which a municipal corporation attempts to limit charges for gas supplied by a gas company that the assent of the company to the ordinance limiting its charges shall be shown. *Richmond v. Richmond Natural Gas Co.* (Ind.), 11-746.

Acceptance of franchise as consent. — Where a municipal ordinance granting a gas franchise contains a provision reserving to the city council the right to fix the price to be charged for gas after a specified period of time, the acceptance of such franchise by the company creates a contract by which the council at the expiration of the time stated is empowered to fix reasonable rates. *Richmond v. Richmond Natural Gas Co.* (Ind.), 11-746.

Injunction to prevent enforcement of statute. — Where the statutory rate to be charged for gas indicates a very narrow line of division between possible confiscation and proper regulation as based upon the value of the gas company's property, and the division depends upon the varying opinions of witnesses as to such value and upon the apprehended result of operating under such rate, a court of equity should not restrain the enforcement of such rate until a fair trial has been made of continuing the business thereunder. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Validity of provision requiring increased pressure. — In a statute which not only fixes the price to be charged for gas but requires such increased pressure that the use of the existing mains and other service pipes would involve great danger of explosion, and that before compliance with the statute would be safe the mains and pipes would have to

be strengthened throughout by an outlay of millions of dollars from which no return could be obtained at the rates provided in the statute, the provision as to the increased pressure is unconstitutional. But the invalidity of the provision does not render invalid other provisions of the statute which are separable therefrom. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Effect of excessive penalties. — Penalties imposed for the violation of such a statute which are enormous and overwhelming in amount are void. But the invalidity of the provision as to penalties does not render invalid other provisions of the statute which are separable therefrom. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

What constitutes reasonable profit. — Six per cent. on the fair value of the property devoted to public use by the Consolidated Gas Company of New York is a reasonable return upon its investment. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Sufficiency of evidence that rate is confiscatory. — In an action by the Consolidated Gas Company of New York to restrain the enforcement of the New York statutes fixing the price to be charged for gas, held, upon a review of the facts, that the value of the company's tangible property and the increase in the value of its franchises is from the evidence so uncertain that the burden of showing beyond any just or fair doubt that the statutory rate is confiscatory has not been sustained. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

b. Defenses to enforcement of statutory rates.

Increased cost of operation. — Where the increased cost of producing gas in accordance with a statute requiring increased candle power has been included in the operating expense of a gas company for the year with reference to which an inquiry as to the profits realized showed a fair return upon the capital invested, the company cannot allege such increased cost as a reason for the inadequacy of the statutory price of gas. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Discrimination between customers. — The only interest which a gas company has in the question whether a statute fixing the price of gas discriminates illegally between a municipality and individual customers is to ascertain whether the profits from the total amount of gas supplied are a sufficient return upon the property used by the company. The fact that with respect to some customers the price is inadequate is immaterial. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

c. Valuation of franchise.

Consolidation agreement as evidence. — Where the validity of an agreement of consolidation between gas companies, made pursuant to a statute authorizing such consolidation at not more than the fair value of their property and franchises, has never been questioned, and the stock issued by the com-

solidated company has been dealt in for more than twenty years on the assumption of the validity of the valuation placed upon the property and franchises of the constituent companies at the time of the consolidation, the valuation placed upon such franchises should be accepted by the courts as conclusive of the value thereof at the time of such consolidation, as a basis for determining whether the statutory rate to be charged for gas yields a fair return. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Tax rate as evidence. — The fact that in taxing the value of such franchises the state has placed a higher valuation upon them than that fixed by the constituent companies at the time of the consolidation, is immaterial, the taxes imposed having been treated by the company as part of its operating expenses. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Increase in value. — In determining whether there has been an increase in the value of such franchises since the consolidation, the facts that there has been a great increase in the amount of gas supplied and that the tangible property of the company has greatly increased in value, cannot be taken as an indication of a like proportional increase in the value of the franchises. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

Allowance for good will. — In estimating the value of the property of a gas company, which has a monopoly of the gas business of a municipality, as a basis for determining the reasonableness of the statutory price to be charged for gas, no allowance can be made for good will. *Willcox v. Consolidated Gas Co.* (U. S.), 15-1034.

5. LIABILITY FOR NEGLIGENCE.

Degree of care required. — A company supplying natural gas is not an insurer of the safety thereof, but bound only to exercise the care and skill required under the circumstances. *Triple-State Natural Gas, etc., Co. v. Wellman* (Ky.), 1-64.

Negligence of consumer. — The owner of premises wherein a natural-gas meter is placed is not an agent of the gas company, and the latter is not liable for an explosion caused by the acts of such owner. *Triple-State Natural Gas, etc., Co. v. Wellman* (Ky), 1-64.

Right to blow off gas wells. — The owner of a gas well situated near a public highway may open it to blow out the water, though horses upon the highway are frightened thereby, providing care is exercised not to inflict injury upon persons driving past. *Snyder v. Philadelphia Co.* (W. Va.), 1-225.

Negligence in blowing off. — Persons using horses on a highway near a gas well have the right to presume that the owner will not open the same without warning, and are not guilty of contributory negligence in failing to turn and fly from it or in failing to give warning of their presence. *Snyder v. Philadelphia Co.* (W. Va.), 1-225.

When by the negligent blowing off of a gas well a teamster's horses are frightened and in attempting to control them the line breaks, causing him to fall from the wagon, the proximate cause of the injury is the blowing off of the well although the line is weak. *Snyder v. Philadelphia* (W. Va.), 1-225.

6. STATUTORY REGULATIONS TO PREVENT WASTE.

The owners of a gas well have no absolute right to do as they please with the gas after it is reduced to possession. The state legislature has power by appropriate legislation to protect from waste the natural resources of the state. *Commonwealth v. Trent* (Ky.), 4-209.

The Kentucky act to prevent the waste of gas, petroleum, etc., construed. *Commonwealth v. Trent* (Ky.), 4-209.

Waste as injury to adjacent owner. — Natural gas, while not subject to absolute ownership, is something to which owners of land under which it exists have a right, and one owner will not be allowed to waste the supply for the purpose of injuring his neighbors. Injunction will lie to restrain such threatened injury. *Louisville Gas Co. v. Kentucky Heating Co.* (Ky.), 4-355.

Where an owner who has leased lands to a gas company enters into a contract to lease the adjacent lands to another gas company, upon the fraudulent representation of the latter company that it will do nothing to injure the former company, and the latter company subsequently wastes the gas so as to injure the former company, a rescission of the lease for fraud will not be decreed, the further waste of the gas being a violation of law and the lessor having a remedy by an action for the protection of his rights. *Louisville Gas Co. v. Kentucky Heating Co.* (Ky.), 4-355.

7. RIGHT TO LAY PIPES IN STREETS AND HIGHWAYS.

Grant by highway authorities. — Certain rights of use in public highways, owing to their peculiar nature, are dependent on the will of the authorities having control of the streets and roads, and can be exercised only with their consent and under such restrictions as they, in the exercise of their discretion, may see fit to impose. Among these is included the right to convey natural gas, for public use, along a highway by means of pipes laid under the surface. Permission so to use a public road may be granted, by a County Court, to a natural person. *Hardman v. Cabot* (W. Va.), 9-1030.

Injunction. — In a suit to enjoin the use of a public road under permission therefor granted by a County Court, for the purpose of conveying natural gas along the road, by means of pipes laid under the surface thereof, for public consumption as a means of producing heat and light, where relief is sought on the ground that the pipes are not maintained, or the gas conveyed by means

of them, for such purpose, the plaintiff must allege and prove the fact; and the defendant may introduce evidence to prove that the pipes are so maintained and the gas so conveyed, in resistance of the effect of the plaintiff's evidence, under his denial of the allegation of the bill. *Hardman v. Cabot* (W. Va.), 9-1030.

Streets opened after grant of franchise. — A franchise authorizing a gas company to lay its mains in the streets of the city applies to streets which are not within the city limits when the franchise was granted, but were subsequently included in the city limits. *Seattle Lighting Co. v. Seattle* (Wash.), 18-1117.

GATES.

Duty of railroad company to maintain gates at crossings, see **RAILROADS**, 5 b (5).
Duty to stop, look, and listen at crossings protected by gates, see **RAILROADS**, 8 b (8) (b).

GAUGE.

Operation of broad gauge and narrow gauge railway in the same street, see **STREET RAILWAYS**, 4.
General appearance, see **APPEARANCES**.

GENERAL AVERAGE.

See **SHIPS AND SHIPPING**, 4.

GENERAL DENIAL.

See **PLEADING**, 4 a (1).
Mode of raising objection to premature suit, see **ACTIONS**.

GENERAL LEGACY.

See **WILLS**, 10 b.

GENERAL VERDICT.

See **CRIMINAL LAW**, 6 r (1); **TRIAL**, 8 b.

GENERAL WELFARE.

See **CONSTITUTIONAL LAW**, 5.

GEOGRAPHICAL FACTS.

Judicial notice of, see **EVIDENCE**, 1 g.

GEOGRAPHICAL TERMS.

Right to trademark and geographical terms, see **TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION**, 3 b.

GIFT ENTERPRISES.

See **LOTTERIES**.

GIFTS.

1. **GIFTS INTER VIVOS.**
 - a. What constitute.
 - b. Delivery.
 - c. Revocability.
2. **GIFTS CAUSA MORTIS.**
 - a. What constitute.
 - b. Delivery and acceptance.
3. **PAROL GIFTS OF LAND.**
4. **EVIDENCE.**

Capacity of married woman to dispose of personality by gift, see **HUSBAND AND WIFE**, 2 d.

Effect of gift or advancement, see **ADVANCEMENTS**.

Effect of gift to take effect at death of giver, see **WILLS**, 2.

Enforcement of intended gift as trust, see **TRUSTS AND TRUSTEES**, 4 b (4).

Gift for masses as charitable purpose, see **CHARITIES**, 1.

Gift of child by parent, see **PARENT AND CHILD**, 1 b.

Gifts of liquors as violation of liquor laws, see **INTOXICATING LIQUORS**, 5 d.

Validity of gift by husband to wife, see **HUSBAND AND WIFE**, 2 d.

1. GIFTS INTER VIVOS.

- a. What constitute.

Deposit in saving banks. — A deposit of money in a savings bank in the name of the depositor and another held to be a completed and joint gift, the donee being entitled upon the death of the donor to the sum in the bank remaining undrawn. *Industrial Trust Co. v. Scanlon* (R. I.), 3-863.

Delivery of stock. — Delivery of stock held to constitute a valid gift *inter vivos*. *Denunzio v. Scholtz* (Ky.), 4-529.

Gift by principal to agent. — A gift from a principal to his agent which satisfactorily appears to be the uninfluenced, deliberate, and intelligent act of the donor is not void merely because the donor had no independent advice. *Zimmerman v. Frushour* (Md.), 15-1128.

An action to set aside a gift from a principal to his agent cannot be maintained where it is satisfactorily shown by the defendant that when the gift was made the donor was of sound mind and in all material respects competent to transact the business, and that he fully understood the matter and needed no advice or assistance other than he had. *Zimmerman v. Frushour* (Md.), 15-1128.

Gift or loan. — In an action by an administrator to recover a sum of money given by the decedent to the defendant, who was the decedent's agent, evidence reviewed and held that the transaction was a gift and not a loan. *Zimmerman v. Frushour* (Md.), 15-1128.

b. Delivery.

Delivery to agent of donor. — Where property intended to be made the subject of a gift is placed by the donor in the possession of a third person as his agent for delivery to the donee, the death of the donor before such delivery to the donee has been made revokes the agency, and no title passes to the donee. Such a gift is incomplete for want of delivery to the donee. *Trubey v. Pease* (Ill.), 16-370.

Delivery to trustee of donee. — Where such property is delivered by the donor to a third person as trustee for the donee, the delivery to the trustee is deemed, in law, a delivery to the donee, and the gift, being irrevocable, is not affected by the death of the donor before delivery to the donee in person. *Trubey v. Pease* (Ill.), 16-370.

Evidence. — In a proceeding by the personal representative of a decedent to recover personal property alleged to belong to the estate of the decedent, evidence examined and held to show a delivery of the property in question to a third person as agent of the decedent for delivery to the intended donees, rather than as trustee for such donees. *Trubey v. Pease* (Ill.), 16-370.

c. Revocability.

Completed gift. — Where a father, during the time that he occupies the dominant position, makes a completed gift *inter vivos* to his children, voluntarily, with full understanding of its effect, and without reserving the power of revocation, he cannot thereafter revoke it, though it is improvident. *James v. Aller* (N. J.), 6-430.

2. GIFTS CAUSA MORTIS.

a. What constitute.

Gift of check. — A check on a bank for the entire amount of the drawer's credit therein, delivered to a person as a gift of money, though unaccepted by the bank, operates as an assignment of the fund; and if so delivered and intended by the donor, in anticipation of death from impending peril from which he subsequently dies, it is valid as a gift *causa mortis*. It is unnecessary that the check shall disclose on its face that it covers the entire bank credit. That fact may be shown *dehors* the instrument. *Varley v. Sims* (Minn.), 10-473.

Gift causa mortis or will. — An instrument transferring personal property to a trustee to be delivered to a third person upon the death of the party executing the instrument, which does not reserve the power to revoke the same, accomplishes a gift of the property, and is not testamentary in its character. *Robertson v. Robertson* (Ala.), 10-1051.

Reservation of interest in donor. — An instrument transferring certain bonds as a gift which does not reserve the right to the donor to defeat or jeopardize the same is a valid gift, although the donor reserves

an interest on the bonds during his life, as such reservation does not operate as a limitation upon the present transfer of the title to the property. *Robertson v. Robertson* (Ala.), 10-1051.

b. Delivery and acceptance.

Necessity of delivery. — The necessity of delivery to the validity of a gift *causa mortis*. *Noble v. Garden* (Cal.), 2-1001.

Sufficiency of delivery to third person. — A delivery of property to a third person held insufficient as a gift *causa mortis*. *Noble v. Garden* (Cal.), 2-1001.

The delivery of a check as a gift *causa mortis* to a person other than the donee, but for the donee's use and benefit, and with instructions to deliver the same to the donee, is a sufficient delivery to pass title, though it does not reach the hands of the donee until after the donor's death. The person to whom the delivery is made is presumed, in the absence of a contrary showing, to be the trustee of the donee. *Varley v. Sims* (Minn.), 10-473.

Presumption of acceptance. — Where a gift *causa mortis* is beneficial to the donee and imposes no burdens upon him, the acceptance by him is presumed as a matter of law. *Varley v. Sims* (Minn.), 10-473.

3. PAROL GIFTS OF LAND.

Validity. — A parol gift of land, where the donee goes into possession and makes permanent improvements, will be upheld in equity if not at law. *Bevington v. Bevington* (Ia.), 12-490.

Sufficiency of evidence to prove. — To establish a parol gift of land, the proof of the gift need not be undisputed or such as to amount to absolute certainty. Reasonable certainty of the gift is sufficient. *Bevington v. Bevington* (Ia.), 12-490.

Power of equity to require execution of deed. — Although there is no direct proof of an express promise, in making a gift of land, to execute a deed, a court of equity has power to require the execution of a deed. *Bevington v. Bevington* (Ia.), 12-490.

4. EVIDENCE.

Presumption of undue influence. — The presumption of undue influence in respect to gifts by a man to his mistress is not a presumption of law, but is merely a presumption of fact, which will sustain a judgment based on undue influence if the trial court chooses to adopt it, but which the trial court is not constrained to adopt. *Platt v. Elias* (N. Y.), 9-780.

GIN.

Cotton gin as nuisance, see NUISANCES, 1 b.
Erection of cotton gins in city, see MUNICIPAL CORPORATIONS, 4 d (3).

GIRL.

Description of female in indictment for incest, see **INCEST**, 2.

GOOD BEHAVIOR.

Commutation of punishment, see **CRIMINAL LAW**, 7 a (1).

GOODS.

Carriers of goods, see **CARRIERS**, 4.

Sales in bulk acts, see **FRAUDULENT CONVEYANCES**, 3.

Sales of goods, see **FRAUDS**, **STATUTE OF; FRAUDULENT CONVEYANCES; SALES; SUNDAYS AND HOLIDAYS**.

GOOD WILL.

1. IN GENERAL.

2. RIGHT OF VENDOR TO SET UP RIVAL BUSINESS.

Allowance for good will in valuation of franchise, see **GAS AND GAS COMPANIES**, 4 c.

Authority of partner to sell good will of firm, see **PARTNERSHIP**, 5 a.

Proceeds of sale of good will as income, see **LIFE ESTATES**, 1 b.

Validity of sale of good will of business, see **MONOPOLIES AND CORPORATE TRUSTS**, 2 c.

1. IN GENERAL.

What constitutes. — Good will is an advantage and benefit gained by business establishments beyond the value of the money and property invested therein. It is property in the legal sense of the term, and it is subject to sale in connection with the business precisely as other personal property is subject to sale. *Haugen v. Sundseth* (Minn.), 16-259.

Sale of business as passing good will. — The good will of a firm engaged in mercantile business is a species of property which will be taken into consideration in valuing the business as a going concern, but if the business is sold out entirely and nothing is said about the good will it goes with the property. *Didlake v. Roden Grocery Co.* (Ala.), 18-430.

2. RIGHT OF VENDOR TO SET UP RIVAL BUSINESS.

Retiring partner. — Where the member of a partnership of dentists in a city, who has sold his interest in the firm and good will, resumes practice and sends out printed circulars to former patients, giving the name of the old firm and announcing that having opened an office in the city he solicits their customs, there is a breach of the implied

covenant against setting up a rival business, and a firm which has acquired the purchaser's rights under the contract is entitled to an injunction enjoining the setting up of such business within the limits of the city and for such money damages as may have been sustained by the breach of the covenant. *Foss v. Roby* (Mass.), 11-571.

Where a firm of dentists dissolves, one partner selling to the other his interest in the office, furniture, and dental equipment with the good will of the business, the agreement is to be construed as an express covenant by the seller to render the former practice of the firm secure to the purchaser by not competing himself under conditions by which it might either be impaired or destroyed. The agreement, as so construed, is not invalid because unlimited in time, for the consideration paid must be treated as having been accepted by the seller as a full equivalent for a release of his right to compete within a restricted area, if by such competition the good will sold might be rendered insecure. *Foss v. Roby* (Mass.), 11-571.

Bankruptcy of purchaser. — The rights of the purchaser of a business and good will are not lost by the subsequent bankruptcy of the purchaser, and an action may be maintained on such rights by a firm composed of the bankrupt and another, which by conveyance from the transferee of the trustee in bankruptcy has become invested with the rights of the bankrupt under the contract. *Foss v. Roby* (Mass.), 11-571.

GOVERNMENT.

Competency of government employee as juror in criminal case, see **JURY**, 5 e.

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Liability for infringement of patent, see **PATENTS**, 4.

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GOVERNOR.

See **STATES**, 2.

Power to create public office, see **CONSTITUTIONAL LAW**.

GRACE.

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GRAND JURY.

1. **SELECTION**, 837.
2. **QUALIFICATIONS AND GROUNDS OF CHALLENGE**, 837.
3. **EXCUSES**, 838.
4. **POWER OF COURT TO FILL VACANCIES**, 838.
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Admissibility of statements by accused before grand jury, see **CRIMINAL LAW**, 6 n (11) (a).

Discharge by grand jury as termination of prosecution, see **MALICIOUS PROSECUTION**, 1 d.

Disclosure of evidence by grand juror as contempt of court, see **CONTEMPT**, 1 h.

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Necessity of presence of grand jurors at return of indictment, see **INDICTMENTS AND INFORMATION**, 2.

Power of state to modify or abolish grand juries, see **INDICTMENTS AND INFORMATION**, 1.

Signing indictment, see **INDICTMENTS AND INFORMATION**, 8.

Testimony as grand juror to impeach indictment, see **INDICTMENTS AND INFORMATION**, 6.

1. **SELECTION.**

Statutory method exclusive. — Where the legislature adopts a method for drawing

and selecting a grand jury, such method is the only one by which a grand jury may be legally organized. *Shepherd v. State* (Miss.), 10-963.

Effect of illegal selection. — Where a statute prescribing the method of selecting grand jurors provides that the jurors shall be selected by chance and by a person designated by the trial judge, it is a manifest violation of the statute for the trial judge himself to select the jurors and to choose such persons only as he desires to place on the jury; and an indictment returned by the grand jury so selected is void. *Shepherd v. State* (Miss.), 10-963.

Power of court to recall after discharge. — The court has the essential and inherent power to recall a grand jury during the term, and, if an order has been entered on the minutes discharging that body, to set aside such order at any time during the term, when their recall is necessary to the ends of justice. *Haynes v. State* (Miss.), 17-653.

Power of court to impanel new jury. — Where an indictment is set aside after the grand jury which was originally organized for the term and by which it was found has been duly discharged, the court may order all the grand jurors who have been drawn for service for the current year to appear, and may impanel from their number a new grand jury to consider the discharge against the accused. *State v. Disbrow* (Ia.), 8-190.

2. **QUALIFICATIONS AND GROUNDS OF CHALLENGE.**

Florida statutes construed. — The Florida statute providing that the provisions of a law covering the qualifications, etc., of petit jurors shall apply to grand jurors is not to be construed as making all grounds of challenge to the favor applicable to a petit juror, grounds of disqualification of a grand juror. *Peebles v. State* (Fla.), 4-870.

The only grounds of challenge to the favor applicable to the grand jurors in Florida are those provided for by section 2810, Revised Statutes. *Peebles v. State* (Fla.), 4-870.

Prior service on coroner's jury. — Under the Arkansas statute providing that every person held to answer a criminal charge may object to the competency of any one summoned to serve as a grand juror, on the ground that "he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been summoned or bound in a recognizance as such," it is no ground for challenging a grand juror, who is neither the prosecutor nor the complainant against the accused in a prosecution for murder, that he served on the coroner's jury, nor is it a ground for challenging him that he is a witness for the prosecution unless he has already been "summoned or bound in a recognizance" at the time he is challenged. *Sullins v. State* (Ark.), 9-275.

3. EXCUSES.

Presumption as to validity. — The action of the trial judge in accepting the excuses of persons sworn in as grand jurors will be presumed to be correct on appeal, in the absence of proof to the contrary. *Posey v. State* (Miss.), 4-221.

4. POWER OF COURT TO FILL VACANCIES.

Increase beyond original number. — Where a trial judge is empowered by statute to determine the number which shall constitute a grand jury, and is also empowered to fill vacancies by a statute which prescribes no mode of procedure, he may, in filling the vacancies, increase the panel beyond the number originally impaneled, provided he does not exceed the statutory maximum. *Posey v. State* (Miss.), 4-221.

Reduction below statutory minimum. — Where after the impaneling and swearing of a grand jury but before its retirement the trial judge excuses two members of the panel, thereby reducing the membership of the body below the minimum prescribed by statute, it is his duty to refill the panel. *Posey v. State* (Miss.), 4-221.

Waiver of objection to irregularity. — An indictment found by the grand jury will not be quashed for irregularity in filling vacancies in such body, where no exception was taken before the impanelment, even though at such time the person indicted was not in custody, or under bond, and had no reason to believe that his case would be investigated by the grand jury. *Posey v. State* (Miss.), 4-221.

The failure to except to the action of the trial judge in filling vacancies in the grand jury from among the bystanders, in disregard of a constitutional provision, is a waiver of irregularity, and the grand jury becomes a lawful body. *Posey v. State* (Miss.), 4-221.

5. EVIDENCE BEFORE GRAND JURY.

a. Weight and sufficiency.

Power of court to determine. — The sufficiency of the evidence before the grand jury to warrant an indictment cannot be inquired into by the court. *In re Kennedy* (Cal.), 1-840.

The rule that the sufficiency of evidence before the grand jury to warrant an indictment cannot be inquired into by the court is not affected by a statute providing that the district attorney may, if he so desires, have the testimony given before the grand jury taken down by a stenographer and that a copy thereof shall be given to the defendant upon his arraignment. *In re Kennedy* (Cal.), 1-840.

b. Right of accused to inspect minutes.

In general. — A person charged with crime is not entitled, before or at the time of trial, to the minutes of the evidence taken before the grand jury, on which the indictment was found against him, or to an in-

spection of a transcript of such evidence, and it is error for the court to order the prosecuting attorney to deliver said minutes, or a transcript of said evidence so taken, to the defendant or his counsel, or to order the prosecuting attorney to permit either of them to make an inspection thereof. *State v. Rhoads* (Ohio), 18-415.

Defendant's own testimony. — The defendant in a criminal prosecution is not entitled to inspect the records of the grand jury in so far as they relate to testimony given by him concerning the transaction involved upon the trial. And such inspection should not be awarded either before or at the trial for the purpose of preparing for trial and for laying the foundation for the impeachment of immune witnesses whose testimony might be different upon the trial from that given before the grand jury. *Havenor v. State* (Wis.), 4-1052.

c. Accused as witness.

Waiver of privilege. — An indictment will not be quashed on the ground that the accused gave self-incriminating evidence before the grand jury if he testified without claiming his constitutional privilege; and this is so though he was not cautioned before testifying, where it does not appear that at the time he was charged with or suspected of the crime named in the indictment. *State v. Duncan* (Vt.), 6-602.

d. Admissibility on trial.

To prove immunity of accused. — Where the defendant in a criminal prosecution claims the benefit of immunity from prosecution and punishment provided by the Wisconsin statutes, on the ground that he is being prosecuted on account of a transaction concerning which he has given evidence before the grand jury, the minutes of such testimony before the grand jury and the testimony of the grand jurors as to what he testified to before them pertaining to the transaction are admissible in evidence to establish immunity from prosecution. *Havenor v. State* (Wis.), 4-1052.

Competency of stenographer's minutes. — Proof of the testimony of a defendant in a criminal prosecution given before the grand jury cannot be made by offering in evidence the records of the grand jury's proceedings as kept by the stenographer, upon the ground that they are statements made by the officials in the pursuance of official duty. *Havenor v. State* (Wis.), 4-1052.

6. SECRECY OF PROCEEDINGS.

Testimony as to number concurring in indictments. — After an indictment has become part of the records of the court, the members of the grand jury will not be permitted to testify as to whether the requisite number of grand jurors concurred in finding the same. *Hooker v. State* (Md.), 1-644.

Even if the court where an indictment is found may inquire into its validity by re-

ceiving the testimony of the grand jurors upon a motion to quash, a similar power to inquire into the record does not exist in the court of another county to which the cause is removed. *Hooker v. State* (Md.), 1-644.

Minutes not a public record. — The minutes of the grand jury which the clerk is required by the Wisconsin statute to keep cannot be treated as a public record, open to the inspection of all persons, but secrecy must be maintained in regard to the proceedings recorded within the bounds prescribed by the statutes and decisions of the state. *Havenor v. State* (Wis.), 4-1052.

Disclosure in furtherance of justice. — The secrecy imposed by the common law and statutes upon the proceedings before a grand jury will not prevent the public or an individual from proving by members of the grand jury in a court of justice what has passed before the grand jury, when, after the purpose of secrecy has been effected, such disclosure becomes necessary in furtherance of justice or for the protection of public or individual rights. *State v. Campbell* (Kan.), 9-1203.

Kansas statute construed. — The language of the Kansas statute providing that "no grand juror shall disclose any evidence given before the grand jury, nor the name of any witness who appeared before them, except when lawfully required to testify as a witness in relation thereto," is not limited by the provisions of the statute permitting such evidence in certain cases. *State v. Campbell* (Kan.), 9-1203.

When obligation of secrecy terminates. — The policy of the law which requires secrecy as to the evidence adduced before the grand jury does not require such evidence to be kept secret after the presentment and indictment have been published, the defendant has been taken into custody, and the grand jury have been finally discharged, and a grand juror does not violate his oath by disclosing such evidence after that time. *Atwell v. United States* (U. S.), 15-253.

GRANTEE.

See DEEDS.

GRANTOR.

See DEEDS.

GRANTS.

See PUBLIC LANDS.

Construction of grants, see BOUNDARIES, 1.

GRATUITY.

Exemption from jury duty, see JURY, 3.

Pay to disabled postal clerks, see POST OFFICE.

GRAVEYARDS.

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GREEK LETTER FRATERNITIES.

Power of school board to prohibit Greek letter fraternities in schools, see SCHOOLS, 5 a.

GROSS AMOUNT.

Allowance of alimony, see ALIMONY AND SUIT MONEY, 4 b.

GROSS EARNINGS.

Taxation of gross earnings, see RAILROADS, 3 b.

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Taxation of gross receipts of corporations, see TAXATION, 11 c.

GROUND RENTS.

1. ASSIGNMENT, 839.

2. EXTINGUISHMENT BY MERGER, 840.

Condemnation of land subject to ground rent, see EMINENT DOMAIN, 7 e.

1. ASSIGNMENT.

Assignment to irresponsible person.—

It is not a fraud upon the owner of the reversion in land out of which a ground rent issues for the owner of the term to assign it to a third person for the express purpose of terminating his future liability for rent, provided the conveyance is designed by both parties to divest the grantor of the estate and vest it in the grantee; and this is so though the termor's grantee has no financial responsibility. *Hartman v. Thompson* (Md.), 10-92.

Necessity of valuable consideration.

—The only duty which the assignee of a ground rent owes the reversioner is to pay the stipulated rent and the taxes, so long and so long only as he continues to be the owner of the leasehold estate, and he may terminate this liability by an assignment divesting himself of the estate, though the assignment is without a valuable consideration. *Hartman v. Thompson* (Md.), 10-92.

Burden of proving valid assignment.

—In an action by the reversioner to recover certain instalments of ground rent issuing out of a tract of land, and certain taxes paid by the plaintiff, where the defendant asserts that he is not liable because he has made an assignment which has had the effect of vesting the leasehold estate in a third person, the burden of proving that fact is upon the defendant. *Hartman v. Thompson* (Md.), 10-92.

Validity of assignment as question for jury. — Evidence reviewed, in an action by the reversioner of land out of which a

ground rent issues against the assignee of the term to recover overdue instalments of rent, and held sufficient to require the submission to the jury of the questions whether the defendant has divested himself of liability by a valid assignment of the term to a third person, and whether such assignment has been consummated by the delivery and acceptance of the conveyance. *Hartman v. Thompson* (Md.), 10-92.

In an action by the reversioner of land out of which a ground rent issues against the assignee of the term to recover overdue instalments of rent, it is improper to submit to the jury at the plaintiff's request a question of law, viz., whether the alleged deed of assignment of the term was "a good and sufficient conveyance thereof;" but the defendant is not injured thereby where other parts of the charge contain language showing that the objectionable language means nothing more than "a *bona fide* conveyance." *Hartman v. Thompson* (Md.), 10-92.

2. EXTINGUISHMENT BY MERGER.

When merger takes place. — Where the owner of a ground rent purchases the fee, the two estates merge, though the purchase is made at a sheriff's sale and is made subject to rent; and therefore the rent is extinguished by a subsequent mortgage of fee without exception of the rent. *Frank v. Guarantee Trust, etc., Co.* (Pa.), 8-991.

Where the owner of a ground rent purchases the fee, the two estates merge, notwithstanding the existence of an intervening secret trust of which the purchaser has no knowledge either actual or constructive. *Frank v. Guarantee Trust, etc., Co.* (Pa.), 8-991.

When merger does not take place. — A ground rent is not merged by the purchase of the land out of which it issues by the owner of the fee, where a third person who is a stranger to the title to the fee holds an intervening estate in, or charge upon, the land. *Frank v. Guarantee Trust, etc., Co.* (Pa.), 8-991.

GROUSE.

See GAME AND GAME LAWS.

GUARANTY.

1. WHAT CONSTITUTES CONTRACT OF GUARANTY.
2. CONSIDERATION.
3. DISCHARGE OF GUARANTOR.

Enforcement of contract of guaranty, see SPECIFIC PERFORMANCE, 3 b.

Power of corporation to guarantee stock of another corporation, see CORPORATIONS, 4 c.

Verbal guaranty by transferrer of negotiable instrument, see FRAUDS, STATUTE OF, 6 d.

1. WHAT CONSTITUTES CONTRACT OF GUARANTY.

Building contractor's bond. — A building contractor's bond is a contract of guaranty as well as of indemnity, where, in addition to a covenant to keep the obligee harmless from loss, it contains separate and distinct covenants binding the surety to furnish all materials and labor necessary to complete the work specified in the contract. *Equitable Trust Co. v. National Surety Co.* (Pa.), 6-465.

Continuing guaranty. — What constitutes a continuing guaranty. *First National Bank v. Waddell* (Ark.), 4-818.

Distinction between guaranty and offer to guarantee. — Where an order for merchandise contains a condition that it shall not be a complete and binding contract until accepted by the vendor, and there is an indorsement thereon that for value received and for the purpose of inducing the vendor to approve the contract, the undersigned guarantees the payment of all claims arising and of any notes taken under the contract, waives demand, notice of nonpayment, and protest, and consents to varying the time of payment or method of settling accounts without affecting his liability as guarantor, such order not being accepted until six days after the execution of the indorsement, the indorsement is in legal effect an offer to guarantee and not an absolute guaranty. *T. and H. Smith & Co. v. Thesmann* (Okla.), 15-1161.

An offer or proposal of guaranty does not become a binding obligation upon the guarantor until such offer or proposal has been accepted by the guarantee, and notice of his acceptance has been given to the guarantor. *T. and H. Smith & Co. v. Thesmann* (Okla.), 15-1161.

2. CONSIDERATION.

Advancing money. — The advancing of money induced by a guaranty is a sufficient consideration for the guaranty. *H. P. Moore Lumber Corp. v. Walker* (Va.), 19-314.

3. DISCHARGE OF GUARANTOR.

Where guaranty is continuing. — Discharge of continuing guaranty. *First National Bank v. Waddell* (Ark.), 4-818.

Change in membership of creditor firm. — A guaranty to a firm of a customer's running account is not operative as to credit extended after the admission into such firm of a new member, in the absence of anything to show that such change in the firm was originally contemplated by the guarantor. *John H. Lyon & Co. v. Plum* (N. J.), 15-1019.

Delay in realizing upon collateral. — Depreciation in the value of collateral given by a principal to secure his debt by reason of delay in realizing upon such collateral will not discharge his guarantor to the extent of the depreciation, where there is no negligence, the delay is not unreasonable, and no request is made for the sale of the collateral. *First National Bank v. Waddell* (Ark.), 4-818.

GUARDIAN AD LITEM.

See INFANTS, 3 f.

GUARDIAN AND WARD.

1. APPOINTMENT.
2. POWERS OF GUARDIAN.
3. ACCOUNTING.
4. LIABILITY OF WARD FOR GUARDIAN'S ACTS.

See INFANTS.

Competency of guardian suing for ward to testify as to transactions with decedents, see WITNESSES, 3 c (1).

Defective guardian's bond good as common-law obligation, see SURETYSHIP, 2.

Embezzlement by guardian, see EMBEZZLEMENT, 2.

Liability of guardian for advising ward to separate from husband or wife, see HUSBAND AND WIFE, 6 c.

Power of guardian to commit ward to insane asylum, see INSANITY, 3.

Property held by guardian as subject to garnishment, see GARNISHMENT, 1 b.

Right of guardian to contest will on behalf of ward, see WILLS, 7 e (1).

Undue influence presumed from relation, see WILLS, 5 c (1).

1. APPOINTMENT.

Right of mother to appoint testamentary guardian. — In the absence of express statutory authorization, a mother has no power to appoint a testamentary guardian for her children. *Hernandez v. Thomas* (Fla.), 7-446.

2. POWERS OF GUARDIAN.

Authority of guardian of married man. — The control over the person of a married man under the guardianship of a person must be exercised by the guardian in subordination to every just right of the wife, and except under very exceptional circumstances the wife is entitled to the society of her husband free from the restraint of the guardian. *In re Chace* (R. I.), 3-1050.

Sale of ward's property. — A guardian may transfer the personal property of his ward without procuring from the probate court the license provided for by the Massachusetts statute. *Gardner v. Beacon Trust Co.* (Mass.), 5-581.

In the absence of statutory restrictions, a guardian may sell the personality of his ward, and compromise and compound debts, without first obtaining an order from the court so to do, subject to the liability to account where he has acted without due regard to the ward's interest. *Nashville Lumber Co. v. Barefield* (Ark.), 20-968.

Compromise of claims. — Where the compromise by a guardian of a claim due his ward is made without sufficient justification

or fraudulently, or on a grossly inadequate consideration, the compromise may be impeached on the appeal of the action in which it is presented as a defense, by proving that it was not made in good faith, but in fraud of the ward's rights. *Nashville Lumber Co. v. Barefield* (Ark.), 20-968.

Equity has jurisdiction of a bill by a beneficiary under a policy of life insurance to set aside a settlement of a claim thereunder entered into under the direction of the probate court by the guardian of the beneficiary and the insurance company where fraud in the making of the settlement is charged. *Berdan v. Milwaukee Mut. Life Ins. Co.* (Mich.), 4-332.

A settlement of a claim under a policy of life insurance made between the guardian of the beneficiary named in the policy and the insurance company issuing it, though authorized by the probate court, will be set aside at the suit of such beneficiary when not made in good faith. *Berdan v. Milwaukee Mut. Life Ins. Co.* (Mich.), 4-332.

3. ACCOUNTING.

Effect of settlement. — Where a partial account presented by a guardian is not acted on at the time, but is subsequently allowed on the presentation of a final account, and no exception is taken thereto, a balance shown by that account in favor of the guardian is conclusive against the ward, and must be deducted from the proceeds of the ward's real estate subsequently received by the guardian. *Lanman v. Lanman* (Mass.), 19-508.

Transactions after majority of ward. — On final accounting by a guardian who has rendered services to the ward under an agreement, made after the ward attained his majority, that the services should be applied as payments to a balance of the estate remaining in the guardian's hands, the guardian will be allowed credit for the services rendered, but only to the extent of such balance in his hands. As to any excess over that amount the relation between the parties is merely that of debtor and creditor and not within the jurisdiction of the probate court. *Lanman v. Lanman* (Mass.), 19-508.

4. LIABILITY OF WARD FOR GUARDIAN'S ACTS.

An agreement by the guardian of an insane person, in leasing premises owned by his ward, that he will cover the opening to a certain cellar way on the premises, to avert the danger of falling into it, is not binding on the ward, and does not give the lessee the right to assume that the estate of the insane person will be liable in case of injury by reason of the guardian's failure to comply with his agreement. *Reams v. Taylor* (Utah), 11-51.

GUARDING MACHINERY.

Statutory requirement, see MASTER AND SERVANT, 3 e (2).

GUARDS.

Cattle guards on railroad, see **FENCES**, 3.
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GUESSING CONTEST.

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GUESTS.

Who are guests, see **INNS, BOARDING HOUSES, AND APARTMENTS**.

GUILT.

Actual guilt as defense to action for malicious prosecution, see **MALICIOUS PROSECUTION**, 2 c.

GUILTY.

Former plea of guilty as evidence of guilt, see **CRIMINAL LAW**, 6 n (4).
Plea of guilty generally, see **CRIMINAL LAW**, 6 j.
Plea of guilty as defense to action for false imprisonment, see **FALSE IMPRISONMENT**, 3.
Right to plead guilty in felony cases, see **JURY**, 1 b (1).

GUNPOWDER.

See **EXPLOSIONS AND EXPLOSIVES**.

GUNS.

See **WEAPONS**.

HABEAS CORPUS.

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2. GROUNDS OF REMEDY, 842.
3. JURISDICTION OF COURTS TO ISSUE WRIT, 843.
4. THE PETITION, 844.
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Grounds of remedy, sentence in excess of power of court, see **CRIMINAL LAW**, 7 b (6).

Power to award costs in habeas corpus proceedings, see **COSTS**, 1.

Review of conviction for contempt, see **CONTEMPT**, 6 a.

Right of husband to maintain habeas corpus for custody of wife, see **HUSBAND AND WIFE**, 8.

Validity of arrest for breach of condition of pardon, see **PARDON, REPRIEVE, AND AMNESTY**, 2 b.

1. NATURE AND SCOPE OF REMEDY.

Use as substitute for appeal. — A writ of habeas corpus cannot be used to perform the office of an appeal or writ of error. *Welty v. Ward* (Ind.), 3-556.

The writ of habeas corpus cannot be substituted for a writ of error, or used to review errors that do not go to the jurisdiction of the court. *State v. Pratt* (S. Dak.), 11-1049.

The appellate or revisory jurisdiction of an appellate court is not invoked by the institution therein of an original habeas corpus proceeding. Errors or irregularities which do not affect the jurisdiction of the trial court do not warrant the discharge of the accused upon habeas corpus. *Hovey v. Sheffner* (Wyo.), 15-318.

Use to bring convict into court. — A writ of habeas corpus may be used to bring a convict from the penitentiary into court for trial upon an indictment there pending against him, while he is serving under a conviction entered against him in another court of the state. *Rigor v. State* (Md.), 4-719.

Necessity of actual restraint. — When it appears that at the time of the service of a writ of habeas corpus upon the sheriff, the complainant was not actually in the latter's company, the court will dismiss the petition without considering the merits. *In re O'Brien* (Mont.), 1-373.

Examination before magistrate as condition precedent. — Under the New York statute providing that "a person imprisoned or restrained in his liberty" is entitled to a writ of habeas corpus "for the purpose of inquiring into the cause of the imprisonment or restraint," a person who has been arrested on a criminal charge may sue out a writ without awaiting an examination before a magistrate. *People ex rel. Perkins v. Moss* (N. Y.), 10-309.

2. GROUNDS OF REMEDY.

Defective warrant. — A person who has been arrested under a criminal warrant is not entitled to be discharged on habeas corpus, where it appears that the magistrate who issued the warrant had jurisdiction of the subject-matter and of the person, and it further appears that the warrant was not so "defective in a matter of substance required by law" as to render it void. *People ex rel. Farrington v. Mensching* (N. Y.), 10-101.

In a habeas corpus proceeding brought by a person arrested under a warrant issued by a magistrate, the court, for the purpose of determining whether the magistrate has jurisdiction to cause the arrest, will look back of his warrant to see if the warrant is supported by the facts stated in the depositions of the prosecutor and his witnesses. *People ex rel. Perkins v. Moss* (N. Y.), 10-309.

Defective commitment or mittimus.—Where a legal sentence has been imposed and the person sentenced is in custody thereunder, a defect in the commitment or mittimus is not available in a habeas corpus proceeding. *Tanner v. Wiggins* (Fla.), 14-718.

Void judgment.—The writ of habeas corpus cannot operate as a proceeding in error. If a person is restrained of his liberty by virtue of an absolutely void judgment, he may be discharged on habeas corpus. To obtain release by such a proceeding, the judgment or sentence must be more than merely erroneous; it must be an absolute nullity. *Michaelson v. Beemer* (Neb.), 9-1181.

A judgment or order committing to jail upon a charge of contempt in disobeying a decree, made in the absence of the person, is void, and a person imprisoned under it will be relieved by a writ of habeas corpus. *Ex p. Mylius* (W. Va.), 11-812.

Excessive sentence.—A prisoner confined under an excessive sentence cannot obtain his discharge under habeas corpus until he has performed so much of the judgment or served out so much of the sentence as it was within the power of the court to impose. *Harris v. Lang* (D. C.), 7-141.

Arrest under unconstitutional statute.—One who is arrested under an unconstitutional statute is entitled to be discharged on habeas corpus. *Ex p. Harrison* (Mo.), 15-1.

Conviction under unconstitutional statute.—Where a person is held in custody under a judgment of conviction, and the judgment is assailed on the ground that it is not merely erroneous but void because it is based on a charge made under an invalid provision of a statute, and the charge constitutes no offense under the laws of the state, the validity of the statutory provision defining the offense may be determined in habeas corpus proceedings; and if the statute is invalid and the charge constitutes no offense under the laws of the state, the petitioner may be discharged from custody under the charge. *Harper v. Galloway* (Fla.), 19-235.

Former jeopardy.—Even if an erroneous or unlawful discharge of a jury, as where such discharge takes place on a nonjudicial day, has the effect of an acquittal, thus enabling the accused on a second trial to plead former jeopardy, such discharge does not divest the court of jurisdiction of the case either on the same or on another information or indictment for the same offense, and therefore such alleged former jeopardy is not ground for discharge on habeas corpus. *Hovey v. Sheffner* (Wyo.), 15-318.

Prosecution barred by statute of limitations.—The operation of a statute of limitations, barring a prosecution for a criminal offense, is not ground for the release of the accused on habeas corpus. *Ex p. Blake* (Cal.), 18-815.

Imprisonment by magistrate not legally appointed.—A commitment to jail issued by a person who has been appointed justice of the peace by the board of county commissioners without authority of law, is void, and a person imprisoned thereunder is entitled to be discharged on habeas corpus. *Ballantyne v. Bower* (Wyo.), 17-82.

Judgment of court-martial.—The proceedings of a military court cannot be reviewed on habeas corpus, when it appears that the military tribunal has jurisdiction over the offense charged and that the offender is a person who is amenable to its jurisdiction. *McGorray v. Murphy* (Ohio St.), 17-444.

Obtaining custody of children.—When a child has been committed to a benevolent institution under the provisions of the Georgia statute providing for the commitment of wayward, etc., children to a benevolent institution, the parent may apply to any judge having the authority to issue a writ of habeas corpus, alleging that the conditions have changed since the commitment was made, and that the parent is now a fit person to have the custody of the child, and is willing and able to maintain and educate it, and if the judge is satisfied that such is the truth he is authorized to restore the child to the custody of the parent. The remedy given in the act to the parent applying for the return of the child by application to the authorities of the institution is merely cumulative, and does not oust the jurisdiction of the court. *Kennedy v. Meara* (Ga.), 9-396.

3. JURISDICTION OF COURTS TO ISSUE WRIT.

Inferior courts, in general.—Jurisdiction does not depend on the correctness of the decision made but on authority to determine the existence or nonexistence of the fact alleged, and render judgment accordingly, and although an inferior court judge has general jurisdiction of habeas corpus, he has no jurisdiction to issue the writ to test the validity of a conviction which the Supreme Court has affirmed, but which is alleged to be void, as such judge has no authority to determine the fact contrary to the judgment of the Supreme Court. *People ex rel. Stead v. Superior Court* (Ill.), 14-753.

After conviction affirmed by higher court.—The fact that the judges of the inferior courts have concurrent jurisdiction with the Supreme Court in habeas corpus proceedings does not authorize a judge of an inferior court to entertain habeas corpus proceedings for the release of a prisoner whose conviction has been affirmed by the Supreme Court. *People ex rel. Stead v. Superior Court* (Ill.), 14-753.

The judgment of the Supreme Court affirming the conviction of the defendant in a crim-

inal case must be regarded as an adjudication by that court, that the judgment of conviction is valid in all particulars, and the validity of the conviction cannot thereafter be questioned by habeas corpus proceedings in an inferior court, even as to a question not presented by an assignment of error to the Supreme Court. *People ex rel. Stead v. Superior Court (Ill.)*, 14-753.

4. THE PETITION.

Who may present. — The wife of a person illegally restrained of his liberty is a proper person to petition for a writ of habeas corpus. *In re Chace (R. I.)*, 3-1050.

Sufficiency of allegations. — The writ of habeas corpus should never issue unless a petition is presented which is in substantial accord and compliance with the provisions of the statute, and which shows on its face that the petitioner is entitled to his discharge. *People ex rel. Stead v. Superior Court (Ill.)*, 14-753.

5. THE RETURN.

Sufficiency. — In habeas corpus proceedings to obtain the release of the petitioner, committed to the custody of the sheriff for contempt, the objection of the petitioner to the sufficiency of the return of the sheriff to said writ that certain portions of said return are improper and constitute no legal part of the return, should be sustained so far as the objection applies to portions of the return wherein the sheriff alleges, on information and belief, matters immaterial and foreign to the proceeding and casting aspersion and accusation on the petitioner and his counsel, but should be overruled in so far as the objection applies to any part of the findings or judgment of the lower court, or to documents of record in the lower court referred to or made a part of the return on which the judgment was based. *Ex p. Hedden (Nev.)*, 13-1173.

6. HEARING AND DETERMINATION.

a. Questions determinable.

Constitutionality of statute. — The validity of the statute under which a person is imprisoned may be tested in habeas corpus proceedings. *Ex p. Hollman (S. Car.)*, 14-1105.

One who has been convicted of a statutory offense cannot procure his release by habeas corpus on the ground that the statute is unconstitutional, as such question can be raised only upon direct review by appeal or error of the judgment of conviction. *People v. District Court (Colo.)*, 3-579.

A peremptory writ of prohibition lies to restrain a District Court from considering in habeas corpus proceedings the constitutionality of a statute under which the petitioner for the writ was convicted before a justice of the peace. *People v. District Court (Colo.)*, 3-579.

Legal existence of court. — Applying the general rule that the title of a *de facto*

officer cannot be attacked collaterally, to a *de facto* court, it follows that the legal existence of such a court cannot be questioned in habeas corpus proceedings instituted by a person convicted and sentenced therein. *State v. Bailey (Minn.)*, 16-338.

Jurisdictional questions. — The jurisdictional facts cognizable on habeas corpus are not only those which relate to the jurisdiction of the trial court over the subject-matter and the person, but also those which relate to its jurisdiction to render the particular judgment. *Hovey v. Sheffner (Wyo.)*, 15-318.

b. Decision on hearing.

Remanding prisoner. — Where a prisoner is held under a void commitment, but is properly informed against by information or indictment charging a crime before a court of competent jurisdiction, on a habeas corpus proceeding he should be discharged from his confinement under the illegal commitment, and remanded to the custody of the court having jurisdiction of the information or indictment pending against him. *Michaelson v. Beemer (Neb.)*, 9-1181.

Release on bail. — Habeas corpus proceedings are not abated by the release of the petitioner on bail pending his appeal from an order denying the writ. *Mackenzie v. Barrett (U. S.)*, 5-551.

Awarding custody of children. — A decree in habeas corpus proceedings awarding the custody of a child to the petitioner is self-executing, and therefore the taking of an appeal and the giving of an appeal bond by the respondent do not entitle him to retain custody of the child pending the determination of the appeal, but merely operate to stay execution for costs. *Willis v. Willis (Ind.)*, 6-772.

Where, after the entry of a decree for the petitioner in habeas corpus proceedings for the custody of a child, the parties consent to a decree that the petitioner shall keep the child within the jurisdiction of the court pending the determination of an appeal by the respondent, the fact that the petitioner thereafter takes the child to another county within the state does not entitle the respondent to procure a habeas corpus from the court of the county to which the child is removed. *Willis v. Willis (Ind.)*, 6-772.

Permitting amendment of defective mittimus. — Where a person convicted before a mayor of an incorporated town for the violation of a statute prohibiting barbering on Sunday is sentenced to pay a fine and costs, and upon his refusal to pay the same is committed by the mayor by a mittimus commanding that the prisoner be committed to the county jail until said fine and costs be paid, without including in the mittimus the words "or secured to be paid," and upon application by the prisoner to a judge of the proper county for a writ of habeas corpus the writ is issued, and the judge is of the opinion that the mittimus is defective because of the absence of the words quoted, it is not error for the judge to give leave to

the mayor to amend the mittimus in that respect and thereupon dismiss the prisoner's application for the writ. *Stanfeal v. State* (Ohio), 14-138.

Decision as res judicata. — The doctrine of *res judicata* applies to a habeas corpus proceeding to obtain the custody of a child. *Willis v. Willis* (Ind.), 6-772.

An order of a court of competent jurisdiction in habeas corpus proceedings to determine the right to the custody of a child is a final order reviewable by writ of error and hence is *res judicata* as to a similar proceeding subsequently instituted in another court, provided the same conditions exist. *Cormack v. Marshall* (Ill.), 1-256.

7. HABEAS CORPUS IN FEDERAL COURT.

When issued in general. — The duty of a federal court to interfere, on habeas corpus, for the protection of a person alleged to be restrained of his liberty in violation of the Constitution or laws of the United States, must often be controlled by the special circumstances of the case, and unless there is some emergency demanding prompt action, the person held in custody will be left to stand trial in the state court, which, it will be assumed, will enforce, as it has power to do equally with a federal court, any rights secured to the accused by the supreme law of the land. *Pettibone v. Nichols* (U. S.), 7-1047.

8. APPEAL AND ERROR.

Disposition of appeal where term of imprisonment has expired. — An appellate court will not reverse a judgment ordering the discharge on habeas corpus of a prisoner, though the judgment was based upon the erroneous ground that the sentence was void, where the prisoner's term has expired pending the appeal. *Harris v. Lang* (D. C.), 7-141.

HABITUAL CRIMINALS.

Cumulative punishment, see CRIMINAL LAW, 7 a (1).

HABITUAL DRUNKARDS.

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HACKS.

Exclusive privileges on railroad station grounds, see RAILROADS, 5 d.
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HALLS.

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HANDBILLS.

Power of municipality to regulate distribution of handbills, see MUNICIPAL CORPORATIONS, 5 f (2).

HANDCUFFS.

Handcuffing as element of damage for false imprisonment, see FALSE IMPRISONMENT, 6.

Right of accused to be free from shackles, see CRIMINAL LAW, 6 c (5).

HANDWRITING.

Identification of handwriting, see HOMICIDE, 6 a (1).

Proof of handwriting, see CRIMINAL LAW, 6 n (9); EVIDENCE, 8 b (2), 11.

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HAWKERS AND PEDDLERS.

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2. POWER TO REGULATE, 846.

3. CONSTRUCTION OF STATUTE, 846.

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5. EXEMPTIONS FROM LICENSE LAWS, 847.

6. CRIMINAL PROSECUTION FOR VIOLATING LICENSE LAWS, 847.

Validity of statute relating to licensing peddlers, see LICENSES, 3.

1. DEFINITION.

A peddler is an itinerant vendor of goods and delivers the identical goods carried with him. One who sells by samples, taking or-

ders for future delivery, to be paid for wholly or in part upon subsequent delivery, is not a peddler. *Potts v. State* (Tex.), 2-827.

2. POWER TO REGULATE.

Under the Illinois statute authorizing cities to regulate traffic and sales on the street and to license, regulate, and suppress peddlers (Hurd's Rev. St. 1909, c. 24, art. 5, § 1) a city may prohibit peddlers from advertising their wares by public outcry on the streets. *Goodrich v. Busse* (Ill.), 20-589.

3. CONSTRUCTION OF STATUTE.

Exposing goods for sale.—Goods are exposed for sale within the meaning of a statute against "exposing for sale" certain goods without a license, where a peddler has with him in his hand, in the presence of one whom he solicits to buy, goods which he refers to in his conversation as contained in a receptacle that he is carrying, which goods he offers to exhibit for the purpose of making a sale, even though the goods are at the time concealed from view by the receptacle that contains them. *Commonwealth v. Hana* (Mass.), 11-514.

Construction of statute regulating peddlers' sales of "provisions."—Tea and coffee are not "provisions," either within the ordinary sense of the word or within its meaning as used in the Massachusetts statute permitting hawkers and peddlers to sell provisions without a license. *Commonwealth v. Caldwell* (Mass.), 5-879.

4. VALIDITY OF REGULATIONS.

In general.—The South Dakota statute licensing peddlers, considered as an exercise of the taxing power does not conflict with the rule requiring all taxation to be uniform. *In re Watson* (S. Dak.), 2-321.

The South Dakota statute licensing peddlers, considered as an exercise of the police power, is not invalid as discriminatory legislation because of exemptions therein contained. *In re Watson* (S. Dak.), 2-321.

Statute discriminating against non-residents.—The Massachusetts statute making it a criminal offense for a hawker or peddler to expose certain goods for sale without a license is in violation of the Constitution of the United States as making an arbitrary discrimination between different classes of citizens, in that it provides that a resident of a city or town in which he pays taxes upon his stock in trade and is qualified to vote shall not be required to pay any fee for his license for said city or town, and that licenses may be granted without charge to a person seventy years of age or upwards. *Commonwealth v. Hana* (Mass.), 11-514.

Discrimination against products of foreign countries.—The Massachusetts statute regulating sales by hawkers and peddlers is void as a regulation of foreign commerce, to the extent that it discriminates in favor of the agricultural products of the United States by permitting their sale with-

out license while prohibiting the unlicensed sale of the agricultural products of foreign countries. *Commonwealth v. Caldwell* (Mass.), 5-879.

Statute discriminating against foreign products.—The Massachusetts statute making it a criminal offense for a hawker or peddler to expose certain goods for sale without a license is in violation of the Constitution of the United States in permitting the sale of agricultural products of the United States without a license, and requiring a license for the sale of agricultural products of other countries. *Commonwealth v. Hana* (Mass.), 11-514.

Confining right to United States citizens.—The Massachusetts statute making it a criminal offense for a hawker or peddler to expose certain goods for sale without a license is not in violation of the Fourteenth Amendment of the Constitution of the United States as taking property without due process of law or denying the equal protection of the laws, in that it allows no one to obtain a license unless he is, or has declared his intention to become, a citizen of the United States; but such provision is a valid exercise of the police power. *Commonwealth v. Hana* (Mass.), 11-514.

Discrimination against hucksters not raising produce.—Under a charter which authorizes it to restrain and punish forestalling and regrating of provisions, a city has power to pass an ordinance permitting hucksters who raise their own produce to sell the same from wagons within the city limits without a license, but prohibiting sales by hucksters who do not raise their own produce. Such an ordinance is valid, being a reasonable regulation calculated to protect the inhabitants of the city against the unlawful raising of the price of the necessities of life. *Dutton v. Knoxville* (Tenn.), 16-1028.

As hucksters who raise their own produce, and those who do not, belong to entirely different classes, a municipal ordinance permitting the former to sell their produce within the city limits without a license, but prohibiting the selling of produce by the latter, is not invalid for unlawful discrimination. *Dutton v. Knoxville* (Tenn.), 16-1028.

The granting of hucksters' licenses by the state and county to hucksters who do not raise their own produce, does not render a city ordinance prohibiting the sale of produce by such hucksters inoperative, or authorize the holders of such licenses to violate the ordinance. *Dutton v. Knoxville* (Tenn.), 16-1028.

Prohibiting crying of wares on street.—An ordinance prohibiting peddlers from crying their wares on the streets does not deprive them of the right to engage in the business of peddling on the streets, and therefore does not deprive them of property without due process of law. *Goodrich v. Busse* (Ill.), 20-589.

A person conceded to have the right to sell goods on the streets of the city has no vested property right to advertise his goods by public outcry, and the city may prohibit peddlers

from thus advertising their wares, and thereby prevent a public nuisance. *Goodrich v. Busse* (Ill.), 20-589.

Distinction as to place of peddling.—An ordinance prohibiting peddlers from advertising their wares by public outcry on the streets but permitting them to do so on licensed amusement grounds does not discriminate against peddlers on the streets, because the conditions surrounding peddlers in the two classes of cases differ so as to furnish a reasonable basis on which to rest a classification. *Goodrich v. Busse* (Ill.), 20-589.

5. EXEMPTIONS FROM LICENSE LAWS.

A statute making hawking and peddling without a license an offense is not rendered objectionable as class legislation by the fact that it exempts from its operation manufacturers, farmers, mechanics, and nurserymen, selling their own work or production, and wholesale dealers selling by sample. *People v. De Blaay* (Mich.), 4-919.

6. CRIMINAL PROSECUTION FOR VIOLATING LICENSE LAWS.

Information charging failure to pay annual tax.—An information charging defendant with violation of a statute requiring peddlers to pay an annual tax, which fails to charge that the defendant is not a merchant who has paid an occupation tax within the excepting clause of the statute, is insufficient. *Potts v. State* (Tex.), 2-827.

HAZARD.

Betting on games of hazard, see GAMING AND GAMING HOUSES.

HAZARDOUS OCCUPATION.

See BENEVOLENT OR BENEFICIAL ASSOCIATIONS, 5 e (2).

HAZARDOUS USE AND OCCUPATION.

Condition against hazardous use and occupation of insured property, see INSURANCE, 5 g (7).

HEADLIGHTS.

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HEALTH.

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Restricting hours of labor in unhealthy occupations, see LABOR LAWS, 1 a.

Vaccination as prerequisite to admission to public schools, see SCHOOLS, 4.

Validity of law purporting to promote public health, see CONSTITUTIONAL LAW, 5 a.

1. BOARDS OF HEALTH AND HEALTH OFFICERS.

a. Enforcement of orders.

Ancillary jurisdiction of court.—In a suit to enforce an order made by a board of health pursuant to a statute authorizing the board to make such orders and providing that the court of chancery may enforce them, an objection that the order in question cannot be enforced is unavailing, because if the court thinks that the order ought to be enforced, it will make an order of its own of such a character that its enforcement will enforce the order of the board. *State Board of Health v. St. Johnsbury* (Vt.), 18-496.

b. Right to bring suit.

Under Georgia statute. — Under the Georgia Act of 1903, creating the state board of health, not declaring the board to be a corporation, and not conferring upon the board as such the right to sue, no suit can be brought in the names of the members of the board in an alleged representative capacity relating to matters within the jurisdiction of the board. *Woodward v. Westmoreland* (Ga.), 4-472.

Validity of statute limiting right to sue. — Section 15 of the New Jersey Board of Health Act, which forbids suits against any local board of health, its officers or agents, unless upon proof that the board acted without reasonable and probable cause to believe that the alleged cause of disease was in fact prejudicial and hazardous to the public health, does not infringe the constitutional provisions protecting private property and individual liberty. *Valentine v. Englewood* (N. J.), 16-731.

Such a statute in effect gives an action against a local board of health upon proof of the facts therein set forth, but in such suits the question of reasonable and probable cause is for the court. *Valentine v. Englewood* (N. J.), 16-731.

c. Right to destroy private property.

Police power. — The legislature under the police power can grant to boards of health authority to employ all means to protect the public health and when the emergency demands to destroy summarily private property. *Lowe v. Conroy* (Wis.), 1-341.

Animals afflicted with malignant disease. — The appearance of a malignant disease in cattle is such a menace to public health as to warrant the destruction of the animals afflicted. *Lowe v. Conroy* (Wis.), 1-341.

Evidence of destruction. — Evidence held sufficient to justify the court in answering in the affirmative a question in a special verdict as to whether a health officer caused the destruction of property. *Lowe v. Conroy* (Wis.), 1-341.

d. Liability for wrongful destruction of property.

Personal liability of health officer. — When a health officer destroys private property which is not a menace to the public health, the owner may recover damages from the officer individually and not from the municipality. *Lowe v. Conroy* (Wis.), 1-341.

e. Prohibiting use of impure water.

Interference with personal liberty. — A statute authorizing the state board of health to prohibit any village, individual, etc., from using water which is so impure as to endanger the public health, and to sue for the enforcement of its orders made thereunder (Pub. St. Vt., § 5496) does not violate the constitutional guaranty of personal liberty. *State Board of Health v. St. Johnsbury* (Vt.), 18-496.

Notice and opportunity to be heard.

— Under a statute authorizing the state board of health to prohibit the use of water which in its opinion is so impure as to endanger the public health, and providing that the court of chancery "may" enforce the orders of the board (Pub. St. Vt., § 5496), an order made by the board prohibiting the use of water as impure is not final and conclusive as to the matters involved, but they may be litigated when suit is brought to enforce the order, and therefore the proceedings of the board do not lack due process of law as failing to give notice of its proposed action and opportunity to be heard. *State Board of Health v. St. Johnsbury* (Vt.), 18-496.

Action for injunction. — A bill to enjoin the use of impure water is not required to be brought in the name of the state, but is properly brought in the name of the state board of health, under a statute (Pub. St. Vt., § 5496) authorizing the board to prohibit the use of impure water, and providing that the court of chancery, on application by the board, may enforce any order made by the board under the statute. *State Board of Health v. St. Johnsbury* (Vt.), 18-496.

2. HEALTH REGULATIONS.

a. Garbage.

(1) What constitutes.

Meaning of term "offal." — The word "offal" in a municipal ordinance relating to the collection of offal, construed. *State v. Robb* (Me.), 4-275.

Grease and cracklings rendered from fat. — Grease and cracklings, which are rendered from the fat of fresh meats cooked in a hotel kitchen and are carried away within twenty-four hours, are not garbage within the meaning of the District of Columbia regulation prescribing the mode of removing and disposing of garbage, and defining garbage to be "the refuse of animal and vegetable foodstuffs." *Nash v. District of Columbia* (D. C.), 8-815.

(2) Municipal regulation of removal.

Power to regulate, in general. — Reasonable municipal regulations for the collection and removal of refuse and offal in thickly populated cities are valid as an exercise of the police power. *State v. Robb* (Me.), 4-275.

In the exercise of the police power the authorities of a municipality may rightfully require the destruction of garbage and refuse, even when they contain some elements of value; and the authorities may regulate the removal and disposition of such substances, designate agents who may rightfully remove and dispose of the same, and prohibit all persons except the designated ones from carrying such substances through the streets of the municipality. *Nash v. District of Columbia* (D. C.), 8-815.

Validity of ordinance granting exclusive privilege. — A municipal ordinance

giving the exclusive privilege of collecting and removing garbage within a city to certain persons and prohibiting all other persons from engaging in that business is not void as creating a monopoly and as being in restraint of trade. *State v. Robb* (Mo.), 4-275.

A municipal ordinance prohibiting collecting garbage except by certain persons is valid at least so far as it extends to the collection of garbage elsewhere than on a person's own premises. *State v. Robb* (Mo.), 4-275.

Whether a municipal ordinance prohibiting the collection of garbage except by certain persons is invalid so far it concerns the removal of garbage by a person from his own premises, *quere*, but the remainder of the ordinance extending to the collection of garbage elsewhere held valid. *State v. Robb* (Mo.), 4-275.

(3) Municipal liability for injuries connected with removal.

Private or government function. — A city acting through its health commissioner in the removal and disposition of garbage is performing a private and corporate function for the convenience and benefit of its inhabitants, and not a governmental function as an agent of the state. *Denver v. Davis* (Colo.), 11-187.

Fire escaping from dumping ground. — Where the health commissioner of a city having control and supervision of the city dumping ground for garbage allows combustible material deposited on the dump to remain burning for several weeks, and the fire is driven by a heavy wind to adjacent property, which it destroys, the city is liable. *Denver v. Davis* (Colo.), 11-187.

b. Manufacture of clothing in tenement houses.

A statute regulating the manufacture of wearing apparel in tenements is constitutional. *State v. Hyman* (Md.), 1-742.

c. Sale of cigarettes.

That the Indiana statute forbidding the sale, etc., of cigarettes was not designed to prohibit the smoking of cigarettes is shown by the fact that it contains no mention of smoking, while two other statutes passed about the same time expressly denounce the smoking of cigarettes by children. *State v. Lowry* (Ind.), 9-350.

d. Water-closets in schools and tenement houses.

A statute requiring school sinks and vaults in tenement houses in certain cities to be replaced by individual water-closets is constitutional as a police regulation designed to preserve the public health; and it is not invalid because applicable only to certain cities and only to tenement houses or by reason of its application to existing buildings. *Tenement House Department v. Moesch* (N. Y.), 1-439.

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3. QUARANTINE.

Liability for injuries to quarantined persons. — Where the board of health of a township, acting in good faith and without malice, quarantines the members of a family on account of the supposed existence of a contagious disease in the family, the members of the board are not liable individually for injuries sustained by the persons quarantined, though the quarantine is unnecessary in that there is in fact no contagious disease in the family. *Beeks v. Dickinson County* (Ia.), 9-812.

Liability for expenses of quarantined persons. — In the absence of statute, a county is not liable to a third person for necessities furnished to persons not paupers while quarantined in their residence for the time being. *Dodge County v. Diers* (Neb.), 5-232.

Liability for loss of property from regulations. — Under the Iowa statute, a county is not liable to a farmer, who has been quarantined with his family by the local board of health of the township on account of the supposed existence of a contagious disease in the family, for injury to the farmer's crops resulting from his inability to care for them during the period of quarantine, though the health officers promised the farmer that the county would provide him the necessary help for taking care of his crops, and though the promise was made by the health officers under the direction of the board of supervisors. *Beeks v. Dickinson County* (Ia.), 9-812.

Liability for acts of officers enforcing regulations. — In so far as a municipality undertakes the duty of making and enforcing quarantine regulations and other laws for the protection of the public health, it performs a governmental function, and its officers are not agents for whose action or inaction it is liable, unless such liability is imposed by its charter or the by-laws of the state under which it exists. *Beeks v. Dickinson County* (Ia.), 9-812.

The members of a board of health acting in performance of a public duty, under a public statute to prevent the spread of an infectious or contagious disease, are not personally liable in a civil action for damages arising out of their acts in establishing a quarantine, even where the disease does not actually exist, provided they act in good faith. *Valentine v. Englewood* (N. J.), 16-731.

HEARING.

See DEAF AND DUMB PERSONS.

Failure to hear fog signals as negligence, see COLLISION.

Hearing on application for interlocutory injunction, see INJUNCTIONS, 4 d.

HEARSAY.

See EVIDENCE, 3.

Effect of letters of hearsay evidence, see CRIMINAL LAW, 6 m (8).

HEAT.

Duty of carrier to heat cars, see **CARRIERS**, 6 e (6).

HEAT OF PASSION.

Killing in heat of passion, see **HOMICIDE**, 4 a (2).

HEATING APPARATUS.

As fixtures, see **FIXTURES**, 7 a.

HEDGES.

Substitution of fence for hedge, see **FENCES**, 2.

HEIGHT OF BUILDINGS.

Statutory regulation, see **CONSTITUTIONAL LAW**, 5 d.

HEIRS.

See **DESCENT AND DISTRIBUTION**.

Right of judgment creditor's heir to contest will, see **WILLS**, 7 e (1).

Specific performance of contract between heirs and devisees, see **SPECIFIC PERFORMANCE**, 3 f (16).

HELPLESS PERSONS.

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1. IN GENERAL.

What constitutes. — In its inception a homestead is a parcel of land on which the family resides, and which is to them a home. It is constituted by the two acts of selection and residence, in compliance with the terms of the law conferring it, and when these exist in good faith, the essential elements of the homestead right exist, of which the persons entitled to it cannot be divested by acts or influences beyond their volition. *Palmer v. Sawyer* (Neb.), 12-715.

Land held by husband and wife as joint tenants. — Land held in joint tenancy by a husband and wife may be impressed with a homestead at the instance of the wife. *Swan v. Walden* (Cal.), 20-194.

Purpose of exemption. — The homestead is granted, not only for residence purposes, but for all purposes of general utility. The object of the exemption is to secure to the debtor, not only a house to live in, but the means of obtaining a livelihood. *Green v. Richardson* (La.), 16-1037.

Extent of exemption. — As a rule, where the constitution or statutes of a state exempt from seizure as a homestead a certain quantity of land owned and occupied by a debtor, the whole is exempt if occupied as a residence of the debtor and his family, without regard to the use to which he may put the land or the business he may pursue. *Green v. Richardson* (La.), 16-1037.

Homestead in different government subdivisions. — A homestead may be composed of contiguous parts of different governmental subdivisions. *Tindall v. Peterson* (Neb.), 8-721.

2. ACQUISITION.

Under Act of Congress. — Under an Act of Congress any person qualified to acquire lands under the federal homestead law can lawfully settle upon unsurveyed public land, and, if the settlement is made with the intention of claiming the land under the homestead law, the settler acquires a prior right to file his claim upon the land in the local land office when it is surveyed, and also a right to the possession of the land settled upon, in which he will be protected when unlawfully disturbed by another. *Huffman v. Smyth* (Ore.), 8-678.

Fraudulent contracts to acquire. — An agreement to procure qualified citizens to enter lands under the general homestead law and to grant their use to another until they shall make final proof or dispose of their holdings, without the reservation of any part of this use for the residence thereon or the cultivation thereof by the entrymen, is inconsistent with the purpose and spirit and violative of the terms of the law, although no

contract is made regarding the position of the title which may be obtained. *Ware v. United States* (U. S.), 12-233.

Reassignment on increase in value.

Under the Utah statute providing in effect that the homestead of a specified value which is set apart to the surviving husband or wife and minor children shall be their "absolute" property, real estate which is assigned to such surviving husband or wife and minor children as a homestead becomes theirs absolutely, subject only to pre-existing incumbrances, and such homestead cannot be re-assigned even though the value thereof is subsequently increased, with the result that such value exceeds the amount of the exemption specified in the statute. *In re Bedford* (Utah), 16-118.

3. EXEMPTION FROM LIEN OF JUDGMENT OR EXECUTION.

Title vested in wife. — Under the North Dakota constitution and statutes, a husband as the head of his family is, notwithstanding the fact that the fee to the homestead is vested in his wife, entitled to claim such homestead as exempt from execution sale. *Bremseth v. Olson* (N. Dak.), 14-1155.

Excess over statutory quantity or value. — Under the statutes of Missouri, a judgment is a lien against all real estate held by the judgment debtor in excess, either as regards value or quantity, of the statutory homestead. It is not a lien, however, against the homestead proper, meaning thereby a tract of land within the statutory limitations both as to quantity and value, which is held, occupied, and claimed as a homestead; nor can it be enforced against the excess, until the homestead has been selected and admeasured in some manner. *White v. Spencer* (Mo.), 16-598.

Ordinarily a homestead must be selected and admeasured in the manner prescribed by statute, before a judgment lien can be enforced against the excess; but where such excess is a matter of quantity rather than of value, and the judgment debtor, before any execution has been levied, voluntarily selects the quantity of land prescribed by the statute, or thereabouts, and conveys the remainder to a third person, under circumstances indicating an intention to give the grantee a preference over the judgment creditor, the latter may recover the portion so conveyed by an action of ejectment against the grantee. Under such circumstances, the selection by the judgment debtor may be held equivalent to the statutory admeasurement and is equally binding upon the debtor and his grantee. *White v. Spencer* (Mo.), 16-598.

4. ALIENATION OR INCUMBRANCE.

Administrator's sale to pay debts. — A homestead of less value than \$2,000 cannot be disposed of at administrator's sale, either for the discharge of incumbrances thereon or for the payment of debts against the estate of the decedent, and a license granted by a Nebraska District Court, purporting to

authorize such sale, is absolutely void. *Tindall v. Peterson* (Neb.), 8-721.

Method of alienation under Florida constitution. — Under the Florida constitution which provides that real and personal property of designated amounts owned by the head of a family residing in the state shall be exempt from forced sale under process of any court, that the exemption shall inure to the widow and heirs of the party entitled to such exemption, that the real property shall not be alienable without the joint consent of husband and wife, where that relation exists, and that nothing in the article shall be construed to prevent the holder of a homestead from alienating his or her homestead so exempted by deed or mortgage duly executed by himself or herself, and by husband and wife, if such relation exists, the exemptions apply only to property owned by the head of the family, are for the benefit of the family, and inure to the widow and heirs of the party entitled to the exemption, and the provisions as to the method of alienation are restrictions upon the inherent right of alienating the homestead real estate, which are designed for the protection of all the beneficiaries of the exemption. Therefore the observances of the restrictions are as essential when the alienation is to members of the family as to others. *Thomas v. Craft* (Fla.), 15-1118.

The words "alienable" and "alienating" are used in such constitutional provision in the sense of conveying or transferring the legal title or any beneficial interest in the exempt homestead real estate during the life of the owner. As the method by which the homestead may be alienated, *i. e.*, conveyed or transferred, is expressly and specifically prescribed in the constitution to be by joint consent and by deed or mortgage duly executed by husband and wife when that relation exists, all other methods of alienation during the life of the owner are inhibited. *Thomas v. Craft* (Fla.), 15-1118.

Joinder of wife in deed. — Where the owner of a homestead to which such constitutional exemption from forced sale is applicable is a married man, a deed executed by him alone does not convey any right, title, or interest whatever in the homestead real estate. *Thomas v. Craft* (Fla.), 15-1118.

Joinder of wife in mortgage. — Where a husband has borrowed money and executed a note therefor without the joinder or knowledge of his wife, and the creditor has filed a suit against the husband alone to have the note declared a mortgage on certain land described in the instrument, and a decree has been entered in such suit establishing the mortgage and ordering a sale thereunder, the husband and his wife may enjoin the execution of the decree of sale upon a showing that the land in question is their homestead, as such decree is absolutely void on account of the nonjoinder of the wife. *McDonald v. Sanford* (Miss.), 9-1.

Validity of mortgage. — A mortgage upon government land, made by a claimant holding under the Homestead Act prior to

final proof, for the purpose of procuring money to improve the land, or for any purpose, provided it is not intended thereby to transfer the title in evasion of the statute, is not void or in violation of the homestead laws, and therefore if the claimant subsequently acquires title from the government, the title will inure to the benefit of the mortgagee. *Stark v. Morgan* (Kan.), 9-930.

Mortgage as alienation. — Inasmuch as a mortgage conveys no title and is merely security for a debt, it is not an "alienation" within the meaning of the federal statute providing that a homestead claimant who has alienated the land entered shall not be entitled to a final certificate. *Stark v. Morgan* (Kan.), 9-930.

5. PARTITION.

After separation of husband and wife. — A wife who has separated from her husband is not entitled to partition the premises still occupied by him as a homestead; though she holds an undivided half interest therein by virtue of a conveyance executed by him through a third person in settlement of divorce proceedings by her on a prior occasion. *Grace v. Grace* (Minn.), 6-952.

6. ABANDONMENT OR FORFEITURE.

Compulsory absence from land. — A person who has established an actual residence and made improvement upon land under the federal homestead law is not deemed to have abandoned the land because he is compelled to be absent from the land for a period in consequence of being convicted of a crime and confined in the penitentiary. *Huffman v. Smyth* (Ore.), 8-678.

Use of part for other purposes. — If property in the country is in fact used by the owner as a residence for himself and his family, the right to claim it as a homestead is not necessarily defeated by the fact that it is not all required for such purpose, and that it is partly used for other purposes. *Green v. Richardson* (La.), 16-1037.

Separation between husband and wife. — A homestead does not become liable to the debts of the husband because he and his wife separate and leave it, where the wife, although living elsewhere temporarily because she cannot live at the homestead alone, retains control of it through tenants and does not intend to abandon it. *Montgomery v. Dane* (Ark.), 11-421.

Failure of widow to occupy. — The Kentucky statute providing that the homestead shall be for the use of the widow so long as she occupies the same, does not give the widow a life estate in the homestead of her deceased husband, but only a right which depends upon her occupancy of the homestead, and the homestead may be sold for her former husband's debts when she ceases to occupy it. *Block v. Tarrent* (Ky.), 12-785.

Loss of family. — A debtor who has acquired a homestead does not lose his right to the exemption, where he continues to occupy the property as a home, though by rea-

son of death and the removal of his family he has no one living with him. *Palmer v. Sawyer* (Neb.), 12-715.

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1. ELEMENTS OF CRIMINAL HOMICIDE.

Liability of assailant for homicide by assault. — Where persons conspire together to commit robbery upon the person of another, and while carrying out such conspiracy their victim, in self-defense, discharges a firearm at his assailants and accidentally kills a bystander, the conspirators are not guilty of murder. *Commonwealth v. Moore* (Ky.), 11-1024.

Liability of corporation. — A corporation is not subject to indictment for manslaughter under section 193 of the New York Penal Code for negligently causing the death of a human being. Under section 180 manslaughter is a form of homicide; and section 179, which defines homicide as "the killing of one human being by the act, procurement, or omission of another," must be interpreted as referring to the killing of one human being by another human being. While a definition might have been formulated which would have included negligent killing by a corporation, the definition given in the above sections of the Penal Code cannot be so interpreted. *People v. Rochester R., etc., Co.* (N. Y.), 16-837.

Liability of convict for life. — The fact that a person is already serving a sentence of life imprisonment does not prevent his being tried and sentenced for murder. *Huffaker v. Commonwealth* (Ky.), 14-487.

Accelerating cause by death. — One who has unlawfully wounded another and thereby accelerated the latter's death by reason of some disease with which he was afflicted is guilty of the crime thereby resulting, though the injury inflicted was not necessarily fatal and the wounded person probably would have recovered but for his diseased condition. *Hopkins v. Commonwealth* (Ky.), 4-957.

Consent of victim. — One who wilfully, deliberately, and with premeditation slays a human being, is guilty of murder in the first degree, and the fact that the person slain consents, and that the homicide is committed in the execution of a compact between the slayer and the slain to die together, is no defense. *Turner v. State* (Tenn.), 14-990.

Compact for suicide — Insanity. — In the absence of evidence of hereditary insanity or previous acts tending to show an unbalanced mind, the fact that the only motive for the commission of a homicide is a compact between the slayer and the slain, who are paramours, to die together, is not evidence of insanity on the part of the slayer

such as may serve as a defense to the charge of murder. *Turner v. State* (Tenn.), 14-990.

Indirect means causing death. — One has no greater right to take the life of another by indirect means than by direct means under the same circumstances, if personally present. *State v. Marfaudille* (Wash.), 15-584.

Malice as showing hatred or malevolence. — In order to support a verdict of murder in the first degree, it is not necessary that malice, in the sense of hatred or malevolence, toward the person slain, should be shown. *Turner v. State* (Tenn.), 14-990.

Subsequent improper medical treatment as defense. — Where it appears that a mortal wound was unlawfully inflicted by one person upon another under such circumstances that, if death had immediately ensued, it would have been a felonious homicide, the fact that other causes, such as errors or accidents in the treatment of the victim, may have contributed to or hastened death, will not relieve the accused from the criminality of his act, the real cause of the death being the felonious assault. *Hamblin v. State* (Neb.), 16-569.

2. CRIMINAL RESPONSIBILITY OF PARTICIPANTS.

One who is present aiding and abetting in a murder is guilty as principal though another does the killing. *State v. Nargashian* (R. I.), 3-1026.

Participation under threat of death. — The fact that a person assisting in the killing of another acts under a fear of death imposed by the threats of the person assisted does not necessarily eliminate the elements of malice and premeditation so as to reduce the crime to manslaughter. *State v. Nargashian* (R. I.), 3-1026.

In a prosecution for murder, a requested instruction as to the defendant assisting in the crime under a fear of death held properly refused. *State v. Nargashian* (R. I.), 3-1026.

3. MURDER.

a. Killing in perpetration of another crime.

Where a person starts to carry out a purpose to commit rape, arson, robbery, or burglary, and kills another under circumstances so closely connected with the crime which he has undertaken as to be part of the *res gestæ* thereof, he is guilty of murder in the first degree, within the meaning of the Ohio statute, whether the crime originally undertaken has been technically completed or not. *Conrad v. State* (Ohio), 8-966.

Robbery. — Homicide committed in the perpetration of a robbery is murder in the first degree, and in such a case the turpitude of the act supplies the element of deliberate and premeditated malice. *Pumphrey v. State* (Neb.), 18-979.

b. Killing by coconspirator.

When two persons, in furtherance of a common design, enter upon the perpetration of a burglary, armed and prepared to kill if

opposed, and while so engaged are discovered, and in the effort to escape one burglar kills a person who is trying to arrest him, both burglars are equally guilty of the homicide, although one of them is not armed with a deadly weapon, and although such killing was not part of the prearranged plan. *Conrad v. State* (Ohio), 8-966.

Where two persons, in furtherance of a common design, enter upon the perpetration of a burglary, armed and prepared to kill if opposed, and while so engaged are discovered, and in the effort to escape one burglar, at a short distance from the building and on another lot, shoots and kills a police officer who has commanded him to halt, the killing is in the perpetration of burglary, and therefore is murder in the first degree. *Conrad v. State* (Ohio), 8-966.

c. Poisoning.

Notwithstanding a statute providing that "all murder perpetrated by means of poison," etc., shall be murder in the first degree, a jury cannot find a defendant guilty of murder perpetrated by means of poison, or by any other means whatever, unless they first find that there has been an "unlawful killing . . . with malice aforethought," as murder is defined in another statute, and the mere fact that a killing has been accomplished by means of poison does not of itself establish "malice aforethought." *State v. Phinney* (Idaho), 12-1079.

Under an information charging murder as having been perpetrated by means of poison, it is in the province of the jury, under the Idaho Revised Statutes, to find the degree or grade of the offense of which the defendant is guilty, and the court cannot deprive the jury of such right by a peremptory instruction to the effect that the defendant, if guilty at all, is guilty of murder in the first degree. *State v. Phinney* (Idaho), 12-1079.

d. Instructions.

When, in a trial for murder, the prisoner has introduced evidence tending to justify the homicide on the ground of self-defense, and the jury have been properly instructed as to the law of self-defense, it is not error to give the following instruction: "If they believe from the evidence in the case that the accused was guilty of shooting the deceased with a deadly weapon and killing him, the intent, the malice and wilful deliberation, and premeditation may be inferred from the act." *State v. Medley* (W. Va.), 18-761.

Deliberation and premeditation. — In a prosecution for murder where there is some evidence that the mind of the defendant had been disturbed shortly prior to the killing, an instruction leaving the question of time for deliberation and premeditation to be determined by the jury is proper. *State v. Megorden* (Ore.), 14-130.

Instructions as to lesser degree. — Under the statutes of Arizona it is not the duty of the court in a trial for murder to instruct the jury as to the several lesser grades of homicide when no request for such

an instruction is made. *Ward v. Territory (Ariz.)*, 3-137.

In order to justify an instruction in reference to manslaughter in the first degree, it should appear from the evidence that the killing was done without any design to effect death, that it was done by the act, procurement or culpable negligence of the defendant, and that it was done while the defendant was engaged in the perpetration of a misdemeanor or crime not amounting to a felony, or while he was attempting to commit such crime. *Dillon v. State (Wis.)*, 16-913.

Where it appears in a prosecution for homicide that shortly before the killing the defendant assaulted the deceased in the former's place of business, but that the homicide was not committed during the assault, and that after having been assaulted the deceased retreated to the door, pushed it open, and kicked the defendant, who, according to his testimony, followed the deceased for the purpose of closing the door, whereupon the defendant shot the deceased, the defendant is not entitled to an instruction as to manslaughter in the first degree, because at the time of the shooting he was not engaged in the perpetration of any crime below the grade of a felony. *Dillon v. State (Wis.)*, 16-913.

Under the New York statute (Pen. Law, § 1044, subd. 2) making it murder in the first degree to kill in the commission of or attempt to commit a felony, though there is no design to effect death, there can be no conviction except for murder in the first degree, where the indictment charges that the homicide was committed while the defendant was engaged in the commission of a burglary; and therefore the trial court, in such a case commits no error in refusing to charge with reference to the "various degrees of crime" or in instructing the jury that they "must find the defendant guilty of murder in the first degree or not guilty." *People v. Schleiman (N. Y.)*, 18-588.

In a prosecution for murder, it is not erroneous to refuse the defendant's request for an instruction enumerating the various verdicts which the jury may find, including one of involuntary manslaughter, where there is no evidence tending to establish that degree of the offense. *State v. Woodrow (W. Va.)*, 6-180.

Where a warden attempted to administer corporal punishment to a convict under circumstances where the attempt amounted to an assault, and called upon another convict to assist in administering the punishment, and the latter, in rendering such assistance, exercised some force against the convict sought to be punished, tending to overcome him and put him in the power of the warden, if the assaulted convict, while engaged in a fight with the warden to prevent the assault, turned and slew the fellow-convict who was an abettor to the warden in committing the assault, the homicide might be reduced to voluntary manslaughter; and it was erroneous for the judge to omit to charge the law relating to that offense. *Westbrook v. State (Ga.)*, 18-295.

Omission of elements of crime.— Upon the trial of an indictment for murder in the second degree, the defendant is entitled to a plain and correct statement from the court to the jury of the charge against him. An instruction purporting to state the offense for which he is being tried, which omits material elements of the offense charged in the indictment, is erroneous. *Hans v. State (Neb.)*, 9-1130.

Necessity for request for nonspecific instruction as to malice.— A judgment of conviction for murder will not be reversed on the ground that the trial court gave an erroneous instruction on the subject of malice, where it appears that though the instruction did not define "malice" in the exact words of the statute, it was sufficiently comprehensive to give the jury a definite idea of the meaning of the term, especially if the record fails to show a request by the defendant for a more specific instruction. *State v. Fuller (Mont.)*, 9-648.

Simultaneous killing of several persons.— On the trial of several defendants for the murder of several persons, it is not erroneous to instruct the jury that the defendants are not charged with the murder of one of the persons named in the indictment, and that if they are so charged there is no evidence to support the charge. *Sawyer v. United States (U. S.)*, 6-269.

Harmless error.— In a prosecution for murder which contains only the theories of self-defense and cold-blooded assassination, and in which the court fully instructs the jury as to the legal right of self-defense, no prejudicial error is committed by the omission of the word "feloniously" in the instructions as to what constitutes murder and manslaughter. *Stout v. Commonwealth (Ky.)*, 13-547.

On a trial for homicide, an instruction which might possibly be interpreted by the jury as authorizing a verdict of murder in the first degree, even though the intent to kill was formed simultaneously with the infliction of the wound, although objectionable, does not present reversible error, if accompanied by other instructions making it clear to the jury that in order to constitute murder in the first degree there must have been deliberation and premeditation, and that the intent to kill must have been formed before the act of killing took place. *Hamblin v. State (Neb.)*, 16-569.

The defendant in a prosecution for murder cannot complain of an instruction incorrectly defining the expression "heat of passion," where the jury find him guilty of murder in the first degree, especially if the evidence does not tend to make out a case of manslaughter. *State v. Fuller (Mont.)*, 9-648.

4. MANSLAUGHTER.

a. Voluntary manslaughter.

(1) In general.

The offense of voluntary manslaughter involves moral turpitude. *Holloway v. Holloway (Ga.)*, 7-1164.

(2) Killing in heat of passion.

The wilful shooting of another person with fatal effect, which is done in the heat of passion and with a design to effect death, does not fall within a statute providing that the involuntary killing of another in the heat of passion shall be deemed manslaughter in the fourth degree, as the term "involuntary" is inconsistent with a wilful shooting. *Johnson v. State* (Wis.), 9-923.

The heat of passion which shall reduce what would otherwise be murder to manslaughter in the third degree, and which is specified inclusively or exclusively in the statutory definitions of other homicidal offenses, is such mental disturbance, caused by a reasonable, adequate provocation, as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man as to render his mind for the time being deaf to the voice of reason, to make him incapable of forming and executing that distinct intent to take human life essential to murder in the first degree, and to cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart or cruelty or recklessness of disposition. Uncontrollable passion in such circumstances is supposed to "sway the reason regardless of her admonitions," but it is not presumed to be, nor does the heat of passion spoken of contemplate, such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily. *Johnson v. State* (Wis.), 9-923.

(3) Adequacy of provocation.

Where in a prosecution of a man for the murder of his wife, the evidence shows that after an altercation with his family in which the defendant's son struck him a severe blow, wounding him on the head, the defendant went into an adjoining room, secured a revolver, chased the son for a hundred yards, firing at him three times, and then turned around and followed his wife for three hundred yards, and overtaking her, pointed the pistol at her and shot her, and then deliberately walked away and went to a doctor to have his head examined, and stated to him that he had shot his wife, the court cannot say as a matter of law that there was no deliberation and premeditation, and may properly refuse an instruction taking that question from the jury. *State v. Megorden* (Ore.), 14-130.

Adultery. — A husband who kills either his wife or her paramour, discovered by him in the act of adultery, is guilty of manslaughter only. *Rowland v. State* (Miss.), 1-135.

Assault on relative as provocation. — The infliction of a beating upon a person in a fight which is ended is not sufficient provocation to such person's friend to make the killing of the assailant by the friend manslaughter instead of murder, although the beating, if inflicted upon the slayer, might

have reduced the killing to manslaughter. *Commonwealth v. Paese* (Pa.), 13-1081.

Question of law or fact. — In a prosecution for murder the sufficiency of the provocation is for the court where the facts are undisputed. *Commonwealth v. Paese* (Pa.), 13-1081.

Instructions. — Where the court in a prosecution for murder gives an affirmative definition of heat of passion, it is not error for the court to refuse to add to such definition the statement that heat of passion "does not contemplate such overpowering disturbance as to destroy volition, the reasoning faculty, even temporarily." *Dillon v. State* (Wis.), 16-913.

In a prosecution for murder an instruction that "heat of passion means such passion as amounts to temporary obscurement of reason, and renders the slayer incapable of forming a premeditated design to kill," is not erroneous. *Dillon v. State* (Wis.), 16-913.

b. Involuntary manslaughter.

Unintentional homicide committed by a person while engaged in an unlawful act is not a criminal offense, if the unlawful act is merely *malum prohibitum*, and not *malum in se*, and the act is free from negligence and is not in itself of dangerous tendency. *State v. Horton* (N. Car.), 4-797.

Omission of duty. — Although under some circumstances the wilful or negligent omission of duty owing by some person to another, resulting in death, may be manslaughter, the duty neglected must be a legal duty and not a mere moral obligation. *People v. Beardsley* (Mich.), 13-39.

Debauch — duty to summon medical assistance for companion. — A man who goes upon a drunken debauch with a woman over thirty years of age, who is accustomed to the use of intoxicants and has on former occasions drunk liquor and kept assignations with him, is not under a legal duty to care for such woman, or guilty of manslaughter for her death occasioned by an overdose of morphine taken by her near the end of the debauch, although he leaves her in a stupor and does not summon medical assistance. *People v. Beardsley* (Mich.), 13-39.

Accidental discharge of concealed weapon. — One carrying a revolver in violation of a statute against carrying concealed weapons is not guilty of involuntary manslaughter because of the accidental discharge thereof resulting in the death of another. *Potter v. State* (Ind.), 1-32.

Killing in unlawful hunting. — Where a person who is hunting game on the land of another in violation of a local statute unintentionally shoots and kills a person without negligence, and the hunting or shooting is not in itself dangerous to life, the homicide is excusable. *State v. Horton* (N. Car.), 4-797.

Killing through negligence — contributory negligence of deceased. — In a prosecution for manslaughter caused by negligence, the state must prove the alleged

unlawful act of the defendant and its consequences, but not that the decedent exercised due care to avoid the consequences of the unlawful act. *State v. Campbell* (Conn.), 18-237.

The rule of law concerning contributory negligence by the injured person as a defense in a civil action for damages for personal injuries is not applicable to a prosecution for manslaughter as the result of negligence. *State v. Campbell* (Conn.), 18-237.

In a prosecution for manslaughter caused by the negligence of the defendant, contributory negligence on the part of the decedent is material only as bearing on the question of the defendant's negligence, and the defendant is guilty if his negligence was the direct cause of the death, even though the decedent did not use due care to avoid injury. *State v. Campbell* (Conn.), 18-237.

Negligent operation of automobile. — In a prosecution for manslaughter by the alleged negligent operation of an automobile the court may properly refuse to charge that the defendant had the right to assume that the decedent would use reasonable care to avoid injury, that the defendant was not chargeable with extra care until he saw that the decedent was needlessly and negligently placing himself in a place of danger, and that if the defendant at the time acted as seemed to him most expedient to avoid the accident, he should be acquitted; because the request to charge involves matters which it is the province of the jury to decide on the evidence before them. *State v. Campbell* (Conn.), 18-237.

In a prosecution for manslaughter in causing death by the negligent operation of an automobile, it is not erroneous, as giving the jury too much latitude, to charge that "it is a case in which you are called upon to fix a standard of conduct under circumstances like those presented to you, and more particularly a standard of conduct with reference to the carefulness required of drivers of automobiles, if they would escape the liability that may come under the law of criminal negligence," where other parts of the charge clearly state that the defendant cannot be convicted unless he was culpably negligent in operating the automobile, and the death ensued as the direct result thereof. *State v. Campbell* (Conn.), 18-237.

Burden of proving accidental killing. — In a prosecution for murder where the defendant relies upon the defense of accidental killing, the burden of proof still rests on the commonwealth to show that the killing was wilful and intentional, and an instruction placing the burden of proving an accidental killing upon the defendant is erroneous. *Com. v. Deitrick* (Pa.), 11-308.

The error of an instruction in a prosecution for murder that the burden of proving the defense of accidental killing is on the defendant is not cured by another instruction that it is the duty of the commonwealth to establish the guilt of the defendant beyond a reasonable doubt. *Com. v. Deitrick* (Pa.), 11-308.

c. Instructions.

Notwithstanding the fact that neither the word "deliberate" nor the word "premeditated" appears in the Wisconsin statute relating to manslaughter in the third degree, an instruction to the effect that if the defendant was in such a heat of passion as to render him incapable of forming a "deliberate, premeditated design" to kill, he may be found guilty of manslaughter in the third degree, is not erroneous, there being no difference between "premeditated design" and "design" as used in the Wisconsin statutes relating to murder and manslaughter, and the words "deliberate" and "premeditated" being capable of being used interchangeably in the sense used in such instruction. *Dillon v. State* (Wis.), 16-913.

An instruction that voluntary manslaughter is never attended by legal malice or depravity of heart, and that "being sometimes a wilful act, as the term 'voluntary' denotes, it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty," is not erroneous. *Commonwealth v. Paese* (Pa.), 13-1081.

5. JUSTIFIABLE AND EXCUSABLE HOMICIDE.

a. Homicide in resisting arrest.

In a prosecution under an indictment for killing an officer where it is shown that the accused refused to submit to arrest though he knew that the deceased was an officer and had a warrant for his arrest, an instruction that the testimony considered in the light most favorable to the accused makes him guilty of manslaughter at least, is not erroneous though there is evidence that he did not fire until the officer had threatened him and had shot at him. *State v. Horner* (N. Car.), 4-841.

b. Self-defense.

The law of justifiable homicide as found in the Penal Code, §§ 70, 71, is not qualified or limited by the law upon the separate branch of the same subject laid down in section 73; and it is error for the court, upon the trial of one indicted for murder, to so charge the jury as to confuse the defense of justifiable homicide under the fears of a reasonable man, based upon the provisions of the two related sections first mentioned, with the defense of absolute necessity to kill, in order to save one's own life, which is contained in section 73. *McCray v. State* (Ga.), 20-101.

The instructions which were excepted to upon the ground that they deprived the accused of the benefit of his defense which is last mentioned in the next preceding headnote, and the instructions which were excepted to upon the ground that they placed improper limitations or restrictions upon this defense, were not subject to the assignments of error made upon them; as in none of these instructions was the court dealing with the law applicable to homicide in defense of one's habitation, and the court did, elsewhere in the charge, deal with this defense of the ac-

cused, and no complaint is made that the instructions on this subject were erroneous or were not full and explicit. *McCray v. State* (Ga.), 20-101.

Relatively to the plea of self-defense alone, in a murder case, an instruction that it was important for the jury to determine "whether the offense, if any, the defendant acted in fear of was a felony or not," was not erroneous. But such instruction, if applied to the defense that the homicide was committed in defense of the habitation of the accused against the deceased and another, who were manifestly intending and endeavoring, in a riotous and tumultuous manner, to enter the same for the purpose of assaulting or offering personal violence to some one dwelling or being therein, would be erroneous. The court should have made it clear to the jury that this instruction was intended to apply only to the defense first above indicated, and did not apply to the last-mentioned defense. *McCray v. State* (Ga.), 20-101.

Killing by trespasser. — When, in a trial for murder, the defendant produces evidence tending to justify the killing on the ground of self-defense, an instruction which limits the right of self-defense to one in the lawful pursuit of his business is erroneous, as even a trespasser may defend himself against murder. *Hans v. State* (Neb.), 9-1130.

Necessity for taking life. — The bare fact that while the slayer and the person slain were about four feet apart, and the former was holding a revolver in his right hand, the latter kicked him, does not show any real or apparent necessity for taking the life of the deceased. *Dillon v. State* (Wis.), 16-913.

An instruction that the defendant, charged with murder by shooting, would be guilty if "said shooting was not necessary, and did not at the time reasonably appear to the defendant to be necessary, to save the defendant from death, or from serious bodily harm," is not objectionable as excluding the right of self-defense for apparent danger. *Stout v. Commonwealth* (Ky.), 13-547.

Retreat by person assaulted. — One who is assaulted with a knife within the yard of his dwelling house and within a few feet from his door-steps, after having warned his assailant not to enter the yard, may defend himself without retreating, and the killing of his assailant under such circumstances is excusable. *State v. Brooks* (S. C.), 15-49.

Mutual combat. — On the trial of an indictment for murder, evidence considered and held to warrant an instruction that if the defendant was informed and believed that the deceased had taken possession of a field claimed by him, and that he would be there with an armed party on the morning of the killing, and that they had made threats against the life of the defendant, and the defendant, knowing all of these things, voluntarily organized a party, arming them with deadly weapons for the purpose of meeting said parties in deadly conflict, and went to

the place of the killing, and a conflict ensued, and the deceased was killed, then such conflict was a "mutual combat," and all parties who knowingly and intentionally engaged in it are guilty of murder. *Driggers v. U. S.* (Okla.), 17-66.

In a prosecution for murder resulting from a mutual combat with malice and premeditation, an instruction as to the right of the accused to stand his ground and slay his adversary if from the facts of the assault he believed such act was necessary to protect his own life or prevent great bodily harm, is improper, but is not prejudicial to the accused, and gives him no right to complain. *Strong v. State* (Ark.), 14-229.

Effect of denying act causing death. — In a prosecution for a homicide, where there is substantial evidence tending to show that the accused acted in self-defense, the fact that he denies having committed the act which caused the death is not necessarily a ground for refusing to submit to the jury the question whether the killing was justifiable. *State v. Jackett* (Kan.), 19-118.

Violent character of deceased. — In a prosecution for murder, where the defense is justifiable homicide, the knowledge of the defendant, derived from personal observation, as well as otherwise, of the violent temper of the deceased and his liability to attack persons without cause, is a most important circumstance in determining from the standpoint of the defendant the reasonableness of the danger apprehended by him, and from which the defendant might estimate the conduct of the deceased, the character of the attack made upon him, and what he might expect from his assailant, as well as that which he might at the moment deem necessary to guard himself against. *Sneed v. Territory* (Okla.), 8-354.

c. Killing in defense of third person.

An accused charged with a homicide which he claims to have committed in defense of another person is entitled to a requested instruction that "the law makes it the duty of every one who sees a felony attempted by violence to prevent it if possible, and allows him to use the necessary means to make the resistance effectual," and that "one may kill in defense of another under the same circumstances that he would have the right to kill in defense of himself," unless such instruction is given in the main charge in clear language readily understandable by ordinary jurors. *State v. Hennessy* (Nev.), 13-1122.

Where a person charged with homicide claims to have done the killing in the necessary defense of another, evidence that a conspiracy had been entered into by the deceased and others to take the life of or do great bodily harm to the person defended, or that the deceased alone had made threats of violence against such person, is competent upon the question whether the deceased was the aggressor, even if such conspiracy or threats were not communicated; and evidence that such conspiracy or threats were communi-

cated to the defendant is not only admissible but highly important to the defense. *State v. Hennessy* (Nev.), 13-1122.

In a prosecution for homicide claimed by the defendant to have been done in defense of another person in danger of death or great bodily harm at the hands of members of a labor union who had come on the premises of another in pursuance of a conspiracy against the person defended, the giving of an instruction that if the alleged conspirators went upon the premises in an orderly and peaceable manner for the purpose of maintaining a rate of wages, and to induce a certain employee to work only at that wage, their purpose was a lawful one under the laws of the state, is error, although a statute defining the crime of conspiracy provides that the statute does not restrict the orderly assembling or co-operation of wage earners for the purpose of securing an advance in the rate of wages or the maintenance of such rate, as the instruction tends to confuse the jury upon a question not involved in the case, by leading them to believe that the statute confers upon wage earners some special privilege of entering on the premises of another to accomplish the maintenance of a wage rate. *State v. Hennessy* (Nev.), 13-1122.

A person acting in defense of another is upon the same plane as a person acting in defense of himself, and may show in justification of a homicide any fact which would be competent to establish justification in behalf of a person acting in his own defense. *State v. Hennessy* (Nev.), 13-1122.

One who undertakes to assist a near relative who is in danger of death or great bodily harm at the hands of an antagonist acts at his peril if the person assisted has been actually in fault in provoking the difficulty, and the person assisting is guilty of murder or manslaughter in taking the life of the relative's antagonist, if the circumstances are such that the relative would have been guilty of one of those crimes had he done the killing. *State v. Cook* (S. Car.), 13-1051.

d. Setting spring gun.

A person has no right to take human life, directly or indirectly, as by setting a spring gun for the purpose of preventing a mere trespass or a theft of property. He may do so only to prevent atrocious and violent felonies in the commission of which human life either is or is not presumed to be in peril. *State v. Marfaudille* (Wash.), 15-584.

6. EVIDENCE.

a. Admissibility.

(1) In general.

Time and place of crime. — In a prosecution for homicide, it is proper to permit a witness for the prosecution to be questioned as to his knowledge of the time and place where and when the deceased is said to have been killed, where the questions are merely introductory to other questions necessary to

elicit facts that are legal evidence. *Richardson v. State* (Ala.), 8-108.

Admissions, evidence to explain. —

Where, in a prosecution of a man for the murder of his wife, the state emphasizes, as a fact tending to show the defendant's guilt, the fact that he procured a steel or burglar proof vault in which the coffin of the deceased was incased for burial, and introduces as a witness the undertaker who sold him the vault to testify to the transaction and to repeat the conversation had with the defendant, it is error to refuse to allow the defendant, as a witness in his own behalf, to deny or explain the matters thus presented and give his own version of the conversation that took place. *State v. Blydenburgh* (Ia.), 14-443.

Declarations of coconspirators. — In a prosecution against two persons for murder, where it appears that the crime was committed during an attack made by the defendant upon the deceased and another person, it is competent to prove that when the attack was made one of the defendants said, "We will whip you in a minute," though it is not shown which of the defendants made the statement, as the declaration is not only part of the *res gestæ* but is competent evidence of a common purpose on the part of the defendants to attack the deceased and his companion. *State v. Jarrell* (N. Car.), 8-438.

Self-serving declaration. — In a prosecution for a murder committed in Oklahoma, where the defense is justifiable homicide, evidence that the defendant told a sheriff in Texas some time after the homicide to notify him and he would surrender if any papers came from Oklahoma for his arrest is properly excluded, where the state has introduced no evidence indicating that the defendant in any way resisted or fled from arrest. *Sneed v. Territory* (Okla.), 8-354.

Res gestæ. — In a prosecution for homicide by shooting, it is erroneous to refuse to permit a witness for the defense to testify as to the story of the manner of the shooting, told him by the defendant when the latter was about a quarter of a mile from the scene of the homicide on his way for the doctor, where it does not distinctly appear that the declaration was close enough in time and place to the transaction to be part of the *res gestæ*. *State v. Woodrow* (W. Va.), 6-180.

In a prosecution for murder, the defendant cannot introduce in evidence as part of the *res gestæ* a conversation concerning the killing, had by him with the motorman of the street car on which he was riding to the police station after the murder for the purpose of surrendering himself, where it appears that the defendant did not leave the scene of the homicide until some time after it had occurred, and that he took time to summon a doctor before going to the police station, as the defendant had too much time for reflection, too much time to calculate upon the consequences, and too much opportunity and motive for making up a story

with reference to the future, to warrant the court in holding that the statement on the car was an undesigned incident of the main fact, the homicide. *Johnson v. State* (Wis.), 9-923.

Evidence of fruits of crimes. — In a homicide case, where there is evidence that prior to the killing the defendant was heavily in debt and in need of ready money, and that immediately thereafter she had bills in her possession, instructions that the evidence is admitted only as bearing on the defendant's motive, etc., that evidence to show motive is competent, and that, in order to consider the evidence, the jury must be satisfied that the deceased had money in his possession immediately before his death, and that thereafter the defendant had such money in her possession, are correct. *Com. v. Richmond* (Mass.), 20-1269.

In a homicide case, certain evidence held to warrant a finding that the deceased had money to the amount of that possessed by the defendant after the killing. *Com. v. Richmond* (Mass.), 20-1269.

Opinion evidence — nervous condition. — It is competent for a witness to testify that the defendant in a murder case was "very nervous" on the day after the homicide. Such evidence is not a statement of a mere opinion, but describes a condition perceptible to the senses of the witness. *State v. Vanella* (Mont.), 20-398.

Respective danger of parties. — On a trial for criminal homicide the question, "From the appearance and acts of the parties at the time of the difficulty who impressed you as being in most danger of being shot?" is properly excluded as calling for an opinion. *State v. Hamilton* (La.), 18-981.

Negligent manslaughter — ability to avoid accident. — It is proper to refuse to allow the defendant in a prosecution for manslaughter as the result of negligence to be asked when testifying in his own behalf, whether he used his best judgment to avoid the accident, and whether he could with safety have done anything other than what he did, because such questions call for a mere expression of the opinion of the witness. *State v. Campbell* (Conn.), 18-237.

Experimental evidence. — In a prosecution for homicide by shooting, where the defense is set up that the killing was the result of the accidental discharge of a pistol by the defendant's three-year-old son, it is competent for the prosecution to introduce in rebuttal evidence of an experiment tending to show that the boy lacked the strength necessary to fire the pistol. *State v. Woodrow* (W. Va.), 6-180.

Identification of handwriting — comparison of writing and carving. — In a murder trial, in which the question is the identification of the defendant with the crime, a lawn mower handle on which is the acknowledged inscription "E. Kent," done in pencil, but containing only straight lines similar to carving, is admissible to show that inscriptions carved on doors, "E. Kent" and "E. K.," were also done by the defendant,

where, though the instruments used in making the inscriptions were different, the inscriptions show peculiarities in the construction of similar letters. *State v. Kent* (Vt.), 20-1334.

Number of deceased's children. — In a murder case, evidence as to the number of children the decedent had, and their ages, held immaterial. *Allen v. Com.* (Ky.), 20-884.

Self-defense—condition of deceased's mind. — In a murder case, where the defendant claims that as she entered the house to go to her apartments on the second floor, the decedent, who lived on the first floor, suddenly appeared, advancing on her with a rifle, whereupon the defendant fired a pistol which caused the decedent's death, and it appears that the decedent had charged her husband with improper relations with the defendant, it is error to exclude evidence showing that after the defendant left the house shortly prior to the homicide, the decedent's husband came home, and he and his wife had a furious quarrel about the defendant, in which he struck the decedent and hurt her hand and arm, after which he left just before the defendant entered the house, when the fatal encounter occurred; since the facts sought to be proved are closely related to the homicide both in time and logical sequence and tend to confirm the defendant's claim as to what took place between her and the decedent, and to render it reasonable by showing the decedent's frame of mind. *Allen v. Com.* (Ky.), 20-884.

Previous encounter. — In a prosecution for murder, evidence of a fight between the defendant and deceased occurring some time before, and not shown to have had any connection with the fatal encounter, is irrelevant and inadmissible. *Strong v. State* (Ark.), 14-229.

Rebuttal of plea of self-defense. — Where, in a prosecution for murder, the defendant testified, presumably for the purpose of showing that he had reason to fear the deceased, that he had heard from persons whom he was unable to name that the deceased, who was town marshal, had clubbed and fatally injured an old man in arresting him, it was competent for the state to prove in rebuttal that the old man in question died of senility and alcoholism, and that there were no marks of violence on his person. *Knapp v. State* (Ind.), 11-604.

Judicial notice — patent medicines — contents. — A court cannot take judicial notice that the name "Rough on Rats" is always and everywhere applied to the same compound, or that any two sealed packages taken from the same pharmacist's stock and bearing that name contain the same article; and hence in a prosecution for murder by arsenic poisoning, evidence, designed to show how the accused came into possession of the poison, that some proportion of such poison was found in a package of "Rough on Rats" taken from the same pharmacist's stock from which the accused had been known to purchase an article bearing the same name and

label is inadmissible, there being no evidence to show that "Rough on Rats" is a known and definite compound containing arsenic. *State v. Blydenburgh* (Ia.), 14-443.

Cross-examination. — In a homicide case, a question, asked the inspector of police by the defendant, if, after the defendant was indicted, the inspector had not "procured the putting of one of the government witnesses on probation after he had pleaded guilty to a crime," is properly excluded, it being unsupported by any suggestion of inducement to a definite person, and being objectionable in form since the placing on probation of one charged with crime is the independent act of the court, and cannot be "procured" by anybody. *Com. v. Richmond* (Mass.), 20-1269.

Where, in a homicide case, a witness for the commonwealth who has testified at length concerning the people in the house where the deceased met his death, and their actions, and some of their conversation, and that one D. had said, in reply to his question a short time before the body of the accused was discovered, that the deceased was in the house, is asked on cross-examination. "When was deceased again mentioned by any of you?" the question is properly excluded, being indefinite as to persons, and appearing to bear no relation to any issue in the case. *Com. v. Richmond* (Mass.), 20-1269.

Redirect examination. — In a homicide case, where it appears by the cross-examination of a police officer called by the commonwealth that certain men in the defendant's house were arrested on the day the deceased's body was found, the arresting officer is properly permitted to testify on redirect examination, subject to the defendant's exception, that the men were arrested for witnesses; the inquiry being permissible, in the court's discretion, to refute any inference that the men were suspected of the crime. *Com. v. Richmond* (Mass.), 20-1269.

Rebuttal evidence. — Where a witness for the prosecution in a murder case testifies without objection that the defendant stayed at the house of the deceased one or two nights and was there several times, and that "one evening" he had a quarrel with the deceased, but did not fix the time of the quarrel, it is proper for the court to refuse to allow a witness for the defense to testify that the defendant stayed at the house of the deceased only one night and that on that occasion there was no quarrel. *Ausmus v. People* (Colo.), 19-491.

Duty of prosecution to call witness. — Where the relations between the defendant in a prosecution for homicide and the only eyewitness to the transaction which led up to the homicide are intimate, and the latter has made apparently conflicting statements in reference to the occurrence, the refusal of the trial court to compel the prosecution to call such eyewitness is not an abuse of its discretion. *Dillon v. State* (Wis.), 16-913.

Harmless error. — In a prosecution for murder arising out of a dispute concerning a corn crop, the admission of evidence that the deceased was advised by officers of the

law that he would be justified in hauling the corn, is erroneous, but not prejudicial to the accused, where the evidence does not show that the deceased was advised that he would be justified in using force to enable him to haul the corn, and therefore does not give the jury the right to conclude that the deceased entertained that belief. *Strong v. State* (Ark.), 14-229.

The discretion of the trial court in regulating the production of testimony is not abused by permitting the state's attorney, after all the testimony for the defense in a murder case is in, to recall the accused who has testified in his own behalf, and ask him if he did not state on the morning of the killing that he thought a certain other person did the deed, and upon his denial, to contradict him; and in any event the testimony is not prejudicial where the accused pleads self-defense and admits that at the time of the alleged statement his whole attitude towards the tragedy was one of feigned ignorance and was false. *Stout v. Commonwealth* (Ky.), 13-547.

(2) Character evidence.

a. Character of deceased.

In the trial of an indictment for manslaughter, when there has been testimony tending to prove an assault by the deceased upon the defendant immediately before the striking of the fatal blow, the defendant may introduce evidence tending to show that the general character and habits of the deceased were those of a violent, passionate person, a quarrelsome, fighting man, which character and habits were known to the defendant. *Commonwealth v. Tircinski* (Mass.), 4-337.

In a prosecution for murder, where the defense is justifiable homicide, the defendant, for the purpose of showing his knowledge of the violent temper of the deceased and of the disposition of the latter to become angry with friendly persons and to use his pistol upon small or no provocation, may introduce evidence to prove that a few hours before the homicide the deceased had a difficulty with a third person growing out of the refusal of the third person to take a drink, and that in course of such difficulty the deceased threw the third person upon the floor, drew his pistol and attempted to shoot him, but was prevented from doing so by the defendant. *Sneed v. Territory* (Okla.), 8-354.

In a prosecution for murder the character of the deceased is presumed to be quiet and peaceable, and until the defendant introduces evidence attacking the general reputation of the deceased as a quiet and peaceable man, no evidence of his quiet and peaceable disposition is admissible, although the defendant seeks to prove that the killing was done in self-defense. *Kelly v. People* (Ill.), 11-226.

Evidence on the part of the state in a prosecution for murder that the deceased was large and strong is no evidence of a quarrelsome or violent disposition so as to authorize the admission of evidence in rebuttal that the deceased was of a quiet and

peaceable disposition. *Kelly v. People* (Ill.), 11-226.

(b) Character of accused.

In a murder case, the accused may introduce evidence of his good character. *Allen v. Com.* (Ky.), 20-884.

A person on trial for homicide may introduce as a part of his defense the testimony of competent witnesses that prior to the date of the crime alleged in the indictment his character as a quiet and peaceable citizen was good, and he is not limited to proving what people may have said about him, as to his being or not being a quiet and peaceable person. *State v. Dickerson* (Ohio), 11-1181.

Where a witness called by the defendant in a criminal case to establish his good character, testifies in chief that he is acquainted with defendant's general reputation for honesty and integrity in the community where he resides; that such reputation is good; and that he has been acquainted with the defendant six or seven years, during which time the defendant has worked for him; and further testifies, on cross-examination, that the only persons he has heard speak about the character of the defendant are members of his own family; that he does not know that he has ever heard defendant's reputation questioned — "that it ever came up any more than any other gentleman's," it is error for the court to strike out the testimony of such witness on the ground that it does not tend to establish a general reputation. Negative evidence of good character, indicated by such testimony, is competent, and should be admitted. *State v. McClellan* (Kan.), 17-106.

Truth and veracity of accused. — In a prosecution for murder it is proper to exclude evidence that the accused is reputed, in his home country, to be a man of truth and veracity, where his reputation for truth and veracity has not been attacked. *Johnson v. State* (Wis.), 9-923.

Reputation in community. — In a prosecution for murder a witness who says he knew the accused for a period of twenty-five or thirty years is competent to testify to the community reputation of the accused as a man of quiet and peaceable disposition, although for five or six years preceding the trial the witness and the accused have lived about ten miles apart. *People v. Van Gaasbeck* (N. Y.), 12-745.

Personal knowledge of witness. — A witness cannot testify to his own personal knowledge of the character of an accused person as a peaceable and quiet man. *People v. Van Gaasbeck* (N. Y.), 12-745.

A person who has lived any considerable length of time in the same neighborhood as another is competent to testify to the fact that he has never heard anything against that other person as a quiet and peaceable man. *People v. Van Gaasbeck* (N. Y.), 12-745.

Matters occurring after homicide showing bad character. — In a murder

case, evidence of the bad character of the accused, based on what occurred after the homicide, is inadmissible as denying the presumption of innocence from good character before the charge of crime was made. *Allen v. Com.* (Ky.), 20-884.

(c) Character of family of deceased.

On a trial for criminal homicide it is not competent to show the reputation of the family of the deceased for violence and fighting. *State v. Hamilton* (La.), 18-981.

(3) Declarations of deceased.

(a) In general.

In a murder case the declarations of the deceased are not admissible in evidence unless they were part of the *res gestæ*, were dying declarations, or were communicated to the defendant so as possibly to have influenced his conduct. *Ausmus v. People* (Colo.), 19-491.

Purpose of seeking accused. — Declarations made by the deceased in reference to his motive in seeking to find the accused, though made while on his way to the scene of the homicide in quest of the accused, were not admissible, over the objection of the accused, for the purpose of showing that the intention of the declarant in seeking the accused was peaceful and lawful. *McCray v. State* (Ga.), 20-101.

Where upon a trial for murder, the evidence disclosed that the accused killed the deceased while he, as a town marshal, was attempting to arrest him for a past violation of a municipal ordinance, it was not erroneous to refuse to allow the defendant to prove by the witness that, on the day of the homicide, he was told by the marshal that the accused was to come to the town that day to stand his trial for violating the town ordinance, and that this was understood between him and the accused. *Yates v. State* (Ga.), 9-620.

Statements made to medical witness by patient. — In a prosecution for murder by poisoning, a physician testifying as an expert for the defense concerning the condition of the deceased at the time of diagnosis is competent to testify not only to what the patient said as to her present condition, but also to statements made by her concerning her previous condition and the history of her case, and the exclusion of the evidence of the statements concerning the history of the case is prejudicial error especially where the theory of the defense is that the disease of which the deceased died was of long standing and sufficient to account for many of the alleged indications of poisoning. *State v. Blydenburgh* (Ia.), 14-443.

(b) Dying declarations.

Consciousness of impending death. — Where a dying declaration is offered in evidence, the declarant's consciousness of impending death is sufficiently shown by evidence that at the time he made the declar-

tion he had been informed by the attending physician that he was about to die and had stated that he realized his condition. *State v. Mayo* (Wash.), 7-881.

Dying declarations, admissible as such, are declarations made under the fixed belief and moral conviction of the person speaking, that death is impending and certain to follow almost immediately. *People v. Buettner* (Ill.), 13-235.

No error is committed in admitting as dying declarations statements of a person shot almost through his body and helpless, who, before making the statements, says, "I am mortally wounded. I am all in. Turn me over, and I will tell you how it happened." *State v. Hennessy* (Nev.), 13-1122.

In order that a dying declaration as to the cause of death may be admissible in evidence at the trial of a prisoner for the murder of the declarant it must be shown that at the time the statement was made the death of the declarant was imminent and that he had abandoned all hope of living, i. e., believed that death must follow. But it is not necessary to prove that the declarant believed that death would ensue immediately. *Rex v. Perry* (Eng.), 17-285.

Declarations indicating hope of recovery. — Although there is nothing in the feelings of a declarant that presages her approaching dissolution, and she replies to inquiry that she feels "good" or "very well," her declarations are admissible if she had been led by the statements of her nurse and physician to abandon hope of life, and look upon death as certain to follow almost immediately. *People v. Buettner* (Ill.), 13-235.

Expression of desire for consolations of religion. — The expression of a desire by a person for the consolations of religion, especially when the particular religion of the person provides for the administration of certain rites to its members when and only when they are actually in *articulo mortis*, is one of the strongest proofs that the person is in that condition of mind which is requisite to the admission in evidence of the statements of such person as dying declarations. *People v. Buettner* (Ill.), 13-235.

Admissibility as part of *res gestæ*. — A declaration of the deceased made immediately after being stabbed by the accused is admissible as a part of the *res gestæ*. *State v. Gilbert* (Idaho), 1-280.

Admissibility as dependent upon completeness. — The admissibility of a dying declaration does not depend upon its completeness, but it is sufficient if the declaration adds a link to the chain of evidence. *State v. Mayo* (Wash.), 7-881.

Admissibility as question for court. — Whether a declaration was competent as a dying declaration is for the court to determine. *Allen v. Com.* (Ky.), 20-884.

In a murder case the question of the competency of dying declarations offered in evidence is, in the first instance, a question of law for the court, and the court must pass upon the competency of such evidence as a

question of law. *Willoughby v. Territory* (Okla.), 8-537.

In the trial of a murder case, the failure or refusal of the court to pass upon the question of the competency of dying declarations offered in evidence, and the submission of such declarations to the jury without first passing upon their competency, is error. *Willoughby v. Territory* (Okla.), 8-537.

Where, in the trial of a murder case, the court as a matter of law passes upon the competency of dying declarations offered in evidence, and finds that they are competent to be submitted to the jury, and they are submitted to the jury, it is not error for the court by an instruction to submit again the question of the competency of such evidence to the jury for their consideration. *Willoughby v. Territory* (Okla.), 8-537.

Part not relating to homicide. — The only part of a dying declaration proper for the jury is the portion of it relating to the homicide, though evidence of what the declarant said and did about the time the declaration was made is admissible to show that she was rational and understood what she was doing; the jury being charged that it could be considered for that purpose only. *Allen v. Com.* (Ky.), 20-884.

Statements in a dying declaration as to matters occurring before the meeting between the deceased and the defendant at which the fatal affray took place, such as the movements of the deceased, what he did, the persons he met, etc., are not admissible in evidence against the defendant, because such matters are not a part of the *res gestæ*. *State v. Kelleher* (Mo.), 19-1270.

Impeachment by contradictory statements of deceased. — Dying declarations may be impeached by evidence that the declarant made other statements inconsistent therewith. *State v. Mayo* (Wash.), 7-881.

Where it is sought to impeach dying declarations by evidence of contradictory statements, the proper course is to permit the impeaching witness to be asked directly what the declarant said to him and to let the witness state in his own words what was said. *State v. Mayo* (Wash.), 7-881.

Ordinarily, where a witness testifies to a fact, it cannot be shown that he has on another occasion made statements inconsistent with his testimony, unless he is first interrogated as to the statements and allowed to explain them; but where a dying declaration is admitted in evidence, other statements of the declarant inconsistent with the declaration may be shown to impeach it. *Allen v. Com.* (Ky.), 20-884.

Declarant devoid of religious belief.

— Evidence to the effect that the person who made a dying declaration was devoid of religious belief is admissible for the purpose of discrediting the dying declaration, it being for the jury to say to what extent such evidence affects the value of the declaration. *Gambrell v. State* (Miss.), 16-147.

To render such evidence admissible it is not necessary to show that the deceased was a non-believer at or near the time when he

made the dying declaration. The defense may show that the deceased was a non-believer at any time during his life, it being for the jury to determine whether he had changed his opinion at the time of making the declaration, and the effect thereof. *Gambrell v. State* (Miss.), 16-147.

Parol evidence to prove. — Where a dying declaration is not wholly reduced to writing, and the writing is not signed by the declarant, parol evidence is admissible to prove the declaration. *Allen v. Com.* (Ky.), 20-884.

Instruction as to credibility — In a criminal prosecution where dying declarations have been admitted in evidence against the defendant, it is erroneous for the court to refuse the defendant's request for an instruction that the evidence should be received with caution. *State v. Mayo* (Wash.), 7-881.

(4) Identification of accused.

Initials carved on door. — In a prosecution for murder, carved initials on a barn door, which was situated near the house in which the murder was committed, are properly admitted in evidence to identify the accused with the crime, as against the objection that there is nothing to connect the accused with the initials, where he admits that he slept in the barn the night before the crime was committed, and there is evidence showing that he had a habit of cutting his initials as a pastime, and that fresh whittlings were found on hay beneath the carving where some one had lain. *State v. Kent* (Vt.), 20-1334.

In a prosecution for murder, evidence that various articles of clothing shown to have belonged to the defendant were found near tracks leading from the scene of the homicide is admissible. *State v. Jeffries* (Mo.), 14-524.

Footprints. — In a prosecution for murder, testimony as to tracks or footprints found half a mile from the scene of the crime and corresponding, in respect to a certain peculiar patch, with one of the shoes worn by the defendant at the time of the homicide, is admissible where it appears that such tracks were a continuation of tracks traced from the scene of the crime, and that certain articles of apparel belonging to the defendant were also found, and that it had rained the night before so that the tracks could be identified as fresh ones. *State v. Jeffries* (Mo.), 14-524.

Instrument of crime. — In a prosecution for murder, testimony as to the finding of a pistol formerly belonging to the defendant, near the scene of the crime and at a place where certain articles of his wearing apparel and tracks resembling his were found, is admissible. *State v. Jeffries* (Mo.), 14-524.

(5) Motive and intent.

Previous altercations. — In a prosecution for homicide, evidence relating to the

defendant's conduct resulting in an assault upon him by the deceased about eight months before the homicide, is admissible for the purpose of showing the animus which probably existed between them at the time of the homicide. *State v. Brooks* (S. C.), 15-49.

In a homicide case, where the presence of the defendant in one of her connecting rooms is a material fact on the trial, the testimony of a witness that she heard one P., while standing near the bedroom door, and after the defendant had been called without response, say in the course of a talk with a servant of the defendant, in which he demanded money or some satisfaction as to a disagreement about the hire of a room, "I shall bring an officer," and that the next morning the defendant asked the witness not to let P. bring an officer, and stated that there was no need of an officer being brought about the room rent, is competent as tending to prove that the defendant was in the rooms when P. spoke of calling an officer. *Com. v. Richmond* (Mass.), 20-1269.

Threats by accused. — Where, in a prosecution of a man for the murder of his wife, a witness for the state is asked on direct examination if he ever "heard any conversation on the part of the defendant of a nature that was ill threatening and cruel toward his wife," and if so to state what it was, and the witness replies, after objection to the question is overruled, that on one occasion the deceased told the defendant that she wished he would drive down and take her out to the farm, and that he replied, "If you want to go to the farm you will have to walk," and "I am not coming down here for you," the testimony is objectionable and should be excluded, both as incorrectly characterizing the conversation as ill treatment and cruelty, and as being too trivial and inconsequential to be admissible. *State v. Blydenburgh* (Ia.), 14-443.

Accused going armed. — In a prosecution for homicide, it is competent to prove that on the day of the killing the defendant was seen with a shot gun by witnesses who were at work a mile or more from the scene of the crime. *Richardson v. State* (Ala.), 8-108.

Killing by spring gun. — In a prosecution for murder for causing the death of a person by means of a spring gun kept in the defendant's trunk, the testimony of the defendant that he warned the deceased, who was the only person who had a lawful right to go to his room, in relation to the gun, may have a material bearing on the question of malice, and is admissible on that issue. *State v. Marfaudille* (Wash.), 15-584.

Declarations of accused — state of feeling towards deceased. — Testimony as to a statement made by the accused, a few days before the homicide, which tended in some degree to illustrate the state of his feelings toward the deceased at the time of the homicide, and to throw some light upon the question of the motive which actuated him when the killing occurred, was not inadmissible because such statement had not been

communicated to the deceased. *McCray v. State* (Ga.), 20-101.

Testimony of accused as to intent. — In a prosecution for murder for causing the death of a person by means of a spring gun the defendant cannot testify that he did not intend to kill the deceased, although he may testify as to his general intent in keeping the gun. *State Marfaudille* (Wash.), 15-584.

(6) Proof of other crimes.

In a prosecution for homicide, it is competent to prove that the defendant seduced the daughter of the deceased at the time when he was engaged to marry another young woman, and that the deceased threatened to prosecute the defendant for the offense, and it is not erroneous to permit the prosecuting attorney to say in his opening statement to the jury that he expects to prove the seduction, where the evidence is offered and introduced for the purpose of proving a motive for the homicide, and the jury are instructed not to consider it for any other purpose. *State v. Martin* (Oregon), 8-769.

In a prosecution of several seamen for a murder committed on the high seas, where one defendant voluntarily becomes a witness in behalf of himself and of his codefendants, it is not prejudicial error for the prosecution to ask the witness on cross-examination whether he had not had trouble and tried to create insubordination on another vessel prior to the commission of the offense for which he is on trial, where he denies the charge implied by the question and no attempt is made to contradict his testimony. *Sawyer v. United States* (U. S.), 6-269.

Where upon a trial for the murder of one who killed a town marshal who was attempting to arrest him for a past violation of a municipal ordinance it appeared that, at the time of the homicide, the marshal, accompanied by a posse, attempted to arrest the accused, without a warrant, evidence that the accused had violated an ordinance of the town where such attempt to arrest was made, "in the presence of the deceased on [a named date], about four months before the killing, and that [the accused] was armed with a gun and resisted arrest," was not "irrelevant and immaterial." *Yates v. State* (Ga.), 9-620.

It is error to allow the state, in cross-examination of witnesses as to the good character of the accused, to prove by them that, prior to the commission of the alleged crime, they had heard rumors or reports in the community where the accused resided, that he had committed certain other crimes of various character. *State v. Dickerson* (Ohio), 11-1181.

(7) Proof of *corpus delicti*.

Corpus delicti means the substance of the crime, and on a trial under an indictment for murder, proof of the manner and means in and by which the crime was consummated does not relate to the *corpus delicti*, but solely and directly to the accused's guilty

agency in the crime. *State v. Knapp* (Ohio), 1-819.

Explaining disappearance of alleged decedent. — Where the defendant in a murder case claims that the person alleged to have been killed is not dead but is only concealing himself, it is proper for the court to exclude evidence offered for the purpose of showing a larceny of live stock by such person as a reason for concealment, that he sold a horse to the witness shortly before the alleged homicide, and that a third person after the date of the alleged murder claimed the horse and compelled the witness to pay him for it. Such evidence is inadmissible both because of irrelevancy and because it is hearsay. *Ausmus v. People* (Colo.), 19-491.

Sufficiency of evidence. — The *corpus delicti* in a murder case is proved by the finding of a human skeleton buried in the ground with a bullet hole through the skull from back to front, and so located that it could not have been self-inflicted, though there is no evidence as to the identity of the deceased or as to who killed him. *Ausmus v. People* (Colo.), 19-491.

The finding of the jury on conflicting evidence as to the identity of the deceased in a murder case will not be disturbed on appeal. *Ausmus v. People* (Colo.), 19-491.

On a trial under an indictment for murder, if the facts extrinsically proved by the state corroborate the confession of the prisoner, positive evidence of the *corpus delicti* is not indispensable to admit the confession in evidence, and such evidence taken together will support a verdict of guilty if the jury is persuaded of the guilt of the prisoner beyond a reasonable doubt. *State v. Knapp* (Ohio), 1-819.

b. Weight and sufficiency of evidence.

In general. — In a prosecution for murder in the first degree, evidence examined and held to sustain a conviction. *People v. Gilbert* (N. Y.), 20-769.

Evidence examined and held sufficient to sustain a verdict that the death of the deceased was the result of strychnia administered by the defendant. *Levering v. Commonwealth* (Ky.), 19-140.

Evidence examined and held sufficient to sustain a verdict of guilty of murder with capital punishment. *Johnson v. State* (Okla.), 18-300.

Evidence examined and held sufficient to support a conviction of murder. *Elias v. Territory* (Ariz.), 11-1152.

In a prosecution for homicide, evidence held to justify the submission to the jury of the question whether the defendant was guilty of murder in the second degree. *Dillon v. State* (Wis.), 16-913.

In a prosecution for murder in the first degree, evidence examined and held that the issue of the defendant's guilt or innocence was for the determination of the jury, and that the defendant's conviction should not be interfered with by the appellate court. *People v. Rogers* (N. Y.), 15-177.

In a prosecution for murder, evidence examined and held to justify the jury in finding that both the accused and the deceased engaged in a mutual combat with malice and after having had ample time for premeditation and deliberation, and therefore to support a verdict of murder in the first degree. *Strong v. State* (Ark.), 14-229.

A verdict of conviction for murder will not be set aside for want of sufficient evidence of the identity of the defendant where the wife and daughter of the deceased identify the defendant as the person who did the killing, and incriminating circumstances strongly corroborated by admissions and statements of the defendant himself all point to his guilty participation in the murder. *State v. Jeffries* (Mo.), 14-524.

In a prosecution for murder, evidence from which the jury can find that shortly after a quarrel between the defendant and the deceased woman he got into a cab with her, and upon her statement that she would tell his father how he had treated her, shot her with a pistol, and, as she was falling from the vehicle, shot her again, is sufficient to support a verdict of murder in the first degree. *Brewer v. State* (Fla.), 12-79.

Evidence reviewed, in a prosecution for murder, and held sufficient to justify a conviction for murder in the second degree under the statute providing that a killing, "when perpetrated by any act eminently dangerous to others and evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed, or of any human being, shall be murder in the second degree." *Johnson v. State* (Wis.), 9-923.

Circumstantial evidence.—A conviction for murder will not be set aside for insufficiency of the evidence where the evidence, though circumstantial, is well connected and excludes every reasonable hypothesis except the guilt of the defendant. *Schwartz v. State* (Tex.), 11-620.

Manslaughter may be proved by circumstantial evidence. *State v. Gillis* (S. Car.), 6-993.

Purpose of person present to aid and abet.—Evidence reviewed, in a prosecution against two defendants for murder, and held sufficient to justify the jury in finding that one of the defendants was present at the time of the homicide for the purpose of aiding and abetting the other, and was therefore a coprincipal. *State v. Jarrell* (N. Car.), 8-438.

Whether aider and abetter acted under fear of death.—Evidence held to warrant a finding that the accused, who assisted in the homicide, did not act under duress by reason of fear of death at the hands of the person assisted. *State v. Nargashian* (R. I.), 3-1026.

Venue of crime.—The evidence is sufficient to sustain the finding of the jury that the scene of a homicide was within the exclusive federal jurisdiction, where the deeds and condemnation proceedings assented to by state legislation and authorized by Congress,

under which the United States claims title to the premises as a military reservation, are put in evidence, together with official maps in the engineer's department, made from original surveys under the authority of the war department, and a book showing titles to such reservation, compiled under the same authority, even if evidence of the *de facto* exercise of exclusive jurisdiction is not enough. *Holt v. U. S.* (U. S.), 20-1138.

7. INDICTMENT AND INFORMATION.

Sufficiency of common-law indictment.—An information under the Montana statute for murder in the first degree need not allege that the acts were done deliberately, notwithstanding the fact that the statutory definition of the offense uses the word "deliberate," but it is enough if the information contains allegations sufficient for a common-law indictment. *State v. Lu Sing* (Mont.), 9-344.

Preliminary averment as to character of assault.—An indictment for murder which charges that the acts constituting the assault were done feloniously and with malice aforethought need not contain such allegations in the preliminary averment of assault. *Holt v. U. S.* (U. S.), 20-1138.

Alleging venue.—An allegation in an indictment for murder that the crime was committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States," charges with sufficient clearness that such reservation was under the exclusive jurisdiction of the United States at the time of the murder. *Holt v. U. S.* (U. S.), 20-1138.

Repetition of feloniously.—Where the charging part of an indictment for murder is in one sentence and the word "feloniously" used in relation to the assault is so connected with the subsequent portions of the sentence as to modify them by a fair and reasonable interpretation, it is not necessary to repeat the word "feloniously" in connection with each act necessary to constitute the crime, but if the pleader uses words to describe the intent with which the mortal wound was inflicted, other than those used to charge the intent with which the assault was made, the words "then and there" used in connecting the infliction of the mortal wound with the felonious assault, will be interpreted to refer to time and place merely, and not as a vehicle to carry the intent with which the assault was made through the indictment so as to modify the intent in making the mortal wound, and the indictment will be insufficient for failure to charge that the mortal wound was inflicted feloniously. *Wright v. United States* (Okla.), 11-995.

Descriptions of weapon.—Where an indictment for murder alleges that the wounds that caused death were inflicted with "a piece of two-inch plank," or "an axe handle," it is not necessary to allege that these instruments were deadly weapons, or to give their size, weight, or dimensions. *Johnson v. State* (Okla.), 18-300.

Description of deceased as human being. — Where an indictment charges the defendant with the murder of "Mary Cuppy," it is not necessary to allege that "she" was a human being, this being a matter of proof, rather than of pleading. *Johnson v. State* (Okla.), 18-300.

An indictment for murder need not specifically allege that the victim was a human being. The use of the word "murder" and the use of an ordinary name and surname in describing the victim, e. g., the defendant did "kill and murder Viola Hughes," sufficiently shows that a human being is meant. *People v. Gilbert* (N. Y.), 20-769.

Equivalent terms. — Under the Montana statute defining murder and classifying as murder in the first degree any kind of "wilful, deliberate, and premeditated killing," an information alleging that the killing was done wilfully, unlawfully, feloniously, premeditatedly, and with malice aforethought, sufficiently charges murder in the first degree though the word "deliberate" is omitted. *State v. Hliboka* (Mont.), 3-934.

Election on counts. — In a prosecution for murder, in which the defendant is convicted of killing the deceased with his own hands, as charged in one count in the information, no error is committed in failing to require the state to dismiss another count charging the defendant with having aided and abetted another person who did the killing. *State v. Jeffries* (Mo.), 14-524.

Variance. — A homicide need not be proved to have been committed on the day charged in the indictment. It is sufficient to show that it was committed at any time before the indictment was filed. *State v. Vanella* (Mont.), 20-398.

Nonprejudicial error. — Under the Montana statutes providing that an information is not rendered invalid by a defect in the matter of form or by a mistake therein which does not actually prejudice or tend to prejudice the defendant in respect to a substantial right, an information is not rendered insufficient to support a conviction for murder in the first degree by the fact that it uses a meaningless word "deliberately," and fails to use a proper word importing deliberation. *State v. Lu Sing* (Mont.), 9-344.

Indictment good for degree of conviction. — A defendant convicted of manslaughter under an information for murder in the first degree cannot complain that the information fails to charge that it is upon the oath of the prosecuting officer, as, even with the omission, the information is sufficient to charge manslaughter. *State v. Morgan* (Mo.), 7-107.

Where one is indicted for murder, but the indictment, although sufficient to charge manslaughter in the second degree, is not a good indictment for either murder or manslaughter in the first degree, and the defendant is put on trial for murder, and the jury returns a verdict of manslaughter in the second degree, the defendant cannot thereafter complain that he was tried upon the theory that the indictment was a good indictment for mur-

der, unless it appears from the record that the defendant may have been prejudiced thereby; and the prejudice will not be presumed from the fact alone that the prosecution and the court proceeded upon the theory that the indictment was a good indictment for murder. *Loudenback v. Territory* (Okla.), 14-988.

8. INSTRUCTIONS.

Absence of motive. — In a prosecution for murder, it is proper to refuse the defendant's request for an instruction that "the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence," for the reason that the instruction would necessarily confuse the jury by leading them to infer that after they had come to the conclusion that there was a reasonable doubt as to who committed the murder they must still pursue their investigation of the case further, and for the reason that it is for the jury to determine whether the presumption is strong or otherwise. *State v. Lu Sing* (Mont.), 9-344.

Deliberation. — In a prosecution for murder, an instruction defining deliberation and premeditation, and declaring that if the killing is not the instant effect of impulse, if there is any hesitation or doubt to overcome, a choice made as the result of thought, "however short the mental thought," the struggle of the mind, it is sufficient to characterize the crime as being deliberate, is not erroneous in the use of the clause quoted. *People v. Gilbert* (N. Y.), 20-769.

Individual opinion of jurors. — The defendant in a prosecution for murder is not prejudiced by and has no cause to complain of an instruction which tells the jury that each juror "should act for himself and form his own judgment, uninfluenced by, and independent of, the judgment of others, and thus determine the guilt or innocence of the defendant from his own standpoint." Such an instruction does not tell the jury that its members must not discuss or indulge in an interchange of views concerning the guilt or innocence of the accused, and it will not be assumed that the jury so understood or acted upon the instruction, especially as the defendant, if he had deemed the instruction prejudicial as forbidding free consultation, could have had the jury directed to consult by putting forward a substantive proposition to that effect. *Knapp v. State* (Ind.), 11-604.

Instruction as to killing by spring gun. — In a prosecution for murder, it is error to instruct the jury that one who sets in his trunk a spring gun which results in the death of a human being is guilty of murder in the second degree. In such a case the court should instruct the jury as to when a person may take human life in defense of person or property, and should allow the jury to apply the law to the facts as they find them. *State v. Marfaudille* (Wash.), 15-584.

Consideration of grades of offense.—

In a prosecution for homicide it is proper to instruct the jury that they should first take up the question of murder in the first degree, and that if they do not find the facts necessary to a conviction, they should take up the next lower grade of homicide, and so proceed down the line until they come to the question of justifiable or excusable homicide, and also to instruct the jury that they need not consider a lower degree of offense if they find the defendant guilty of a higher one. *Dillon v. State* (Wis.), 16-913.

Refusal of instruction explaining flight.—

In a prosecution for homicide, where the case upon the evidence is very close, the refusal of a requested charge that the jury may consider, in connection with the circumstance that the defendant went from the town where the homicide occurred to his home in the country after the killing, the additional fact if proved, that on the day following his return home he voluntarily notified the sheriff of the county that he would come in the next day and surrender himself, is error, which is not cured by a charge that the defendant's flight, even if proved, may only be considered as a circumstance of guilt, and that, unless the evidence is so positive and certain as to produce in the minds of the jury a solemn conviction beyond all reasonable doubt that the defendant is guilty, they should acquit him. *Bell v. State* (Miss.), 11-431.

Self-defense not in issue.—

Where there is no evidence to establish a case of justifiable homicide as defined by the Wisconsin statute, and the defendant denies that he killed the deceased in self-defense, it is unnecessary to instruct the jury as to justifiable homicide. *Dillon v. State* (Wis.), 16-913.

Lesser degrees not supported by evidence.—

In a prosecution for murder there is no error in refusing to instruct the jury upon the question of involuntary killing where there is no evidence in the case upon which to base such an instruction. *State v. Megorden* (Ore.), 14-180.

Circumstantial evidence.—

Where in a prosecution for murder, the state's case rests entirely on circumstantial evidence, the jury should be told so and should be instructed as to the rules governing circumstantial evidence; and it is erroneous for the court in its instructions to define both direct and circumstantial evidence and submit the case to the jury upon the theory that there is in the record evidence of both classes from either or both of which an inference of guilt can be drawn. *State v. Blydenburgh* (Ia.), 14-443.

Reasonable doubt.—

On a trial for murder, an instruction that if, after a fair and impartial consideration of the entire testimony in the case, the jury entertain any reasonable doubt as to whether the deceased came to his death in any other manner than that charged in the information, then it is their duty to acquit the defendant, is erroneous; the true rule being that if the jury have

any reasonable doubt that the deceased came to his death in the manner charged in the information, they should acquit. *State v. Berberick* (Mont.), 10-1077.

Necessity for request for instruction as to threats by deceased.—

In a homicide case, where self-defense is relied upon by the defendant and testimony is given of threats made against him by the deceased, some of which were communicated to him, the court may, in instructing as to the threats, omit a reference to the communication of the threats, where no instruction as to communicated threats is asked. *State v. Nelson* (Kan.), 1-468.

Harmless error.—A defendant who has been convicted of murder in the second degree cannot complain that the court charged the law of manslaughter, and that the evidence did not justify such a charge. *State v. Vanella* (Mont.), 20-398.

9. PUNISHMENT.

Reduction of sentence on appeal.—

On review of a conviction for murder in the first degree, the facts considered and held sufficient, under section 509a of the Criminal Code of Nebraska, to call for a reduction of the sentence of death, imposed by the trial court, to that of imprisonment for life. *Hamblin v. State* (Neb.), 16-569.

10. CONTINUANCE.

In a prosecution of a penitentiary convict for the murder of another convict, an affidavit for continuance setting forth that the accused is not ready for trial because of the absence of a witness who will testify that he was a guard down to the time of the killing, and that the deceased was reported to him for threatening, insulting, and declaring his purpose to assault the defendant, and that he, as guard, had forbidden the deceased, under penalty, from threatening to assault or insult the defendant, is properly excluded, because the testimony which it is alleged the absent witness will give is merely hearsay and fails to cast any light upon any issue of the trial. *Huffaker v. Commonwealth* (Ky.), 14-487.

11. ARGUMENT OF COUNSEL.

In a homicide case, where evidence as to the possession by the deceased of money prior to the killing and its subsequent possession by the defendant is introduced to show motive, remarks of the district attorney that the deceased had been working for thirty dollars per month are harmless, though there is no evidence of it, where the argument is not interrupted, no ruling is requested on the point, and no exception is taken respecting it. *Com. v. Richmond* (Mass.), 20-1268.

12. FORMER JEOPARDY.

Prior conviction of assault.—The commitment of a person to a state penitentiary to serve a term for felonious assault does not affect the jurisdiction of the court

sitting in the county in which the crime was committed to try such person for murder after the person assaulted has died, and the accused has been removed from the penitentiary and brought within the jurisdiction of habeas corpus at the instance of the district attorney. *Commonwealth v. Ramunno* (Pa.), 12-818.

13, INSANITY AS DEFENSE.

On the trial of a person charged with murder in the first degree, where the defense of insanity is presented by the evidence, an instruction that when the defendant has introduced evidence as to his mental condition sufficient to raise a doubt as to his sanity, which the law presumes, then it is incumbent upon the state to overcome such doubt, and to establish by evidence beyond a reasonable doubt that the defendant was sane at the time of the commission of the acts charged, does not present reversible error as tending to mislead the jury as to the burden of proof, when accompanied by other instructions clearly stating that the burden of proof never shifts, but as to all defenses which the evidence tends to establish rests with the state throughout. *Hamblin v. State* (Neb.), 16-569.

In such a case, where the claim and testimony of the accused are that he was unconscious of his act, and has no recollection of the occurrence, it is not error for the court to instruct the jury that if the accused was, at the time of the alleged criminal act, laboring under an aberration of mind to such a degree that he was unconscious of his acts, so much so that his intellectual powers were obliterated to that extent that he had no will, no purpose, no consciousness of right or wrong, he should be acquitted. *Hamblin v. State* (Neb.), 16-569.

In such a case, where the jury have been fully instructed upon every feature of the case, including the defense of insanity and the question of reasonable doubt, a further instruction which covers the physical facts of the case and states that if they are established beyond a reasonable doubt, "then the defendant is guilty of murder or manslaughter according as the evidence as explained in these instructions proves the one or the other," is not erroneous as withdrawing the defense of insanity from the jury. *Hamblin v. State* (Neb.), 16-569.

HONESTY.

Proof of reputation for honesty, see **CRIMINAL LAW**, 6 n (3).

Words affecting honesty as libelous, see **LIBEL AND SLANDER**, 2 h.

HORSE RACES.

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1. PUBLIC HOSPITALS AND ASYLUMS.

a. In general.

Construction of statute authorizing establishment. — As used in the Massachusetts statute relating to the establishment of hospitals for contagious diseases, the word "town" includes a city. *Barry v. Smith* (Mass.), 8-817.

Creation by special act of legislature. — The provision of the California constitution prohibiting the creation of corporations by special acts of the legislature does not prevent the creation by a special act of a state hospital for the insane, which is a public corporation acting merely as an agency of the state for governmental purposes. *Napa State Hospital v. Dasso* (Cal.), 15-910.

Liability of municipality for location. — Where the board of health of a city

are required by statute to exercise their discretion in determining the erection of a hospital for contagious diseases, they are not liable for mistake or negligence in the selection of the location. *Barry v. Smith* (Mass.), 6-817.

In an action against the board of health of a city to recover damages resulting from the maintenance of a smallpox hospital, brought by the adjoining owner of property in the city, it is no ground for recovery that the hospital is located closer to dwellings in an adjoining city than is permitted by statute. *Barry v. Smith* (Mass.), 6-817.

Right to use adjoining premises. —

Where the board of health of a city establish a smallpox hospital on land hired for that purpose, they cannot use adjoining premises for hospital purposes to the exclusion of the owner and his tenants unless they acquire the right by an agreement with the owner or in the manner provided by statute. *Barry v. Smith* (Mass.), 6-817.

b. Duty of municipality to care for sick.

Delegation to private institution. —

A city which is charged by statute with the duty of caring for poor persons who are afflicted with contagious diseases cannot transfer the duty to an incorporated hospital which has received a testamentary gift in trust for the purpose of providing free medical treatment to sick, injured, and infirm poor persons. *Stearns v. Newport Hospital* (R. I.), 8-1176.

c. Liability of municipality for negligence.

Negligence in management of pesthouse. — The failure of a city to appoint a board of health as an instrumentality in protecting the public health, as it is authorized by statute to do, cannot affect its liability for negligence in the management of a pesthouse. *Twyman v. Frankfort* (Ky.), 4-622.

A municipal corporation held not liable for negligence in the management of a pesthouse whereby a person confined therein was injured. *Twyman v. Frankfort* (Ky.), 4-622.

A city does not become a participant in the negligent acts of those who have in hand the removal of a diseased person to the city pesthouse, by reason of the fact that the city council in seeking to enforce a proper ordinance directs such removal. *Twyman v. Frankfort* (Ky.), 4-622.

d. Liability of asylum for torts of inmates.

Negligent or malicious injury to employee. — A lunatic asylum created by the state and maintained at its expense as an eleemosynary institution for the beneficent purpose of caring for persons of unsound mind is not liable for a personal injury inflicted upon an employee by a lunatic in its charge engaged in work for the asylum, though such injury results from negligence or malice on the part of the lunatic. *Leavell v. Western Kentucky Asylum* (Ky.), 12-827.

The fact that the statute from which an

eleemosynary insane asylum derives its corporate life and powers declares that it may sue and be sued does not render the institution liable for torts committed by its inmates or employees. *Leavell v. Western Kentucky Asylum* (Ky.), 12-827.

2. PRIVATE HOSPITALS AND ASYLUMS.

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3. HOSPITALS AS NUISANCES.

Maintenance of smallpox hospital. —

The board of health of a city are not liable for negligently maintaining a smallpox hospital in such a manner that it is a nuisance to an adjoining owner, unless the nuisance is caused by acts of misfeasance, as distinguished from nonfeasance, committed by them personally or by others in their presence. *Barry v. Smith* (Mass.), 6-817.

In an action for damages based on the maintenance of a smallpox hospital it is competent for the defendants to testify that they are members of the board of health of the city wherein the hospital is maintained, whether or not their evidence is sufficient of itself to establish their legal right to hold such offices. *Barry v. Smith* (Mass.), 6-817.

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1. DISABILITIES OF MARRIED WOMAN.

a. Contracts.

See also *CONFLICT OF LAWS*, c (3).

Common-law rule. — At common law the contracts of a married woman are absolutely void and not simply voidable; and this disability of a married woman to contract cannot be overcome by any mode of acknowledgment, or method of execution, or by uniting with her husband in execution of a contract. *Forsyth v. Barnes* (Ill.), 10-710.

Conveyance by wife to husband. — Though a husband joins in his wife's deed, she cannot make a valid conveyance of her real estate to him. *Alexander v. Shalala* (Pa.), 20-1330.

b. Confession of judgment.

Invalid under common law. — At common law a confession of judgment on a warrant of attorney executed by a married woman is void as to her and can be attacked either directly or collaterally. *Forsyth v. Barnes* (Ill.), 10-710.

Evidence of coverture. — Where coverture is not specifically put in issue under the pleadings in an action on a foreign judgment by confession against a married woman, evidence of that fact is properly admissible under the plea of *nul tiel record*. *Forsyth v. Barnes* (Ill.), 10-710.

2. RIGHTS AND LIABILITIES INTER SE.

a. Antenuptial agreements.

(1) Validity.

In general. — Antenuptial agreements determining the rights which each party shall have in the other's property are not against public policy, but are valid and enforceable. *Kroell v. Kroell* (Ill.), 4-801.

Antenuptial contracts between persons contemplating matrimony, determining the prospective rights of each in the property of both parties during and after marriage, are not against public policy and are enforceable. *Rieger v. Schaible* (Neb.), 16-700.

Common-law rule. — Antenuptial contracts were void at common law and did not constitute a bar to dower. *Rieger v. Schaible* (Neb.), 16-700.

Contract barring husband's homestead rights. — An antenuptial contract cutting off the intended husband's homestead right and his statutory one-third interest in his intended wife's property is not prohibited by the Minnesota statute, and is valid. *Appleby v. Appleby* (Minn.), 10-563.

Provision for husband on wife's death. — Where an antenuptial contract contains a stipulation that in consideration of a contemplated marriage and the relinquishment by the intended husband of all his rights and interests in and to the property and estate of the intended wife she shall provide from her estate after her death an annuity for him so long as he shall remain unmarried, provided the parties are living and cohabitating together as husband and wife at the time of the wife's death, the provision is valid, as it does not tend to induce a separation between the husband and wife. *Appleby v. Appleby* (Minn.), 10-563.

Invalidity of separable provision. — An antenuptial contract, fair and reasonable, respecting the property and property rights of the parties, fully performed by one of the parties after the marriage and before his or her death; will not be held void at the instance of the other party, merely because one of the provisions thereof might be so construed as to have justified the one performing in adopting a course of conduct before death that would have rendered the contract inoperative and to no effect. *Appleby v. Appleby* (Minn.), 10-563.

Review of judgment declaring agreement void. — A judgment of the Illinois Appellate Court holding invalid an antenuptial agreement between future husband and wife releasing all interests in each other's property and adjudging that a widow's award be granted, under which judgment it becomes the duty of a Circuit Court to appoint appraisers for the ascertainment of the award, is a final judgment of which the Supreme Court has jurisdiction on a writ of error, and this is true without regard to the amount of the award, as the proceeding is not in the nature of an action *ex contractu*. *Kroell v. Kroell* (Ill.), 4-801.

(2) Consideration.

Marriage and mutual release of interests. — An antenuptial contract in consideration of marriage and the release by each party of all interest in the property of the other, is based upon a sufficient consideration as to both parties, when each is the owner of property in which the other would acquire an interest by reason of the marriage but for the antenuptial agreement, and is sufficient, when equitable and fair in its terms and entered into in good faith, to constitute an equitable bar to dower. *Rieger v. Schaible* (Neb.), 16-700.

Mutual covenants. — The mutual covenants of the parties to an antenuptial agreement to waive their rights in the property of each other, and the release of such rights, constitute a good consideration to support the agreement, as the marriage of the parties is of itself a sufficient consideration. *Kroell v. Kroell* (Ill.), 4-801.

Agreement to marry. — An agreement to marry is a sufficient consideration to support an antenuptial contract disposing of and definitely fixing the property rights of the parties, even though the contract is made and signed several months after the contracting of an absolute engagement to marry, and only a couple of days before the celebration of the marriage. *Appleby v. Appleby* (Minn.), 10-563.

(3) Oral agreements.

Validity under Iowa statute. — Under section 3154 of the Iowa Code providing that when property is owned by husband or wife, the other has no interest therein that can be the subject of contract between them, an oral antenuptial agreement by which each party relinquishes all rights to the property of the other, may be given effect by a written postnuptial agreement, but unless the postnuptial agreement recites that it is to furnish evidence of or is in consideration of the previous antenuptial contract it is prohibited by the statute and is unenforceable. *Frazer v. Andrews* (Ia.), 13-556.

Validation by performance. — Where a man executes to a woman to whom he is engaged to be married and who afterwards becomes his wife, a deed to certain land, and simultaneously procures the woman to execute to him a note, together with a mortgage on the same property as security, promising orally to discharge such note and mortgage after the marriage, and does after the marriage discharge the note and mortgage voluntarily and in the absence of mistake or fraud, such discharge is in pursuance of a moral obligation and in the performance of a promise which, even though unenforceable by legal proceedings, because within the statute of frauds, is not illegal or contrary to public policy, and equity will not relieve him, against such discharge upon a bill by him, seeking to have the note and mortgage declared to be still in force. *Blackwell v. Blackwell* (Mass.), 12-1070.

(4) Effect.

As excluding operation of law. — Antenuptial contracts in anticipation of marriage, equitably and fairly made, exclude the operation of the law in respect to the property rights of each party, in so far as covered by the contract. *Appleby v. Appleby* (Minn.), 10-563.

As bar to dower. — The provisions of a statute that a jointure is a bar of dower do not ordinarily deprive the intended wife of the power to bar her dower by any other form of antenuptial contract. *Rieger v. Schaible* (Neb.), 16-700.

Dower may be waived by a reasonable and bona fide antenuptial agreement, though not provided for by such statute, and the agreement will be enforced in the absence of contravening equitable considerations. *Rieger v. Schaible* (Neb.), 16-700.

As bar to widow's award. — An antenuptial contract between future husband and wife, whereby each expressly releases all rights which may be acquired by the survivor in the property or estate of the other, embraces not only the enumerated rights, such as dower, curtesy, homestead, but also the widow's award. *Kroell v. Kroell* (Ill.), 4-801.

As bar to widow's statutory allowance. — An antenuptial contract made in good faith between parties, each of whom owns real and personal property not disproportionate in value, providing that in consideration of marriage each party thereto waives and releases and forever quitclaims and renounces all dower and other interest in and to the real estate and personal property which the other party has or shall thereafter acquire — the expressed intention being that all the property of each shall descend to his or her lawful heirs, released and divested of all claims of dower, curtesy, or other interest that the other contracting party may have as husband or wife, widower or widow, under the laws of the state of Nebraska — is sufficient to bar the widow's statutory allowance, the rights of children not being involved. *Rieger v. Schaible* (Neb.), 16-700.

As bar to widow's life estate in homestead. — Whether such antenuptial contract bars the widow's life estate in the homestead of her deceased husband is not here determined. If ineffectual for that purpose, the contract would not thereby be rendered void *in toto*. *Rieger v. Schaible* (Neb.), 16-700.

b. Antenuptial conveyances by intended husband.

When void in general. — A voluntary conveyance made by a man under an engagement to marry, made before and in contemplation of marriage, without the knowledge of the intended wife, with intent to free the land of the marital rights of the wife, is void as to her dower rights and as to the alimony decreed against him in a suit for divorce. *Goff v. Goff* (W. Va.), 9-1083.

A court of equity will relieve a wife against a voluntary conveyance by the husband of all his estate made on the eve of marriage without her knowledge and with the intent to defeat her marital rights. *Collins v. Collins* (Md.), 1-856.

A voluntary antenuptial conveyance made with the intent to defeat the marital rights of any person whom the grantor may subsequently marry is void as to such rights whether the future spouse is then selected or not. *Beechley v. Beechley* (Ia.), 13-101.

Conveyance to child by former marriage. — A conveyance made without fraudulent intent to the grantor's child by a former wife is not within the rule that a voluntary conveyance made in contemplation of marriage will be declared fraudulent. *Beechley v. Beechley* (Ia.), 13-101.

Conveyance before marriage agreed upon. — A conveyance eight months before the negotiations resulting in the grantor's marriage is not void as in fraud of a contemplated marriage, although the grantor had previously, within about a year, made unsuccessful proposals of marriage to the woman who afterwards became his wife, and to another woman. *Beechley v. Beechley* (Ia.), 13-101.

Conveyance for adequate consideration. — A conveyance, by a father to his son, of land worth from sixteen thousand to twenty-two thousand dollars, the grantee assuming the debts of the grantor amounting to sixteen thousand dollars, the consideration named in the deed, and the grantor retaining a life estate in the premises, is not voluntary, and will not be set aside as in fraud of the subsequent wife of the grantor, except on proof that the grantee was a party to the fraudulent intent; and such intent is not shown by the fact that the grantee withheld the deed from record at the unexplained request of the grantor. *Beechley v. Beechley* (Ia.), 13-101.

Misrepresentations as to amount of property. — In an action to set aside an antenuptial conveyance as in fraud of the subsequent marriage, evidence of a misrepresentation made by the grantor as to the amount of his property is inadmissible. *Beechley v. Beechley* (Ia.), 13-101.

Estoppel of grantee to assert title. — The grantee of land alleged to have been conveyed in fraud of the subsequent marriage of the grantor does not become estopped to assert title to the lands by his mere silence as to the conveyance at a time when the grantor and his wife execute in his presence a deed to other of their lands. *Beechley v. Beechley* (Ia.), 13-101.

c. Rights of husband during marriage.

Right to dispose of personal property. — Where a husband, the owner of certain bonds, executes an instrument transferring the same to a trustee to be delivered to his sisters upon his death, such transfer is valid as a gift although the wife does not assent thereto, as the wife has no vested in-

terest in the personal estate of her husband during his life, and he may make such disposition thereof during his life as he may choose. *Robertson v. Robertson* (Ala.), 10-1051.

Rights in wife's estate in general. — Under the Missouri statutes, the husband is entitled to share in his wife's estate regardless of whether he is entitled to curtesy. *Perry v. Strawbridge* (Mo.), 14-92.

Rights in ornaments and wearing apparel. — The common-law rule that "suitable ornaments and wearing apparel of a married woman, which come to her through her husband during coverture, remain his personal property during his life, and he may sell and dispose of them during his life," has not been abrogated in New Jersey by the Married Woman's Act or by any other statutory provision. *Farrow v. Farrow* (N. J.), 16-507.

Right to wife's earnings. — In the absence of any consent or agreement, either expressed or implied, on the part of the husband that the earnings of the wife shall be retained by her as her separate estate, they belong to him. *Georgia, R. etc., Co. v. Tice* (Ga.), 4-200.

d. Rights of wife during marriage.

Right to dispose of personal property. — The validity in Maine of a gift by a wife of her personal property during her lifetime to a person not her husband. *Wright v. Holmes* (Me.), 4-583.

As surety for husband. — Where a wife mortgages her separate property to secure the payment of money borrowed by her husband on their joint note, she is a surety, and as such is entitled to exoneration. *Browne v. Bixby* (Mass.), 5-642.

Where a wife, after mortgaging her separate property to secure the payment of money borrowed by her husband on their joint note, dies testate, her administrator with the will annexed has a sufficient interest to enable him to maintain a suit against the husband's executors to compel exoneration, whether or not such property is disposed of by the testatrix's will. *Browne v. Bixby* (Mass.), 5-642.

Compensation for improvements on husband's estate. — A woman who, chiefly for her own gratification and convenience, makes improvements on her husband's estate, supposing that such estate will be a home for herself and her children, cannot recover compensation for such improvements. *Bryan v. Councilman* (Md.), 14-1175.

Right to redeem from foreclosure sale. — A wife has such an interest in her husband's lands that in order to protect her interest she is entitled to redeem them from foreclosure. *Kopp v. Thele* (Minn.), 15-313.

Though the effect of such redemption is to annul the foreclosure sale, the redemption does not transfer to the wife her husband's title to the land; and if, after being divorced from her, the husband conveys his interest

in the land to a third party, the latter becomes the owner in fee thereof, subject to the wife's equitable lien thereon for the amount paid by her on the redemption from the foreclosure sale, with interest on such amount, less the net value of the land while in her possession. *Kopp v. Thele* (Minn.), 15-313.

Avoidance of deed procured by threats against husband. — The maxim *in pari delicto, melior est conditio defendentis*, does not apply in a case where a married woman sues to set aside a deed of her separate property, made by her under express or implied threats of the prosecution of her husband for the crime of embezzlement, and to save him from such prosecution, whether the threatened prosecution was lawful or unlawful, particularly so when she was sick and nervous, and when she does not appear to have had abundant opportunity for consideration and consultation with disinterested advisers. *Burton v. McMillan* (Fla.), 11-380.

Gift by husband to wife. — A gift of personal property from husband to wife must be clearly proved. There must be clear and convincing evidence of a delivery of the property by the husband with the intention of divesting himself of all dominion and control of it, and of vesting title in the wife. *Farrow v. Farrow* (N. J.), 16-507.

e. Payment of taxes on land of spouse.

Obligation to pay. — One spouse has no estate in the real property of another, and has no interest therein by virtue of such relation which imposes a legal or moral obligation to pay the taxes upon the real estate of the other. *Nagle v. Tieperman* (Kan.), 10-977.

The mere fact that the relation of husband and wife exists does not impose upon either spouse the legal or moral obligation to pay the taxes upon real estate owned by the other. *Nagle v. Tieperman* (Kan.), 10-977.

f. Suits between husband and wife.

Action on promissory note. — A husband and wife who have married since the passage of the Connecticut Married Women's Act may contract with each other and may sue each other at law or in equity for breach of a contract; and therefore the wife may sue the husband on a promissory note given by him to her. *Mathewson v. Mathewson* (Conn.), 6-1027.

Action to recover personal property. — Under the English Married Woman's Property Act, a married woman may sue her husband to recover her personal property detained by him. *Larner v. Larner* (Eng.), 3-144.

Action for assault and battery. — The District of Columbia Code does not authorize a married woman to maintain an action for assault and battery against her husband. *Thompson v. Thompson* (D. C.), 14-879.

Although a married woman cannot maintain an action for assault and battery against

her husband, costs will not in such an action be awarded to the husband, for the reason that the parties are one in law. *Thompson v. Thompson* (D. C.), 14-879.

g. Conveyances to husband and wife.

Partition on wife's death. — Although a conveyance to a husband and wife ordinarily creates a tenancy by the entirety, yet where a husband purchases land partly with his money and partly with money constituting the separate estate of his wife, and takes the legal title jointly to himself and his wife, a court of equity will declare a trust in favor of the wife for the proportion which her money bears to the entire amount invested, and upon her death the court will, at the instance of her heirs, decree partition and order the land to be sold and the proceeds distributed. *Donovan v. Griffith* (Mo.), 15-724.

Liability to account for rents. — Where there is no dispute between a husband and wife, who are living together harmoniously, as to the control of their joint land, and no agreement in reference to accounting for the rents received therefrom by the husband, the husband will not, after his wife's death, be charged, at the instance of her collateral heirs, with the rents which he received during her lifetime. *Donovan v. Griffith* (Mo.), 15-724.

h. Community property.

Conveyance. — Where an agreement for the sale of community property is made by the husband who, pursuant to the agreement, executes a deed which he leaves in escrow, the fact that the wife afterwards signs and acknowledges the deed is evidence that she understands and is assisting to carry out the agreement. *Manning v. Foster* (Wash.), 16-95.

Effect of change of domicile. — Personal property acquired by a husband or wife in a state by the laws of which it is separate property continues the separate property of that spouse when brought within a community property state, and property in the latter state, whether real or personal, purchased with or received in exchange for such separate property, is also the separate property of that spouse. *Brookman v. Durkee* (Wash.), 13-839.

i. Effect of marriage upon existing contracts between parties.

Promissory note. — The marriage of the maker of a promissory note with the payee thereof does not extinguish the debt and does not render the note void. *MacKeown v. Laey* (Mass.), 16-220.

3. RIGHTS AGAINST THIRD PERSONS.

a. Actions by husband for injuries to wife.

General elements of recovery for personal injuries. — The Alabama statute providing that the earnings of a wife are her separate property does not deprive the

husband of his common-law right, where the wife has been injured by the wrongful act of a stranger, to recover for the loss of her services, for the loss of her society, and for the expense incurred in the alleviation of her sufferings. *Birmingham Southern R. Co. v. Lintner* (Ala.), 3-461.

Where a wife suffers personal injuries by another's actionable fault and without any fault on her part, two distinct causes of action may accrue—one to her for the direct injuries to her person and the like; the other to her husband, for the consequential injuries to him, consisting of loss of her services and society, and of the expense to which he may have been put, and the like. *Mageau v. Great Northern R. Co.* (Minn.), 14-561.

Value of services in husband's business. — The damages that may be recovered by a husband for the loss of the services of his wife by reason of personal injuries are not confined to the value of her services in the household, but may include the value of services rendered in the husband's business, where she was thus engaged at the time of the injury without any contract or expectation of pay for the same. *Georgia, etc., Co. v. Ties* (Ga.), 4-200.

In a joint action by a husband and wife to recover damages for personal injuries sustained by the wife wherein separate verdicts are rendered, the husband is entitled to recover for the loss of the value of the wife's services to him, as an assistant in his business as a florist as well as for the loss of her services in a domestic capacity, notwithstanding the existence of a statute vesting in a married woman all earnings acquired by her in carrying on any separate or independent business or in performing any labor or service on her sole and separate account. *Standen v. Pennsylvania R. Co.* (Pa.), 6-403.

Future loss of services. — Where, in an action by the husband to recover for the loss of the services and society of his wife resulting from personal injuries occasioned by the wrongful act of the defendants, there is evidence of such loss merely up to the time of the trial, the plaintiff cannot recover for the loss of the services of his wife which may occur in the future. *Birmingham Southern R. Co. v. Lintner* (Ala.), 3-461.

Evidence of permanent injuries. — In an action by a husband to recover for the loss of the services and society of his wife resulting from injuries to her occasioned by the wrongful act of the defendant, evidence that she is still suffering from the injuries is properly received, though the right of action for such suffering is vested in her. *Birmingham Southern R. Co. v. Lintner* (Ala.), 3-461.

Effect of action by wife's administrator. — The right of the husband to recover for the consequential damages resulting to him from personal injuries to the wife is not barred by the fact that such injuries have resulted in the death of the wife, and that an action has been brought by her administrator for the statutory beneficiaries

and a verdict recovered therein. *Mageau v. Great Northern R. Co.* (Minn.), 14-551.

Indecent and insulting language. — The constitutional and statutory changes in respect to the property and personal rights of married women do not affect a husband's right to recover actual and exemplary damages for indecent and insulting language and conduct towards his wife. *Brame v. Clark* (N. Car.), 16-73.

b. Actions by wife for personal injuries.

Recovery of medical expenses. — In an action by a married woman to recover damages for personal injuries, the plaintiff is entitled to recover as an element of damages the amount of a medical bill which the evidence shows she has personally incurred on account of her injuries. *Indianapolis Traction, etc., Co. v. Kidd* (Ind.), 10-942.

c. Release of claims.

Sufficiency of seal. — Where a release of damages for personal injuries to a married woman reciting that it is "given under our hands and seals" is executed by both husband and wife, the wife signing without a seal after the husband signed with a seal, the presumption may be indulged that the wife adopted the seal affixed to the husband's signature. *Rockwell v. Capital Traction Co.* (D. C.), 4-648.

4. LIABILITY OF HUSBAND TO THIRD PERSONS.

a. Support of wife.

(1) In general.

Outside of matrimonial home. — The common-law liability of a husband to support his wife does not extend to support outside of the matrimonial home, reasonably chosen by him, unless she refuses to do so there, or she resides away therefrom by his consent. *Richardson v. Stuesser* (Wis.), 4-784.

Wife in insane asylum. — The common-law liability of a husband for the support of an insane wife in an asylum. *Richardson v. Stuesser* (Wis.), 4-784.

Extension of common-law liability. — The common-law liability of a husband to support his wife cannot be extended by implication from the written law as to the support of other persons. It can only be extended by a statute plainly so intended. *Richardson v. Stuesser* (Wis.), 4-784.

Existence of legal relation. — Where there is admittedly no relation that legally imposes the duty of the wife's maintenance on the husband, the law gives no power to make him maintain her. *Chapman v. Parsons* (W. Va.), 19-453.

(2) Prosecution for failure to support.

Instructions. — In a prosecution of a husband for the abandonment of and failure to support his wife, there is no error in the refusal of an instruction that the defendant

would not be under obligation to support her if, after she left him with his consent, she thereafter refused to return to his house upon being requested by him to do so, where the instruction is substantially covered by an instruction given. *Spencer v. State* (Wis.), 13-969.

In such a prosecution, there is no error in refusing an instruction directing the jury to find the defendant not guilty if he did not know that his wife's means of support were exhausted, where it appears that the defendant knew that the wife had but a small sum of money, entirely inadequate to supply her needs, and that later she applied to the town for aid and as a pauper, and that the defendant was requested to provide for her and refused to do so. *Spencer v. State* (Wis.), 13-969.

In a prosecution of the husband for the abandonment of and failure to support his wife, an instruction stated, and held not erroneous as confusing the two crimes, covered by the information and the statute, of wilful abandonment and unreasonably neglecting to support, being of sufficient ability to do so. The omission of such instruction to require a finding that the husband had means and ability to support the wife held to be immaterial, it appearing as a fact that he had such ability. *Spencer v. State* (Wis.), 13-969.

b. Necessaries.

Books. — The books known as "Stoddard's Lectures" are not necessities within the meaning of the rule that a husband is liable for necessities bought by his wife on his credit. *Shuman v. Steinel* (Wis.), 9-1064.

c. Wife's debts.

Validity of husband's promise to pay.

— Where a wife has contracted a debt on her own credit, the mere promise of her husband to pay is of no greater dignity than any other promise without consideration to answer for the debt of another. *Shuman v. Steinel* (Wis.), 9-1064.

Where a wife, assuming to act as her husband's agent, orders books and receives them, and the husband, with knowledge of the facts, adopts his wife's act as his own by promising to pay for the property, or by accepting the benefit of the transaction, or in any other way, he thereby becomes liable for the indebtedness. *Shuman v. Steinel* (Wis.), 9-1064.

Evidence of ratification by husband.

— In an action against a husband to recover the value of books purchased by the defendant's wife, who assumed to act as the defendant's agent, evidence that the defendant stated that if his wife had ordered the goods he would pay for them at the rate of a specified amount per month, and that the plaintiff assented to this arrangement, is evidence that the defendant ratified his wife's act. *Shuman v. Steinel* (Wis.), 9-1064.

Pleading and proof in action against husband. — In an action against a husband, where the complaint alleges that the defend-

ant contracted in writing to buy a set of books from the plaintiff, proof that the defendant's wife, assuming to act as his agent, signed his name to the contract, and that he afterwards adopted her act, does not constitute a variance, as upon the defendant's ratification the contract became, in legal effect, the defendant's from the beginning, and enforceable as such. *Shuman v. Steinel* (Wis.), 9-1064.

Counsel fees in action for divorce.

Where there is ample statutory provision for the allowance by the divorce court of the reasonable expenses of a wife in the prosecution or defense of an action for divorce, a husband is not liable in an action by his wife's attorney for counsel fees incurred by her in prosecuting an action for divorce. *Zent v. Sullivan* (Wash.), 15-19.

The above rule is particularly applicable where it appears that the contract between the wife and the attorney provided for the payment by her of a specified sum regardless of any allowance made by the court in the divorce proceedings, and where there is no evidence that there were reasonable and justifiable grounds for the institution of such proceedings. *Zent v. Sullivan* (Wash.), 15-19.

d. Wife's torts.

Abrogation of common-law rule in Nebraska. — The common-law rule that, solely because of the marriage relation, the husband is liable jointly with his wife for torts committed by her in his presence, but which he did not instigate and in which he did not participate, does not exist in Nebraska. *Goken v. Dallugge* (Neb.), 9-1222.

Effect of divorce pending action.

The intention and effect of section 26 of the English Matrimonial Causes Act, 1857, is to put the wife for all civil purposes in the same position as if her husband were dead during all the time that the decree of judicial separation is in force, and, therefore, in an action against husband and wife for fraudulent representations by the wife after the marriage, whereby the plaintiff has sustained damage, where it appears that the husband had no knowledge of or connection with the fraud, and that the wife has obtained a decree absolute for judicial separation from him since the commencement of the action, the husband is entitled to judgment discharging him from the action. *Cuenod v. Leslie* (Eng.), 16-375.

e. Wife's funeral expenses.

Husband primarily liable. — A husband is primarily liable for the funeral expenses of his wife, and not the estate of the wife. *Kenyon v. Brightwell* (Ga.), 1-169.

5. LIABILITY OF WIFE TO THIRD PERSONS.

For services rendered to husband.

A wife is not liable for services rendered to her husband for which she does not undertake to pay, especially where the services are rendered voluntarily, with the express assur-

ance that no charge will be made. *Cochran v. Zachery* (Ia.), 15-297.

Execution against wife's property. — Under the Idaho statutes, the issue and profit arising from the investment of the separate property of the wife are not liable upon execution against her husband. *Evans v. Kroutinger* (Idaho), 2-691.

For medical services to deceased husband. — Under a statute providing that the expenses of a family are chargeable upon the property of both the husband and wife, or either of them, the property of a widow is chargeable with the expense of medical and hospital services rendered to her deceased husband. *Russell v. Graumann* (Wash.), 5-830.

Evidence reviewed, in an action under the Washington statute to charge a widow's property with the expense of medical and hospital services rendered to her deceased husband, and held to establish the existence between the husband and wife of the necessary family status or relationship intended by such statute. *Russell v. Graumann* (Wash.), 5-830.

For husband's funeral expenses. — A woman is personally liable for the funeral expenses of her husband, where the services were rendered with her knowledge and consent, though she did not contract therefor, and her husband left her no estate. *Butterworth v. Teale* (Wash.), 18-854.

Support of husband. — The Wisconsin statute (Laws 1907, c. 224) providing that a wife, "being of sufficient ability" shall be liable for the support of her husband, if he is poor and dependent, refers to a continuing existence of the marriage relation, and does not apply to a case where the parties are divorced. *Brenger v. Brenger* (Wis.), 19-1136.

6. ALIENATION OF AFFECTIONS.

a. In general.

Gist of action. — The gist of the action for alienation of affections is the loss of *consortium*, that is, the loss of the conjugal fellowship, company, co-operation, and aid of the husband or wife. Loss of *consortium* is the actionable consequence of the injury, and alienation of affections is a matter of aggravation. *Dodge v. Rush* (D. C.), 8-671.

Prior unhappy relations. — In an action by a wife for alienation of her husband's affections, evidence of any unhappy relations that may have existed between the plaintiff and her husband, not caused by the conduct of the defendant, may affect the question of damages, but it affords no justification or palliation of the defendant's conduct. *Dodge v. Rush* (D. C.), 8-671.

b. Who may maintain action.

Married woman. — Under legislation relieving a married woman from the ordinary disabilities of coverture, a married woman may maintain an action for alienation of her

husband's affections. *Dodge v. Rush* (D. C.), 8-671.

Under the Massachusetts statute removing the disability of a married woman to sue and be sued, a married woman may maintain an action in her own name alone for criminal conversation with her husband and for alienation of his affections; and the damages she recovers in such action are her separate property. *Nolin v. Pearson* (Mass.), 6-658.

Under the Oregon statute providing with certain exceptions that "all laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed" and that "for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that the husband has," the wife may maintain an action for the alienation of her husband's affections. *Keen v. Keen* (Ore.), 14-45.

Wife who has obtained divorce. — A wife's right of action for the alienation of her husband's affections is not lost by reason of her obtaining a divorce from him. *Keen v. Keen* (Ore.), 14-45.

c. Liability of parent or guardian.

Advice given from honest motives. —

An action for alienation of affections will not lie against a parent or guardian for advising his child or ward to separate from her or his husband or wife, unless the advice was recklessly and maliciously given, and therefore it is a good defense to such an action that the advice was given from honest motives and under a sincere belief that it was for the moral and social good of the child or ward. *Trumbull v. Trumbull* (Neb.), 8-812.

An action for alienation of affections will not lie against a parent for advising his daughter to leave her husband, unless the parent was actuated by malice or ill-will toward the husband, and not by a proper parental regard for the welfare and happiness of his daughter. *Multer v. Knibbs* (Mass.), 9-958.

A parent, when he acts in good faith and for his daughter's welfare, may advise his daughter to abandon her husband, if he fairly and honestly believes that the continuance of the marriage relation will tend to injure her health or disturb her peace of mind, and to this end he may use proper and reasonable argument and persuasion without being liable to the husband, even though it may turn out that his action is based upon mistaken premises or false information and that the results of his intervention are unfortunate. *Multer v. Knibbs* (Mass.), 9-958.

Liability dependent upon intent. —

In an action against a parent for advising his daughter to separate from her husband, the material question is the intent with which the parent acted, rather than the wisdom, or even the justice, of the course which he took. *Multer v. Knibbs* (Mass.), 9-958.

d. Evidence.

Conduct of wife after separation. —

In an action by a husband for alienation of his wife's affections, evidence of the conduct of the plaintiff's wife and the defendant after the separation of the plaintiff and his wife may be sufficient to support a judgment for the plaintiff, as it does not necessarily follow that the affection does not survive the separation. *Morris v. Warwick* (Wash.), 7-687.

Declarations of husband. — In an action by a wife for alienation of her husband's affections, the plaintiff cannot testify as to certain declarations made to her by her husband concerning the defendant or the defendant's conduct. *Dodge v. Rush* (D. C.), 8-671.

In an action by a wife against the parents of her husband for alienation of the latter's affections, the admission in evidence, on behalf of the plaintiff, of declarations by the husband in reference to the attitude of his parents regarding the marriage and their opposition thereto, constitutes reversible error. *Cochran v. Cochran* (N. Y.), 17-782.

Presumption as to good faith. — Where a parent or guardian advises his child or ward to separate from the latter's wife or husband, the presumption is that the advice is given in good faith; but where the advice is given by a stranger, the presumption is otherwise. *Trumbull v. Trumbull* (Neb.), 8-812.

Burden of proving parent's malice. —

In an action against a parent to recover damages for his conduct in advising his daughter to leave her husband, the burden is on the plaintiff to show that the defendant was prompted by malice, and to overcome the presumption that the defendant acted under the influence of natural affection and for what he believed to be the real good of his child. *Multer v. Knibbs* (Mass.), 9-958.

Sufficiency. — Evidence reviewed, in an action by a wife for alienation of her husband's affections and for criminal conversation with him, and held sufficient to show that the trial court erred in directing a verdict for the defendant. *Dodge v. Rush* (D. C.), 8-671.

Evidence reviewed in an action against a parent to recover damages for his conduct in advising his daughter to leave her husband and held sufficient to entitle the plaintiff to have the question whether the defendant was actuated by malice toward him, instead of by a regard for the good of his daughter, submitted to the jury for their determination. *Multer v. Knibbs* (Mass.), 9-958.

e. Damages.

Mitigation. — In an action by a husband for alienation of his wife's affections, evidence offered by the defendant to show a state of facts indicating that no affection existed between the plaintiff and his wife will be received in mitigation of damages, but not as a bar to the action. *Morris v. Warwick* (Wash.), 7-687.

f. Questions of law and fact.

Cause of loss of consortium. — In an action by a wife for alienation of her husband's affections, where there is evidence of illicit relations between the husband and the defendant, it is for the jury to say whether the defendant thereby enticed and allured the plaintiff's husband, alienated his affections, and caused her the loss of *consortium*. *Dodge v. Rush* (D. C.), 8-671.

Malice. — In an action against a parent to recover damages for his conduct in advising his daughter to leave her husband, if there is evidence which would justify a jury in finding that the defendant actively interfered to cause his daughter to abandon her husband, and that in so doing he was actuated by malice toward the husband and not by a desire to afford proper protection to his daughter and further her true welfare, the case must be left to the jury, with instructions that if these facts are proved the action may be maintained. *Multer v. Knibbs* (Mass.), 9-958.

7. CRIMINAL CONVERSATION.

a. Necessity for alienation of affections.

In an action by a husband for criminal conversation, evidence of the alienation of his wife's affections is not necessary to establish his right of action. *Stark v. Johnson* (Colo.), 15-868.

b. Right of wife to sue.

Under modern legislation relieving married women from the ordinary disabilities of coverture, a married woman may maintain an action for criminal conversation with her husband. *Dodge v. Rush* (D. C.), 8-671.

Under the Massachusetts statute removing the disability of married women to sue and be sued, a married woman may maintain an action in her own name alone for criminal conversation with her husband and for alienation of his affections; and the damages she recovers in such an action are her separate property. *Nolin v. Pearson* (Mass.), 6-658.

c. Defenses.

Connivance by plaintiff. — An action for criminal conversation is barred by the husband's connivance at the adulterous intercourse. *Kohlhoss v. Mobley* (Md.), 5-865.

The rule stated as to what conduct on the part of the husband will constitute connivance barring an action for criminal conversation. *Kohlhoss v. Mobley* (Md.), 5-865.

The rule stated as to when the question whether an action for criminal conversation is barred by the husband's connivance is a question of law or fact. *Kohlhoss v. Mobley* (Md.), 5-865.

d. Damages.

Mental anguish. — In an action by a husband for criminal conversation it is not

error to permit the plaintiff to testify as to the humiliation and mental anguish which he suffered upon learning of the conduct of his wife and the defendant, and to instruct the jury that in determining the amount of their verdict they should consider the plaintiff's suffering and anguish. *Stark v. Johnson* (Colo.), 15-868.

Mitigation by proof of condonation. — While a husband's condonation of his wife's offense does not bar an action by him for criminal conversation, it is a circumstance to be considered in mitigation of damages. *Smith v. Hockenberry* (Mich.), 10-60.

e. Evidence.

Circumstances antecedent to offense. — In an action for criminal conversation, it is proper to admit evidence of circumstances occurring prior to the earliest date of criminal conduct alleged in the declaration, where there is evidence of conduct after such date sufficient to form the basis for a verdict and the earlier circumstances are connected with and explanatory of the later ones. *Dodge v. Rush* (D. C.), 8-671.

Confession by wife. — In an action for criminal conversation it is not erroneous to refuse to permit the plaintiff to introduce in evidence a written confession by the wife which she signed out of the presence of both the plaintiff and the defendant. *Kohlhoss v. Mobley* (Md.), 5-865.

Chastity of wife. — In a husband's action for criminal conversation, the defendant may introduce evidence tending to show that prior to the act charged the wife was guilty of criminal intimacy with other men, and of associating with women of bad repute, as such evidence bears upon the question of the wife's chastity. *Smith v. Hockenberry* (Mich.), 10-60.

Letters of attorney to show character of wife. — In a husband's action for criminal conversation, where there is evidence tending to show that the plaintiff's wife saw his attorney before the plaintiff did, the defendant may introduce in evidence a letter written by the plaintiff's attorney to the defendant which tends to show the depravity of the plaintiff's wife, and tends to show that the alleged acts of criminal intercourse were brought about by the plaintiff's wife herself and under circumstances indicating that discovery was expected, as such evidence has a bearing upon the question of the character of the plaintiff's wife at the time of the alleged intercourse, and in this way affects the question of damages. *Smith v. Hockenberry* (Mich.), 10-60.

Proof of marriage. — Though in an action for criminal conversation there must be proof of an actual marriage, such proof is not limited to the official record thereof. *Stark v. Johnson* (Colo.), 15-868.

In such an action the uncontradicted testimony of the plaintiff and his wife to the effect that twenty-five years before the trial they were married by a minister of the gospel in another state, such marriage being

valid according to the laws of that state, that since that time they had constantly lived together as husband and wife, and that they have a son twenty-two years of age, is sufficient direct evidence of an actual marriage. *Stark v. Johnson* (Colo.), 15-868.

Credibility of witness — conspiracy to extort money from defendant. — In a husband's action for criminal conversation, where a witness for the plaintiff has testified that she discovered the plaintiff's wife and the defendant in a compromising position, and on cross-examination of such witness the defendant has laid a foundation for her impeachment, the defendant may introduce in evidence statements made by such witness to another witness the tendency of which is to show an understanding between the plaintiff's wife and the plaintiff's witness to get money out of the defendant, as such evidence bears directly upon the truthfulness of the plaintiff's witness, and tends to show that her testimony was given in pursuance of a conspiracy between her and the plaintiff's wife, although the plaintiff was not a party to the conspiracy. *Smith v. Hockenberry* (Mich.), 10-60.

Sufficiency. — Evidence reviewed in an action for criminal conversation and held to justify a trial court in directing a verdict for the defendant. *Kohlhoss v. Mobley* (Md.), 5-865.

f. Instructions.

Refusal to instruct as to conspiracy — theory of case. — On writ of error by the plaintiff in an action for criminal conversation to review a judgment in his favor for less than the amount claimed, the plaintiff cannot complain of the refusal of a request which in substance instructed the jury that collusion could not be inferred from certain facts appearing in the case, where it appears that the charge of the court made the case turn upon the sole question whether the defendant was guilty of the act of intercourse alleged, and it further appears that the defendant disclaimed any theory of conspiracy. *Smith v. Hockenberry* (Mich.), 10-60.

8. HABEAS CORPUS.

A male of the age of nineteen years who has been lawfully married to a female of the age of fourteen, though without the consent of her parents, is entitled to the society and services of his wife, and if she is detained against her will by her parents, he may procure her release by habeas corpus. *Matter of Hollopeter* (Wash.), 17-91.

9. ESTATES BY ENTIRETY.

a. Creation of estate.

Deed to husband and wife. — A deed of realty conveying to a husband and wife each an undivided half interest in land creates an estate in entirety at least in the absence of any clear intention to create a tenancy in common. *Wilson v. Frost* (Mo.) 2-557.

Provision for survivorship. — A deed to a husband and wife "as joint tenants with fee to the survivor" shows an intent that the grantees shall take a simple joint tenancy and not an estate by entireties. *Swan v. Walden* (Cal.), 20-194.

A deed of land to a husband and wife "and to the survivor of them and to the heirs and assigns of such survivor" creates in the grantees an estate by entireties. *Joerger v. Joerger* (Mo.), 5-534.

b. Rights of tenant.

Crops growing on land. — At common law a wife has no right to a share of the crops growing on land held by her and her husband as tenants by the entirety, and in Michigan no such right is conferred by statute. A verbal agreement by the husband made at the time of the purchase of the land, to share the profits thereof with the wife, is not binding, as to enforce it would be to vary the legal effect of the deed. *Morrill v. Morrill* (Mich.), 4-1100.

Right of action for injuries to land. — Where land is held by entireties, the wife is not a necessary party to an action brought by the husband for damages by fire to woods on the land. *West v. Aberdeen, etc., R. Co.* (N. Car.), 6-360.

Ejectment by one spouse against the other. — A judgment of rule absolute to bring ejectment, rendered in an action brought by a woman against her divorced husband to recover possession of land held by them by entireties, is a nullity where, by the terms of the statute, the rule is to bring ejectment or "show cause why the same cannot be so brought," and where the petition for the rule discloses that the parties hold by entireties; and this is so though the husband fails to appear and answer. *Alles v. Lyon* (Pa.), 9-137.

c. Rights of third parties.

Judgment creditor of one spouse only. — Where husband and wife are registered owners by entireties of land when a municipal lien is filed against the wife alone, and judgment on the lien is entered against the wife only, the lien is a nullity as against the husband, and the sale under it passes no title, even though the execution avers that it is issued with notice to the husband, if it does not appear that any such notice was given. *Alles v. Lyon* (Pa.), 9-137.

A husband and wife holding property as tenants by the entireties are able to give to a purchaser of the property a good and merchantable title, such as entitles them to enforce specific performance against the purchaser, free and clear of an outstanding judgment against the husband. The property is not subject to execution on the judgment either during the lifetime of the wife or on her death. *Jordan v. Reynolds* (Md.), 12-51.

d. Effect of divorce.

In general. — Divorce does not convert
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an estate by entireties into a tenancy in common, notwithstanding the fact that it severs the unity of person of the husband and wife. *Alles v. Lyon* (Pa.), 9-137.

The granting of a divorce destroys a tenancy by entirety and renders the tenants tenants in common. *Joerger v. Joerger* (Mo.), 5-534.

Partition after divorce. — After a tenancy by entirety has been converted by divorce into a tenancy in common, either tenant, or the devisee of either, is *prima facie* entitled to partition; and if the defendant resists partition on the ground that he is the sole owner of the land by reason of having furnished the purchase money therefor, the burden is upon him to establish such fact by clear and satisfactory evidence. *Joerger v. Joerger* (Mo.), 5-534.

e. Effect of death of one spouse.

In general. — The interest of the wife in an estate by entirety is not one that can be inherited or that can descend to her heirs, but becomes terminated and extinguished by her death before her husband. *Beddingfield v. Estill* (Tenn.), 11-904.

Murder of one spouse by other. — Where land is conveyed to husband and wife to hold by entirety, the survivor, upon the death of the other, takes and becomes vested by the entire estate in fee simple, by virtue of the grant or deed conveying the property to them, the interest of the deceased being terminated by his or her death. Upon the death of the wife, although by the felonious act of the husband, the husband continues to hold the estate in fee under the conveyance, and to no extent from or through the wife, and his power to sell and convey the estate in fee is not affected by the common-law rule that no one can inherit property from another whose death is caused by the former's felonious act, or by a statutory provision to similar effect. *Beddingfield v. Estill* (Tenn.), 11-904.

f. Statutory abolition of estate.

Estates by entireties are abolished by the California statutes which provide that the ownership of property by several persons is either of joint interests, of partnership interests, of interests in common, or of community interests (Civ. Code, § 682), and that in case of a conveyance to a married woman and her husband the presumption is that the woman takes the part conveyed to her as tenant in common, unless a different interest is expressed in the instrument (Civ. Code, § 164). *Swan v. Walden* (Cal.), 20-194.

HYPOTHETICAL QUESTIONS.

See EVIDENCE, 8 b (1).

Necessity of hypothesis in facts in examination of experts, see CRIMINAL LAW, 6 n (7).

ICE.

Failure of carrier to ice cars, see **CARRIERS**, 4 b (2).

Ice house as fixture, see **FIXTURES**, 3.

Power of municipality to operate ice plant, see **MUNICIPAL CORPORATIONS**, 4 e.

Validity of ordinance requiring removal of ice from sidewalks, see **MUNICIPAL CORPORATIONS**, 5 f (2).

Taking ice from public waters. —

While a state may not deny the public the right to take ice from a public stream, it may make such a right the subject of reasonable regulation; and a regulation is not unreasonable if it does no more than to authorize the taking of such steps as will best preserve the use of the stream for all persons and for all purposes. *Board of Park Com'rs v. Diamond Ice Co. (Ia.)*, 8-28.

The Iowa statute concerning the taking of ice from the Des Moines river does not take from riparian owners or others any property, but merely regulates the use that may be made of a common public right; and the statute does not violate either the federal or the state constitution. *Board of Park Com'rs v. Diamond Ice Co. (Ia.)*, 8-28.

Under the Iowa statute, the board of park commissioners of the city of Des Moines has power to prohibit the taking of ice by riparian owners from any portion of the Des Moines river within the jurisdiction and control of the board, though the statute specifically prohibits the taking of ice from a particular portion of the river without referring to the other portions, and though the statute provides that "the vested rights of other riparian owners shall not be affected by this act." *Board of Park Com'rs v. Diamond Ice Co. (Ia.)*, 8-28.

Rights of riparian owners. — Riparian ownership carries with it no right to the ice formed on public waters, and no vested right to such ice can arise from the making of improvements on a riparian owner's land or because of the length of time he has harvested ice from the waters. *Board of Park Com'rs v. Diamond Ice Co. (Ia.)*, 8-28.

Liability for cutting holes in ice. —

Persons who cut channels through the ice on the waters of a navigable harbor for purposes of navigation in placing vessels in winter quarters are under the obligation, both at common law and under the Ontario Criminal Code, to protect the opening so made, and are civilly liable for the death of a person who, while skating on the harbor according to the customary use of the harbor at that place and season of the year, breaks through the ice and is drowned by reason of the cutting of the channels and the failure to guard them. *Pennock v. Mitchell (Can.)*, 14-363.

IDEM SONANS.

See **NAME**.

Averring names in indictments, see **INDICTMENTS AND INFORMATIONS**, 8.

IDENTITY.

Effect of certificate of acknowledgment, see **ACKNOWLEDGMENTS**.

Identification of accused, see **ASSAULT AND BATTERY**, 1 f; **CRIMINAL LAW**, 6 n (2); **HOMICIDE**, 6 a (4).

Identification of accused by blood stains, see **CRIMINAL LAW**, 6 n (2).

Identification of justice's record, see **CRIMINAL LAW**, 6 n (1).

Identification of land described in deed, see **ADVERSE POSSESSION**.

Identity of action and issues as affecting conclusiveness of judgment, see **JUDGMENTS**, 6 b (3).

Parol evidence to identify legatee or property bequeathed, see **WILLS**, 8 a (9).

Proof of identity of animals, see **EVIDENCE**, 8 c.

Proof of identity of fugitive from justice, see **EXTRADITION**, 4 d.

Proof of identity of offenses on plea of former acquittal, see **CRIMINAL LAW**, 5 b.

• Proof of identity of stolen money, see **LARCENY**, 6 a (3).

Proof of identity of testator as person executing will, see **WILLS**, 7 h (2).

Using shoes of accused to identify tracks, see **CRIMINAL LAW**, 6 n (1).

IGNORANCE.

Defense to criminal charge, see **CRIMINAL LAW**, 1.

Effect of ignorance of illegality of commitment, see **FALSE IMPRISONMENT**, 3.

Knowledge of infancy as affecting liability for injuries to infant servants, see **MASTER AND SERVANT**, 3 e (3).

Plea of guilty entered through ignorance, see **CRIMINAL LAW**, 6 j (1).

Sale of liquor to infant in ignorance of infancy, see **INTOXICATING LIQUORS**, 5 h.

Statute of limitations as affected by ignorance of existence of cause of action, see **LIMITATION OF ACTIONS**, 4 b (5).

IGNORANCE OF LAW.

Application of maxim to mutual mistake, see **EQUITY**, 2 d.

ILLEGAL CONTRACTS.

See **CONTRACTS**.

Duty to account for money received for illegal purpose, see **AGENCY**, 2.

Illegal conditions in bonds, see **BONDS**, 3.

Validity of life insurance policy, see **INSURANCE**, 7 a.

ILLEGITIMACY.

Bastards and bastardy proceedings generally, see **BASTARDS**.

Illegitimacy as relations within law of incest, see **INCEST**, 1 a.

Inheritance between brothers and sisters, see DESCENT AND DISTRIBUTION, 5 b.
 Proof by wife of nonaccess of husband, see BASTARDS, 1; EVIDENCE, 2.

ILLITERACY.

Ignorance of contents of will presumed from illiteracy of testator, see WILLS, 5 c (1).

ILLNESS.

Removal of juror for medical treatment as separation see JURY, 7 c.

ILLUMINATING GAS.

See GAS AND GAS COMPANIES.
 Subject of larceny, see LARCENY, 2 a.

ILL WILL.

Element of malicious mischief, see MALICIOUS MISCHIEF.

IMITATIONS.

Imitation of butter, see FOOD, 5 c.
 Regulating manufacture and sale of imitation of butter, see CONSTITUTIONAL LAW, 5 c.

IMMEDIATE FAMILY.

See BENEVOLENT OR BENEFICIAL ASSOCIATIONS, 8 b.

IMMIGRATION.

See ALIENS.
 Recovery of penalty under immigration law, see PENALTIES AND PENAL ACTIONS.

IMMISCIBILITY.

Doctrine of, see DOMICIL.

IMMORALITY.

Ground for discharge of servant, see MASTER AND SERVANT, 1 c (3).

IMMOVABLES.

Division of property into movable and immovable, see CONFLICT OF LAWS, 2.
 Mortgage on land as immovable, see MORTGAGES AND DEEDS OF TRUST, 1.

IMMUNITY.

From searches and seizures, see CONSTITUTIONAL LAW, 12.
 Privilege of witness as affected by immunity from prosecution, see WITNESSES, 6 g (6).
 Rights of accused, testifying under promise of immunity, see CRIMINAL LAW, 6 d.
 Waiver of immunity from second jeopardy, see CRIMINAL LAW, 5 c.

IMPAIRMENT OF CONTRACT.

Element of damage in condemnation proceeding, see EMINENT DOMAIN, 7 c (4).
 Impairment of obligation of contracts, see CONSTITUTIONAL LAW, 15.

IMPANELING.

See GRAND JURY; JURY.

IMPEACHMENT.

Certificate in record on appeal, see APPEAL AND ERROR, 8 b.
 Certificate of acknowledgment, see ACKNOWLEDGMENTS.
 Dying declarations, see HOMICIDE, 6 a (3) (b).
 Evidence of confessions see CRIMINAL LAW, 6 n (11) (c).
 Indictments, see INDICTMENTS AND INFORMATION, 6.
 Power to pardon in cases of impeachment, see PARDON, REPRIEVE, AND AMNESTY, 1.
 Testimony of grand juror to impeach indictment, see INDICTMENTS AND INFORMATION, 8.
 Verdict in civil cases, see TRIAL, 8 l.
 Verdicts in criminal cases, see CRIMINAL LAW, 6 r (7).
 Witnesses, see INCEST, 4 c; WITNESSES, 5.

IMPLICATION.

Repeal of statutes by implication, see STATUTES, 6.

IMPLIED REQUESTS.

See WILLS, 8 a (7), 8 c (2).

IMPLIED CONDITIONS.

Termination of contract of employment by death of servant, see MASTER AND SERVANT, 1 c (2).

IMPLIED COVENANTS.

See CONTRACTS. 3 a.

IMPLIED NOTICE.

Notice implied from written authority of agent, see AGENCY, 3 a (1).

IMPLIED POWERS.

See CORPORATIONS, 4 a.

IMPLIED TRUSTS.

See TRUSTS AND TRUSTEES, 1 b.

IMPLIED WARRANTY.

See SALES, 4.

Sale of shares of stock, see CORPORATIONS, 8 b (2).

IMPOLITIC LEGISLATION.

See CONSTITUTIONAL LAW, 23.

IMPORTANCE.

Judicial notice of matters of public importance, see EVIDENCE, 1 i.

IMPORTATION.

Bringing game into state during close season, see GAME AND GAME LAWS, 4.

Power of state to prohibit importation articles for personal use, see INTERSTATE COMMERCE, 2 b (1).

Power of state to prohibit or restrict importation of intoxicating liquors, see INTOXICATING LIQUORS, 3 b.

IMPOSSIBLE CONTRACTS.

See CONTRACTS, 4 k.

IMPOSSIBLE DATE.

Averment of impossible date in indictment, see INDICTMENTS AND INFORMATIONS, 4.

IMPOSSIBLE RELIEF.

See PLEADING, 3 g.

IMPRISONMENT.

See ARREST; FALSE IMPRISONMENT.

Discharge of prisoner, see HABEAS CORPUS.

Effect of imprisonment on settlement rights of pauper, see POOR AND POOR LAWS.

Fine and imprisonment under statute authorizing fine or imprisonment, see CRIMINAL LAW, 7 b (6).

Ground for divorce, see DIVORCE, 2 d.

Place of imprisonment, see CRIMINAL LAW, 7 b (7).

IMPRISONMENT FOR DEBT AND IN CIVIL CASES.

Exemption from arrest on civil process, see EXTRADITION, 5.

Right of partner to arrest copartner in civil action, see PARTNERSHIP, 4 b.

Arrest on judgment in tort action. —

A judgment in an action of tort is not a "debt" within the meaning of a constitutional provision (Const. Neb., art. 1, § 24) providing that no person shall be imprisoned for debt except in cases of fraud. *Ex p. Berry* (S. C.), 20-1344.

IMPROVEMENTS.

Allowance in action of ejectment, see EJECTMENT, 8 c.

Assessments for local improvements, see SPECIAL OR LOCAL ASSESSMENTS.

Compensation for improvements on condemned land, see EMINENT DOMAIN, 7 c (1).

Compensation to wife for improvements on husband's property, see HUSBAND AND WIFE, 2 d.

Deduction for improvements in action of replevin, see REPLEVIN, 4.

Deduction for improvements in condemnation proceedings, see EMINENT DOMAIN, 7 c (6).

Duties and liabilities as to demised premises, see LANDLORD AND TENANT, 5 f.

Improvement of public roads and streets, see STREETS AND HIGHWAYS, 3, 8.

Right of remainderman to allowance for improvements, see REMAINDERS.

Right of state to engage in works of internal improvement, see STATES, 1.

Rights of tenants in common *inter se*, see JOINT TENANTS AND TENANTS IN COMMON, 2.

Reducing wild land to cultivation. —

While it is recognized as a general rule that the plowing and cultivating of land therefore under cultivation does not constitute a permanent improvement, the breaking and reducing of wild lands to cultivation does constitute such an improvement. *Gibson v. Fields* (Kan.), 17-405.

IMPROVIDENCE.

See SPENDTHRIFTS.

IMPUTABLE NEGLIGENCE.

See NEGLIGENCE, 7 e.

INADEQUACY.

- Inadequacy of price as ground for setting aside judicial sale, see **JUDICIAL SALES**, 2 c.
- Inadequacy of price as ground for setting aside sale of pledged property, see **PLEDGE AND COLLATERAL SECURITY**, 5.
- Inadequacy of remedy at law, see **ADEQUATE REMEDY AT LAW**.

INADVERTENCE.

- Ground for allowing withdrawal of plea of guilty, see **CRIMINAL LAW**, 6 j (2).
- In plea of guilty, see **CRIMINAL LAW**, 6 j (1).
- Papers inadvertently taken to jury room, see **JURY**, 7 d (3).

INCEST.

1. **ELEMENTS OF OFFENSE**, 885.
 - a. Relationship of parties, 885.
 - b. Carnal knowledge, 885.
2. **INDICTMENT**, 885.
3. **DEFENSES**, 885.
4. **EVIDENCE**, 885.
 - a. Proof of relationship, 885.
 - b. Proof of carnal knowledge, 886.
 - c. Corroboration and impeachment of witnesses, 886.
5. **INSTRUCTIONS**, 886.
6. **ELECTION OF OFFENSES**, 886.
7. **ATTEMPTS TO COMMIT INCEST**, 887.

Annulment of incestuous marriage, see **MARRIAGE**, 3 a.

Incestuous act as rape, see **RAPE**, 1 c.

1. ELEMENTS OF OFFENSE.**a. Relationship of parties.**

Illegitimacy of one party. — A man who marries the mother of an illegitimate daughter becomes the stepfather of such child within the meaning of the Georgia statutes concerning incest. *Lipham v. State* (Ga.), 5-66.

Knowledge of relationship. — The crime of incest being purely statutory, and the statute defining the offense not including scienter as an element of the crime, the scienter need not be charged or proven in order to justify a conviction. *State v. Judd* (Ia.), 11-91.

b. Carnal knowledge.

What constitutes. — Penetration without emission constitutes carnal knowledge within a statute against incest. *State v. Judd* (Ia.), 11-91.

Use of force. — A person who in committing the crime of incest is also guilty of rape may be convicted on either charge. *State v. Rennick* (Ia.), 4-568.

Under the Utah statute, it is incest for a

male person to have sexual intercourse with a female whom he knows to be within the specified degree of relationship to him, though the intercourse is accomplished by force and against the consent of the female. *State v. Winslow* (Utah), 8-908.

2. INDICTMENT.

An indictment for incest which charges the acts constituting the crime substantially in the language of the statute is sufficient, though it does not charge that the defendant knew the woman with whom the offense was committed to be within the prohibited degree of relationship. *State v. Rennick* (Ia.), 4-568.

Persons included within term. — Under the Alabama statute against incest which describes the parties to the offense as "man and woman," an indictment charging that the offense was committed with a named "girl" is not demurrable on the ground that it fails to charge that the defendant had sexual intercourse with a "woman." *Dixon v. State* (Ala.), 10-957.

3. DEFENSES.

Conspiracy to procure incestuous intercourse. — In a prosecution for incest where the defendant advances the theory that the woman and a third person entered into a conspiracy either to prefer a false charge against him or to entice him into the incestuous act, it is proper to instruct the jury that even if such conspiracy be proven it goes only to the credibility of the persons involved in the conspiracy, and that if the defendant did have intercourse with the prosecutrix the crime was complete even though the others had conspired to bring it about. *State v. Rennick* (Ia.), 4-568.

4. EVIDENCE.**a. Proof of relationship.**

In a prosecution of a woman for incest, testimony of a witness for the accused, on cross-examination, that he is a brother of the man with whom the defendant is charged with having committed incest, and is an uncle of the defendant, is admissible as affecting the credibility of the witness by showing his relationship to the party for whom he testifies, although the testimony also has a bearing on the issue of the relationship of the defendant to the other alleged party to the incest; the latter possibly being ground for limiting the effect of the testimony but not for excluding it. *State v. Judd* (Ia.), 11-91.

In a prosecution of a woman for incest with her uncle, testimony of a witness that he had known the defendant ten years, during which period she lived with a man and his wife whom she frequently addressed as father and mother, and that she had frequently addressed the alleged uncle as uncle, and that the woman whom the defendant called mother had frequently in the presence of the defendant addressed the said uncle as brother, is admissible, and not open to the,

objection that it is not the best evidence. *State v. Judd* (Ia.), 11-91.

b. Proof of carnal knowledge.

Physical examination of woman by physician. — In a prosecution by a daughter against her father for incest, the physician's testimony that he examined the vaginal parts of the prosecutrix five or six days after the date on which it is alleged that the offense was committed is competent as tending to corroborate the prosecutrix's charge, and is not too remote in point of time from the alleged offense. *State v. Winslow* (Utah), 8-908.

Prior acts. — In the trial of one charged with incest, evidence tending to establish acts of incest at times other than and prior to that relied on for the conviction is admissible as throwing light on the relations of the parties towards each other. *Lipham v. State* (Ga.), 5-66.

In a prosecution for incest evidence of undue intimacy between the parties or of intercourse prior to that charged is admissible. *State v. Judd* (Ia.), 11-91.

Lascivious familiarity. — In a prosecution of a man and woman for incest, it is proper for the jury to consider any acts of intercourse which may have been committed by the defendants prior to the commission of the act alleged in the information or on which the state relies for a conviction, as well as any acts of "lascivious familiarity between the parties not amounting to actual intercourse." *State v. Pruitt* (Mo.), 10-654.

Birth of child. — In a prosecution of a man for incest with a woman who has died since the commission of the offense, evidence as to the pregnancy of the deceased and of the birth of a child to her is admissible where there is other evidence tending to show intercourse between the defendant and the deceased. *People v. Stison* (Mich.), 6-69.

Complaints made by woman. — In a prosecution by a daughter against her father for incest, where it appears that the offense was committed without the consent of the prosecutrix, who was under the age of consent, and where the prosecutrix has testified, the prosecution has a right to show by a third person that shortly after the commission of the offense the prosecutrix made to the third person a complaint of the injury, even though the complaint is not a part of the *res gestæ*. *State v. Winslow* (Utah), 8-908.

Dying declarations of woman. — In a prosecution for incest it is not competent to introduce in evidence the dying declaration of the woman that the defendant was responsible for her pregnant condition. *People v. Stison* (Mich.), 6-69.

c. Corroboration and impeachment of witnesses.

Corroboration of prosecutrix. — Corroboration of the prosecuting witness on a trial for incest is not necessary. *State v. Aker* (Wash.), 18-972.

Where in a prosecution for incest the woman testifies unequivocally that the connection was accomplished by force and against her will, she is not an accomplice and her evidence need not be corroborated in order to support a conviction. *State v. Rennick* (Ia.), 4-568.

Hostility of witness. — Where in a prosecution for incest, a witness for the state admits on cross-examination her extreme hostility to the defendant, and states that she had wanted to get the defendant out of town, and on redirect examination is asked why she was anxious to get rid of the defendant, and answers over objection, "She isn't fit to bring up children by," the answer is without prejudice as it adds nothing to what the witness has already stated. *State v. Judd* (Ia.), 11-91.

5. INSTRUCTIONS.

Form of verdict. — Where the evidence in a prosecution for incest warrants no verdict other than guilty or not guilty of the offense charged, the court may properly refuse to submit forms of verdict covering attempts and assault, and to instruct the jury in regard thereto. *State v. Aker* (Wash.), 18-972.

Failure to request instruction. — Where, in a prosecution for incest, the defendant relies on testimony that the person with whom the offense is charged to have been committed was absent at the time of the alleged offense, it is not error to omit specific reference to such defense in charging the jury, in the absence of a request for the instruction. *State v. Judd* (Ia.), 11-91.

Waiver of omission to instruct. — Where in a prosecution for incest the defendant claims that there is testimony from which the consent of the woman can be inferred, thereby making her an accomplice who requires corroboration, he should request an additional instruction based on that theory, and failing to do so he cannot allege error upon the omission. *State v. Rennick* (Ia.), 4-568.

6. ELECTION OF OFFENSES.

In a prosecution for incest, where more than one act of intercourse has been proven to have occurred within three years next preceding the time of the filing of the information or of presentation of the indictment, it is the duty of the court, at the close of the state's case, on motion of the defendant for that purpose, to require the state to elect on which act it will rely for a conviction. *State v. Pruitt* (Mo.), 10-654.

In a prosecution for incest, it is not necessary for the state to prove that the offense was committed upon any particular day, provided it was committed within three years next preceding the filing of the information; but where the evidence tends to show a commission of two different offenses, the court should require the state to elect, and should by its instructions restrict the jury in its consideration of the case to one of such

offenses, in accordance with such election.
State v. Pruitt (Mo.), 10-654.

7. ATTEMPTS TO COMMIT INCEST.

Under the Utah statute against incest, a person may be convicted of an attempt to commit the crime. *State v. Winslow* (Utah), 8-908.

INCIDENTAL DUTIES.

Duties incidental to judicial office, see JUDGES, 3 a.

INCIDENTAL INJURIES.

As taking of private property, see EMINENT DOMAIN, 6.

INCIDENTS.

Duty to instruct servant as to dangers incidental to service, see MASTER AND SERVANT, 3 d (1).

Incidents passing by assignment of judgment, see JUDGMENTS, 11.

INCOME.

Accumulation of income, see CHARITIES, 6; PERPETUITIES AND TRUSTS FOR ACCUMULATION, 2.

Devise of income as creating life estate, see WILLS, 7 c (6).

Dividends as income or principal, see LIFE ESTATES, 1 c.

Increase of fund by appreciation in value, see LIFE ESTATES, 1 b.

Proceeds of sale of good will see LIFE ESTATES, 1 b.

Taxation of income, see TAXATION, 2 e.

INCOMPATIBLE OFFICES.

See PUBLIC OFFICERS, 5 b.

INCONSISTENT POSITIONS.

See ESTOPPEL, 3.

INCONSISTENT PROVISIONS.

See DEEDS, 3 f.

INCONVENIENCE.

Element of damage in condemnation proceedings, see EMINENT DOMAIN, 7 c (4).

INCORPORATION.

Corporations generally, see CORPORATIONS, 2.
 Of railroads, see RAILROADS, 1.

INCORRIGIBLE CHILDREN.

Regulation and control, see INFANTS, 4 c.

INCREASE.

Condition against increase of risk, see INSURANCE, 5 g (8).

Increase in value of land as affecting right to specific performance, see SPECIFIC PERFORMANCE, 3 f (11).

Ownership of increase of animals, see ANIMALS, 1 a.

INCRIMINATION.

Privilege of witness as to self-incrimination, see WITNESSES, 4 g.

Self-incrimination by compelling accused to try on garment, see CRIMINAL LAW, 6 n (1).

Using shoes of accused to identify tracks, see CRIMINAL LAW, 6 n (1).

INCUMBRANCE.

See HOMESTEAD, 4; GROUND RENTS.

Condition in fire insurance policy against incumbrances, see INSURANCE, 5 g (4).

Covenants against incumbrances, see DEEDS, 4.

Discharge by life tenant, right to reimbursement, see LIFE ESTATES, 1 d.

INDECENT ASSAULT.

See ASSAULT AND BATTERY, 1 c.

INDECENT CONDUCT.

Indecent conduct as nuisance, see NUISANCES, 2 b.

INDEFINITENESS.

Description of property in deed, see DEEDS, 1 a.

INDEMNITY.

Contract indemnifying bail, see BAIL, 10.

Right of constable to demand indemnity bond, see SHERIFFS AND CONSTABLES, 2.

Verbal contract of indemnity, see FRAUDS, STATUTE OF, 6 b.

Building contractor's bond as contract of indemnity, see GUARANTY, 1.

Negligence of indemnitee. — A contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless such intention is expressed in unequivocal terms. *Perry v. Payne* (Pa.), 10-589.

Negligence of indemnitee's servants. — Where the contractor in a building con-

tract gives a bond undertaking to "protect and keep harmless" the owner "from damages arising from accidents to persons employed in the construction of, or passing near to, the said work," the bond does not indemnify the owner against liability for personal injuries sustained by a servant of the subcontractor in consequence of the negligence of the owner's servants. *Perry v. Payne* (Pa.), 10-589.

INDEMNITY LANDS.

See PUBLIC LANDS.

INDENTURE.

Liability of apprentice, see APPRENTICES.

INDEPENDENT CONTRACTORS.

Liability for damages by fire, see FIRES, 2 a.
Liability for injuries caused by explosion, see EXPLOSIONS AND EXPLOSIVES, 4.

Who are independent contractors. —

The test of the relation of independent contractor is actual independence in respect to the performance of the contract. Accordingly a person employed in a box factory to perform one of the several operations in the manufacture of boxes is a servant and not an independent contractor, where he is required to do the work as and when directed by the superintendent of the factory, and is subject to discharge, though he is paid by the piece, and personally employs and pays his assistants. *Messmer v. Bell, etc., Co.* (Ky.), 19-1.

A dredging company, furnishing, under contract, a ditching and dredging machine with a captain and crew for the performance of a certain work, at a specified sum per day for the entire outfit, is an independent contractor and solely responsible for its negligence in the prosecution of the work, where the other party to the contract has no control over the captain and crew of the machine other than to designate the place of performance and the general character of the work. *Teller v. Bay, etc., Dredging Co.* (Cal.), 12-779.

Liability of owner. — The alteration of a four-story building so as to make one room on the ground floor by removing therefrom about sixty linear feet of a brick wall seventeen inches thick which divides the building from foundation to roof, and substituting three iron columns to support the wall above, is intrinsically dangerous, and the owner cannot, by letting the work to a contractor, relieve himself from liability to third persons injured by the collapse of the building in consequence of the alteration. *Earl v. Reed* (Can.), 18-1.

Liability of contractor. — An independent contractor is not liable for injury to a third person occurring after the contractor

has completed the work and turned it over to the owner or employer and the same has been accepted by him, though the injury result from the contractor's failure properly to carry out the contract. *Young v. Smith & Kelly Co.* (Ga.), 4-226.

Ordinarily an independent contractor is not liable for an injury to the property or person of one not a party to the contract, occurring after he has completed his work and turned it over to the owner or employer, and the latter has accepted it, even though the injury results from the contractor's failure properly to perform his contract. *McCrorey v. Thomas* (Va.), 17-373.

INDETERMINATE SENTENCES.

See CRIMINAL LAW, 7.

INDIANS.

Indians as citizens within public school law, see SCHOOLS, 4 c.

Property of Indians as subject of larceny, see LARCENY, 2 b.

State regulation. — The North Carolina statute constituting the Cherokee Indian lands, in which the United States government Indian school is located, a special school district, and requiring attendance at said school by Indian children within the district, is not class legislation and unconstitutional as applying only to Indians, and discriminating against the white and colored races. *State v. Wolf* (N. Car.), 13-189.

Such statute is not unconstitutional because applicable only to one school district, since the funds for the school in question are supplied by the general government and the act applies alike to all Indians within the district. *State v. Wolf* (N. Car.), 13-189.

The objection that such a statute is beyond the power of the state because compelling attendance at a school maintained by the federal government, is untenable, where the statute excepts from the requirement children sent to any other school for a like time and period. *State v. Wolf* (N. Car.), 13-189.

Leases of lands. — Under section 17 of the Act of Congress of June 30, 1902 (32 St. 504, c. 1323), which provides that "Creek citizens may rent their allotments for strictly nonmineral purposes for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes," and also that "any agreement or lease of any kind or character violative of this paragraph shall be absolutely void, and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity," the right to avoid a lease of the prohibited character, for illegality, is not confined to the lessors, but may be exercised by the lessee or by any person against whom the lease is sought to be asserted as a valid obligation. As regards such a lease, the general rule

which prohibits a tenant from denying his landlord's title has no application. *Muskogee Land Co. v. Mullins* (U. S.), 16-337.

Amenability to criminal laws. — The Criminal Code of Canada applies to Indians as well as to others. *Rex v. Beboning* (Can.), 13-491.

INDICTMENTS AND INFORMATION.

1. NECESSITY OF INDICTMENT OR INFORMATION, 889.
2. FINDING AND FILING, 889.
3. FORMAL REQUISITES, 890.
4. CHARGING OFFENSE, 891.
5. BILLS OF PARTICULARS, 893.
6. AMENDMENT, 893.
7. JOINDER OF COUNTS AND OFFENSES, 893.
8. DISMISSING, QUASHING, OR SETTING ASIDE, 893.

See ABORTION; ADULTERATION; ARSON, 3; ASSAULT AND BATTERY, 1 d; BIGAMY; BURGLARY, 2; CONSPIRACY, 1 e; EMBEZZLEMENT, 4; FORGERY, 3; HOMICIDE, 7; INCEST, 2; KIDNAPPING; LARCENY, 5; PERJURY, 6; RAPE, 2 a; RECEIVING STOLEN PROPERTY, 2; ROBBERY, 2 a; SEDUCTION, 2 c (1).

Accessories, necessity of indictment against principal, see ACCESSORIES AND OTHER PARTICIPANTS IN CRIME.

Averment of venue, see VENUE, 2 c.

Defect in indictment as ground for arrest of judgment, see JUDGMENT, 7 a.

Effect of plea of guilty under defective indictment, see CRIMINAL LAW, 6 j (1).

Election of offenses, see EMBEZZLEMENT, 1.

Information for contempt, see CONTEMPT, 3 a.

Information in nature of *quo warranto*, see *QUO WARRANTO*.

In prosecutions for practicing medicine without license, see PHYSICIANS AND SURGEONS, 3 b.

Mode of selecting and impaneling grand jury, see GRAND JURY.

Name of foreman printed instead of signed by him, see CRIMINAL LAW, 6 j (1).

Necessity of calling all witnesses indorsed on indictment, see CRIMINAL LAW, 6 m (4).

Obtaining money or property under false pretenses, see FALSE PRETENSES AND CHEATS, 4.

Offenses included, conviction for assault with dangerous weapon under indictment for assault with intent to kill, see ASSAULT AND BATTERY, 1 l.

Pendency of another indictment as ground for arrest of judgment, see JUDGMENTS, 7 a.

Power to proceed by information in superior court in case within jurisdiction of inferior court, see CRIMINAL LAW, 6 b.

Prosecutions for violation of liquor laws, see INTOXICATING LIQUORS, 6 d.

Review of decision as to sufficiency of, see APPEAL AND ERROR, 12 a.

Right to examine witnesses not indorsed on indictment, see WITNESSES, 3 b (9).

Sufficiency of evidence before grand jury, see GRAND JURY, 5 a.

Violation of anti-gambling laws, see GAMING AND GAMING HOUSES, 5.

1. NECESSITY OF INDICTMENT OR INFORMATION.

Proceedings in courts of record. — No original prosecution can be instituted in a court of record in this state except by presentment of indictment by a grand jury, or by an information exhibited by the county attorney or some other officer thereto authorized by law. *Evans v. Willis* (Okla.), 18-258.

Effect of invalid information. — Where the paper writing purporting to be an information is not exhibited or presented by the county attorney, or some one authorized by law, the same being invalid, and not capable of being amended, the County Court did not acquire any jurisdiction of such action or prosecution. *Evans v. Willis* (Okla.), 18-258.

Prosecution by information without indictment. — The prosecution of a person for felony by information only does not violate the due process of law clause of the Fourteenth Amendment of the Federal Constitution. *State v. Guglielmo* (Ore.), 7-976.

The Oregon statute empowering the district attorney to charge the commission of crimes, including felonies, by information only, is authorized by the provision of the state constitution that the legislative assembly may modify or abolish grand juries, and is not repugnant to the Fourteenth Amendment of the Federal Constitution. *State v. Guglielmo* (Ore.), 7-976.

The Vermont statute providing that the state's attorney may prosecute by information instead of indictment all crimes except those punishable by death or by imprisonment for life held to be constitutional. *State v. Stimpson* (Vt.), 6-639.

2. FINDING AND FILING.

Return in open court. — It is essential to the validity of an indictment that the grand jury as a body should return it in open court; and this requirement is not answered where a paper purporting to be an indictment and indorsed "a true bill" is brought into the court room before the entrance of the judge, though after the hour for opening the court, and is handed by the foreman of the grand jury to the clerk in the absence of the other grand jurors. *Renigar v. United States* (U. S.), 19-1117.

The delivery of an indictment by the foreman of the grand jury to the clerk of the court while the clerk is in the court room awaiting the entrance of the judge, instead of returning it in open court, is not a "defect or imperfection in matter of form only"

within the curative provision of Rev. St. U. S., § 1025 (2 Fed. St. Ann. 340), but is a defect of substance. *Renigar v. United States* (U. S.), 19-1117.

An indictment held not properly returned because not returned in open court. *Sampson v. State* (Ga.), 4-525.

Time for return. — The District of Columbia statute providing for the discharge of the accused for failure to return an indictment within a specified time does not repeal or modify the general statute of limitations in force in the district, but is merely intended to limit the time within which the grand jury must act upon the charge upon which the accused has been arrested and committed or admitted to bail. *U. S. v. Cadarr* (U. S.) 3-1057.

Evidence of return. — An indorsement on an indictment and a recital in the minutes held to show sufficiently that the indictment was found or returned by the grand jury. *Peoples v. State* (Fla.), 4-870.

The clerk's indorsement of an indictment, "This is a true bill, Marion Phillips, Foreman of Grand Jury; filed Dec. 5th, 1905, Josiah M. Harrell, Clerk," is sufficient to show that the indictment was returned by the grand jury into the proper court. *State v. Campbell* (Mo.), 14-403.

Presence of grand jurors at return of indictment. — A record on appeal in a criminal case which recites that the indictment was returned into open court by the foreman in the presence of "all the other grand jurors," and from which it also appears that there were more than eleven other grand jurors, shows a compliance with section 4914 of the Code of 1896 which requires that indictments must be presented to the court by the foreman in the presence of at least eleven other jurors. *Letcher v. State* (Ala.), 17-716.

Right to file information after preliminary examination. — The provisions of the New York statute (Code Crim. Pro., § 743) authorizing the district attorney, in certain cases to file an information against a defendant who has had a preliminary examination before a magistrate, and requiring a dismissal of the action, if an information is not filed, apply only to cases where the defendant has been held for trial, and if the defendant has been discharged by the magistrate, the district attorney has no right to file an information, but he can proceed only by indictment. *People v. Dillon* (N. Y.), 18-552.

Sufficiency of objections to information. — In a criminal prosecution, the objection that the information was not found, indorsed, or presented as required by law is insufficient to challenge the appointment of the deputy district attorney by whom the information was prepared, and as the trial court is presumed to be cognizant of its own officers and of the measure of their powers, no proof of the appointment of the deputy is necessary. *State v. Guglielmo* (Ore.), 7-976.

3. FORMAL REQUISITES.

Recital of authority to prosecute. — An information which recites that it was presented in the name and by the authority of the "state" complies with the provision of the state constitution (art. 1, § 97) that "all prosecutions shall be carried on in the name and by the authority of the state of North Dakota," where it is entitled in the name of the state of North Dakota, and shows on its face that it was presented by the state's attorney for a certain county in the state of North Dakota, in the name and by the authority of the state. *State v. Bednar* (N. D.), 20-458.

Recital of authority in each count. — The requirement of section 169 of the constitution of Mississippi that "all prosecutions shall be carried on in the name and by authority of the state of Mississippi" has reference to the preface to the indictment as a whole and does not require the words "in the name and by authority of the state" to be repeated in subsequent counts. *Starling v. State* (Miss.), 13-776.

Conclusion contra pacem. — Under a constitutional requirement that all indictments shall conclude "against the peace and dignity of the state" an indictment concluding "against the peace and dignity of state," thereby omitting the word "the" before the word "state," is invalid. *State v. Campbell* (Mo.), 14-403.

Repetition of conclusion after each count. — Under the requirement of section 169 of the constitution of Mississippi that "all indictments shall conclude against the peace and dignity of the state," it is not necessary for the words "against the peace and dignity of the state" to be repeated after each count. *Starling v. State* (Miss.), 13-776.

The sustaining of a demurrer to the last count of an indictment concluding with the words "against the peace and dignity of the state" does not take such concluding words out of the indictment but leaves them applicable to the preceding counts. *Starling v. State* (Miss.), 13-776.

Signature by prosecuting attorney. — A court may take judicial notice of its officers, and it is not essential to the validity of an indictment that the prosecuting attorney signing the indictment as such attorney should add to his signature the county and state of which he is the prosecuting attorney. *State v. Campbell* (Mo.), 14-403.

Verification of information. — A district attorney's oath of office is sufficient to support an unverified information filed by him, where there is a statute providing that his information charging the commission of a crime may take the place of the indictment found by the grand jury, and there is no statute requiring him to procure leave of court to file such an information. *State v. Guglielmo* (Ore.), 7-976.

Though the Oregon statute provides that no warrant shall issue but upon probable cause supported by oath or affirmation, and

though there is a state statute providing that "an information is the allegation of statement made before a magistrate, and verified by the oath of the party making it, that a person has been guilty of some designated crime," an information need not be verified, as the official oath of the person whose duty it is to prosecute the formal charge complies with the constitutional and statutory requirements. *State v. Guglielmo* (Ore.), 7-976.

Where a deputy district attorney prepares an information and subscribes thereto, not his own name, but the name of the district attorney, the information is supported by the official oath of the district attorney and therefore is sufficient, though it is not verified and though the deputy district attorney is not required by law to take an oath of office. *State v. Guglielmo* (Ore.), 7-976.

An affidavit verifying an information complies with the statute requiring such an affidavit to set forth the offense and the name of the accused and to state on the personal knowledge of the affiant that the offense was committed (Mills Ann. St. Colo., § 1432b), where it is attached to the information and recites that "the facts stated in the foregoing information are true and the offense therein charged was committed of his [affiant's] own personal knowledge" but without reciting the facts set forth in the information. *Ausmus v. People* (Colo.), 19-491.

Verification on information and belief. — In Missouri an information for a criminal offense may be verified by the prosecuting attorney upon his information and belief. *State v. Temple* (Mo.), 5-954.

An information must be made upon oath; and it cannot rest wholly on information and belief, but must state enough facts to show that the complainant is acting in good faith and that he has reasonable grounds to believe that a crime has been committed by some person named or described. *People v. Wyatt* (N. Y.), 9-972.

Waiver of verification. — When no objection is taken to an information upon the ground that it is not verified the verification is waived. *State v. Montgomery* (Mo.), 2-261.

4. CHARGING OFFENSE.

Substantial compliance with statute. — It is the declared policy of the legislature, as well as of the court, to uphold indictments and informations whenever there has been a substantial compliance therein with the statutory requirements. *Tillman v. State* (Fla.), 19-91.

Following language of statute. — When an offense is created by statute which sets forth with precision and certainty all the elements of the offense, an indictment is sufficient which charges the offense in the words of the statute. *Commonwealth v. R. I. Sherman Mfg. Co.* (Mass.), 4-268.

Words of same meaning and import. — An indictment is not insufficient because it does not describe the offense in the very words of the statute if it uses words of the same

meaning and import. *State v. York* (N. H.), 13-116.

Negating exceptions in statute. — An information for the violation of a penal statute need not negative an exception contained in the statute unless the exception is so incorporated with the enactment as to constitute a material part of the definition or description of the offense. *State v. Paige* (Vt.), 6-725.

In a prosecution for the unlawful sale of intoxicating liquor under a statute containing an exception allowing the sale of pure apple cider not containing more than a certain percentage of alcohol which exception is not incorporated in the enacting clause, the commonwealth is not required to plead or prove that cider sold by the accused was not pure apple cider, but the burden is on the accused to show that his sale was within the statutory exception. *Devine v. Commonwealth* (Va.), 13-361.

Test of certainty. — An indictment which apprises the party charged of the charge against him, so that he may know from the language of the instrument what he is expected to meet and will be required to answer, alleges sufficient matter to indicate the crime and the person charged, and is not void for uncertainty. *State v. Toney* (Ohio), 18-395.

Under the Iowa statute providing that it is necessary to allege in an indictment only the facts constituting the offense, in ordinary and concise language, with such certainty and in such manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment according to law on a conviction, the use of the word "feloniously" in charging a felony is unnecessary and amounts to nothing more than saying that the crime charged is a felony, and is not to be construed as meaning "knowingly" so as to necessitate proof by the state of guilty knowledge on the part of the accused. *State v. Judd* (Ia.), 11-91.

Omission of word "did." — An indictment is not rendered fatally defective by the omission of the word "did" before the verb expressing the action charged where the omission is a mere clerical mispision and the meaning is perfectly clear from the context. *Cæsar v. State* (Fla.), 7-45.

Characterization of offense. — It is not the name, but the description of the crime, which characterizes the offense charged in an indictment. *Lipham v. State* (Ga.), 5-66.

Charging particulars of crime. — Where the statutory definition of an offense is in generic terms, an indictment for such offense must charge the particulars of the crime. *State v. Southern Indiana Gas Co.* (Ind.), 13-908.

Charging attempt to commit crime. — An indictment for an attempt to commit a crime must aver the intent and the overt act constituting the attempt. *Hogan v. State* (Fla.), 7-139.

Surplusage. — An allegation in an indictment descriptive of that which is essen-

tial to the charge therein made is a material allegation and cannot be rejected as surplusage. *Goodlove v. State* (Ohio), 10-893.

Duplicity. — When a statute makes either of two or more distinct acts, connected with the same general offense, and subject to the same punishment, indictable as distinct crimes, they may, when committed by the same person at the same time, be coupled in one count and constitute but one offense; and such indictment will not be subject to the charge of being duplicitous. *Irvin v. State* (Fla.), 10-1003.

Conjunctive averments. — A statute which declares that any person who "buys or receives" stolen property shall be punishable, etc., creates only one offense, and therefore an information charging the defendant with "buying and receiving" stolen property is not duplicitous. *State v. Pirkey* (S. D.), 18-192.

Laying time. — The Florida statute providing that "no indictment shall be quashed or judgment be arrested or new trial be granted on account of any defect in the form of the indictment" does not abrogate the common-law rule that the indictment must allege with definiteness and certainty the date upon which the alleged crime was committed. *Morgan v. State* (Fla.), 7-773.

An indictment is not fatally defective because it alleges that the crime charged was committed "on the ---- day of ----, 19--." *Grayson v. State* (Ark.), 19-929.

"On or about" a certain day. — An indictment must allege with definiteness and certainty a date upon which the alleged crime was committed, whether or not such specific date must be proved at the trial, and an indictment charging that the offense was committed "on or about" a certain date will be held fatally defective for uncertainty upon motion in arrest of judgment. *Morgan v. State* (Fla.), 7-773.

Impossible date. — An indictment is fatally defective if it alleges as the date of the commission of the offense charged an impossible date in the future. *Terrell v. State* (Ind.), 6-851.

The Indiana statute providing that no indictment shall be deemed invalid for stating imperfectly the time of the commission of the offense, unless time is of the essence of the offense, does not operate to cure an indictment which alleges as the date of the offense an impossible date in the future. *Terrell v. State* (Ind.), 6-851.

Avoiding statute of limitations. — Where it appears from an information that the statute of limitations has run against the offense charged, but that the accused was prosecuted for the same within the statutory period by the making of an affidavit before a justice of the peace, and the issuance of a warrant which could not be served on account of the concealment and absence of the accused, but the information fails to allege any connection with the prosecution before the justice of the peace, it should be quashed on motion on the ground that the prosecution

by information is barred by the statute. *Rouse v. State* (Fla.), 1-317.

Laying place. — A complaint in a justice's court charging a person with keeping and maintaining a nuisance in a certain building in a certain village and county, without specifying the lot or block where kept, is a sufficient description on which to base a preliminary examination for such offense. *State v. Wisnewski* (N. Dak.), 3-907.

Misnomer. — Where there is but a single defendant named in an indictment, whose name, Giles Morris, is correctly and repeatedly given in such indictment, and after being thus correctly and repeatedly given, he is in one place in such indictment referred to as "the said Gules Morris," such misspelling of the defendant's first name under these circumstances is so patently a mere *lapsus penne*, as to leave no room for doubt as to who was intended to be named, and is an immaterial error in such indictment that does not vitiate it. *Morris v. State* (Fla.), 14-285.

Use of alias. — Where an indictment charges the accused with having assaulted and killed one "Percy Stuekey, *alias* Frank McCormick," evidence that the defendant assaulted and killed a person commonly known as Frank McCormick will not sustain a verdict of guilty against the defendant unless it also be shown that the Frank McCormick assaulted and killed and Percy Stuekey were one and the same person. *Goodlove v. State* (Ohio), 19-893.

References to former conviction. — In a criminal prosecution under a statute imposing a more severe punishment for a second offense than for the first, the defendant's conviction for the first offense must be alleged in the indictment and proved on the trial, in order to warrant his conviction and punishment as for a second offense. *Pastz v. State* (Wis.), 9-767.

Under a statute making former convictions the basis of an extended term for the imprisonment of a person convicted of crime and providing that "such former judgment shall be referred to in the indictment," an indictment is not vitiated by the fact that it refers to former judgments instead of to former convictions, as "conviction" and "judgment" are used interchangeably. *State v. Smith* (Ia.), 6-1023.

Waiver or aid of defects. — In a criminal prosecution, after the jury have been impaneled and before any evidence has been given, the defendant cannot object to the admission of any evidence on the ground that the indictment is insufficient, as, when the defendant has joined issue by pleading not guilty, any evidence pertinent to the issue is admissible. *State v. Louanis* (Vt.), 9-194.

In a criminal prosecution, after the jury have been impaneled and before any evidence has been given, the defendant cannot object to the admission of any evidence on the ground that the indictment does not show that the crime was committed within the county or

the state, as the question should have been raised by a motion in arrest. *State v. Louanis* (Vt.), 9-194.

5. BILLS OF PARTICULARS.

Effect as limiting evidence. — When the solicitor for the state in a criminal action files a bill of particulars, the state is confined to the items therein set down. *State v. Van Pelt* (N. Car.), 1-495.

Effect as supplying defects in indictment. — A bill of particulars cannot supply a defect in an indictment. *State v. Van Pelt* (N. Car.), 1-495.

Furnishing a bill of particulars to a defendant in a criminal action does not deprive him of the right to have the indictment quashed if insufficient. *State v. Van Pelt* (N. Car.), 1-495.

Facts equally accessible to accused. — No error is committed in refusing the demand of an accused for a bill of particulars when the means of obtaining the facts are just as accessible to him as to the state. *Starling v. State* (Miss.), 13-776.

6. AMENDMENT.

Leave to amend after plea. — By leave of court an information may be amended in a matter of substance as well as of form after a plea of not guilty has been entered and before the trial is begun. *State v. Chance* (Kan.), 20-164.

Adding indorsement during trial. — It is discretionary with the court on the trial of an information to permit the indorsement thereon of the names of witnesses previously known to the prosecuting attorney. *State v. Le Pitre* (Wash.), 18-922.

7. JOINDER OF COUNTS AND OFFENSES.

Election. — Where an information contains two counts charging but one offense, the prosecutor will not be required to elect on which count he will rely for a conviction. *Candy v. State*, 8 Neb. 482; *Stevens v. State* (Neb.), 19-121.

Objection on ground of duplicity. — Where an information or indictment is complained of on the ground of duplicity the defendant must make the objection by demurrer, or by motion to quash before verdict rendered. If he delays presenting such issue until after verdict he will be held to have waived the same. He cannot raise such issue in a motion for new trial or by a motion in arrest of judgment. *Irvin v. State* (Fla.), 10-1003.

Offenses of different grades. — An attempt to commit a felony should not be blended in one count with an attempt to commit a misdemeanor. *Hogan v. State* (Fla.), 7-139.

8. DISMISSING, QUASHING, OR SETTING ASIDE.

Misnomer. — Neither an indictment nor the service of a copy thereof should be quashed on the ground that the defendant's name appears therein as "Dove" Smith in-

stead of Dave Smith, especially where the chirography is such that the letter "o" can also be read "a." *Smith v. State* (Tex.), 15-357.

Names idem sonans. — The names "Staunton" and "Stanton" are *idem sonans*, and the fact that an indictment for bigamy spells the name of the defendant's first wife as "Staunton" instead of "Stanton" is not material. *People v. Spoor* (Ill.), 14-638.

Omission of dates. — A motion to quash an indictment on the grounds that it is not dated, that it does not set out the year when it was found, and that it does not show when the grand jury was impaneled, is addressed to the discretion of the trial court, and the exercise of that discretion will not be revised by a reviewing court. *State v. Louanis* (Vt.), 9-194.

Incompetency of evidence before grand jury. — An indictment need not be quashed because the grand jury considered testimony of admissions by the prisoner which were obtained under circumstances that made them incompetent. *Holt v. U. S.* (U. S.), 20-1138.

An indictment cannot be quashed because it rests, in whole or part, on incompetent evidence. *State v. Woodrow* (W. Va.), 6-180.

Failure to show that witnesses before grand jury were sworn. — Under the North Carolina statute providing that an indictment which is otherwise sufficient shall not be quashed "by reason of any informality or refinement," the indictment will not be quashed on the ground that it fails to show that any of the witnesses before the grand jury were sworn, but the fact that the witnesses were not sworn must be established by proof offered by the defendant. *State v. Sultan* (N. Car.), 9-310.

Impeachment by testimony of grand juror. — Members of the grand jury under the New Mexico statute will not be permitted to impeach an indictment duly found, returned in open court and filed as such, by testifying as to what was said by the prosecution officer while advising with them in his official capacity. *U. S. v. Tallmadge* (N. Mex.), 20-46.

Names of witnesses not indorsed on indictment. — No error is committed in refusing to quash an information on the ground that the names of certain witnesses for the state were not indorsed upon the information, where it appears that the witnesses had been summoned on the preliminary examination and for the trial, and that the defendant was fully advised to that effect. *State v. Jeffries* (Mo.), 14-524.

Signature of prosecuting attorney. — The failure of the prosecuting attorney to write his full name in the body of the information or to sign it in that way is not ground for quashing the information. *State v. Brock* (Mo.), 2-768.

Signature by foreman of grand jury. — Under the provisions of the Alabama Code the failure of the foreman of the grand jury to subscribe his name to the statement that

the indictment is a true bill is good cause for quashing such indictment. *Coburn v. State (Ala.)*, 15-249.

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1. WHO ARE INFANTS.

Time of attainment of majority. —

The common-law rule that a minor becomes a major "on the beginning of the day preceding the (21st) anniversary" of his birth does not prevail in the state of Louisiana, which by codal provision has adopted the civil-law rule that minors are persons "who have not as yet attained the age of one and twenty years complete." Rev. Civ. Code, art. 37. This provision was taken from the Code Napoleon, and the French commentators all agree that a minor does not become of age until the commencement, at least, of the twenty-first anniversary of his birth. Hence a minor whose twenty-first anniversary will not occur until the next day after the date fixed for an election cannot lawfully register for the purpose of voting thereat. *State v. Joyce* (La.), 17-905.

In law a man is twenty-one years old on the day preceding the twenty-first anniversary of his birth, and may then do whatever the law permits an adult male person to do. *Erwin v. Benton* (Ky.), 9-264.

2. LIABILITY ON CONTRACTS.

a. Necessaries.

In order to determine the question whether the contract of an infant for a course in stenography was a contract for necessities, in the sense in which the term "necessaries" is used to render the contract binding upon such infant, the evidence in the case should show the state, degree, and condition in life in which the infant is whose contract is under consideration; and it should also affirmatively appear that the parents or guardian of such infant failed or refused to furnish the alleged necessary. *Mauldin v. Southern Shorthand, etc., University* (Ga.), 8-130.

Articles suitable and which would be beneficial to an infant are not *ex vi termini* necessities. *Neilson v. International Textbook Co.* (Me.), 20-591.

An attorney at law cannot recover from an infant on a *quantum meruit* for professional services rendered in the settlement of a decedent's estate in which the infant is interested, where the services were rendered pursuant to employment by the infant's relatives but without appointment by his guardian or guardian *ad litem*, as services so rendered are not necessities. *McIsaac v. Adams* (Mass.), 5-729.

b. Disaffirmance.

(1) Right to disaffirm.

Voidable contracts in general. — The voidable contract of an infant gains no additional force from the fact that he is engaged in business for himself, or is emancipated; nor is it any bar to the infant's right to rescind such a contract that the same has been executed, or that the rescission may operate injuriously or unjustly on the other party. *Wuller v. Chuse Grocery Co.* (Ill.), 16-522.

Marriage settlement. — An infant female who, on the eve of her marriage, unites with her intended husband, her guardian, and her mother, in settling her maiden lands, through the intervention of a trustee, on herself and the issue, if any, of her proposed marriage, may, after the disabilities of infancy and coverture have been removed, disaffirm and annul such settlement where she has done no act in the meantime to ratify or affirm it. *Smith v. Smith* (Va.), 12-857.

Purchase of shares of stock. — The purchase by an infant of shares of the capital stock of a corporation is voidable, and the infant may, at his election, avoid it and recover the purchase money, either during or after his minority. *Wuller v. Chuse Grocery Co.* (Ill.), 16-522.

Executory contract. — A minor may disaffirm an unexecuted contract for necessities although he would have been bound by the contract had it been fully performed. *Wallin v. Highland Park Co.* (Ia.), 4-421.

Release of liability for tort. — An infant who has signed a release of liability for a tort may maintain an action on the tort before attaining his majority although no fraud is shown and he has not repaid or tendered the consideration received for the release, but the jury should inquire to what extent he has been benefited by the consideration and take that into account in estimating his damages. *Worthy v. Jonesville Oil Mills* (S. Car.), 12-688.

(2) Mode of disaffirmance.

Acts and declarations. — A contract of a minor may be avoided by any act or declaration disclosing an unequivocal intent to repudiate its binding force and effect, as that he does not intend to fulfil it, or that he disaffirms it. *Spencer v. Collins* (Cal.), 20-49.

Conveyance disaffirmed by subsequent deed. — To constitute a disaffirmance of a conveyance made during minority, a deed made after reaching majority must be

inconsistent with the prior deed. Thus, a quitclaim deed is not a disaffirmance of a mortgage made during minority. *Shreeves v. Caldwell* (Mich.), 3-592.

(3) Time of disaffirmance.

Attainment of majority. — When a mortgage of a homestead is given by the owner and his wife, the latter being a minor, and the husband shortly thereafter dies, a conveyance by the guardian to the widow is not a disaffirmance of the mortgage, as such disaffirmance must take place after majority; nor in such case is a conveyance by the administrator of the deceased husband a disaffirmance of the mortgage. *Shreeves v. Caldwell* (Mich.), 3-592.

Statute of limitations. — When a female becomes of age, the statute of limitations begins to run against her right to disaffirm a deed made by her during her infancy, and the running of the statute is not interrupted by her subsequent marriage, as one disability cannot be tacked to another to defeat the statute. *Priddy v. Boice* (Mo.), 9-374.

(4) Notice of disaffirmance.

Contract with partnership. — Notice by an infant of the disaffirmance of a contract with a partnership is sufficient if given to one of the partners. *Spencer v. Collins* (Cal.), 20-49.

Notice to assignee of contract. — Notice of the disaffirmance of an infant's contract need not be given to the assignee of the contract. It is sufficient, when required, if it is given to the contracting party notwithstanding the assignment by him. *Spencer v. Collins* (Cal.), 20-49.

(5) Return of consideration.

In an action to rescind the voidable contract of an infant, such part of the consideration as remains in the infant's possession or control must be returned, but if the infant has lost or expended it, so that he cannot restore it, he is not obliged to make restitution. *Waller v. Chuse Grocery Co.* (Ill.), 16-522.

In such an action, where the property purchased by the infant consists of shares of the capital stock of a corporation, a provision in the decree for cancellation of the certificates of stock held by the plaintiff amounts, in effect, to a restoration of the stock to the defendant. *Waller v. Chuse Grocery Co.* (Ill.), 16-522.

An infant who has made a contract for services to be rendered to him and has paid full value for such services as have been rendered, is entitled to disaffirm the contract as to further services, under a statute (Civ. Code Cal., § 35) which permits an infant to disaffirm his contracts "upon restoring the consideration to the party from whom it was received." *Spencer v. Collins* (Cal.), 20-49.

It is not necessary that an infant, in order to recover back money paid by him in execution of a voidable contract, should place the

other party in *statu quo*. The fact that the infant may have received and retains intangible benefits from the use of property purchased is no bar to such action. *Neilson v. International Textbook Co.* (Me.), 20-591.

3. ACTIONS.

a. Pleading.

Infants have a right to sue by a guardian and next friend to recover damages for an injury done to the person by the tortious acts of another. *Clasen v. Pruhs* (Neb.), 5-112.

A bill in equity cannot be taken for confessed as to infants. *Holderby v. Hagan* (W. Va.), 4-401.

b. When relief granted.

Although minors may not be bound either by contract or by estoppel, equity will not lend its affirmative aid to enable them to take an unjust advantage of the mistakes or misfortunes of their adversaries. *Tindall v. Peterson* (Neb.), 8-721.

c. Defenses.

The doctrine of estoppel *in pais* does not apply to the act of an infant in misrepresenting his age. *Kirkham v. Wheeler-Osgood Co.* (Wash.), 4-532.

d. Evidence.

Action for necessities. — In an action against an infant for the purchase price of necessities the burden is on the plaintiff to prove, not only that the goods supplied were suitable to the condition in life of the infant, but that he was not sufficiently supplied with goods of that class at the time of the sale and delivery. *Nash v. Inman* (Eng.), 14-682.

e. Trial.

Province of jury in action for necessities. — Whether a course of instruction in electrical engineering is a necessary for an infant is a question of fact. *Neilson v. International Textbook Co.* (Me.), 20-591.

In an action against an infant for the price of necessities, the question whether the infant already had a sufficient supply of the articles purchased by him is a question of fact for the jury, but where there is no evidence that the articles purchased were necessities judgment is properly directed to be entered for the defendant. *Nash v. Inman* (Eng.), 14-682.

f. Guardian *ad litem* or next friend.

(1) Appointment.

For infant married woman. — Under the South Carolina statute providing that "when an infant is a party, he must appear by guardian who may be appointed by the court in which the action is prosecuted," an infant wife cannot maintain an action where unable, from sickness, to labor, the judge

is properly joined with her as coplaintiff, and though there is a statute providing that "when a married woman is a party her husband must be joined with her," and further providing that "in no case need she prosecute or defend by guardian or next friend," as the latter statute relates to the disability of coverture and not to that of infancy. *Hiers v. Atlantic Coast Line R. Co.* (S. Car.), 9-1114.

Who may apply for appointment. — Under the California Code of Civil Procedure, providing that "when a guardian *ad litem* is appointed by the court he must be appointed . . . when the infant is a plaintiff, upon the application of the infant, if he be of the age of fourteen years," an order appointing a guardian *ad litem* on the application of the guardian only, for a minor sixteen years of age, is erroneous, and ordinarily requires the reversal of a judgment rendered in favor of the infant at the suit of such guardian; but where it appears that the infant after reaching majority has not disaffirmed the judgment, the right to do so is waived, and the judgment having become binding equally on both parties, no reversal is required. *Johnston v. Southern Pacific Co.* (Cal.), 11-841.

(2) Removal and substitution.

Power of court. — Under the Arkansas statutes (Kirb. Dig., § 6021) providing that an action by an infant must be brought by next friend, and authorizing the court to charge the next friend, the next friend of a minor plaintiff is at all times subject to the control of the court, and the court may at its discretion revoke the authority of the next friend to represent the infant, and substitute another. *Nashville Lumber Co. v. Barefield* (Ark.), 20-968.

(3) Compensation and expenses.

Attorneys' Fees. — In a suit in chancery involving the real property of infants, where the chancellor, on account of the fact that the statutory guardian of the infants claims an adverse interest in the property, refuses to allow him to defend for the infants and appoints a guardian *ad litem* for that purpose, who employs attorneys to represent him, and the attorneys conduct the litigation to a successful conclusion, the infants are liable for reasonable attorney's fees, but the amount cannot be made a lien on their property. *Owens v. Gunther* (Ark.), 5-130.

(4) Powers.

Cross-complaint on behalf of infant defendant. — It is proper to sustain a demurrer to a cross-complaint filed by a guardian *ad litem* for an infant defendant in a suit to quiet title, where the statute under which the guardian has been appointed imposes on him the duty to defend and not to prosecute suits on behalf of the infant, and the order of appointment does not purport to enlarge the powers and duties prescribed

by the statute. *Gibbs v. Potter* (Ind.), 9-481.

Compromise and settlement. — When acting as next friend for his infant child, a parent who has been regularly made a party to an action may properly negotiate for an adjustment of the controversy. He cannot, however, bind the infant by such settlement, which can become effective only by due judicial examination and adjudication. *Missouri Pacific R. Co. v. Lasca* (Kan.), 17-605.

Payment and satisfaction of judgment. — Under the Michigan statutes, the next friend of an infant has the authority to receive payment of a judgment recovered in favor of the infant, and a payment so made will constitute a satisfaction of the judgment. *Baker v. Pere Marquette R. Co.* (Mich.), 7-605.

4. REGULATION AND CONTROL OF INFANTS.

a. Education.

The legislature of a state may define the status of infants requiring state guardianship and may enforce state control and education of infants coming within the class so defined. *Hunt v. Wayne Circuit Judges* (Mich.), 7-821.

b. Child labor laws.

The Fourteenth Amendment to the Federal Constitution does not limit the power of a state to regulate in good faith the labor of minors. *Starnes v. Albion Mfg. Co.* (N. Car.), 15-470.

The North Carolina statute prohibiting the employment of minors under twelve years of age in manufacturing establishments does not violate the Fourteenth Amendment to the Federal Constitution. *Starnes v. Albion Mfg. Co.* (N. Car.), 15-470.

Inasmuch as minors are more subject to injury from excessive exertion and are less capable of self-protection than adults, they form a class to which legislation concerning their employment may be exclusively directed without falling under the constitutional prohibition of special legislation and unfair discrimination. *In re Spencer* (Cal.), 9-1105.

The California statute making it a misdemeanor to employ children under fourteen years of age in certain specified occupations is not repugnant to the state constitution as being a special law for the punishment of crime where a general law could be made applicable. *In re Spencer* (Cal.), 9-1105.

The California statute prohibiting the employment of children under fourteen years of age in certain specified occupations is not invalid, either as making an unfair discrimination against the occupations mentioned, or as unduly restricting the rights of minors to work at any and every occupation in which they may wish to engage. *In re Spencer* (Cal.), 9-1105.

The Washington statute providing that no child under the age of fourteen years shall be hired out in any factory, not only prohibits the parents and guardians from hiring out children below such age, but also pro-

hibits the employment of such children. *Kirkham v. Wheeler-Osgood Co.* (Wash.), 4-532.

The provision of the California statute prohibiting the employment of children under fourteen years of age in certain specified occupations, that "upon the sworn statement of the parent that the child is over twelve years of age and that the parent or parents are unable, from sickness, to labor, the judge of the Juvenile Court, in his discretion, may issue a permit allowing such child to work for a specified time," is not open to the objection that it discriminates against orphans and abandoned children, as the exception allowed by the provision is not made for the direct benefit of the child, but for the sick parent. *In re Spencer* (Cal.), 9-1105.

The provision of the California statute prohibiting the employment of children under fourteen years of age in certain specified occupations, that "during the time of the regular vacation of the public schools of the city or county, any child over twelve years of age may work at any of the prohibited occupations, upon a permit from the principal of the school attended by the child during the immediately preceding term," must be construed as meaning that the permit may be given by the principal of the school which the child has attended, whether the school is public or private, but that it can extend only to the time of the public school vacation; and as so construed the provision is valid. *In re Spencer* (Cal.), 9-1105.

The provision of the California Child Labor Act, that no minor under sixteen shall work in any mercantile institution, office, laundry, manufacturing establishment, or workshop between ten o'clock in the evening and six o'clock in the morning, is valid. *In re Spencer* (Cal.), 9-1105.

The provision of the California Child Labor Act, that no child under sixteen years of age shall work at any gainful occupation during the hours that the public schools are in session, unless he can read English at sight and write simple English sentences or is attending night school, is a reasonable regulation to prevent those having control of such children from so working them as to hinder them from acquiring the beginning of an education. *In re Spencer* (Cal.), 9-1105.

The provision of the California Child Labor Act, that no child under sixteen years of age shall work at any gainful occupation during the hours that the public schools are in session, unless he can read English at sight and write simple English sentences or is attending night school, and the provision that no minor under sixteen shall work in any mercantile institution, office, laundry manufacturing establishment, or workshop between ten o'clock in the evening and six o'clock in the morning, are, even if invalid, separable from and independent of the other provisions of the statute, and are not so important to the entire scheme as to require the court to declare the entire statute invalid on the theory that the legislature would have refused to adopt the other provisions had it

been aware of the invalidity of these particular provisions. *In re Spencer* (Cal.), 9-1105.

The provision of the California Child Labor Act that nothing in the statute is to be construed to prevent the employment of minors at agricultural, viticultural, horticultural, or domestic labor during the time the public schools are not in session, or during other than school hours, does not constitute an unreasonable discrimination. *In re Spencer* (Cal.), 9-1105.

c. Juvenile offenders.

Jurisdiction. — The Pennsylvania statute defining the power of courts in reference to delinquent children is not unconstitutional as creating a new court. *Commonwealth v. Fisher* (Pa.), 5-92.

The Pennsylvania statute defining the powers of the several courts of quarter sessions of the peace with reference to delinquent children is not unconstitutional as denying due process of law. *Commonwealth v. Fisher* (Pa.), 5-92.

The Michigan Juvenile Court Act is unconstitutional as conferring on Circuit Court commissioners powers other than those which the state constitution permits them to exercise; and the statute is invalid throughout the state and is not merely inoperative in those counties wherein it attempts to confer exclusive jurisdiction on such commissioners. *Hunt v. Wayne Circuit Judges* (Mich.), 7-821.

Section 9 of chapter 5388, Florida Laws of 1905, in so far as it confers jurisdiction on the judge of any Circuit Court or on a county judge to commit to the state reform school persons over ten and under eighteen years of age who are guilty of incorrigible or vicious conduct, is constitutional. *Pugh v. Bowden* (Fla.), 14-816.

Such section of the statute, in so far as it authorizes the commitment by a judge of the Circuit Court or by a county judge, without a trial by jury, of persons over ten and under eighteen years of age who are guilty of incorrigible or vicious conduct, is constitutional. *Pugh v. Bowden* (Fla.), 14-816.

Such section of the statute, in so far as it authorizes a judge of any criminal court of record to commit to the state reform school, upon written complaint under oath and without a jury trial, persons over ten and under eighteen years of age who are guilty of incorrigible or vicious conduct, contravenes the provision of the Florida constitution conferring jurisdiction on such courts to try criminal cases. The judge of a criminal court of record may commit to the state reform school only by virtue of the provisions of section 1 of the same statute after regular conviction in said court for crime. *Pugh v. Bowden* (Fla.), 14-816.

Commitment to benevolent institution. — The Georgia act providing for the commitment of wayward, etc., children to a benevolent institution provides for a hearing before the child is finally taken from the cus-

tody of the parent and a reasonable notice before such hearing; and when the terms of the act in reference to the hearing are construed in the light of the constitution and general laws of Georgia regulating the procedure of inferior judicatories, there is nothing in the act which deprives the parent of any right without due process of law. *Kennedy v. Meara* (Ga.), 9-396.

A judgment of commitment to a benevolent institution under the Georgia act providing for the commitment of wayward, etc., children to such institutions, is a judgment made by a court of competent jurisdiction, and so long as it stands unreversed it is binding on the parties; and it is therefore not erroneous, in a habeas corpus proceeding to recover possession of an infant committed to such institution, to reject evidence tending to impeach the validity of such judgment. *Kennedy v. Meara* (Ga.), 9-396.

The special courts created by the Georgia act providing for the commitment of wayward, etc., children to a benevolent institution, are all of the same grade and class, the presiding officer in each being the judge of a given municipal court in the particular municipality, and the act is not subject to the objection that it is violative of that provision of the constitution contained in the Civil Code, § 5958. *Kennedy v. Meara* (Ga.), 9-396.

The Georgia act providing for the commitment of wayward, etc., children to a benevolent institution is not subject to the objection that it is a special law enacted in a case for which provision has been made by an existing general law. *Kennedy v. Meara* (Ga.), 9-396.

5. CRIMINAL RESPONSIBILITY.

Capacity to commit crime. — Under the statutes of North Dakota a child under seven years of age is legally incompetent to commit crime. Between the ages of seven and fourteen he is presumed to be incompetent but the presumption is not conclusive. To overcome the presumption of incompetency, the burden is upon the state to show by clear proof that the defendant knew the wrongfulness of the act when he committed it. *State v. Fisk* (N. Dak.), 11-1061.

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1. NATURE AND GROUNDS OF INJUNCTIVE RELIEF.

a. Mandatory injunctions.

Mandatory injunctions are not favored by the courts but they are permissible in special cases. *Magpie Gold Min. Co. v. Sherman* (S. D.), 20-595.

b. Preventive relief.

The remedy by injunction is a preventive one only, but when there is a continuance of the injury against which, before the act was committed, an injunction might have been granted, and a right to continue the injury is claimed by the aggressor, an injunction may, in a proper case, be granted to restrain such continuance. *Seaboard Air Line Ry. v. Southern Investment Co.* (Fla.), 13-18.

Nonexistent conditions. — An injunction against ticket brokers and scalpers to restrain them from dealing in non-transferable railroad tickets is properly made to extend to tickets to be issued for an approaching occasion, and is not on that account unauthorized as promulgating a rule applicable to conditions which have not yet arisen, and prohibiting dealing in tickets not *in esse*. *Bitterman v. Louisville, etc., R. Co.* (U. S.), 12-693.

Comparative injury to parties. — In a suit by landowners to enjoin a nuisance caused by smelters, where it clearly appears that on the one hand a right is violated and on the other that a wrong is committed, the extent of the comparative interests to be affected, and the fact that the interests to be adversely affected by the injunction are very large, should not weigh against the granting of injunctive relief. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

Where a corporation purchases land with constructive and actual notice of a contract for the sale of fire clay contained in the land, and erects a fire-clay mill on the land after it has been warned by the purchaser of the fire clay that he will protect his rights in the courts, it cannot defeat such purchaser's right to restrain a breach of the contract of sale by

the claim that the granting of an injunction will greatly injure its business. *Southern Fire Brick, etc., Co. v. Garden City Sand Co.* (Ill.), 7-50.

c. Inadequacy of remedy at law.

In general. — An injunction should not issue where the allegations of the plaintiff's petition show that he has an adequate remedy at law. *Thompson v. Tucker* (Okla.), 6-1012.

The fact that trees are about to be cut in erecting a telephone line on a highway does not authorize an injunction at the suit of an abutting owner against proceeding with the work until compensation shall be paid, for the owner is entitled only to the wood when felled, and in any event his remedy at law is adequate. *Hobbs v. Long Distance Tel., etc., Co.* (Ala.), 11-461.

Financial irresponsibility of defendant. — The purchaser under a contract for the exclusive sale of fire clay in a tract of land is not precluded, on the ground of adequate remedy at law, from maintaining a bill to enjoin breach of the contract, where one defendant is not a party to the contract but is a subsequent purchaser of the land with notice, and the other defendant is a seller of the fire clay and the vendor of the land, and is financially unable to respond in damages. *Southern Fire Brick, etc., Co. v. Garden City Sand Co.* (Ill.), 7-50.

2. SUBJECTS OF REMEDY BY INJUNCTION.

a. Property and rights of property generally.

Trespass on land. — Without the aid of a statute courts of equity do not grant injunctions to restrain the mere trespass of taking turpentine from trees on lands when such trespass can be compensated in damages in an action at law. *Cowan v. Skinner* (Fla.), 11-452.

Cutting trees. — Equity may, independent of statute, enjoin the destruction of or injury to growing trees when the inadequacy of the remedy at law is because of the value and use of the trees as a part of the estate, the destruction or injury of which would be an actual and irreparable injury to the owner of the land and the use and enjoyment of his estate, that cannot be adequately compensated for in damages. *Cowan v. Skinner* (Fla.), 11452.

Continued trespass by riding bicycle on railroad tracks. — One who constantly rides on a railroad track by means of a bicycle is a trespasser, and such conduct on his part may be enjoined. *Achison, etc., R. Co. v. Spaulding* (Kan.), 2-546.

Business reputation. — An injunction may be granted to prevent a wrong which will result in injury to the general business reputation of the complainant and destroy its power to receive profits from future business. *American Electrical Works v. Varley Duplex Marget Co.* (R. I.), 3-975.

Police surveillance. — Equity will not intervene to restrain the police authorities from stationing officers outside of a place having a liquor tax certificate, when such

authorities suspect that place of being conducted as a disorderly house, and from notifying customers who are within and those who are about to enter that it is a disorderly house which is likely to be raided at any moment, and that those who are on the premises at the time of the raid are liable to arrest. *Delaney v. Flood* (N. Y.), 5-380.

Acts committed in other states. — The United States Supreme Court will issue an injunction at the suit of a state to restrain the creation in another state, by mining operations, of sulphurous fumes and gases, which are carried great distances over large tracts of land in the complaining state, and cause and threaten to cause damage on a considerable scale to forests and vegetable life and possibly to health within such state. *Georgia v. Tennessee Copper Co.* (U. S.), 11-488.

Threatened sale under mortgage. — A court of equity will not, on the ground that the statute of limitations has run against a mortgage, restrain a sale under the power contained in the mortgage, where there is neither an allegation in the complaint nor a finding by the court that the bond and mortgage have been paid. *House v. Carr* (N. Y.), 7-185.

b. Personal rights.

Right of privacy. — A temporary injunction granted by a judge of the Arkansas Supreme Court at the instance of a person accused of crime, restraining a photographer and officers of the law from developing and using a photograph of the accused, pending the determination of an action brought by him permanently to enjoin the use of such photograph, will be dissolved where it appears that the photograph has already been taken, and only remains to be developed, and that it is desired solely for the purpose of identifying the accused in the locality where the offense is alleged to have been committed, and where the defendants disclaim any intention of using it for any other purpose. *Mabey v. Kettering* (Ark.), 16-1123.

Unless it be evident that a picture should be taken to identify the person or to detect crime, it cannot be taken, the purpose not being detection or identification. If a person is under arrest or within the court's jurisdiction, generally there arises no necessity for the exercise of the photographer's art before his trial and conviction. *Schulman v. Whitaker* (La.), 8-1174.

An action for a violation of the right of privacy held not to be an action instituted to punish the infraction of the criminal laws. *Schulman v. Whitaker* (La.), 8-1174.

To restrain enforcement of statute against solicitation of patients by physicians. — An injunction will not issue to restrain an association of physicians from prosecuting the violators of the Arkansas statute making it unlawful for physicians and surgeons engaged in the practice of medicine to solicit patients by agents or drummers. *Thompson v. Van Lear* (Ark.), 7-154.

c. Contracts.

Restraining breach generally. — In the absence of some special equity involving good will, peculiar intellectual or other skill or capacity, secret process of business or other recognized ground for relief, a court of equity will not enjoin the breach of a contract by a bookkeeper not to engage in the liquor business in the state. *Simms v. Burnette* (Fla.), 15-690.

Where no trade secret or other secret process is involved, the fact that a bookkeeper has learned where and what his employer buys and to whom he sells does not warrant the enjoining of a breach of such bookkeeper's contract not to engage in a business similar to his employer's business. *Simms v. Burnette* (Fla.), 15-690.

The difficulty of detecting all the violations of a contract and the alleged insolvency of the defendant does not furnish an equitable ground for the issuance of an injunction on an original bill. *Simms v. Burnette* (Fla.), 15-690.

Negative covenants. — Where the owner of land containing fire clay makes a valid contract binding himself for a specified period to sell the clay exclusively to another person, and not to sell to any third person, there is an express negative covenant, breach of which may be restrained by injunction, though the contract is incapable of specific enforcement and though an action at law lies for breach of the contract. *Southern Fire Brick, etc., Co. v. Garden City Sand Co.* (Ill.), 7-50.

Contracts not enforceable specifically. — A person may be entitled to an injunction restraining a breach of contract though the contract is not one that a court of equity would specifically enforce. *American Electrical Works v. Varley Duplex Marget Co.* (R. I.), 3-975.

d. Municipalities and public officers.

(1) In general.

Unauthorized expenditure of public funds. — Where there is no solicitor or other legal counsel in an incorporated village whose duties require him, in the name of the corporation, to apply to a court to restrain the illegal use of its funds, a resident taxpayer, whose property is taxable by the village, may, for himself and on behalf of the village, maintain an action against the municipal authorities to enjoin the unauthorized expenditure of its funds. *Pierce v. Hagens* (Ohio), 15-1170.

Performance of illegal contracts. — Property holders and taxpayers may enjoin the performance by public authorities of a contract for street grading and paving where such contract is illegal because entered into without sufficient advertisement. *Bennett v. Baltimore* (Md.), 14-419.

Change of street grades. — In an action to enjoin a city from further lowering the grade of a street in front of the plaintiff's property and to command the defendant to replace all the excavating work and make

the street as it had theretofore existed, evidence and pleadings examined and held to justify a finding that the street was about to be lowered still further, and that an injury had been done to the plaintiff's property that justified the court in issuing a mandatory injunction to compel the defendant to place the street in the condition it was in prior to the excavation. *Hart v. Seattle* (Wash.), 13-438.

Designation of official newspaper. — Municipal authorities may be enjoined, at the suit of a rival publishing company, from designating as the official city newspaper a publication which has not the general circulation required by the city charter. *Times Printing Co. v. Star Pub. Co.* (Wash.), 16-414.

(2) Passage of ordinances.

As a general rule courts will not enjoin the passage of an alleged unauthorized resolution or ordinance by a municipal corporation. An injunction should not issue in such a case until some effort is made to enforce such resolution or ordinance. *Chicago, etc., R. Co. v. Lincoln* (Neb.), 19-207.

(3) Enforcement of ordinances.

A bill in equity to enjoin the enforcement of an ordinance which attempts to revoke a former ordinance granting to the complainants a franchise for a waterworks system will be dismissed for want of equity where the invalidity of the revoking ordinance is apparent without the introduction of evidence, and it prescribes no penalties, and its enforcement against the complainants is not even threatened. *Weller v. Gadsden* (Ala.), 3-981.

Enjoining violation of ordinance. — Injunction will issue at the suit of a private individual to prevent the erection of buildings in violation of a municipal ordinance, though the buildings are not nuisances *per se*, if the person seeking such injunction shows that their erection will work special or irreparable injury to him and his property. *Bangs v. Dworak* (Neb.), 13-202.

A prosecution for violation of a municipal ordinance will not be enjoined on the ground that the ordinance is illegal, as that fact is a defense to the prosecution. *Thompson v. Tucker* (Okla.), 6-1012.

(4) Enforcement of statutes.

General rule. — Courts of equity should, as a rule, decline to exercise jurisdiction, though having it, to enjoin public officers from executing the legislative will as to mere minor features of an enactment, not essential to efficacy of the general and dominant features. *Wadhams Oil Co. v. Tracy* (Wis.), 18-779.

Constitutionality of statute. — It is competent for a court of equity to entertain an action commenced by a person, specially interested, against administrative officers to enjoin them from executing a law, on the ground of its being unconstitutional, when such person would otherwise be irremediably

damaged. *Wadhams Oil Co. v. Tracy* (Wis.), 18-779.

Power of federal courts. — Where an indictment or proceeding is brought in a state court to enforce an alleged unconstitutional statute, the validity of which is the subject of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has power to retain its jurisdiction and enjoin the proceeding in the state court whether it be criminal or civil in its nature. *In re Young* (U. S.), 14-764.

A federal court ought not to enjoin proceedings by a state official to enforce a legislative act of the state except in a case reasonably free from doubt, but where a state officer is about to commence suits which have for their object the enforcement of a statute which violates the Federal Constitution, to the great and irreparable injury of a complainant seeking injunctive relief, the sovereignty of the state is in reality not involved and the court should not refuse to act. *In re Young* (U. S.), 14-764.

The right of a federal court to enjoin a state official from commencing suits to enforce an unconstitutional state statute does not include the power to restrain a state court from acting in any case brought before it, either of a civil or criminal nature, nor does it include the power to prevent any investigation or action by a grand jury. *In re Young* (U. S.), 14-764.

An action or proceeding brought by a state attorney-general in the name of the state to enforce a statute alleged to be void because in conflict with the Federal Constitution is, if the act is void, a proceeding without authority of the state, and one which does not affect the state in its sovereign or governmental capacity, and hence a federal injunction against the prosecution of such action or proceeding is not an interference with the sovereign power of the state. *In re Young* (U. S.), 14-764.

A suit against the attorney-general of a state to enjoin the enforcement of an unconstitutional statute amounts to a suit against the state unless such officer has a duty with regard to the enforcement of the act; and it is not material whether his duty to enforce the act arises out of the general law, or is specifically created by the act itself, so long as the duty exists. *In re Young* (U. S.), 14-764.

The general discretion of the attorney-general of a state regarding the enforcement of the laws when and as he deems appropriate is not interfered with by an injunction which restrains such officer from taking any steps towards the enforcement of an unconstitutional enactment, as no affirmative action is thereby directed and he is merely prevented from doing that which he has no legal right to do. *In re Young* (U. S.), 14-764.

The attorney-general of Minnesota, under his power existing at common law, and by virtue of the statutes of that state making it his duty to cause proceedings to be instituted against any corporation whenever it

shall have offended against the laws of the state, and to prosecute all actions which the state railroad commission shall order brought, has a general duty imposed upon him to enforce the statutes of the state, including the statutes fixing freight and passenger rates and is therefore a proper party defendant to an action to enjoin the enforcement of such statutes. *In re Young* (U. S.), 14-764.

A United States Circuit Court has jurisdiction to inquire whether freight and passenger rates fixed by state statutes and regulations are so low as to be confiscatory, and to grant a temporary injunction against the adoption or enforcement of the rates pending such inquiry; and on finding such rates to be confiscatory, the court has power to enjoin permanently their adoption or enforcement. *Ex p. Young* (U. S.), 14-764.

A suit in a federal court by stockholders of a railroad company to enjoin the attorney-general of a state from attempting by any action or proceeding to compel obedience to the provisions of unconstitutional statutes of the state fixing freight and passenger rates, or from instituting any action to enforce the penalties provided for violations of such statutes, is not a suit against the state within the prohibition of the Eleventh Amendment of the Federal Constitution, where the attorney-general is clothed by law with a duty in regard to the enforcement of such statutes. *In re Young* (U. S.), 14-764.

The opportunity of a railroad company to disobey a state statute fixing freight and passenger rates, and claimed to be in violation of the Federal Constitution as a taking of property without due process of law, to incur the penalties provided for every violation of the statute, and to test the constitutionality of the statute upon the bringing of an action for its violation, does not afford the company such a remedy at law as will defeat its right to enjoin in a federal court the enforcement of the statute, because a single violation of the statute and subsequent obedience to it pending the determination of its validity would operate as a taking of the company's property without due process of law in case the statute were declared invalid, and because its continuous refusal to obey the act would subject the company to enormous penalties in case the statute were upheld, and for the further reason that the question of the validity of the rates fixed by the statute is one requiring a long examination of complicated facts which a jury cannot properly investigate, and which can be best passed upon by a court of equity. *In re Young* (U. S.), 14-764.

e. Civil actions and proceedings.

(1) In general.

Equity will not entertain jurisdiction of a bill to enjoin a pending action of ejectment, and to remove a cloud on the complainant's title by the cancellation of the deed relied upon by the plaintiffs in eject-

ment to establish their claim to the land, although the bill alleged that the deed was fraudulently altered as to the date of execution and filing for registration and as to the interest conveyed, since these matters are available as a defense in the pending action. *Wilson v. Miller* (Ala.), 5-724.

A bill in equity which proceeds alone on the theory that the complainants will suffer irreparable injury from an erroneous and improper judicial action on the prayer for injunction in bills which the respondents threaten to file, and seeks only injunctive relief forestalling such apprehended future miscarriage of justice and maladministration of law, presents no case of equitable cognizance. *Robertson v. Montgomery Baseball Assoc.* (Ala.), 3-965.

Where a principal has brought an action at law against his agent to recover money collected for the principal but paid over by the agent to the stranger, the stranger is not entitled to an injunction restraining the prosecution of the action at law, as, if the money belonged to the principal the agent is liable for having paid it over, and if it belonged to the stranger the payment to him is a complete defense to the action at law. *Moss Merchante Co. v. First Nat. Bank* (Oregon), 8-569.

Even if a stranger may bring a suit to enjoin the prosecution of an action at law against another for want of a defense thereto, he may maintain such suit only when the defense at law is inadequate. *Moss Mercantile Co. v. First Nat. Bank* (Oregon), 8-569.

Actions in foreign states. — The courts of Arkansas will not enjoin a resident of a foreign state from suing a citizen of Arkansas in the courts of such foreign state, even though the effect of the suit may be to deprive the defendant of his exemptions under the laws of Arkansas. Nor is this rule altered by the fact that one of several parties who might have brought the action sought to be enjoined is a resident of Arkansas, or by the fact that another action on the same claim was brought in Arkansas and was there pending when the action in the foreign jurisdiction was commenced. *Greer v. Cook* (Ark.), 16-671.

Where the complaint in a suit to enjoin the prosecution of an action in a foreign state does not set forth the residence of either party to the action sought to be enjoined, and the proof fails to show conclusively that none of the parties are residents of the state in which such action is brought, an injunction should be denied. *Greer v. Cook* (Ark.), 16-671.

On a proper showing, a court may enjoin one of the citizens of a state from prosecuting a suit against a fellow citizen in the courts of another state. *Rader v. Stubblefield* (Wash.), 10-20.

Proceedings in other courts. — A state court has no jurisdiction to enjoin a proceeding or judgment of a federal court. The jurisdictions are separate and independent, and it is essential to the independence and

efficiency of each that they be exempt from interference and control one by the other. *Henderson v. Henrie* (W. Va.), 11-741.

Where land is sold under a decree in a bankruptcy proceeding and a deed is ordered to be made to the purchaser, a state court is without jurisdiction to enjoin the execution of such deed on a bill filed therein by one claiming to be jointly interested with the purchaser in the purchase of said property. Nor can the purchaser be enjoined from acquiring the title to such land. *Henderson v. Henrie* (W. Va.), 11-741.

(2) Enforcement of judgments.

Fraud in obtaining judgment. — A court of equity will not restrain the enforcement of a judgment at law on the ground of perjury or fraud in obtaining it, unless such fraud is extrinsic or collateral to the question examined and determined in the action. *Donovan v. Miller* (Idaho), 10-444.

Want of consideration in contract. — A court of equity will not grant an injunction to restrain the enforcement of a judgment at law on grounds of want of consideration or that the contract sued on is against public policy, where it appears that the defendant, through the negligence of his attorneys, failed to set up such offenses. *Donovan v. Miller* (Idaho), 10-444.

Where a defendant fails to interpose all of his defenses in the trial court, and a judgment goes against him, the court of equity will not restrain the enforcement of such judgment on the ground of failure or negligence of the defendant's attorney to interpose such defenses. *Donovan v. Miller* (Idaho), 10-444.

Issuance of execution on dormant judgment. — Injunction will lie to enjoin an execution on a dormant judgment. The plaintiff in such a suit does not thereby seek to use the statute of limitations as a sword, but as a shield to protect something which the law has already given him—the right not to have his property taken upon void process. *Updegraff v. Lucas* (Kan.), 13-860.

A judgment becomes dormant on the death of the defendant creditor, although the action was prosecuted by one having no beneficial interest therein, and the judgment belongs, in fact, to another; and under such circumstances, where no proceedings to revive the judgment have been taken within one year after the death of plaintiff in the action, an execution issued on the judgment is void and may be enjoined. *Updegraff v. Lucas* (Kan.), 13-860.

(3) Garnishment.

Injunction will not issue to restrain the prosecution of successive garnishment proceedings against an employer for the employee's wages, although it is claimed that the wages are exempt and that the garnishment writs are issued with intent to vex and

harass the employee and tie up his wages. *Baxley v. Laster* (Ark.), 12-332.

f. Criminal proceedings.

A court of equity may not restrain a criminal prosecution by an injunction. *Old Dominion Tel. Co. v. Powers* (Ala.), 1-119.

A court of equity will not enjoin the enforcement of a valid criminal statute and thereby forestall the decision of the criminal courts as to the plaintiff's guilt or innocence, notwithstanding the fact that to do so would prevent a multiplicity of actions or would prevent injurious interference with the plaintiff's business. *Sullivan v. San Francisco Gas, etc., Co.* (Cal.), 7-574.

Where property rights will be destroyed or greatly impaired, interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity. *New Orleans Baseball, etc., Co. v. New Orleans* (La.), 10-757.

Where the facts alleged show injury to property rights resulting from the enactment of an ordinance excluding the erection or operation of baseball parks within certain limits, and that the ordinance was personal, arbitrary, and discriminatory in its character, and the power of the city council to enact any such ordinance as a police regulation is questionable, a proper case is disclosed for the interference of a court of equity by the process of injunction. *New Orleans Baseball, etc., Co. v. New Orleans* (La.), 10-757.

Equity has no criminal jurisdiction, and therefore will not entertain a bill to enjoin criminal proceedings. *Fritz v. Sims* (Tenn.), 19-458.

Where property rights will be destroyed or their lawful enjoyment taken away by criminal proceedings under an invalid law or ordinance, equity has jurisdiction to enjoin such proceedings. *Fellows v. Charleston* (W. Va.), 13-1185.

g. Criminal acts.

The legislature may authorize the issuance of a writ of injunction against the use of a building for a gambling house, although the effect of such injunction may be to restrain the commission of a crime. *Ex p. Allison* (Tex.), 13-684.

The jurisdiction of the Texas District Court under the statute authorizing the issuance of a writ of injunction against the use of a building for a gambling house at the suit of the state or a private citizen, and providing that the procedure shall be similar to all other suits for injunction, is not affected by a constitutional amendment giving the County Court jurisdiction to grant an injunction where the amount in controversy is within its jurisdiction, on the ground that the act so restrained is a misdemeanor and therefore within the jurisdiction of the County Court. If the County Court has jurisdiction in any such case it is concurrent with that of the District Court. *Ex p. Allison* (Tex.), 13-684.

3. ACTIONS FOR INJUNCTIONS.

a. Jurisdiction.

Proceedings in another state. — On a proper showing, a court may enjoin one of the citizens of a state from prosecuting a suit against a fellow citizen in the courts of another state. *Rader v. Stubblefield* (Wash.), 10-20.

Trespass on land in another state. — An action for an injunction to restrain acts of continuing trespass on land, which involves necessarily and chiefly the question of the title to land, is local and not transitory, and a court of equity has no power to entertain such a suit where the land in question is without its territorial jurisdiction, notwithstanding the fact that it has jurisdiction of the persons of the alleged trespassers. *Columbia Nat. Sand Dredging Co. v. Morton* (D. C.), 8-511.

b. Parties.

Suit by taxpayers. — Citizens and taxpayers, simply as such, stating no special harm to themselves different from that sustained by others, cannot enjoin the use of a lease of a part of the city park, made by the city, for a term of years for the purpose of racing horses. *Bryant v. Logan* (W. Va.), 3-1011.

c. Bill, complaint, or petition.

(1) Allegations.

Inadequacy of remedy at law. — An injunction will not issue to restrain the cutting of timber on the complainant's land where it is neither alleged nor proved that the cutting will result in irreparable injury to the land or that the defendant is insolvent. *Haggart v. Chapman, etc., Land Co.* (Ark.), 7-333.

Allegations in a bill "that almost the entire value of said lands consists in the said pine trees and their product which the said defendants are carrying away, and your orator being engaged in the manufacture of naval stores was induced to purchase the said lands in order to get the product of such trees, and the said defendants by their trespasses are destroying the value of the said lands for the purpose for which the same were acquired by your orator," did not warrant the granting of an injunction to restrain the trespass at the time the constitutions of the state were adopted, therefore the granting of an injunction now in such a case by virtue of a statute cannot deprive the defendant of a jury trial as to damages caused by the trespass. *Cowan v. Skinner* (Fla.), 11-452.

Multiplicity of suits. — Allegations in a bill for an injunction to restrain trespasses on timber lands, that several trespasses by taking turpentine from the trees have been committed by the same parties, and that an action at law has been instituted to recover damages for such trespasses, and that one of the trespasses has occurred since the action at law was brought, do not state

an equity to prevent a multiplicity of suits, there being no showing of the inadequacy of the remedy by action at law for damages. *Cowan v. Skinner* (Fla.), 11-452.

Conclusions of pleader. — In an injunction suit to restrain strikers and labor leaders from interfering with complainant's business and employees, the bill held not to be open to the objection that the allegations therein are mere conclusions of the pleader. *O'Brien v. People* (Ill.), 3-966.

(2) Verification.

A bill for injunction is properly verified by the solicitor for complainant, where his affidavit is positive and direct to all the allegations of the bill. *Seaboard Air Line Ry. v. Southern Investment Co.* (Fla.), 13-18.

d. Demurrer.

In an action to enjoin a nuisance and for the recovery of damages when a judgment sustaining a demurrer to the answer has been reversed, the plaintiff will be allowed to file a reply, and when the issues are completed time will be given to either party to take additional proofs is desired; and on the question of the damages sustained by the plaintiff, the court will, if either party desires it, order a jury trial. *Ireland v. Bowman* (Ky.), 17-786.

e. Decree.

Effect as to persons not parties. — The assignee of a contract for the construction of a public building is not bound by an injunction restraining the carrying out of the contract, issued in a suit to which he is not made a party, where he acquired his rights under the assignment and commenced the construction of the building before the institution of the injunction suit. *Marengo County v. Matkin* (Ala.), 6-902.

A person who has actual knowledge of an injunction is bound to obey it though he has not been served with process and is not even a party to the suit. *O'Brien v. People* (Ill.), 3-966.

Damages. — In cases where equity will, independent of statute, enjoin the destruction of or injury to growing trees, the court may proceed to an accounting and award damages for the trespass as an incident to the relief by injunction. But when the injunction is granted under a statute on grounds which would not be sufficient independent of the statute, the court cannot legally proceed to an accounting and award damages for the trespass, since in such a case the defendant is entitled to a jury trial on the question of damages. *Cowan v. Skinner* (Fla.), 11-452.

Damages in lieu of injunction. — In an action to enjoin a city from lowering the grade of a street in front of the plaintiff's property and to compel the defendant to restore the street to its former condition, the court has power to make a decree finding that the plaintiffs are entitled to have the street restored to its former condition, but giving the defendant the privilege of leaving the

street in the condition to which it has been changed, provided the defendant pays the plaintiffs the amount of damages occasioned by its action; and an ordinance of the city requiring claims for damages to be presented to the city council has no application to a case of this character. *Hart v. Seattle* (Wash.), 13-438.

f. Reference to master.

Where a proceeding by the state, on the relation of the attorney-general, to enjoin the obstruction of a canal, is brought in the Supreme Court in the first instance, and the return to the petition for an injunction alleges that the supply of wholesome water of the defendant city depends on the maintenance of the bridge which is complained of as an obstruction, but does not allege sufficient facts to enable the court to determine whether the immediate removal of the bridge would so seriously interfere with the city water supply as to endanger the public health, or what length of time should be allowed the city to provide another means of conveying its water to its waterworks, a master will be appointed to take testimony and report his conclusions of fact on those questions before the final order in the case is framed. *State v. Columbia Water Power Co.* (S. Car.), 17-343.

4. PRELIMINARY OR TEMPORARY INJUNCTIONS.

a. Discretion of court.

Generally. — The granting or refusing of interlocutory injunctions where the evidence is conflicting is a matter of sound discretion intrusted to the judges of the Georgia Superior Court to be exercised by them according to the circumstances of each case; and such discretion will not be controlled by the appellate court unless manifestly abused. *Green v. Freeman* (Ga.), 7-1069.

The granting or denying of a temporary injunction is largely within the discretion of the trial judge; but such discretion is controlled by established principles of equity, and if the allegations of the bill and the evidence in support thereof are sufficient to warrant the granting of the temporary injunction, and no adequate defense is made, an order denying an injunction will be reversed. *Taylor v. Florida East Coast R. Co.* (Fla.), 14-472.

In aid of appellate jurisdiction. — Applications for temporary injunctions in aid of the appellate jurisdiction of the Arkansas Supreme Court, and motions to dissolve such injunctions, are addressed to the discretion of the court. *Mabry v. Kettering* (Ark.), 16-1123.

b. Notice of application.

Where the allegation in a bill for an injunction, and the affidavit in support thereof, do not assert simply the legal conclusion that notice to the defendant of the application for injunction will accelerate the injury complained of, but show further that, before said application could be heard, the defendant

railroad would be able to lay its track and have its cars in operation over the land of complainant, a sufficient reason for dispensing with notice of the application for injunction is made to appear. *Seaboard Air Line Ry. v. Southern Investment Co.* (Fla.), 13-18.

c. Bond.

Where a court grants a restraining order *ex parte* without requiring the filing of the undertaking required by its rules as a condition precedent, the defendants do not, by appearing and answering, waive the right to object that the order is void for want of jurisdiction, especially where they appear without knowledge of the defect. *Drew v. Hogan* (D. C.), 6-589.

d. Hearing.

On an interlocutory hearing of an equitable petition for injunction, where the judge, after hearing argument of counsel, announces that he will grant the interlocutory restraining order, but that for the purpose of making certain rulings on the evidence offered he will pass the case until two days later, it is not error for him to refuse to receive and consider other affidavits tendered by the defendant on the day set for announcing such rulings, no reason being shown for not submitting the rejected affidavits at the hearing. *Green v. Freeman* (Ga.), 7-1069.

e. Dissolution or dismissal.

Where there is no equity in the bill, a motion to dissolve a preliminary injunction should be sustained. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.* (W. Va.), 9-667.

On the hearing of a motion to dissolve an injunction before answer, the allegations of the bill must be taken as true. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.* (W. Va.), 9-667.

Where the parties to an action in which a temporary injunction has been issued make an amicable and voluntary agreement settling the matters in controversy and consenting to a decree dismissing the action, the dismissal is not equivalent to a judgment by the court that the plaintiff was not entitled to the injunction which it obtained. *St. Joseph, etc., Power Co. v. Graham* (Ind.), 6-399.

5. BONDS.

a. Necessity.

An injunction issued by the Supreme Court of the District of Columbia is void unless the complainant has executed and filed the undertaking required as a condition precedent by the court's rules. *Drew v. Hogan* (D. C.), 6-589.

b. Validity and requisites.

Conditions of bond. — An injunction bond will not be held invalid merely because the order, in pursuance of which it was given, provided that the injunction should not take effect until a bond was executed conditioned "according to law," instead of pre-

scribing the particular condition to be inserted in the bond. Although section 3442 of the Virginia Code provides that an injunction, except in specified cases, shall not take effect until a bond is given with such condition "as to the court shall seem just and proper in the case," the almost universal practice in granting injunctions is for the court to direct a bond to be executed conditioned according to law; and it is only where the peculiar nature of the case calls for a special condition in the bond that the condition is prescribed by the order. *Columbia Amusement Co. v. Pine Beach Investment Corp. (Va.)*, 16-1120.

Estoppel to deny validity of bond. — A party who has executed an injunction bond, and obtained and taken the benefit of the injunction, is thereby estopped to deny the validity of the bond, or his liability thereon, because of any informality in the order which directed the bond to be given. *Columbia Amusement Co. v. Pine Beach Investment Corp. (Va.)*, 16-1120.

c. Actions on bonds.

(1) Who may sue.

Persons not parties. — A person who voluntarily obeys an injunction which is not binding on him cannot maintain an action on the injunction bond on the dissolution of the injunction. *Marengo County v. Matkin (Ala.)*, 6-902.

Where a person not named as an obligee sues on an injunction bond he must allege facts showing that he has been damaged by the issuance of the injunction. Allegations of a breach of the condition of a bond and of the dissolution of the injunction are not of themselves sufficient to make out a case for nominal damages even. *Marengo County v. Matkin (Ala.)*, 6-902.

A person not named as an obligee to an injunction bond and not made a party to the injunction suit may maintain an action on the bond for all damages resulting to him from the direct effects of the injunction, where the bond is conditioned to pay "all damages and costs which any person may sustain by the suing out of such injunction if the same is dissolved." *Marengo County v. Matkin (Ala.)*, 6-902.

(2) Accrual of cause of action.

Dissolution of injunction. — Under a statute providing that the failure of the court to assess the defendant's damages shall not operate as a bar to an action on the injunction bond, the defendant may maintain an action on such bond immediately on the dissolution of the injunction without waiting for the final disposal of the case. *Shackelford v. Bennett (Ill.)*, 15-719.

Voluntary dismissal of action. — The rule that the voluntary dismissal by the plaintiff of an action in which he has obtained a temporary injunction or restraining order in such a breach of the injunction bond as gives the defendant a right of action there-

on, does not apply to a dismissal by amicable and voluntary agreement of the parties. *St. Joseph, etc., Power Co. v. Graham (Ind.)*, 6-399.

(3) Defenses.

Violation of injunction. — It is no defense to an action on an injunction bond that the plaintiff (defendant in injunction suit) violated the injunction. *Phoenix Pad Co. v. United States (Md.)*, 19-667.

(4) Damages.

In general. — In an action on an injunction bond, given in a suit brought to restrain the enforcement of a judgment, the extent to which the amount collectible on the judgment has been reduced in consequence of the injunction is a proper element of damage. *Stull v. Beddeo (Neb.)*, 15-950.

In an action on an injunction bond, conditioned to pay all costs that may be awarded against the party obtaining the injunction "and all such damages as shall be incurred in case the said injunction be dissolved," the plaintiff is entitled to recover the damages sustained by him between the date when the injunction was made permanent and the date of its final dissolution, as well as the damages sustained while the temporary injunction was in force. *Columbia Amusement Co. v. Pine Beach Investment Corp. (Va.)*, 16-1120.

Where an injunction prohibiting the carrying on of a certain business on leased premises is dissolved, and the lessor of the premises brings an action on the injunction bond to recover the damages occasioned by the injunction, and it appears that the business enjoyed was the only business which could be conducted on the premises by the lessee, under the terms of the lease, the plaintiff is entitled to recover, as damages, the rent of the premises during the period that the injunction remained in force. The fact that the lessee remained in possession of the premises during the period in question, does not affect the right of the lessor to recover such damages, since the lessee could not be held liable for the rent during that period, and, therefore, the ultimate loss falls on the lessor, although the immediate injury from interference with the business is suffered by the lessee. *Columbia Amusement Co. v. Pine Beach Investment Corp. (Va.)*, 16-1120.

Attorney's fees. — Attorney's fees for services rendered by him for the injunction defendant in the appellate court in a successful endeavor to sustain the judgment of the lower court dissolving the injunction and dismissing the action, are properly allowable against the plaintiff's bond. *Miller v. Donovan (Idaho)*, 13-259.

Under the Idaho statute requiring the plaintiff to whom an injunction is granted to give an undertaking conditioned to the effect that if the right to the injunction is finally denied, the plaintiff will pay to the party enjoined "costs, damages, and reasonable counsel fees," a defendant seeking to recover at-

torney's fees on the plaintiff's bond after the dissolution of the injunction, is required to show only that the services rendered were performed in securing the dissolution of the injunction, or that the services were performed principally and mainly for that purpose, and the fact that the services rendered inured to his benefit in the main case, and resulted in a final disposition of the action on the merits, cannot defeat the right to recover attorney's fees for services originally and primarily required on account of the injunction. *Miller v. Donovan* (Idaho), 13-259.

The fact that the evidence as to the amount of attorney's fees paid for services rendered in resisting an injunction, and the reasonableness of the charge made, is disrupted and contradicted, does not authorize or justify the appellate court in disturbing the finding of the trial court, either as to the amount of fees actually paid or as to the reasonableness of the charge where the evidence presents a substantial conflict. *Miller v. Donovan* (Idaho), 13-259.

In the absence of a statutory provision to the contrary, an attorney's fees incurred by the defendant in an injunction suit in procuring the dissolution of the injunction are not an element of damage to be considered by the jury in an action on the injunction bond. *Lindeberg v. Howard* (U. S.), 8-709.

(5) Evidence.

In an action on an injunction bond given in a patent infringement case, where the plaintiff claims, as an item of damage, increased cost of manufacture as the result of the injunction, such item may be proved by showing any fact from which the damage suffered may be logically be deducted, and the court properly refuses to charge that it must be "determined from records of expense kept at the time the expenditures were made." *Phoenix Pad Co. v. U. S.* (Md.), 19-667.

Actual damage as the result of the granting of an injunction in a patent infringement suit is proved in an action on the injunction bond, where it is shown that the granting of the injunction made it necessary for the plaintiff (defendant in injunction suit) to manufacture its goods by a different process, that to retain its customers it had to sell the goods at the same price as before, that during the time the injunction was in force a certain number of the articles were manufactured and sold, and that the cost of manufacture exceeded the former method by a certain amount. *Phoenix Pad Co. v. United States* (Md.), 19-667.

(6) Instructions.

The defendant in an action on an injunction bond is not prejudiced where the court charges that the plaintiff's loss "must be proven by data sufficient to enable the jury to calculate with reasonable certainty the compensation to which the plaintiffs are entitled," instead of charging, as requested by the defendant, that the loss must be proved "by clear and definite data sufficient." etc. *Phoenix Pad Co. v. U. S.* (Md.), 19-667.

6. VIOLATION OF INJUNCTION.

Evidence held to establish a violation of an injunction restraining interference with the complainant's business and intimidation of his employees. *O'Brien v. People* (Ill.), 3-966.

In an injunction suit to restrain strikers and labor leaders from interfering with a complainant's business and employees, where the bill sufficiently charges the acts of the defendants to give the court jurisdiction to pass on the sufficiency of the bill, the fact that the court grants an injunction improvidently does not affect the question of jurisdiction or authorize the defendants to disobey the injunction. The injunction is binding until the order granting it is reversed by the court of a competent jurisdiction. *O'Brien v. People* (Ill.), 3-966.

7. APPEALS.

Review of discretion. — The discretion vested in the New York Supreme Court to issue or refuse an injunction is not absolutely unlimited, as it frequently happens that facts are proved which raise questions of law reviewable by the Court of Appeals. *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.* (N. Y.), 2-782.

Effect of supersedeas bond. — A prohibitory injunction restraining the continuance of an act or a series of acts is not superseded by taking an appeal and giving the supersedeas bond provided by statute, and a defendant against whom such an injunction has been granted is not entitled to supersede the order granting the injunction as a matter of right. *State ex rel. Gibson v. Superior Court* (Wash.), 4-229.

A temporary injunction restraining the defendants from operating in connection with their business a shooting gallery and certain musical instruments is a preventive, and not a mandatory, injunction, and the defendants, on appealing from the order, are not entitled to a supersedeas as a matter of right. *State ex rel. Gibson v. Superior Court* (Wash.), 4-229.

INJURY.

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IN LOCO PARENTIS.

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INNS, BOARDING HOUSES, AND APARTMENTS.

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Right to serve guests with intoxicating liquors on Sunday, see INTOXICATING LIQUORS, 5 c.

1. WHO ARE INNKEEPERS.

Innkeepers distinguished from keepers of boarding houses. — A boarding house keeper, who is responsible for the safety of his boarders' personal effects only to the extent of reasonable care on the part of himself and his servants, is one who reserves the right to select and choose his patrons and takes them in only by special arrangement and for a definite time, whereas an innkeeper, who is responsible as an insurer, holds out his place of entertainment as one where all transient persons who may choose to come will be received as guests for compensation. *Holstein v. Phillips* (N. Car.), 14-323.

2. WHO ARE GUESTS.

Character of accommodations sought.

— Where a person resorts to a hotel with the primary purpose of securing food or lodging, he is to be considered a *bona fide* guest of the hotel, even though he incidentally procures and drinks intoxicating liquor therein; but if he goes to the hotel for the purpose of procuring liquor, then the fact that he registers and procures a sandwich with the liquor does not make him a *bona fide* registered guest. *Cake v. District of Columbia* (D. C.), 17-814.

Character as transients. — A person who leaves home and enters, for a short but indefinite stay, a hotel which is doing a general hotel business during the summer months as a summer resort for the reception and entertainment of all who may choose to come there, is a transient with all the rights of a guest, and the fact that such guest is to pay board by the week, or even at a reduced rate, does not change his position as guest or deprive him of the right to hold the innkeeper liable as insurer for the loss of his personal effects. *Holstein v. Phillips* (N. Car.), 14-323.

Effect of leaving horse at inn stable.

— Where it appears in an action against an innkeeper to recover for the death of the plaintiff's mule, that the defendant provided a lot and stable in which his guest were permitted to keep their horses without charge, but that it was customary to charge for feed

for such horses if furnished by the defendant; that the plaintiff drove into the lot, unhitched his mule from his buggy, placed the mule in a stall pointed out by a boy in charge of the lot and stable, and then left the premises without having made any agreement with the innkeeper or his authorized agent that the plaintiff would be a guest or that the innkeeper should furnish any feed for the mule, and without having done anything else towards becoming a guest except that he stated to the boy that he would return and would himself feed the mule at dinner time; and that although the plaintiff had intended to take dinner at the inn with another person who accompanied him in his buggy and who actually dined at the inn, the plaintiff did not do so because before the dinner hour he learned of the injury to his mule, the evidence does not establish the relation of innkeeper and guest between the defendant and the plaintiff. *Brewer v. Caswell* (Ga.), 16-936.

Use of bath house attached to inn.

— If an innkeeper also conducts a bath house on the seashore where the general public, as well as guests at his inn, may obtain the use of bath rooms and accessories to the bath, this is not sufficient to constitute the relation of innkeeper and guest between him and persons using such bath house. *Walpert v. Bohan* (Ga.), 8-89.

Guest distinguished from boarder.

— The essential difference between a guest and a boarder lies in the character in which the person comes. One who stops at an inn as a transient is a guest with all the rights and privileges incident to that station, while one who seeks accommodation with a view to permanency, so as to make the place his home for the time being, is not a guest, but a boarder; but the duration of the stay is not decisive of the question, for the character of guest will continue as long as he remains in the transitory condition of that relation. *Holstein v. Phillips* (N. Car.), 14-323.

3. STATUTORY REGULATION.

Fire escapes. — Under the Missouri statute requiring "the owner, proprietor, lessee, or keeper of every hotel" to provide fire escapes, the lessee is bound to provide the escapes in case the lessor fails to do so, but the initial duty is imposed on the lessor or owner. *Yall v. Snow* (Mo.), 9-1161.

As used in the Missouri statute requiring "the owner, proprietor, lessee, or keeper of every hotel" to provide the structure with fire escapes, the word "owner" means the owner of the property, and not the owner of the business, or the person conducting the hotel. *Yall v. Snow* (Mo.), 9-1161.

4. DUTY TO RECEIVE AND ENTERTAIN GUESTS.

Governing principles. — Under the Alabama statute the liability of an innkeeper is to be ascertained by the common law in the absence of a special contract regulating that liability. *Hervey v. Hart* (Ala.), 13-1049.

Right to transfer guest to another room. — An innkeeper incurs no liability to a guest in transferring the guest from one room or apartment to another if he offers proper accommodations in lieu of those first assigned. *Hervey v. Hart* (Ala.), 13-1049.

Right to remove disorderly guest. — In an action against the proprietor of a hotel for damages for assault and battery in the expulsion of the plaintiffs from the hotel, where one of the defenses is that the plaintiffs were conducting themselves improperly as guests of the hotel, and upon refusing to leave when requested were ejected without the use of unnecessary force, and there is evidence sufficient to support such a finding, a requested instruction that "if the plaintiffs wrongfully refused to leave the defendant's premises when requested the defendant and his servants then had a lawful right to remove them, and their resistance to such removal was unlawful," is applicable to the case under the evidence, and the refusal of such instruction and the giving of an instruction which seems to imply that even if the defendants had the right to order the plaintiffs out of the hotel, they could not proceed to expel them forcibly unless the plaintiffs were still conducting themselves in a disorderly manner, is reversible error. *Holden v. Carraher* (Mass.), 11-724.

5. LIABILITY FOR EFFECTS OF GUEST.

Nature of bailment. — An innkeeper is not liable as a gratuitous bailee for the loss of baggage delivered to the porter by one who intends to but does not actually become a guest, the porter himself being the gratuitous bailee, if there is bailment in such case. *Tulane Hotel Co. v. Holohan* (Tenn.), 2-345.

"Jewels and ornaments." — A watch and fob are embraced in the terms "jewels or ornaments" within the Tennessee statute relieving a hotel proprietor from liability for the loss of jewels or ornaments belonging to guests when he has provided a safe for the deposit of such articles. *Rains v. Maxwell House Co.* (Tenn.), 2-488.

Leaving guest's baggage in unlocked room. — It is gross negligence for an innkeeper to store the trunks of a boarder in an unlocked and insecure room. *Greene v. Windsor Hotel Co.* (Quebec), 2-12.

Effects left by departing guest. — The clerk of a hotel has no authority to bind the proprietor by receiving for safekeeping money from one who has been a guest of the hotel, but who, at the time of making the deposit, terminates the relation of guest by paying his bill and announcing his departure. *Oxford Hotel Co. v. Lind* (Colo.), 18-983.

Liability for baggage of boarder. — An innkeeper is liable for the baggage of persons boarding at the hotel equally as for the baggage of mere travelers, and parol evidence by a boarder is permissible to show the deposit of the baggage with the innkeeper. *Greene v. Windsor Hotel Co.* (Quebec), 2-12.

Statutory regulation of liability. — Under the English Innkeepers Liability Act,

limiting the liability of an innkeeper for the goods or property of a guest except "where such goods or property shall have been deposited expressly for safe custody with such innkeeper," it is necessary to prove, in order to show the deposit for safe custody contemplated by the statute, that something was said or done by the guest to whom the goods belonged which would indicate to the innkeeper that the goods were being deposited with him for safe custody, and that the innkeeper received them into his charge with the intention of making himself liable for their safety. *Whitehouse v. Pickett* (Eng.), 12-96.

The North Carolina statute limiting an innkeeper's liability, but providing that the statute shall not apply to an innkeeper or his guests when the innkeeper fails to keep posted in the rooms occupied by guests and in the hotel office a copy of the statute and all regulations relating to the conduct of guests, leaves the innkeeper responsible as insurer for the safety of the guest's goods and money, as at common law, where the copy of the statute and regulations is not posted in the guest's room as the statute provides. *Holstein v. Phillips* (N. Car.), 14-323.

6. LIABILITY FOR PERSONAL INJURIES TO GUESTS.

Implied undertaking of innkeeper. — In receiving a guest into his hotel, the hotel keeper impliedly undertakes that such guest shall be treated with due consideration for his comfort and safety. *Clancy v. Barker* (Neb.), 8-682.

Assaults by employees. — It is the duty of a hotel keeper to protect his guests while in his hotel against the assaults of employees who assist in the conduct of the hotel and in the care and accommodation of the guests. If damages result from such an assault the hotel keeper is liable therefor. *Clancy v. Barker* (Neb.), 8-682.

A trespass committed on a guest in a hotel by a servant of the proprietor, whether actively engaged in the discharge of his duties at the time or not, is a breach of such implied undertaking, for which the proprietor is liable in damages. *Clancy v. Barker* (Neb.), 8-682.

Defects in premises. — The fall of the upright portion of a folding bed whereon a guest at a hotel is lying, inflicting severe injuries on him, is such an extraordinary accident as raises the inference that it is due to the negligence of the management of the hotel. In such case the hotel keeper must show why he should be relieved from liability. *Lyttle v. Denny* (Pa.), 15-924.

Failure to provide fire escapes. — The Missouri statute requiring "the owner, proprietor, lessee, or keeper of every hotel," etc., which has a height of three or more stories, to provide the structure with fire escapes, imposes the duty of maintaining fire escapes on the owner of a leased hotel, and the owner is liable for personal injuries resulting from his failure to perform this duty, notwith-

standing the fact that the lessee may also be liable. *Yall v. Snow* (Mo.), 9-1161.

Liability of lessor of inn. — In an action against the owner of a building leased as a hotel to recover damages for personal injuries resulting from the defendant's failure to comply with a statute requiring him to maintain a fire escape, it is no defense that at the time of the passage of the statute the building had been leased for a term of years and was in the sole possession and control of the lessee, as it would have been no violation of the lessee's rights for the defendant to have entered on the premises and erected the fire escapes in compliance with the requirements of the statute. *Yall v. Snow* (Mo.), 9-1161.

7. LIEN OF INNKEEPER.

Property of third persons. — The common law of England, as it existed on and prior to April 19, 1775, and as preserved in force in the state of New York by the constitution of that state, gives to an innkeeper, for his guest's entertainment, a lien on goods owned by a third person but in the rightful possession of the guest, and the lien law of New York, giving an innkeeper a lien on the property of the guest, except when the innkeeper knows or has notice that such property is not that of the guest, does not extend the rule beyond that established at common law, in giving a lien on the property of a third person in the rightful possession of the guest. *Horace Waters & Co. v. Gerard* (N. Y.), 12-397.

Under the New York lien law and at common law, an innkeeper's lien on a piano in a guest's possession under a conditional contract of sale stipulating that the title of the piano shall remain in the seller until payment in full of the agreed price, is superior to the right of the seller to take the piano upon the failure of the buyer to make the payments required by the contract. *Horace Waters & Co. v. Gerard* (N. Y.), 12-397.

The New York lien law, in giving to an innkeeper a lien on property of a third person in the rightful possession of a guest, does not go beyond the requirements of a public policy and is constitutional. *Horace Waters & Co. v. Gerard* (N. Y.), 12-397.

Samples carried by traveling salesman. — The Washington statute giving a lien to hotel keepers on the baggage, property, or other valuables of a guest does not give a lien on samples carried by a traveling salesman when the hotel keeper has reason to know that the samples are the property of the salesman's employer. *Wertheimer-Swartz Shoe Co. v. Hotel Stevens Co.* (Wash.), 3-625.

8. LIABILITY TO THIRD PERSONS FOR ACTS OF GUESTS.

An innkeeper is not liable to a person in the street who is injured by a bottle thrown into the street by a guest, where the previous conduct of the guest has not been such as would charge the innkeeper with knowledge

or with reasonable grounds of belief that the guest would be guilty of such conduct. *Brunner v. Seelbach Hotel Co.* (Ky.), 19-217.

9. ACTIONS.

a. Pleading.

Action for personal injuries. — In an action against the owner of a building leased as a hotel to recover damages for personal injuries resulting from his failure to comply with a statute requiring him to maintain a fire escape, where the petition sets forth the lease, and alleges that the defendant leased the building "as a hotel" and that it was conducted as a hotel by the lessee, and that the defendant knew that it was so conducted, it is no ground for demurrer that the petition fails to allege that the building was built to be occupied as a hotel. *Yall v. Snow* (Mo.), 9-1161.

b. Evidence.

Burden of proof. — In view of the duty of an innkeeper to guard with reasonable care the safety of his guests, proof of the happening on his premises of an extraordinary accident whereby one of his guests is injured, casts the burden of explanation on the innkeeper. *Lyttle v. Denny* (Pa.), 15-924.

Admissions. — Admissions by a hotel keeper held to show a knowledge on his part of a custom so universal as to estop him from asserting ignorance as to the ownership of the samples in the possession of a traveling salesman to whom he gave credit as a guest on the strength of his interest in the samples without making inquiry as to the title thereto. *Wertheimer-Swartz Shoe Co. v. Hotel Stevens Co.* (Wash.), 3-625.

It is not within the scope of the authority of a hired manager of a hotel to bind his employer by admissions concerning a trespass committed on a guest by a servant of the innkeeper after it has been committed. *Clancy v. Barker* (Neb.), 8-682.

When admissions by a hired manager of a hotel as to a trespass on a guest by a servant of the proprietor are made the day after the trespass and are only remotely connected therewith, they are not admissible in evidence as part of the *res gestæ*. *Clancy v. Barker* (Neb.), 8-682.

Parol evidence. — Parol evidence by a boarder is permissible to show the deposit of his baggage with the hotel keeper. *Greene v. Windsor Hotel Co.* (Quebec), 2-12.

10. CRIMINAL LIABILITY OF GUESTS.

The Indiana statute of 1897 for the protection of innkeepers and others against fraud, which makes it a misdemeanor for any person to obtain food, lodging, entertainment or any other accommodation at any hotel, inn, restaurant, rooming, boarding, or eating house with intent to defraud the owner or keeper thereof, and subjects offenders to fine or imprisonment or both, has not been repealed, either by implication or by the repealing clause of the Public Offenses Act of 1905. *Clark v. State* (Ind.), 16-1229.

The statute above mentioned does not contravene the provision in the Indiana constitution which declares that "there shall be no imprisonment for debt, except in case of fraud." Such constitutional inhibition is directed against imprisonment for debt in civil actions at the instance of the creditor, with a view to coercing payment of his debt, and has no reference to such actions as may be brought by the state through its officers in the interests of good morals and honest dealing. *Clark v. State* (Ind.), 16-1229.

The statute above mentioned is not invalid for failure sufficiently to define and describe the offense. *Clark v. State* (Ind.), 16-1229.

In a prosecution under the above statute, an affidavit which charges the offense in the language of the statute is sufficient. *Clark v. State* (Ind.), 16-1229.

11. APARTMENT HOUSES.

Failure to light common hallway. —

Evidence examined and held sufficient to present a question for the jury as to due care on the part of the occupant of an apartment in an apartment house who fell down a stairway while attempting to pass through a common hallway which was not lighted as usual. *Faxon v. Butler* (Mass.), 19-666.

The landlord of an apartment house is negligent in failing, during certain hours, to maintain a light in a common hallway, where the maintenance of such a light was a part of the general management of the building at the time the apartments were let. The tenants do not assume the risk of the hallway being unlighted during those hours. *Faxon v. Butler* (Mass.), 19-666.

Liability of tenants inter se. — The defendants were held liable in damages for injury to the plaintiffs' premises by water overflowing from a tap negligently left running in the lavatory in the defendants' premises on the floor above the plaintiffs' in the same building, both plaintiffs and defendants being tenants of the owner of the building. *Powley v. Mickleborough* (Can.), 18-532.

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1. EVIDENCE OF INSANITY IN GENERAL.

Presumptions. — The presumption always is that a person is sane; and proof of insanity at a certain time raises no presumption of the existence of insanity prior to such time. *Estate of Dolbeer* (Cal.), 9-795.

Opinions of nonexperts. — The California statute permits the admission in evidence of the opinion of an intimate acquaintance respecting the mental sanity of a person whose sanity is in issue, but with that opinion must be given the reasons on which it is based, and the opinion itself can have no weight other than that which the reasons bring to its support. *Estate of Dolbeer* (Cal.), 9-795.

Opinions of experts. — A general medical practitioner who has had experience in various kinds of mental afflictions is as competent to testify to the sanity or insanity of a person as a skilled expert who has devoted his entire time to the study of mental diseases. *Estate of Dolbeer* (Cal.), 9-795.

2. INQUISITION OF INSANITY.

Notice. — In the execution of a writ de lunatico inquirendo, the person alleged to be *non compos* must have reasonable notice of the proceedings, and must be afforded an opportunity to test the truth of the allegations in the petition, and must be produced before the jury, unless the court for a sufficient reason shown dispenses with the notice and personal attendance. *Supreme Council R. A. v. Nicholson* (Md.), 10-213.

Time of application. — The Wisconsin statute providing for inquisition by a jury as to the sanity of a person accused of crime does not fix the time for making inquisition, but allows an application for inquisition to be made at any time during the progress of the trial. *Steward v. State* (Wis.), 4-389.

Power to set aside order of confinement. — A court has power to grant a petition to set aside an order confirming a verdict finding a person to be of unsound mind, though the petition is not filed until after the enrolment of the order of confirmation. *Supreme Council R. A. v. Nicholson* (Md.), 10-213.

Petition to set aside order. — Where a petition to quash an order of the court confirming a verdict finding a person to be of unsound mind alleges that no notice of the inquisition was given to the lunatic, and the petition is demurred to, the demurrer admits the allegations of the petition, and the inquisition, return, and order of the confirmation should be set aside, a new jury summoned, and a new inquisition taken.

Supreme Council R. A. v. Nicholson (Md.), 10-213.

Collateral attack of order of commitment. — Where the recitals of an order of commitment to an insane asylum and the legal implications therefrom show jurisdiction to pass the order, the fact that the examination which resulted in the order was had before a judge of the court acting by virtue of a specially conferred power, does not render such order subject to collateral attack. *Napa State Hospital v. Dasso* (Cal.), 15-910.

3. RESTRAINT OF INSANE PERSONS.

Acquittal of crime on ground of insanity. — The Washington statute providing that when a person is acquitted of crime on the ground of insanity, the trial court may commit the defendant to prison as a person dangerous to the community, held not to be unconstitutional. *In re Brown* (Wash.), 4-488.

A statute providing that when any person accused of murder shall have been acquitted on account of insanity, he shall in the discretion of the court be committed to the hospital for the dangerous insane, is unconstitutional as depriving the person so committed of his liberty without due process of law; but a person confined in accordance with such statute is not entitled to be discharged on habeas corpus if he is at the time insane. *In re Boyett* (N. Car.), 1-729.

An order issued by a trial court under the Washington statute permitting the imprisonment of a person acquitted of crime on the ground of insanity, directing the sheriff to return the defendant to jail to await the further order of the court, is not void for uncertainty as indefinite as to time, inasmuch as the statute neither limits the duration of the imprisonment nor deprives the defendant of the right of establishing at any time his restoration to sanity. *In re Brown* (Wash.), 4-488.

The Washington statute providing that a person acquitted on the ground of insanity may be committed to prison by the court, when taken in connection with the rule that when permanent insanity is once established it is presumed to continue until the contrary is shown, authorizes the court to commit to prison a person found not guilty by reason of insanity on his trial for homicide, wherein he has set up the defense of permanent and continuous insanity, and such rule imposes upon the person so committed the burden of proving his sanity in habeas corpus proceedings to secure release from imprisonment. *In re Brown* (Wash.), 4-488.

Commitment by parents or guardians. — Under the Rhode Island statute providing for the commitment of insane persons by their parents, guardians, etc., to insane hospitals managed under the supervision of a board of officers appointed under the authority of the state, on the certificate of two practicing physicians of good standing known by the superintendent of the hospital to be such, it is not required that the certificate for

commitment shall be sworn to, or that it shall be signed by physicians practicing in the state, or that they shall not be officers of an institution for the care of the insane, or that the persons committed shall have been removed from another hospital. *In re Crosswell* (R. I.), 13-874.

Under such statute the "guardians" who are authorized to commit their insane wards are guardians of foreign as well as of domestic appointment. *In re Crosswell*, (R. I.), 13-874.

Such statute does not violate the provisions of the Fourteenth Amendment of the Federal Constitution that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws, since by statute the function of the writ of habeas corpus has been enlarged to apply to cases of commitments in insane hospitals, and it is made the duty of the court upon application for such writ "to inquire and determine as to the sanity or insanity or the necessity of restraint of the person confined, at the time such application was made," and to discharge the person confined if it appears, upon the verdict of a jury or in the opinion of the court, that such person is not insane or is not dangerous to himself or others, and ought not longer to be confined. *In re Crosswell* (R. I.), 13-874.

4. MAINTENANCE OF INSANE PERSONS.

Proceedings to enforce liability of relatives. — The Wisconsin statutes in reference to the support of insane persons, and providing the procedure to be followed compelling those privately liable for such support to do so, construed. *Richardson v. Stuesser* (Wis.), 4-784.

An action to enforce an order of the county judge establishing the liability of a person for the support of an insane person at an asylum must be commenced in the name of the county in some court having jurisdiction of such civil actions. The County Court does not possess such jurisdiction in the absence of special authorization. *Richardson v. Stuesser* (Wis.), 4-784.

Under the Wisconsin statutes the trustees of a county asylum for the insane should proceed by petition to the county judge to establish the liability of any one for the support of an insane person at such asylum, who refuses to perform his duty in that regard, and to have the amount which he should pay and the time of payment determined, and they may cause the order of the county judge in that regard to be enforced by contempt proceedings or by action. *Richardson v. Stuesser* (Wis.), 4-784.

Action by state hospital. — An action to recover the cost of maintaining an insane person commenced before the repeal of the California Insanity Law of 1897, which authorized the maintenance of such an action, may be maintained after the repeal of such statute, it being provided therein that actions commenced before the taking effect of such statute may be prosecuted to final determina-

tion. *Napa State Hospital v. Dasso* (Cal.), 15-910.

Under the California statute of 1897, establishing the Napa State Hospital, a suit by such hospital to recover the cost of maintaining an insane person is properly brought by the treasurer thereof. *Napa State Hospital v. Dasso* (Cal.), 15-910.

A statute conferring on a state insane hospital the right to recover from the estates of insane persons confined therein the cost of maintaining such persons is not class legislation because it does not apply to the estates of insane persons not confined therein. *Napa State Hospital v. Dasso* (Cal.), 15-910.

In an action by a state insane asylum to recover the cost of maintaining an insane person, it is not necessary, before introducing the order of commitment, from the recitals of which it appears that the court had jurisdiction of the person, to prove that the preliminary steps on which the order was based were taken. *Napa State Hospital v. Dasso* (Cal.), 15-910.

Recovery for necessities furnished. — Services rendered by a sister in taking care of and supplying the wants of her idiotic sister come under the head of necessities. *Key v. Harris* (Tenn.), 8-200.

5. LIABILITY ON CONTRACTS.

Deeds and contracts of a person of unsound mind who has not been judicially declared incompetent are voidable and not absolutely void. *Smith v. Ryan* (N. Y.), 14-505.

6. ACTIONS.

Enforcement of judgment against insane person. — Under the provisions of the Iowa code authorizing county auditors to collect from the property of patients in insane hospitals the sums expended by the county in their behalf, a judgment for such sums may be rendered in an action against an insane person who is represented therein by guardian, especially where the guardian does not object to the form of the proceeding or move to transfer the case to the probate or other court. *Gressly v. Hamilton County* (Ia.), 15-354.

The fact that a judgment rendered in such an action declares that it is not intended as an order directing the sale of property by the guardian does not prevent the enforcement of such judgment by execution sale. Nor is such sale prevented by the provisions of a stipulation between the parties, the stipulation being merged in the judgment. *Gressly v. Hamilton County* (Ia.), 15-354.

7. INSANITY AS AFFECTING RESPONSIBILITY FOR CRIME.

a. Forms of insanity.

Epilepsy. — Proof that a person has epilepsy does not necessarily show that the subject is so disordered mentally as to be at all times free from responsibility for his acts. *People v. Gambacorta* (N. Y.), 18-425.

Delirium tremens. — Delirium tremens is a form of insanity which will excuse a person from criminal responsibility the same as insanity produced by other causes. *State v. Driggers* (S. C.), 19-1166.

Inability to communicate with others. — Where a prisoner who is totally deaf and can neither read nor write stands mute on his arraignment for a felony, and a jury duly impaneled and sworn for the purpose, finds that he stands mute by the visitation of God, and also finds that he is incapable of pleading to and taking his trial on the indictment and of understanding and following the proceedings by reason of his inability to communicate with and be communicated with by others, the latter finding is equivalent to a finding that the prisoner is insane within the meaning of the Criminal Lunatic Act, 1800, and, therefore, an order by the judge, under section 2 of the act, that such prisoner be kept in custody until his Majesty's pleasure shall be known, is properly made. *Rex v. Stafford Prison* (Eng.), 16-442.

b. Reduction of degree of guilt.

Under the system of criminal jurisprudence prevailing in this state the defense of insanity only goes to the question of the guilt or innocence of the accused. It does not operate to reduce the degree of guilt. *State v. Maioni* (N. J.), 20-204.

c. Evidence.

(1) Admissibility.

Reputation. — The insanity of a person whose mental condition is at issue cannot be proved by reputation in the family or by general reputation. *State v. Charles* (La.), 18-934.

Heredity. — Where evidence is given of personal manifestations of the insanity of a person, proof of a hereditary tendency may be received as supporting such primary evidence. *People v. Gambacorta* (N. Y.), 18-425.

Conversations of defendant. — Evidence of conversations of the defendant in a criminal case, tendered in support of a plea of insanity, cannot be excluded on the ground of being self-serving declarations. *State v. Driggers* (S. C.), 19-1166.

Discretion of court. — On the trial of a special issue of insanity interposed by a person charged with a crime, where the defendant in rebuttal calls a witness and questions him as to the insanity of the defendant, and it appears that the subject had been covered by the defendant in the examination in chief, the admission of such evidence is in the discretion of the trial court and the exclusion of the evidence does not constitute reversible error. *Steward v. State* (Wis.), 4-389.

Scope of inquiry. — On the trial of an indictment for murder in which the defense of alcoholic insanity is set up, an exception to a refusal to allow the question "will you kindly tell the jury, in your own way, just

what sort of a man" the defendant appeared to be in his place of business, is untenable. *State v. Quigley* (R. I.), 3-920.

(2) Degree of proof.

Preponderance of evidence. — The Rhode Island statute providing that whenever, on the trial of an indictment, the accused shall set up his insanity as a defense, the jury, if they acquit the accused on such ground, shall state that they have so acquitted him, requires the defense of insanity in a criminal case to be set up by the accused, and it is incumbent on him to sustain it by a fair preponderance of the evidence. *State v. Quigley* (R. I.), 3-920.

An instruction to the jury that an accused on trial for murder, who sets up insanity as a defense to the crime charged against him, must convince the jury by a preponderance of testimony that his mind was so deranged as to make him irresponsible for his act, does not require him to bear a burden greater than that which the law imposes on him. The word "convince," in the connection in which it is used, is equivalent to "satisfy," and does not indicate that the defendant must prove his insanity by evidence which would produce absolute conviction in the minds of the jury. *State v. Maioni* (N. J.), 20-204.

An instruction that the defense of insanity must be "satisfactorily established" requires a higher degree of proof than the law imposes. *State v. Crowe* (Mont.), 18-643.

(3) Burden of proof.

Where the defense of insanity is set up in a criminal case, the burden of proving it does not rest on the defendant, but the prosecution must prove that the defendant was criminally responsible. *State v. Crowe* (Mont.), 18-643.

The presumption that every person is sane until the contrary appears ordinarily relieves the prosecution of the necessity of proving the sanity of an accused person, but where during the progress of the trial evidence tending to show the insanity of the accused is adduced either by the prosecution or the defense, the burden is on the prosecution to prove beyond a reasonable doubt that the accused was sane when he committed the crime. *State v. Pressler* (Wyo.), 15-93.

(4) Weight and sufficiency of evidence.

On an indictment for murder, temporary insanity existing at the time of the homicide being set up as a defense, the evidence held to furnish no ground on which the jury could found a reasonable doubt of the defendant's responsibility. *State v. Quigley* (R. I.), 3-920.

d. Instructions.

An instruction that before the jury can acquit the defendant on the ground of insanity, they must find that he was "laboring under such a defect of reason from disease of the mind as not to know—that is, as not to have sufficient mental capacity to know—

the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing wrong," is not inconsistent with a further instruction that in order to acquit on the ground of insanity it must appear that the defendant was "affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged by overriding his reason and judgment." *State v. Crowe* (Mont.), 18-643.

Disparagement of defense. — Where insanity is set up as a defense in a criminal case it is erroneous for the court to charge as follows: "The defense of insanity is one which may be, and sometimes is, resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully and justly, and, when satisfactorily established, must recommend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care, lest an ingenious counterfeit of such mental disease or disorder should furnish protection to guilt." Such instruction requires the defense to be "satisfactorily established" by the defendant, and also disparages the defense. *State v. Crowe* (Mont.), 18-643.

Usurping province of jury. — On the trial of a special issue of insanity interposed by a person charged with a crime, an instruction to the jury held erroneous as taking the question of insanity from the jury. *Steward v. State* (Wis.), 4-389.

e. Trial of issue.

Where a plea of present insanity is made on behalf of the accused, the judge may appoint a commission of experts to inquire into the mental condition of the defendant, or may refer the issue to a jury. *State v. Charles* (La.), 18-934.

The arraignment of the accused and the fixing of the case for trial, after the appointment of such a commission, will not be set aside, where it appears that the commission subsequently reported that the accused was not insane. *State v. Charles* (La.), 18-934.

f. Form of verdict.

An instruction in a criminal case in which insanity is set up as a defense that the jury may find the defendant guilty of either degree of the offense charged, or not guilty, is inaccurate because, on an acquittal on the ground of insanity, the statute provides that the verdict must be "not guilty by reason of insanity." *State v. Crowe* (Mont.), 18-643.

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Preference of claims of laborers. —

The Illinois statute providing that on the insolvency of any person, corporation, or firm, the debts owing to laborers or servants for services "shall be considered and treated as preferred claims," merely gives a preference to claims for labor or services, and does not give to the laborers a lien superior to the lien of a pre-existing valid mortgage. *Seymour v. Berg* (Ill.), 10-340.

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Right of purchaser to inspect goods, see **SALES**, 6 a.

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1. INSURANCE COMPANIES.

a. In general.

Duration of corporate existence. — The nature and purpose of a life insurance company denote perpetuity, and therefore a provision of its charter that it shall have "perpetual succession" will not be construed, according to the general rule, as meaning a continuance of succession merely during the period for which the corporation may lawfully exist, so as to bring such a company within the operation of the Missouri statute (Rev. St. 1855, p. 369, § 1) limiting corporate existence to a period of twenty years in the absence of some special provision to the contrary. *State v. German Mutual Life Ins. Co.* (Mo.), 19-1210.

Right to issue "deferred-dividend insurance." — The laws of New York authorize the issuance by life insurance companies of that state of "deferred-dividend insurance" policies, wherein by the terms of the contract the accumulated assets of surplus are only to be distributed in longer periods than five years. *Equitable Life Assur. Soc. v. Host* (Wis.), 4-413.

Right to abandon issuance of assessment policies and issue only old line insurance. — Where an insurance company has the charter right to issue both assessment and old-line policies, and there is nothing in its charter or in its contracts with assessment members that it shall continue to do that kind of business, the company may cease writing assessment policies and restrict itself entirely to old line or legal reserve insurance, leaving the assessment members in a class by themselves. *Green v. Hartford Life Ins. Co.* (N. Car.), 4-360.

Right of policyholder to equitable relief for waste and mismanagement of officers. — Where the charter of a life insurance company provides that its capital stock shall consist of a certain amount upon which its stockholders shall be entitled to receive dividends not exceeding a certain percentage, that the company's net earnings are to be accumulated, that the company is to be conducted on the mutual plan, and that the surplus of net earnings over the dividends is to be equitably applied for the benefit of the policyholders, a policyholder who has elected to receive his equitable share of such surplus may maintain a bill in equity for relief in behalf of himself and all other policyholders, upon a showing that by reason of abuse of discretion, wrongs, fraud, waste, mismanagement, and inequitable conduct on the part of the company, its officers, stockholders, and agents, the company, its officers and stockholders have wrongfully retained and fraudulently wasted and misappropriated to themselves a large portion of the surplus belonging to the policyholders, and that certain of the stockholders in a pending suit have asserted their ownership of and right to the whole or a portion of such surplus as against the policyholders. A bill alleging specific instances of such waste and mismanagement is good as against a demurrer based on the ground that it states no cause of action. *Brown v. Equitable Life Assurance Soc. (U. S.)*, 10-402.

Responsibility for acts of agent. — An insurance company, establishing a local agency, is responsible to the parties with whom the agent transacts business for his acts and declarations within the scope of his employment, and to the extent of the authority apparently conferred upon him by the company, and a limitation upon such apparent authority, not communicated to the insured before he acted upon the representations or conduct of the agent, will not relieve the company from liability, unless, after discovery of the want of authority in the agent, the insured has precluded himself from the assertion of his rights by laches. *Medley v. German Alliance Ins. Co. (W. Va.)*, 2-99.

b. Statutory regulation.

Validity of statute permitting recovery of damages for vexatious refusal to pay loss. — A statute providing that where it appears in an action against an insurance company on a policy that the company has vexatiously refused to pay a loss, the court or jury may allow the plaintiff in addition to the amount of the loss, a reasonable attorney's fee and damages not exceeding ten per cent. of the loss, is not unconstitutional. *Williamson v. Liverpool, etc., Ins. Co. (U. S.)*, 5-402.

Validity of statute permitting recovery of damages for failure to pay loss within certain time. — The Georgia statute providing for the recovery of damages and attorney's fees against insurance companies for failure to pay losses within sixty days

after demand, is not violative of the Fourteenth Amendment of the Constitution of the United States or of any of the provisions of paragraphs 2, 3, and 4 of article 1 of the constitution of the state of Georgia. *Harp v. Fireman's Fund Ins. Co. (Ga.)*, 14-299.

2. INSURANCE AGENTS.

a. Existence of relation.

Agreement between agents of several companies to share commissions as creating agency in each company. — The fact that the agent of one insurance company has an agreement with the agent of another company to share commissions is without effect to constitute each agent the agent of both companies. *McGraw W. W. Co. v. German F. Ins. Co. (La.)*, 12-1229.

Agent procuring policy from agents of other companies as agent of insurer or insured. — An insurance agent to whom a merchant makes a request for insurance, and who, acting as broker, procures all or part of such insurance through agents of other companies, not represented by him, may be the agent of the insured. The mere fact that he receives "a commission from a company which he does not represent for placing the insurance with it does not make him the agent of that company." *McGraw W. W. Co. v. German F. Ins. Co. (La.)*, 20-1229.

b. Rights, powers, and duties.

Right to settle claims for premiums.

— An insurance agent having authority to represent the company in delivering drafts in payment of claims under policies, binds the company by his acts in so effecting a settlement of the claims, regardless of any restrictions in the policies. *New York Life Ins. Co. v. Chittenden (Ia.)*, 13-408.

Right of agent to commissions on renewal premiums after termination of agency. — A contract between a life insurance company and its agent providing for the payment to the agent of commissions on renewal premiums does not give him any right to such premiums after the termination of the agency by his resignation, especially where the contract, when construed as a whole, discloses a contrary intention on the part of the parties. *Scott v. Travellers' Ins. Co. (Md.)*, 7-1166.

Right of manager to recover premiums collected by agent. — The manager of a life insurance society who appoints an agent to canvass for applications and to collect premiums on all policies obtained by him, the premiums collected to be paid by the agent to the manager, has, as between him and the agent, a special property in the premiums collected by the agent and is entitled to receive them. This right gives him a remedy against the agent upon his refusal to pay over the same as directed. *Hazelton v. Locke (Me.)*, 15-1009.

c. Actions.

Trover as remedy against agent withholding premiums collected. — Where

the defendant is the agent of the plaintiff for the collection and paying over not of a single life insurance premium, but of such as are payable for all policies effected by him, and he is entitled to receive as commission a certain percentage of such premiums when paid over, an action of trover by the principal might be unjust to the agent by depriving him of his right of set-off and other legal defenses. *Hazelton v. Locke (Me.)*, 15-1009.

3. CONTRACTS OF INSURANCE IN GENERAL.

a. Existence of contract.

Necessity that policy be countersigned. — A life insurance policy, or a benefit certificate in a fraternal insurance association, which is not countersigned by the proper officer as required by its provisions, is invalid, and the defect is not cured by the fact that the corporate seal of the insurer is attached to the policy. *Caywood v. Supreme Lodge (Ind.)*, 17-503.

Necessity of delivery of policy. — In the absence of such a stipulation in the application or policy as makes the actual delivery of the policy a condition precedent to the consummation of the contract of insurance, the actual delivery or nondelivery of the policy is not of itself conclusive evidence of the completion of the contract of insurance; but the unconditional acceptance of the application by the insurer is a consummation of the contract. *Hartford Fire Ins. Co. v. Whitman (Ohio)*, 9-218.

Where there is no oral agreement for insurance prior to the policy, if a policy has been executed in form, but has not passed out of the possession of the insurer or his agent and no payment of premium has been made, the contract is *prima facie* incomplete; and the burden is upon the party who asserts that there is a contract to show that the policy became operative by the intention of both parties. *Hartford Fire Ins. Co. v. Whitman (Ohio)*, 9-218.

Risk rejected before delivery of policy. — Where, there being no oral agreement for insurance to take effect prior to the issue of the policy, upon an application for insurance at less than the regular rate, an agent wrote up and countersigned a policy and, without parting with the possession thereof, wrote to the applicant that he had "issued" a policy, but would hold the same until he should have time to hear from his company, and the company thereafter rejected the risk and the agent forwarded the policy to the company, these facts constitute no proof of a consummated contract of insurance, although the applicant may not have received notice of the refusal of the risk. *Hartford Fire Ins. Co. v. Whitman (Ohio)*, 9-218.

Necessity that insurer incur some liability as consideration for premiums. — To constitute a consideration for the payment of premiums on a policy of life insurance, the insurer must incur a liability by a contract which is not affected by any infirmity which it may elect to interpose as a defense to an action on the policy if the life in-

sured should end. *Metropolitan Life Ins. Co. v. Felix* (Ohio), 4-121.

Executory parol contract. — A parol contract of insurance, as distinguished from a parol agreement to issue a policy, must not be executory, but must take effect *in presenti*. *Hartford Fire Ins. Co. v. Whitman* (Ohio), 9-218.

b. Place of contract.

Power of parties to fix by stipulation in policy. — In the absence of statute, the parties to a contract may agree on the place of the contract, and a provision in a policy of life insurance that the place of the contract shall be the home office of the insurance company is effective. *Williams v. Mutual Reserve Fund Life Assoc.* (N. Car.), 13-51.

c. Provisions in contract.

(1) Validity.

Limitation of time to sue in absence of statute. — In the absence of any statutory provision to the contrary, a provision in an insurance policy limiting the time within which suit may be brought thereon to a period less than that fixed by the general statute of limitations is valid and binding. *Caywood v. Supreme Lodge* (Ind.), 17-503.

Parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which the suit may be brought thereon, provided the period of limitation fixed is not unreasonable. *Appel v. Cooper Ins. Co.* (Ohio), 10-821.

A stipulation in a policy of insurance limiting the time in which an action to recover the loss covered by the policy can be begun is valid. *Heilig v. Aetna L. Ins. Co.* (N. C.), 20-1290.

Statutes invalidating provision limiting time to sue. — In Indiana there is a statute which renders void any provision in a policy of a foreign insurance company doing business in that state, limiting the time within which suit can be brought thereon to less than three years. *Caywood v. Supreme Lodge* (Ind.), 17-503.

(2) Construction.

Adopting construction most favorable to insured. — Where the terms of a policy of insurance are not clear, or are capable of two constructions, the one which is the most favorable to the insured will be adopted. *Preferred Accident Ins. Co. v. Fielding* (Colo.), 9-916.

It has become a settled rule in the construction of contracts of insurance that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer, and will never be extended beyond the strict words of the policy. *Haas v. Mutual Life Ins. Co.* (Neb.), 19-58.

If a clause in a contract of insurance is susceptible of two interpretations, that one will be adopted which is most favorable to

the insured. *Peterson v. Manhattan Life-Ins. Co.* (Ill.), 18-96.

Application as part of contract. — Where a life insurance policy states that a part of the consideration for the agreement of the insurance company is the application for the policy, which is made a part of the contract, and the application itself, which is annexed to the policy and signed by the insured, contains a statement that it shall become a part of the contract for insurance thereby applied for, the policy and the application together constitute the contract between the parties, and both alike are to be considered in determining their rights. *Lee v. Prudential Life Ins. Co.* (Mass.), 17-236.

(3) Warranties or representations.

Breach of warranty as rendering policy void or voidable. — An untrue warranty in an application for insurance does not render the policy void, but only voidable at the election of the insurer. *Modern Woodmen of America v. Vincent* (Ind.), 14-89.

False swearing as avoiding policy. — When by the provisions of an insurance policy it shall be void in case of fraud or false swearing by the insured, such false swearing in order to defeat a recovery must be intentional and done for the purpose of defrauding the insurer. *Medley v. German Alliance Ins. Co.* (W. Va.), 2-99.

Breach of condition as to one of several objects of insurance. — Where an insurance policy is issued, and different classes of property are insured, each class being separated from the others and insured for a specific amount, and there is a breach of the conditions of the contract as to one class of the property insured, the contract should be considered as not one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other, provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase of the risk of the company on the whole property insured because of the breach. *Miller v. Delaware Ins. Co.* (Okla.), 2-17.

Violation of condition affecting property destroyed. — A policy of insurance placing separate valuations upon separate subjects will not be severable if the risk intended to be excluded by a condition which has been violated affected the item of property for the destruction of which a recovery is sought. *Republic County Mut. F. Ins. Co. v. Johnson* (Kan.), 2-20.

Missouri statute. — The Missouri statute providing that warranties of facts or conditions in applications for and in policies of fire, tornado, or cyclone insurance shall, if not material to the risks insured, be deemed representations only, does not affect warranties of facts or conditions which are material to the risks. *Connecticut Fire Ins. Co. v. Manning* (U. S.), 15-338.

Question for court. — Where a promise in a policy of insurance is declared to be a warranty, the only concern of the courts in the absence of a contrary statutory enactment is to ascertain whether it has been complied with. *St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co. (La.)*, 3-821.

(4) Waiver of provisions and estoppel to allege breach.

Application of nonwaiver clause as to conditions relating to inception of policy. — Restrictions in a policy of insurance upon the power of the agent to waive conditions except in a particular manner do not apply to conditions relating to the inception of the contract. *Medley v. German Alliance Ins. Co. (W. Va.)*, 2-99.

Nonwaiver clause is notice of want of authority of agent after inception of policy. — As to promissory warranties for the violation of which a policy is rendered noneffective after it has once become effective, a limitation clause upon the power of the agent to waive conditions is not only a notice to the insured of want of authority to waive such conditions, but also a stipulation between the parties that the agent has not and shall not have any such power. *Medley v. German Alliance Ins. Co. (W. Va.)*, 2-99.

The agent of an insurance company cannot by oral contract with the assured waive the express terms of the policy and extend the time of payment of a premium, when the policy provides that none of its terms can be varied or modified, nor any forfeiture waived nor premiums in arrears received, except by agreement in writing signed by the president, vice-president, secretary, or assistant secretary. *McElroy v. Metropolitan Life Ins. Co. (Neb.)*, 19-28.

Estoppel to allege false warranty by act of agent. — Where an insurance agent, intrusted with blank policies and authorized to fill up, countersign, and deliver them, is correctly informed, by the person whose property he undertakes to insure, as to the state of the title and other facts material to and affecting the inception of the contract, so far as inquiry is made respecting them, and takes no written application for the insurance, and then issues a policy embodying, as warranties therein, facts different from those which were given to him by the insured, the company is estopped from defending a claim for loss under the policy on the ground of such false recitals, unless it is shown that the insured has prior or contemporaneous notice of want of authority in the agent to waive conditions. *Medley v. German Alliance Ins. Co. (W. Va.)*, 2-99.

Waiver of false warranty by agent. — A fire insurance company may be estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question, or of a breach of warranty, or of a violation of the provisions of the application or policy, notwithstanding clauses in the application or policy to the effect that the

company shall not be bound by any such conduct or representation of its agent; and such estoppel or waiver may be proved by parol evidence, though the policy or application contains clauses to the effect that no waiver shall be effective unless indorsed in writing on the policy at the home office of the company. *People's Fire Ins. Assoc. v. Goyno (Ark.)*, 9-373.

Waiver of breach by cancellation of policy. — A cancellation of a fire insurance policy by an agent of the insurer who has no authority to waive conditions except by indorsement on the policy or additions thereto does not imply a waiver of a prior breach of a promissory warranty contained in the policy, nor does it estop the insurer from setting up such breach as a defense to an action on the policy, even though the agent has knowledge of the breach when the cancellation is made. *Ruffner v. Dutchess Ins. Co. (W. Va.)*, 8-866.

Waiver of payment of premium by accepting note. — A life insurance company waives a provision in the policy that it is not to take effect until the first premium shall have been paid by accepting a note instead of the cash. *Lawrence v. Penn Mut. L. Ins. Co. (La.)*, 1-965.

Accepting delayed payment of premium as waiver of forfeiture. — An action of a life insurance company in accepting delayed payments of premiums held to amount to a waiver of forfeiture of the policy for the nonpayment of the premiums when due. *Morgan v. Northwestern National Life Ins. Co. (Wash.)*, 7-382.

Attempt to enforce premium note as waiver of forfeiture for nonpayment. — Where a life insurance company, after marking a policy on its policy register as canceled for nonpayment of a premium note, not only retains the note but continues to attempt to enforce it against the insured, it thereby waives a condition in the policy for forfeiture for such nonpayment. *Union Central Life Ins. Co. v. Spinks (Ky.)*, 7-913.

Waiver of forfeiture by retention of premium. — Forfeiture for breach of a promissory warranty is not waived by retention of the premium after notice thereof. *Medley v. German Alliance Ins. Co. (W. Va.)*, 2-99.

Waiver of limitation of time to sue. — A provision in a life insurance policy limiting the time within which an action may be brought thereon, being for the benefit of the company, may be waived by it. *Caywood v. Supreme Lodge (Ind.)*, 17-503.

Presumption of waiver. — Assuming that a requirement as to counter signature of a life insurance policy by a designated officer may be waived by the insurance company, no presumption of such a waiver arises from mere possession of the policy by the insured. *Caywood v. Supreme Lodge (Ind.)*, 17-503.

d. Reformation of contract.

Nonwaiver clause as precluding reformation. — A clause in a policy of insur-

ance limiting the authority of the agent to waive conditions is not a notice to the insured of the agent's want of power to bind his principal in respect of transactions had between them before the policy was delivered, such as will prevent a reformation of the contract at the instance of the insured or preclude him from relying upon a waiver made by the agent prior to the issuance of the policy. *Medley v. German Alliance Ins. Co.* (W. Va.), 2-99.

Failure to read policy as laches precluding reformation. — A failure to read the policy of an insurance within a short time after delivery is not such neglect or laches as will preclude the insured from reforming the same, or deprive him of the benefit of a waiver by the company through its agent unless he was possessed of knowledge sufficient to put him on inquiry as to the limitations upon the powers of the agent contained in the policy. *Medley v. German Alliance Ins. Co.* (W. Va.), 2-99.

e. Cancellation and forfeiture.

Forfeiture for nonpayment of premium. — Where a life insurance agent accepts part of the premium in cash and notes payable to himself for the part which such agent is entitled to retain as compensation under his agreement with the insurance company, such notes are not subject to the forfeiture provided for in the policy for nonpayment of a note given as part of the premium. The fact that the company subsequently acquires such notes from the agent does not change this rule. *Reppond v. National Life Ins. Co.* (Tex.), 15-618.

Where a life insurance company accepts cash for a portion of the premium due on a policy and notes for the balance, each note containing the provision that it "is given said company upon this express understanding or agreement that for any loss occurring by death after this note is due and remains unpaid, then said company shall not be liable," the rights of the parties are measured by said provision embodied in the notes; and where one of the notes is not paid at maturity because of the failure of the company to give a sufficient notice of its maturity, and thereafter a tender of the amount of the note is made on behalf of the insured but is refused by the company, and the insured subsequently dies, it cannot be claimed by the company that the death of the insured occurs while the note "is due and remains unpaid," and hence there is no forfeiture. *Kavanaugh v. Security, etc., Ins. Co.* (Tenn.), 10-680.

Sufficiency of notice of time of payment of premium to effect forfeiture. — In the absence of statute, or any express provision in a life insurance policy, making sufficient the mere mailing of a communication containing information of the approaching maturity of a premium, such communication must actually be received before it can be operative as a notice, and thereby effect a forfeiture of the policy upon a failure to

pay on the day. *Kavanaugh v. Security, etc., Ins. Co.* (Tenn.), 10-680.

If a life insurance company has been in the practice of notifying the insured of the time when his premiums fall due, and of the amount thereof, and the custom has been so uniformly and so reasonably long in continuance as to induce the insured to believe that the clause for forfeiture for nonpayment will not be insisted on, but that a notice will precede an insistence upon the forfeiture, and the insured is in consequence put off his guard, such notice must be given, and if not given, no advantage can be taken of any default in payment which the custom of the insurance company has thus encouraged. *Kavanaugh v. Security, etc., Ins. Co.* (Tenn.), 10-680.

Statutory notice of the time of payment of a premium to avoid a forfeiture of a life insurance policy held to be sufficient. *Nederland Life Ins. Co. v. Meinert* (U. S.), 4-480.

Necessity of notice of forfeiture. — In case of a breach of condition invalidating a policy of insurance, the insurer is not bound at its peril, upon notice of such breach, to declare the policy forfeited, or to do or say anything to make the forfeiture effectual, and a waiver will not be inferred from mere silence or inaction on its part, but it may wait until a claim is made under the policy and then rely on the forfeiture in denial of the claim or in defense of an action brought to enforce payment. *Weddington v. Piedmont Fire Ins. Co.* (N. Car.), 8-497.

Right of insured who has abandoned contract to damages for cancellation. — When a policyholder in a life insurance company has voluntarily ceased payment and abandoned his policy he cannot be heard to ask damages for its cancellation. *Green v. Hartford Life Ins. Co.* (N. Car.), 4-360.

Cancellation by insured. — Where the insured notifies his insurance broker to cancel a policy, and the broker fails to do so, the policy will remain in effect, as the insurance company must be notified of the cancellation in order to make it effective. *McGraw W. W. Co. v. German F. Ins. Co.* (La.), 20-1229.

f. Assignment of contract by insured.

Manner of assignment. — A policy of life insurance is not assignable by mere delivery unless the assignment is made for a valuable consideration; and in the absence of a written assignment, a holder other than the beneficiary must show that he is a *bona fide* holder and the manner in which he became such. And this is so though the holder is the insured person. *Cuyler v. Wallace* (N. Y.), 5-407.

Presumption of ownership after assignment. — Where a son has duly assigned and delivery a policy of insurance on his life to his father, the law presumes a continuance of ownership in the father; and this presumption is not rebutted by evidence of the mere possession by the son before the

death of the father without any evidence as to the manner in which he reacquired possession. *Cuyler v. Wallace* (N. Y.), 5-407.

g. Actions.

Necessity that person attempting to recover on policy show insurable interest. — A contract of insurance is a contract of indemnity, and any person attempting to enforce a claim under such a contract must show an interest in the subject-matter of the contract. *Bassett v. Farmers, etc., Ins. Co.* (Neb.), 19-252.

Necessity of pleading statute invalidating provision limiting time to sue.

— In an action on a life insurance policy which contains a provision limiting the time within which an action may be brought thereon to one year from the death of the insured, if the plaintiff relies upon the statute making void such a provision in a policy issued by a foreign insurance company, the complaint must allege all of the facts necessary to bring the policy sued upon within the provisions of the statute. *Caywood v. Supreme Lodge* (Ind.), 17-503.

Waiver of defense of want of consideration in action for premium. — In an action to recover premiums payable to an insurer which has not incurred a risk not affected by any infirmity which it may elect to interpose as a defense to an action on the policy after the death of the insured, the rights of the parties at the beginning of the action should determine the judgment, and the insurer cannot by the averments of its answer effectively waive such defense. *Metropolitan Life Ins. Co. v. Felix* (Ohio), 4-121.

For what purpose proofs of loss are admissible as evidence. — Proofs of loss in an action upon an insurance policy are admissible to prove compliance with the conditions of the policy, but for no other purpose, and it is error to refuse an instruction limiting the scope and effect of such testimony. *Order of United Commercial Travelers v. Barnes* (Kan.), 7-809.

Sufficiency of proof to establish policy. — In order to establish the relation of insurer and insured, in parol, as existing before the delivery of the policy, the plaintiff must do so by full and clear proof. *Hartford Fire Ins. Co. v. Whitman* (Ohio), 9-218.

Deducting unpaid premiums from recovery. — The amount of an unpaid note for a premium should be deducted from the recovery on a policy of the life insurance company. *Lawrence v. Penn Mut. L. Ins. Co.* (La.), 1-965.

Under a policy of life insurance providing that any indebtedness of the insured to the insurer shall be deducted from the face of the policy if the policy becomes a claim against the insurer, the amount of an unpaid premium note, together with the interest thereon from its date, should be credited on the sum payable to the beneficiary under the terms of the policy. *Union Central Life Ins. Co. v. Spinks* (Ky.), 7-913.

4. REINSURANCE.

Construction of reinsurance contract.

— A provision in a reinsurance contract that after the reinsured shall have adjusted, accepted proofs of, or paid, the loss, it shall forward to the reinsurer the proof of its loss and claim and a copy of the receipt taken for payment, means that a copy of the receipt is to be sent in case the loss has in fact been paid, but does not mean that there must be payment before any liability exists on the part of the reinsurer. *Allemania Fire Ins. Co. v. Firemen's Ins. Co.* (U. S.), 14-948.

In a contract for reinsurance a clause providing that "losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as paid by the said reinsured company under its contracts hereunder reinsured, and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof," means that the reinsurer shall not pay more than its ratable proportion of the actual liability of the reinsured after deducting the ratable proportion of other reinsurers, and does not mean that the reinsured must actually pay such liability before it can have the benefit of the reinsurance contract. *Allemania Fire Ins. Co. v. Firemen's Ins. Co.* (U. S.), 14-948.

Liability of reinsurer in general. — Where, in order to effect the ininsurance of the policies of an insolvent life insurance company in the hands of receivers, the court appoints actuaries who prepare a schedule of all the policies in good standing in the insolvent company, as a basis for the contract of reinsurance, and another insurance company, with such schedule before it, agrees to reinsure those policies which the schedule shows to be in good standing, in consideration of a portion of the assets of the company, the insurer is not liable on a policy not included in the actuaries' schedule, although the policy is a valid obligation of the insolvent company. *Kansas Mutual Life Ins. Co. v. Whitehead* (Ky.), 13-301.

Insolvency of reinsured as affecting liability of reinsurer. — The liability of the reinsurer to the reinsured is not affected by the latter's insolvency or inability to fulfill its own contract with the insured. *Allemania Fire Ins. Co. v. Firemen's Ins. Co.* (U. S.), 14-948.

Payment of loss by reinsured as condition precedent to recovery. — In the absence of contrary provisions in a reinsurance contract, it is not necessary that the reinsured shall pay the loss before proceeding against the reinsurer. *Allemania Fire Ins. Co. v. Firemen's Ins. Co.* (U. S.), 14-948.

Pleading in action on reinsurance contract. — A plea of estoppel *in pais* in an action on a contract of reinsurance, which

does not allege that the defendant misled the plaintiff, or that the latter relied on any representation or conduct on the part of the former, and changed its status or did or omitted to do anything by reason of any such representations or conduct, but merely alleges that if the defendant had claimed that the contract of insurance had expired, the plaintiff would have been informed of the claim, and either could have caused the contract of insurance to be duly corrected, or in case of dispute or delay concerning it could have protected itself by other insurance is demurrable. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. (Ga.)*, 7-1134.

Petition in an action on a reinsurance contract held sufficient to withstand a demurrer to the effect that it does not appear that the contract was signed. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. (Ga.)*, 7-1134.

Allegations in a petition on a reinsurance contract held to show that the contract was sufficiently signed. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. (Ga.)*, 7-1134.

5. FIRE INSURANCE

a. Statutory regulation of business.

Penalty on membership in tariff association. — The Alabama statute providing for an additional recovery by the plaintiff, in an action on a fire insurance policy, of twenty-five per cent. on the amount of the actual loss or damage, if the insurer belonged to, or was a member of, or in any way connected with, any tariff association for the fixing of rates of insurance, either at the time of the issuance of the policy or subsequently before the trial, is constitutional and valid, but must be construed as authorizing the recovery of a penalty of twenty-five per cent. of the loss or damage covered by the policy; and not twenty-five per cent. of the loss or damage sustained and not covered by the policy. *Fireman's Fund Ins. Co. v. Heller (Ala.)*, 17-793.

b. Nature of contract.

Fire insurance or guaranty. — Under a statute rendering a railroad company liable for an injury to property by fire communicated by its locomotives, and conferring on the company an insurable interest in such property, a policy insuring a railroad company against claims for loss or damage caused by fires so communicated is a fire insurance policy and not a guaranty policy, and may be issued by a company authorized only to insure against loss or damage by fire. *Canadian Pacific Ry. v. Ottawa Fire Ins. Co. (Ont.)*, 6-567.

c. Validity of contract.

Insurance on furniture in bawdy house. — A fire insurance contract upon household furniture used by the insured in a bawdy house is not void as against public policy, because such contract does not promote the illegal business of the insured. *Conithan v. Royal Ins. Co. (Miss.)*, 15-539.

Issuance of policy to agent. — A policy of fire insurance issued by an agent of the insurance company upon property in which he is personally interested, without notice to or consent of the company, creates no enforceable liability. *Arispe Mercantile Co. v. Capital Ins. Co. (Ia.)*, 12-93.

Mistake in name of assured. — The validity of a renewal policy of fire insurance issued to a corporation is not affected by the fact that the assured corporation has changed its name without the knowledge of the insurer, and that the policy was issued in the original name of the assured. *Peever Merc. Co. v. State Mut. Fire Assoc. (S. D.)*, 19-1236.

d. Parties to contract.

(1) What parties have insurable interest.

General rule for determining. — If the holder of interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or of a security or lien resting thereon, or of other certain benefits growing out of or depending upon it, he has an insurable interest. *Farmers', etc., Ins. Co. v. Mickel (Neb.)*, 9-992.

Builder. — A builder has an insurable interest in a building he is reconstructing for another, even though he has been paid most of the contract price for his work. Hence, in an action by the builder on a contract insuring the building against fire, an instruction is not rendered erroneous by the fact that it speaks of the building as "the property of the plaintiff." *King v. Phoenix Ins. Co. (Mo.)*, 6-618.

The Missouri valued property law applies to a policy of fire insurance issued to a builder on a building he is reconstructing for another person. *King v. Phoenix Ins. Co. (Mo.)*, 6-618.

Husband in property of wife. — A husband living with his wife in a house on land constituting her separate estate has no insurable interest therein. *Tryee v. Virginia F. & M. Ins. Co. (W. Va.)*, 2-30.

In Nebraska, in 1906, a husband by virtue of the marital relation only had no insurable interest in his wife's real estate. *Bassett v. Farmers', etc., Ins. Co. (Neb.)*, 19-252.

(2) Policy made payable to estate of deceased person.

Validity. — A policy of fire insurance is not rendered void by the fact that it is made payable to the estate of a deceased person. *Norwich Union Fire Ins. Co. v. Prude (Ala.)*, 8-121.

Who are beneficiaries. — The heirs and next of kin of a deceased person are not, as such, the beneficiaries under a policy of fire insurance payable to "the estate" of the deceased, unless the deceased died intestate and has no personal representative, or unless there

are no debts and no need for a personal representative, and even then not unless the property is exempt from administration and from the claims of the surviving husband or wife. *Norwich Union Fire Ins. Co. v. Prude* (Ala.), 8-121.

e. Form of contract.

(1) Statutory regulation.

Standard policy. — The Michigan statute empowering a commission thereby created to draft a form of fire insurance policy to be known as the "Michigan Standard Policy" is unconstitutional as an attempted delegation of legislative power, and therefore it is competent for the parties to a contract of fire insurance to insert a condition in addition to those contained in such standard policy. *King v. Concordia Fire Ins. Co.* (Mich.), 6-87.

Application of statute to foreign companies. — An exception in favor of "mutual companies in cities and villages" in the Wisconsin statute providing that "all fire insurance corporations . . . shall, upon issue or renewal of any policy, attach to such policy or indorse thereon a true copy of any application or representation of the assured which by the terms of such policy are made a part thereof or of the contract of insurance or referred to therein, or which may in any manner affect the validity of such policy," does not include foreign mutual fire insurance companies. *Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co.* (Wis.), 10-795.

(2) Parol contracts.

Validity in general. — Under a statute providing that parol contracts may be binding on corporations, a fire insurance company may be bound by an oral contract of insurance, unless such a contract is expressly prohibited by statute, notwithstanding the fact that the company's charter requires the signature of the president to all policies of insurance. *King v. Phenix Ins. Co.* (Mo.), 6-618.

Oral contract of renewal. — Where an agent for a fire insurance company is intrusted with blank policies signed by the president and the secretary of the company and is clothed with authority to negotiate, fill up, and issue them, he may bind the company by an oral contract to insure, though his written appointment does not empower him to make oral contracts, especially if the oral contract is a mere renewal of a written policy which is about to expire. *King v. Phenix Ins. Co.* (Mo.), 6-618.

Effect of Stamp Act. — An oral contract of fire insurance made prior to the repeal of the Federal Stamp Act was not rendered invalid by that statute. *King v. Phenix Ins. Co.* (Mo.), 6-618.

Necessity of writing under Georgia statute. — Under a Georgia statute, a contract of fire insurance must be in writing and signed by the insurer or by some person authorized to sign for the insurer. *Delaware*

Ins. Co. v. Pennsylvania Fire Ins. Co. (Ga.), 7-1134.

(3) Signature of policy.

Signature in body of contract. — The usual and proper place for the signature of the insurer to a contract of fire insurance is at the end of the matter which it attests. But in strict law, it will suffice if, with intent to constitute a signing, it is inserted in writing at another place. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.* (Ga.), 7-1134.

f. Construction of contract.

(1) In general.

Rules of construction. — Rules for construing a contract of fire insurance stated. *L'Engle v. Scottish Union, etc., Ins. Co.* (Fla.), 5-748.

Strict construction against insurer. — Conditions in a policy of fire insurance which provide for the forfeiture of the interest of the insured or of other persons claiming under the policy are to be construed strictly against the insurer, and if there is any ambiguity in a policy which may be solved reasonably by either one of two constructions, that interpretation will be adopted which is the more favorable to the insured or other person protected. *Welch v. British American Assurance Co.* (Cal.), 7-396.

Where language is ambiguous. — A fire insurance contract should, in case of ambiguity, be construed most favorably to the insured, and the language of the contract, if ambiguous, is to be interpreted in the light of the attendant circumstances and the intent of the parties. *Bickford v. Aetna Ins. Co.* (Me.), 8-92.

(2) Divisibility of contract.

In general. — A contract of fire insurance held to be indivisible. *St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co.* (La.), 3-821.

Policy covering different classes of property. — Where a fire insurance policy covers different classes of property, each of which is separately valued and is insured for a distinct amount, the contract is severable, and a breach of warranty as to only one of the subjects of the insurance does not affect the policy as to the other subjects, unless it appears that such was the intention of the parties, even though the premium for the aggregate amount of the insurance is payable in gross. *Donley v. Glens Falls Ins. Co.* (N. Y.), 6-81.

All property affected by breach of condition. — A policy of fire insurance providing that the entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstances concerning the insurance or the subject thereof must be regarded as entire and unseverable as to such provision where the property is so situated that a breach of the provision as to one item of property will necessarily affect the risk as to other items of property, though

the contract would be severable if the risk on the different items of property was separate and distinct. Where such a policy covers a building and the furniture therein, and there is a misrepresentation as to the ownership of the building invalidating the policy so far as the building is concerned, the policy is also invalidated as to the furniture, because any circumstance which increases the risk of fire to the house necessarily increases the risk to its contents. *Goorberg v. Western Assur. Co. (Cal.)*, 11-801.

(3) Duration of contract.

Premium payable in instalments. — A policy of fire insurance issued on March 19 for a period of five years, for a stated premium, one-fifth of which is paid in cash and the remainder of which, according to stipulation, is to be paid in four annual instalments due upon the first day of January of each succeeding year, with a provision that the company shall not be liable for any loss that may occur while any instalment of the premium remains past due and unpaid, cannot be construed as a yearly contract which the payment of each instalment of premium keeps in force for a full year ending March 19, but is for an entire term of five years and becomes immediately suspended by failure to pay an instalment of premium on January 1. *McCullough v. Home Ins. Co. (Tenn.)*, 12-626.

Policy expiring during fire. — Where a building and its contents are insured against fire, and a fire breaks out in the building before the expiration of the policy and continues to burn thereafter until the building and its contents are destroyed, the loss is one occurring during the life of the policy, though the policy expires before the building has been totally destroyed and before the fire has been actually communicated to the articles of merchandise covered by the insurance; but where the policy expires before the fire breaks out in the insured building, the loss does not occur during the life of the policy, notwithstanding the fact that at the time of the expiration it is inevitable that the building will be destroyed by the fire which is then consuming another building in the neighborhood. *Rochester German Ins. Co. v. Peasley-Gaulbert Co. (Ky.)*, 9-324.

(4) The risk.

Negligence of insured. — A fire insurance policy covers loss from a fire which occurs through the negligence of the insured unless it contains a stipulation to the contrary, notwithstanding the fact that it contains a provision exempting the insurer from liability for loss caused "by neglect of the insured to use all reasonable means to save and preserve the property at or after a fire, or when the property is endangered by fire in neighboring premises." *Beavers v. Security Mutual Ins. Co. (Ark.)*, 6-585.

Insurance against loss of rents. — Under a policy insuring against loss of the rents of an office building by fire, the as-

sured, on the total destruction of the building, is entitled to recover the gross amount of the rents, without deducting the cost of maintenance, such as the pay of janitors, cost of water, and the like, where the policy provides that the liability of the insurer shall be "based upon the rentals in force from the rented portions of the premises at the time of fire not exceeding the sum insured," for such period as may be required to put the premises in tenantable condition, and that appraisers shall be appointed to ascertain the time required to put the premises in tenantable condition, if the parties disagree in regard thereto. *Whitney Estate Co. v. Northern Assur. Co. (Cal.)*, 18-512.

(5) Property covered.

Meaning of term "addition." — The term "addition" in a fire insurance policy construed. *Bickford v. Aetna Ins. Co. (Me.)*, 8-92.

A fire insurance policy on a "two-story basement and brick building, with metal roof, and its additions adjoining and communicating, including foundations, occupied as a steam laundry," covers a boiler house situated about four feet distant from the main building and connected therewith by a steam pipe conveying power for an engine situated in the main building, by a partially completed platform and an overhead arch between the buildings, and by a sidewalk along the side. *Guthrie Laundry Co. v. Northern Assur. Co. (Okla.)*, 10-936.

Term "property" as including standing timber. — Standing timber held not to be "property" within the meaning of a fire insurance policy. *Canadian Pacific Ry. v. Ottawa Fire Ins. Co. (Ont.)*, 6-567.

Goods in process of removal. — Under the provision of a rider of a fire insurance policy giving permission to remove the property from one building to another specified building and stipulating that the policy shall cover the property "in both locations during removal in proportion as the value in each location shall bear to the value in both and after removal shall attach and cover in new location only," the property after being removed from the first location and while in process of removal to the other authorized location, but before it is placed in that location, is not covered by the policy. *Palatine Ins. Co. v. Kehoe (Mass.)*, 14-690.

(6) Warranties and representations.

Warranties in application as part of policy. — An insurer against fire cannot claim that the warranties in the application for insurance have a different effect from those in the policy, where the application provides that the warranties therein shall be "the same as if written on the face of the policy." *Donley v. Glens Falls Ins. Co. (N. Y.)*, 6-81.

Materiality as question of law or fact. — The materiality of a warranty in an insurance policy to the risk taken under it is a question of law whenever the character of

the warranty of the entire evidence relative to the materiality thereof is such that a decision but one way may be lawfully sustained by the court, but is a question for the jury whenever all the admissible evidence is such that a decision either way may be lawfully sustained by the court. *Connecticut Fire Ins. Co. v. Manning* (U. S.), 15-339.

A warranty in a fire insurance contract regarding the existence or the amount of incumbrances upon the property insured thereunder is material to the risk as a matter of law. *Connecticut Fire Ins. Co. v. Manning* (U. S.), 15-338.

Assuming that a condition in a fire insurance policy that "if the interest of the assured be or become other than the entire unconditional, unincumbered, and sole ownership of the property . . . this policy shall be void unless otherwise provided by agreement indorsed hereon," constitutes a warranty, such warranty is material to the risk as a matter of law, and where the property insured under such a policy is incumbered by a mortgage, it is error to submit to the jury the question of the materiality of such warranty. *Connecticut Fire Ins. Co. v. Manning* (U. S.), 15-338.

Effect of false warranty. — A false warranty in an application for fire insurance that the applicant has no reason to fear incendiarism renders the policy void, even though the fact warranted is not material to the risk; and in an action on the policy it is reversible error to exclude evidence tending to prove the falsity of such warranty. *Donley v. Glens Falls Ins. Co.* (N. Y.), 6-81.

g. Particular provisions of policy.

(1) Provisions as to ownership in general

Validity of provision requiring ownership in fee. — A provision of an insurance policy to the effect that if the title of the insured is less than the absolute fee simple ownership, the company shall not be liable thereunder, is reasonable and enforceable. *Tyree v. Virginia F. & M. Ins. Co.* (W. Va.), 2-30.

Effect of false statement by insured. — A false statement to an agent by an applicant for insurance that the latter is the sole and absolute owner of the property sought to be insured, the agent having no knowledge to the contrary, avoids the policy. *Tyree v. Virginia F. & M. Ins. Co.* (W. Va.), 2-30.

Effect of erroneous statement in policy. — In an action by the insured on a policy of fire insurance, where it is shown that the insured truthfully and correctly stated the nature and condition of his title in making his application for insurance, he is not precluded from recovering by the fact that a contrary statement as to the title was inserted in the policy by the insurer. *Allen v. Phoenix Assur. Co.* (Idaho), 10-328.

Waiver of false representations. — A misrepresentation as to the title to the property covered by a policy of fire insurance, avoiding the policy, is not waived by the fact

that the insurer, after the loss occurred, ascertained the true state of the title, and for a period of several months thereafter and up to the time suit was brought on the policy made no offer to return the premium. In such an action, if the plaintiff relies on waiver or estoppel as to any defense that would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance. *Goorberg v. Western Assur. Co.* (Cal.), 11-801.

(2) Condition requiring sole and unconditional ownership.

(a) In general.

Materiality. — A stipulation in a fire insurance policy for unconditional ownership of the insured held to be material and valid. *Insurance Co. v. Erickson* (Fla.), 7-495.

Acceptance of policy as consent to condition. — By accepting a policy of fire insurance containing a clause requiring him to have sole and unconditional ownership of the property, the insured becomes charged with notice of the condition and becomes bound thereby. *Parsons, Rich & Co. v. Lane* (Minn.), 7-1144.

To what time condition relates. — The provision in a policy of fire insurance that the policy shall be void if the interest of the insured is other than an unconditional and sole ownership, or if the subject of the insurance is a building on ground not owned by the insured in fee simple, applies to conditions existing at the date of the policy, and not to future changes in title. *Parsons, Rich & Co. v. Lane* (Minn.), 7-1144.

Presumption as to compliance with condition. — While the conditions in a policy of fire insurance against incumbrances and for unconditional and sole ownership are conditions precedent to be performed or made to exist prior to the consummation of the contract and the delivery of the policy, the delivery of the policy raises a *prima facie* presumption that these conditions have been found by the insurer to have been performed. *Allen v. Phoenix Assur. Co.* (Idaho), 10-328.

Effect of breach as to part of property. — A policy of fire insurance on a building and its contents which contains a clause requiring the insured to have sole and unconditional ownership and title of and to property, is avoided as to all the property by a breach as to the title to the land upon which the building stands, where the contract is entire and the increase of moral hazard caused by the condition of the title to the land affects all of the property insured. *Parsons, Rich & Co. v. Lane* (Minn.), 7-1144.

(b) What constitutes breach.

Title in government. — A fire insurance policy containing a clause providing that the policy shall be void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be

a building on ground not owned by the insured in fee simple," is not avoided by the fact that the property insured is situated upon a government homestead for which the insured has not made the final proof required by law and the legal title to which remains in the United States government. *Allen v. Phoenix Assur. Co. (Idaho)*, 10-328.

Existence of vendor's lien. — An owner of property, who is in possession under a conveyance of title in fee simple which does not expressly reserve a vendor's lien, is the sole and unconditional owner thereof within the meaning of a condition in a policy insuring the property against fire, though the conveyance recites a cash payment and several deferred annual payments, and though the law gives the vendor a lien to secure the deferred payments. *Insurance Co. of North America v. Pitts (Miss.)*, 9-54.

The incumbrance of a vendor's lien does not work a forfeiture under a clause of a fire insurance policy providing that the policy shall be void if the interest of the insured "be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple." *Planters' Mutual Ins. Assoc. v. Hamilton (Ark.)*, 7-55.

Part of purchase money unpaid. — A vendee of land in session under a contract of purchase which he is entitled to enforce specifically, though a part of the purchase money may remain unpaid, is the unconditional and sole owner within a clause of a fire insurance policy declaring that it shall be void "if the interest of the insured be other than unconditional and sole ownership." *McCullough v. Home Ins. Co. (Cal.)*, 18-862.

Existence of contract to sell. — Existence of a contract to sell property held to be a violation of an unconditional ownership clause in a fire insurance policy. *Insurance Co. v. Erickson (Fla.)*, 7-495.

(c) Waiver.

Failure to make inquiry. — Where an insurance company has issued a policy and accepted and retained the premium without requiring an application by the insured and without making inquiry as to the condition of the property or the state of its title, and the insured had in fact an insurable interest, the company will be conclusively presumed to have insured such interest, and to have waived all provisions in the policy providing for its forfeiture by reason of any facts or circumstances affecting the condition or title of the property in regard to which no such statement was required or inquiry made. *Farmers', etc., Ins. Co. v. Mickel (Neb.)*, 9-992.

Issuance of policy with knowledge. — Where a written application for fire insurance states that the applicant is not the owner in fee of the land on which the property insured is situated, and that the property is mortgaged, the insurer, if it issues its policy with knowledge of these facts, will be estopped from claiming subsequently that the policy is

void because of breaches of conditions for sole and unconditional ownership and against incumbrances. *Allen v. Phoenix Assur. Co. (Idaho)*, 10-328.

While an insurer against fire cannot take advantage of a condition in its policy to avoid payment of a loss, when the facts invalidating the policy were known to it or to its agent when it issued the policy, this rule has no application when the facts were not known. *Parsons, Rich & Co. v. Lane (Minn.)*, 7-1144.

The issuance of a policy of fire insurance with full knowledge on the part of the insurer that the assured has not the unconditional and sole ownership of the insured property operates as a waiver of a condition that the policy shall be void if the interest of the assured "be other than unconditional and sole ownership," and that no condition shall be deemed to have been waived "unless such waiver, if any, shall be written upon or attached" to the policy. *Damms v. Humboldt Fire Ins. Co. (Pa.)*, 18-685.

Issuance of policy without written application. — An insurer against fire does not, by issuing a policy without a written application therefor, waive a condition in the policy requiring the insured to have unconditional and sole ownership of the property. *Parsons, Rich & Co. v. Lane (Minn.)*, 7-1144.

Waiver by agent. — Evidence reviewed in an action on a fire insurance policy, and held sufficient to authorize the submission to the jury of the question whether the insurer, through its agent, knew that the house insured stood on leased ground at the time the application was made and the policy issued, and thereby waived a provision in the policy that it should be void if the building was on land not owned by the insured in fee simple. *Ætna Ins. Co. v. Johnson (Ga.)*, 9-461.

Whether a clerk of the agent of a fire insurance company can waive a provision in the policy that it shall be void if the building is on land not owned by the insured in fee simple, and whether this question is affected by the fact that the agent has referred the applicant for insurance to his clerk or assistant, held to be questions not made in the record with such distinctness as to require their decision. *Ætna Ins. Co. v. Johnson (Ga.)*, 9-461.

(3) Provision against change in title, interest, or possession.

(a) In general.

Meaning of word "interest." — The word "interest" in a forfeiture clause of a fire insurance policy which provides that the policy shall become void "if any change . . . takes place in the interest, title, or possession of the subject of insurance" has application only where the insured owns and insures an interest less than title, and has no application where the insured owns the title. *Garner v. Milwaukee Mechanics' Ins. Co. (Kan.)*, 9-459.

- (b) Clause avoiding policy on commencement of foreclosure.

Validity and construction. — A clause in a fire insurance policy which provides that this "entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if with the knowledge of the insured, foreclosure proceeding be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed," is a wise and proper safeguard to the insurer against the greatly increased risk consequent upon the circumstances provided against therein, and is valid. The plain meaning and purpose of such a clause is that the policy shall become void, if, with the knowledge of the insured, foreclosure proceedings of any mortgage, whether executed by the insured or by another, covering any of the insured property, shall be commenced during the life of the policy, unless there shall be an agreement indorsed upon or added to the policy providing otherwise. *J. I. Kelly Co. v. Saint Paul Fire, etc., Ins. Co. (Fla.)*, 16-654.

Pleading. — In an action by the insured on a policy containing such a clause, a plea by the defendant insurance company which sufficiently alleges the commencement of foreclosure proceedings of a valid and subsisting mortgage upon the insured property, and that the insured had knowledge of such proceedings, and that no agreement was indorsed upon or added to the policy providing against its avoidance by the commencement of the proceedings, presents a valid defense and is not subject to demurrer. *J. I. Kelly Co. v. Saint Paul Fire, etc., Ins. Co. (Fla.)*, 16-654.

In such an action, where the defendant insurance company pleads that the policy has been forfeited by the commencement of foreclosure proceedings upon the insured with the knowledge of the insured, a replication setting up the agreement between the insured and the fore mortgagee for the discontinuance of the foreclosure proceedings upon payment of a part of the mortgage debt, does not present any answer to the plea. *J. I. Kelly Co. v. Saint Paul Fire, etc., Ins. Co. (Fla.)*, 16-654.

- (c) What constitutes breach.

In general. — To avoid a policy of fire insurance containing a provision against a sale of property or an assignment of the policy, the sale must be such as passes title to the property. *International Wood Co. v. National Assur. Co. (Me.)*, 2-356.

Executory contract of sale. — A contract of sale of insured property held to be within a provision of the policy voiding the same for a change of interest of the insured. *Excelsior Foundry Co. v. Western Assur. Co. (Mich.)*, 3-707.

Where the insured in a fire insurance policy, who owns the title of the subject of insurance, has made an executory contract to convey the property, and the consideration has been fully paid but no transfer either of title or possession has been actually made, no change has taken place in "interest, title,

or possession," within the meaning of a forfeiture clause in the policy. *Garner v. Milwaukee Mechanics' Ins. Co. (Kan.)*, 9-459.

Sale and mortgage back. — A policy of fire insurance providing in plain and unmistakable terms that any change in interest, title, or possession of the subject-matter of the insurance shall avoid the policy, unless otherwise provided by agreement, is rendered void, where the insured makes an absolute conveyance of the subject-matter of the insurance and takes a mortgage to secure the purchase money, the mortgage being a mere lien or security for money and conveying no title to the mortgage. *Jump v. North British, etc., Ins. Co. (Wash.)*, 12-257.

Judicial sale. — The effect of service upon the insured of a notice of sale of the insured property under a deed of trust when the policy contains a stipulation against a sale of the property and a clause prohibiting the agent from waiving such condition except in a particular manner. *Medley v. German Alliance Ins. Co. (W. Va.)*, 2-99.

Appointment of receiver. — Where a fire insurance policy on personal property provides that if any change takes place in the interest, title, or possession of the property, "whether by legal process of judgment, or otherwise," the policy shall be wholly void, the appointment of a receiver, in a suit against the insured, to take possession and control of the property, and the taking of actual possession by such receiver, avoids the policy and prevents any recovery thereon. *Bronson v. New York Fire Ins. Co. (W. Va.)*, 16-868.

Bankruptcy of insured. — A fire insurance policy contained the following stipulation: "The entire policy, unless otherwise provided by agreement herein indorsed or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership . . . or if any change other than death of an assured takes place in the interest, title, or possession of the subject of insurance whether by legal process or judgment, or by voluntary act of the assured, or otherwise, or if this policy be assigned before a loss." On Feb. 1, 1905, the assured filed a petition in the United States District Court for the Eastern District of Kentucky in voluntary bankruptcy, and on the same day he was adjudged a bankrupt. On February 2 the stock of merchandise insured was (at Ruston, La.) destroyed by fire. On February 3 a receiver was appointed, and on February 13 the same person was appointed as trustee and qualified as such. On May 13 the District Court confirmed a composition which had been entered into between the bankrupt and his creditors. The assured thereafter sued the insurance company. The latter pleaded that the policy had become void by reason of the proceedings in bankruptcy. The court rendered judgment in favor of the plaintiff, and the correctness of that judgment has been brought up for review. Held, the judgment is correct and is affirmed. The property insured was destroyed before either a receiver or a trustee was appointed. In the

interim between the adjudication in bankruptcy and the appointment and qualification of the trustee, the title to the property with the incidents of interest and possession continued in the bankrupt. When the trustee was appointed, there was no property in existence to which the title in the trustee could vest. The trustee of a bankrupt is not obliged to accept title to the property surrendered by the bankrupt, if to do so would not benefit the creditors, or would prejudice them. The creditors deemed it to their interest to make a composition with the bankrupt, and depend upon his personal obligation to them and did so. The court confirmed the composition. The composition did away with the effect of the bankruptcy proceedings, and the assured had the right to sue on the policy with his rights intact. *Gordon v. Mechanics', etc., Ins. Co.* (La.) 14-886.

(4) Condition against incumbrances.

(a) In general.

Validity. — A condition in a policy insuring personal property against fire that the policy shall be void if the property is encumbered by a chattel mortgage, is a just and lawful one, and will be enforced according to its plain meaning and so as to carry into execution the reasonable purpose of the parties. *Weddington v. Piedmont Fire Ins. Co.* (N. Car.), 8-497.

Estoppel to deny knowledge of condition. — In an action by the insured on a fire insurance policy, the plaintiff, in the absence of any proof of fraud or mistake, will not be heard to say that when he signed the agreement he did not know what was in it. *Weddington v. Piedmont Fire Ins. Co.* (N. Car.), 8-497.

(b) Waiver.

Issuance of policy without inquiry. —

A waiver by an insurance company of a condition in a policy against incumbrances by issuing the policy and accepting a premium without making an inquiry as to incumbrances, where the insured has no knowledge that the existence of an incumbrance affects the contract. *Allesina v. London, etc., Ins. Co.* (Ore.), 2-284.

Issuance of policy with knowledge. —

A waiver by a fire insurance company of a condition against incumbrances by issuing a policy and accepting a premium with knowledge that the subject of the risk is covered by a chattel mortgage. *German-American Ins. Co. v. Yeagley* (Ind.), 2-275.

In an action upon a fire insurance policy containing a condition against incumbrances, a finding for the plaintiff is justified by evidence showing that a general agent issued the policy and received the premium with full knowledge, conveyed to him orally and in writing, of the existence of a chattel mortgage upon the goods insured. *German-American Ins. Co. v. Yeagley* (Ind.), 2-275.

Power of agent to waive. — The power of an insurance agent to waive conditions in

a policy which would render it void from the beginning, such as a condition against incumbrances. *German-American Ins. Co. v. Yeagley* (Ind.), 2-275.

Waiver of breach after issuance of policy. — Where the insured in a policy insuring personal property against fire writes to the president of the insurance company requesting a loan and offering to give a chattel mortgage on the property, a letter from the president expressing his regret that he cannot accommodate the insured and further wishing him "success in his undertaking" does not amount to a waiver of a condition in the policy against encumbering the property, nor does it constitute an equitable estoppel to set up such condition as a defense to an action on the policy. *Weddington v. Piedmont Fire Ins. Co.* (N. Car.), 8-497.

Nonwaiver agreement. — In an action on a policy of fire insurance, where the plaintiff relies on a waiver by the defendant of a breach of a condition against incumbrance, and the defendant sets up a nonwaiver agreement executed by the insured after the occurrence of the loss, the plaintiff is not entitled to prove that the defendant's agent told him that signing the agreement would prevent any difficulty in settling the loss, if it appears that at the time the agreement was signed neither the agent nor the defendant knew that the property was encumbered. *Weddington v. Piedmont Fire Ins. Co.* (N. Car.), 8-497.

(5) Condition against vacancy, disuse, and neglect.

Construction where property is rented. —

The condition against vacancy and unoccupancy usually found in fire insurance policies must be construed with reference to the character or class of property insured, and it should not receive the same interpretation when the insured property is occupied by tenants as when it is occupied by the owners thereof. *Ohio Farmers' Ins. Co. v. Vogel* (Ind.), 9-91.

Interval between occupation by tenants. —

In construing a policy issued by a fire insurance company with knowledge of the fact that the property was occupied by a tenant and that the property should continue to be occupied by tenants during the life of the policy, the necessary and reasonable time intervening between the outgoing of one tenant and the incoming of another must be held to have been contemplated by the parties and not intended to affect the validity of the policy, in the absence of something more specific than the general and usual conditions against vacancy and unoccupancy. *Ohio Farmers' Ins. Co. v. Vogel* (Ind.), 9-91.

Clause inserted by mistake. — Where the owner of a tenement and a fire insurance company make a contract to insure property for tenement occupancy, but the policy issued is appropriate only for insurance taken out by occupying owners, in that it contains a condition against occupancy by tenants, such condition is ineffective to vary the contract

actually made; and in an action on the policy it will not be presumed that any condition of forfeiture was annexed to the contract as it was agreed upon. *Ohio Farmers' Ins. Co. v. Vogel (Ind.)*, 9-91.

Waiver of condition against occupancy by tenants. — Where a fire insurance company issues a policy with knowledge that the property is occupied by a tenant, and accepts and retains the premium paid by the insured, it thereby waives a condition in the policy providing that the policy shall be void if the building "shall hereafter become . . . occupied by tenants," and the policy will be given the same effect as would be given if it lacked such condition. *Ohio Farmers' Ins. Co. v. Vogel (Ind.)*, 9-91.

Temporary cessation in operation of mill. — Where a fire insurance policy covering a mill run by water is issued with knowledge of the insured that the mill cannot be operated in severe winter weather on account of the lack of power, a clause in the policy providing that the policy shall be void if the subject of the insurance shall "cease to be operated for more than ten consecutive days" is ineffectual to avoid the policy on account of the temporary cessation of the operation of the mill occasioned by the lack of power during cold weather. *Waukau Milling Co. v. Citizens' Mutual Fire Ins. Co. (Wis.)*, 10-795.

Revival of policy on occupation after vacancy. — The provision in a policy insuring a building against fire, that the policy shall be void if the building shall "be or become vacant or unoccupied, and so remain" for a specified length of time, operates to suspend the policy during the prohibited vacancy, but the insurance is revived by a subsequent occupancy. *Insurance Co. of North America v. Pitts (Miss.)* 9-54.

(6) Condition against hazardous use and occupation.

Storing or keeping gasoline. — Under a statutory condition exempting a fire insurance company from liability for loss or damage occurring while gasoline is "stored or kept" in the insured building or the building containing the insured property, the words "stored" and "kept" should be read together and indicate the continuous, habitual storage or keeping of an article; and the procuring by the tenant and servant of the insured of one-half gallon of gasoline, and the keeping of the same without the insured's knowledge in part of the insured's premises, is not a storing or keeping within the meaning of the condition. *Thompson v. Equity Fire Ins. Co. (Can.)*, 13-532.

A small quantity of gasoline in a stove used for cooking in an insured building does not violate a statutory condition protecting the insurer from liability "for loss or damage occurring while gasoline is stored or kept in the building insured." *Thompson v. Equity Fire Ins. Co. (Eng.)*, 19-412.

Storing of seed cotton by tenant. — Where a by-law of a mutual co-operative insurance company, which is a part of the pol-

icy of insurance issued by it, provides that "liabilities cease at once on dwellings in the association, in which seed cotton or loose lint cotton is stored," a violation of such provision avoids the policy, although the storing of the seed cotton is done by a tenant to whom the insured has rented or leased the premises and delivered the control, and without the knowledge of the insured. *Edwards v. Farmers' Mut. Ins. Assoc. (Ga.)*, 10-1036.

Waiver by company. — A notice to the company that the property is rented to a tenant, and its continuing to receive the payment of premiums or assessments from the owner, do not operate as a waiver of the terms of a fire insurance policy prohibiting the storing of seed cotton in a dwelling house. *Edwards v. Farmers' Mut. Ins. Assoc. (Ga.)*, 10-1036.

(7) Condition against increase of risk.

Increase without knowledge of insured. — Under a statutory condition providing that a policy of fire insurance shall be avoided by "any change material to the risk and within the control or knowledge of the insured," a policy on a building leased as a dwelling is not avoided by an action of the lessee in putting in a stock of goods for sale without the consent of the lessor, though the insurance was effected prior to the execution of the lease. *London, etc., Trust Co. v. Canada Fire Ins. Co. (Ont.)*, 7-386.

Conspiracy to burn insured property. — A conspiracy to burn insured property in order to obtain the insurance money, without any act done to carry it out, is not within a clause of the policy avoiding it "in case of any fraud . . . touching any matter relating to this insurance or the subject thereof," or "if the hazard be increased by any means within the control or knowledge of the insured;" and therefore the insured may recover for a loss by fire not caused by any act of the conspirators, though the conspiracy was in progress at the time. *Amperand Hotel Co. v. Home Ins. Co. (N. Y.)*, 19-839.

Increase ceasing before loss. — Under a stipulation in a policy of fire insurance that the entire policy shall be void if the hazard is increased by any means within the control or knowledge of the insured, the policy is not rendered totally void by a temporary change of possession of the property which increases the risk while it lasts, but which is discontinued before the burning of the property and has no connection therewith, such change of possession merely suspending the validity of the policy while it lasts. *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co. (S. Car.)*, 11-780.

Waiver by company. — A violation of a clause in an insurance policy declaring that the policy shall become null and void if the hazard is increased by any means within the control or knowledge of the insured, is not waived by a letter, written at or about the date of the fire which destroys the property, by an agent of the insurer who has no authority to waive conditions except by indorse-

ment on the policy or addition thereto, notifying the insured that the policy is canceled and specifying such violation as the reason for cancellation. *Ruffner v. Dutchess Ins. Co.* (W. Va.), 8-866.

(8) Earthquake clause.

Construction. — A clause in a fire insurance policy which provides that the insurance company shall not be liable for loss caused directly or indirectly by earthquake, must be construed as exempting the company from liability only where an earthquake is the proximate cause of the loss. *Richmond Coal Co. v. Commercial Union Assur. Co.* (U. S.), 17-1092.

Intervening causes of loss. — In an effort to stop a great conflagration which threatens to destroy the major portion of a great city, and which extends over a considerable period of time, there will naturally be intervening events, such as explosions, backfiring, and dynamiting, and the course of the flames may be changed by windstorms and other natural causes. All of these events are possible intervening causes, which may prevent an earthquake which gave rise to the conflagration from being considered the proximate cause of the destruction of a particular building therein, and, hence, in an action on a fire insurance policy to recover for the loss of property destroyed in such a conflagration, where the insurance company interposes the defense that the loss was caused by earthquake, the jury should be instructed that it is their duty to consider whether any of the events above mentioned occurred, and instructions which fail to inform the jury of their duty in that regard, or to take any note of such possible intervening causes of the loss, are erroneous. *Richmond Coal Co. v. Commercial Union Assur. Co.* (U. S.), 17-1032.

(9) Fallen building clause.

Construction. — A provision in a fire policy that if the insured building "or any part thereof" shall fall except as the result of fire, the insurance shall immediately cease, does not refer to the fall of a trivial or minute part of the building, but means that the building must fall in whole, or in part to such an extent that its integrity as a building is destroyed or substantially impaired. *Clayburgh v. Agricultural Ins. Co.* (Cal.), 18-579.

(10) Explosion clause.

Construction. — Under a policy of fire insurance exempting the insurer from liability for loss or damage by explosion "unless fire ensues, and in that event for the damage by fire only," the insurer is not liable for damage to the insured property resulting solely from the explosion of explosives in a fire in the neighborhood. *Hall v. National Fire Ins. Co.* (Tenn.) 5-777.

Proximate cause of explosion not material. — Where a fire insurance policy contains a provision that the insurance company shall not be liable for losses caused by

explosion of any kind, unless fire ensues, and, in that event, for the damage by fire only, the only inquiry in an action on the policy is whether an explosion was the proximate cause of the fire, and when such has been ascertained to be the case the inquiry in that regard must stop there. An instruction which permits the jury in such a case to find for the defendant insurance company even though an explosion was the proximate cause of the fire, if they believe that an earthquake was the proximate cause of the explosion, is erroneous. *Richmond Coal Co. v. Commercial Union Assur. Co.* (U. S.), 17-1092.

(11) Provisions regarding location of property.

Effect of mistake in policy. — Where a policy of fire insurance on personal property stipulates that the property is insured while in a specified house and not elsewhere, and describes with certainty an existing house as the house in which the property is to be, when in fact the property was in another house, evidence that the house containing the property was the one intended to be described contradicts the terms of the writing, and no recovery can be had on the policy if it is to stand as the contract of the parties. *Ætna Ins. Co. v. Brannon* (Tex.), 13-1020.

The fact that the holder of a policy of fire insurance on personal property accepts the policy without noticing a mistake in the policy as to the location of the insured property does not preclude him from having the mistake corrected. *Ætna Ins. Co. v. Brannon* (Tex.), 13-1020.

Property not ordinarily kept in one place. — Where for more than twenty years it has been a settled rule of construction in a state that in an insurance policy on personal property which is ordinarily not kept constantly in a particular location, the designation of the location thereof shall, in the absence of restraining language, be held to be descriptive merely of the subject of the insurance and its customary location, the parties to such an insurance contract must be presumed to have designated the location thereof understandingly in the broad sense which such established rule of construction suggests. *Lathers v. Mutual Fire Ins. Co.* (Wis.), 15-659.

Live stock customarily kept in barn.

— A fire insurance policy on a farm barn and live stock customarily kept therein, the live stock being described as "therein, on the farm," covers the loss by fire of such live stock while temporarily, and according to custom, off the farm. *Lathers v. Mutual Fire Ins. Co.* (Wis.), 15-659.

Waiver of condition. — Plaintiff, Taylor-Baldwin Company, a corporation, was the owner of a building and stock of goods located in what is called the old town of G., which it insured in defendant company. Afterwards, and contrary to the provisions of the policy, it removed the property insured to the new town of G., four miles distant, obtained additional insurance, and installed a

gasoline lighting plant. After the removal to the new location, the plaintiff delivered the policy to one Robinson, who was the legal soliciting agent of defendant, and requested him to have the insurance company make an indorsement on the policy to cover the property at its new location. Through a misunderstanding, Robinson sent the policy to defendant at its home office, with the written request that it cancel the same, which the company did, and retained the policy, but did not notify the plaintiff. The building and stock of merchandise were afterwards destroyed by fire caused by the gasoline lighting plant. The plaintiff made proofs of loss and sent them to defendant. The proofs showed that the property was destroyed at its new location, the amount of additional insurance obtained, and that the fire was caused by a defective gasoline lighting plant. The company returned the proofs with a letter denying any liability, on the ground that the policy had been canceled before the fire. Held, that the rejection of the claim on the ground stated in defendant's letter did not constitute a waiver of the condition of the policy. *Taylor-Baldwin Co. v. Northwestern Fire, etc., Ins. Co. (N. D.)*, 20-432.

(12) Option to repair or rebuild.

Exercise as creating new contract. —

Under a stipulation in a fire insurance policy giving the insurance company an option to repair or replace the building in case it is damaged by fire, the election of the insurance company to repair or replace creates a new contract which supersedes the contract to pay the loss. *Winston v. Arlington Fire Ins. Co. (D. C.)*, 16-104.

Time limit of action for performance. — A clause in such policy limiting the time within which an action may be brought on the contract of insurance does not apply to an action by the insured for the failure of the insurance company to perform properly the new undertaking created by such election to repair. *Winston v. Arlington Fire Ins. Co. (D. C.)*, 16-104.

(13) Provisions regarding other insurance.

Meaning of term "concurrent." — A fire insurance policy containing a clause referring to "concurrent" insurance construed. *L'Engle v. Scottish Union, etc., F. Ins. Co. (Fla.)*, 5-748.

Innocent failure to disclose other insurance. — A statutory condition as to fire insurance requiring the disclosure of prior insurance in an application does not apply to prior policies effected by others without the knowledge of the insured, and the failure to refer to such policies in the application is not a breach of the condition where there is no fraudulent design. *Thompson v. Equity Fire Ins. Co. (Can.)*, 13-532.

Additional insurance taken by mistake. — Where a fire insurance company, having a risk of \$2,000 upon a building, takes a risk of \$1,000 more to last thirty days, and expresses to its agent its willingness to con-

tinue the policy for a stated premium, but the insured, before hearing of the company's intention, and on the day following the expiration of the thirty days, effects insurance for the same amount in another company, to which no reasonable objection can be had, and a fire occurs after notice of the additional insurance is sent to the original company but before it is received, a recovery on the original policy cannot be resisted on the ground of subsequent undisclosed insurance, the additional insurance being taken merely in substitution of the insurance assented to by the original company, and there being no pretense of any question as to the continuance of the additional risk by that company other than the amount of the premium. *Thompson v. Equity Fire Ins. Co. (Can.)*, 13-532.

Permission by agent. — Where a policy has a slip attached thereto by the agent permitting other insurance, additional insurance on the property will not prevent recovery for loss under the policy. *Medley v. German Alliance Ins. Co. (W. Va.)*, 2-99.

Validity and effect of co-insurance clause. — The defendant issued its policy of insurance for \$1,500 on the building in Shreveport, known as the "Simon Building." It was partially destroyed by fire. The policy contained the following clause: "It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that the assured shall maintain insurance on each item of property insured by this policy of not less than seventy-five per cent. of the actual cash value thereof, and that failing so to do, the assured shall be an insurer to the extent of such deficit and in that event shall bear his, her, or their portion of the loss." The assured obtained other insurance on the building, but fell short of obtaining insurance up to seventy-five per cent. of the building to the amount of several thousand dollars. On being sued, the defendant company claimed the benefit of the co-insurance clause contained in the policy. Plaintiff resisted this claim on the ground that the clause seeking to make him a co-insurer as declared therein was violative of the provisions of Act No. 135, p. 209, of 1900, known as the "Valued Policy Statute." This position was sustained by the court, and judgment was rendered accordingly. On appeal to the Court of Appeals that judgment was affirmed, and the case was then brought to the Supreme Court for review. Held, the stipulation in defendant's policy as to the assured becoming a co-insurer with the insurance company in a certain contingency to the extent and under the conditions stated is not against public policy. It is not prohibited by law, and a prohibition should not be read into the law by construction. Liberty of contract is the rule, and limitations and restrictions the exceptions. *Simon v. Queens Ins. Co. (La.)*, 14-847.

(14) Condition against assignment of policy.

Assignment as collateral security. — The assignment or hypothecation of a policy

of fire insurance of the face value of \$2,000 to a creditor, as collateral security for an extension of time on a debt of \$300, does not constitute or amount to an assignment of the policy in violation of a stipulation contained therein to the effect that the policy shall be void if "assigned before loss." *Allen v. Phoenix Assur. Co. (Idaho)*, 10-328.

(15) Mortgage clause.

Mortgage bound by appraisal. — A "mortgage clause" attached to a fire insurance policy at the time the same is executed, which clause makes the loss, if any, under the policy, payable to the mortgagee as his interest may appear, is not an assignment of the policy to such mortgagee, and, in the absence of fraud or collusion, he is bound by the award of appraisers provided for and required by the terms of the policy in the event of a disagreement between the insured and the insurance company as to the amount of the loss, although the mortgagee was not a party to and had no notice of the appraisal and award. *Erie Brewing Co. v. Ohio Farmers Ins. Co. (Ohio)*, 18-265.

(16) Iron safe clause.

(a) In general.

Validity of clause. — It is competent for the parties to a contract of fire insurance to stipulate that, in order to preserve exact evidence of the extent of the loss, the books of account and inventory of the insured shall be kept in an iron safe; and the promise of the insurer to indemnify the insured is a sufficient consideration to support such undertaking. *King v. Concordia Fire Ins. Co. (Mich.)*, 6-87.

Promissory warranty. — What is commonly known as the "iron-safe clause" in a policy of insurance, requiring the insured to "keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit," is a promissory warranty. *Ætna Ins. Co. v. Johnson (Ga.)*, 9-461.

Clause in rider attached to policy. — It cannot be contended that an "iron-safe clause," which is contained in a rider attached to a fire insurance policy and not in the policy itself, is not a part of the contract, where the rider also contains the description of the property insured. *King v. Concordia Fire Ins. Co. (Mich.)*, 6-87.

Necessity of exact compliance by insured. — The promissory warranty contained in an iron-safe clause in a policy of fire insurance must be complied with by the insured; but in determining what it requires, a fair and liberal construction is to be placed upon it so as to effectuate the contract of indemnity, rather than to defeat it. *Ætna Ins. Co. v. Johnson (Ga.)*, 9-461.

What constitutes compliance by insured. — It is a sufficient compliance with the usual "iron-safe clause" of a fire insurance policy, in respect to the keeping of books,

if from the books kept by the insured, with the assistance of those who understand the system on which they were kept, the amount of purchases and the amount of sales can be ascertained, and cash transactions distinguished from those on credit. *Ætna Ins. Co. v. Lipsitz (Ga.)*, 14-1070.

What constitutes violation. — The iron-safe clause in a fire insurance policy held not to have been complied with. *St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co. (La.)*, 3-821.

In an action on a policy of fire insurance, where it appears that a small store or "commissary" in the country was conducted by the insured in connection with a lumber business, and that tickets were given to the employees for the sums due them for work, which tickets were treated as cash at the store, the amount of each purchase being indicated on the ticket by a punch and entered as a cash sale, and it further appears that there were no credit sales, but that the aggregate of the cash sales each day was entered at the close of the day, and it further appears that all goods were sold at a profit of from twenty-five to fifty per cent., it cannot be said as a matter of law that there was a violation of the requirement of the iron-safe clause of the policy as to keeping books. *Ætna Ins. Co. v. Johnson (Ga.)*, 9-461.

Effect of violation. — A policy of fire insurance is rendered void by the failure of the insured to comply with the requirements of the "iron-safe clause," where the policy so provides, notwithstanding the provision of the Michigan statute that a policy shall not be avoided for a breach of condition which does not injure the insurer. *King v. Concordia Fire Ins. Co. (Mich.)*, 6-87.

Waiver by insurer. — Where a clause in a policy of fire insurance requires the insured to "keep his books and inventory in an iron safe at night, or at some place secure against fire in another building," and the insurer knows at the time he solicits the insurance that the insured has no iron safe, the fact that there is no building in town safer than the building in which the insured goods are stored does not constitute a waiver of the requirement that the books shall be kept in another building. *King v. Concordia Fire Ins. Co. (Mich.)*, 6-87.

(b) Sufficiency of inventory.

In general. — In determining what constitutes an inventory within the meaning of an iron-safe clause in a policy of fire insurance, regard must be had to the purpose for which the inventory is required, and in ascertaining this purpose all parts of the clause should be read and construed together. *Ruffner v. Dutchess Ins. Co. (W. Va.)*, 8-866.

Itemized list with values. — An inventory of a stock of merchandise, within the meaning of the term "inventory" as used in what is known as the "iron-safe clause" of a fire insurance policy, is a list of all the articles of merchandise in the stock, sufficiently itemized to show the kinds and numbers or

quantities thereof, together with their values at the time of making the same, as nearly as they can be ascertained. *Ruffner v. Dutchess Ins. Co. (W. Va.), 8-866.*

Invoice of goods. — In the case of a store which opens with an entirely new stock of goods at or about the date of the issuance of a policy of fire insurance on the building and the goods, the invoices of the first lot of goods put into the store, giving the quantities of the goods by items, with the cost prices, will, if they are preserved and kept for production upon the demand of the insurer as and for an inventory, constitute an inventory within the meaning of the iron-safe clause in the policy, even though they are not pinned together and indorsed "inventory." *Ruffner v. Dutchess Ins. Co. (W. Va.), 8-866.*

List of goods without prices. — In an action on a policy insuring a store and its contents against fire, where the evidence shows that the insured kept a merchandise account which purported to show goods purchased, and that some of the items in such account stated the character of the goods and their prices, but that there were other items, aggregating in amount nearly one-half of the whole sum, which merely stated in each case the name of some person or firm with the added word "bill" and the total amount due such person or firm, this evidence, in the absence of any other evidence of a compliance with the requirements of the iron-safe clause in the policy as to keeping books, is insufficient to show compliance with such requirement. *Ætna Ins. Co. v. Johnson (Ga.), 9-461.*

Inventory in foreign language. — Where the only complaint as to an inventory, required by an insurance policy to be taken of the stock of goods insured, is that part of it was in Hebrew, it not being stated what portion thereof was in such language, and it not appearing from the record that any portion of the inventory was in Hebrew, such complaint is without merit. *Ætna Ins. Co. v. Lipsitz (Ga.), 14-1070.*

(17) Provision for suspension of liability.

Validity. — A stipulation for a suspension of liability under a policy of fire insurance in case of default in payment of the premium, is a reasonable one, violating no principle of public policy, and becomes effective against the insured upon default. *McCullough v. Home Ins. Co. (Tenn.), 12-626.*

h. Renewal of policy.

Continuance of conditions in original policy. — Unless otherwise expressed, the renewal of a policy of fire insurance, though a new contract, will be construed to be subject to the terms and conditions contained in the original policy. *Bickford v. Ætna Ins. Co. (Me.), 8-92.*

i. Assignment of policy after loss.

Necessity of consent by insurer. — An assignment of a fire insurance policy after

loss is valid without the consent of the insurer, although the written transfer purports by its terms to be subject to the consent of the insurer. *Georgia Co-operative F. Assoc. v. Borchardt (Ga.), 3-472.*

An assignment of a fire insurance policy without the consent of the insurer after a loss does not render the policy void, but the assignee has a right to bring an action thereon. *Georgia Co-operative F. Assoc. v. Borchardt (Ga.), 3-472.*

j. Cancellation of policy.

(1) What constitutes.

Telegram to agent directing cancellation. — Where a fire insurance policy provides that the insurance company may cancel the same upon five days' notice to the insured, a telegram sent by the company to its agent, directing the latter to cancel the policy does not operate *per se* as a cancellation, even though it is exhibited to the insured, and until there is some affirmative action on the agent's part, canceling the policy, it remains in force and effect. *Fireman's Fund Ins. Co. v. Hellner (Ala.), 17-793.*

Question for jury. — In an action against a fire insurance company to recover the amount of a policy issued by it, where the defendant claims that the policy has been canceled, and the evidence shows that the defendant sent a telegram to its agent directing him to cancel the policy, but the evidence as to whether the agent served notice on the insured of the cancellation of the policy and demanded its surrender is conflicting, the question whether there has been an effective cancellation is one for the jury. *Fireman's Fund Ins. Co. v. Hellner (Ala.), 17-793.*

(2) Notice to insured.

Necessity. — Where a fire insurance agent cancels a policy and insures the property in another company, and the assured ratifies the transaction, the company in which the new insurance is effected cannot, after a loss has occurred, object that the original policy was canceled without due notice to the assured. *Phoenix Ins. Co. v. State (Ark.), 6-440.*

Form of notice. — Notice of the cancellation of such policy need not be in writing or in any particular form. It is only necessary that the company shall positively, distinctly, and unequivocally indicate to the insured its intention that the policy shall cease to be binding as such upon the expiration of five days from the time when its intention is made known to the insured. *Davidson v. German Ins. Co. (N. J.), 12-1065.*

Waiver of notice. — The assured may waive a stipulation in a fire insurance policy that it shall not be canceled except upon the giving of a specified notice to him, as the stipulation is for his benefit. *Phoenix Ins. Co. v. State (Ark.), 6-440.*

Power of agent to cancel without notice. — Where a property owner constitutes the agent of fire insurance companies as his

agent to keep the property insured and empowers him to select the insurer, the agent has power to cancel a policy without notice to the insured and to substitute therefor a policy in another company, as an agent for insurance companies may be the agent of the insured for those purposes. *Phoenix Ins. Co. v. State* (Ark.), 6-440.

(3) Return or tender of premiums.

Necessity. — Under the cancellation clause in a standard policy of fire insurance the company is not required to pay or tender the unearned premiums in order to bring about a cancellation of the policy. *Davidson v. German Ins. Co.* (N. J.), 12-1065.

The return of the unearned portion of a premium paid on a policy of fire insurance is not a condition precedent to the right of the insurer to insist upon a forfeiture in an action brought against it on the policy, where the policy provides expressly that an unearned premium shall be returned on the surrender of the policy, and no surrender has been made. *Weddington v. Piedmont Fire Ins. Co.* (N. Car.), 8-497.

Where risk never attached. — Where, by reason of the breach of a condition precedent, a policy of fire insurance never attached and no risk was assumed thereunder, the insured may recover back premiums paid by him, unless he has been guilty of fraud, or unless the contract is illegal and he is *in pari delicto*; but the failure of the insurer to offer to return the premiums which were paid voluntarily before the insured was notified that the policy was not in force does not preclude the insurer from setting up the breach of condition as a defense to an action on the policy. *Parsons, Rich & Co. v. Lane* (Minn.), 7-1

k. Reformation of policy.

Reformation after loss for mistake in name of assured. — Where, on oral application for a policy of insurance to indemnify the applicant against loss by fire for the period of one year, the proper agent of the insurer agrees to issue to the applicant a policy of insurance as contracted for, but by mistake of the insurer's agent another's name is inadvertently inserted therein as the insured, and the policy is delivered to the applicant by the insurer, who collects the premium, and the applicant retains the policy without discovering the mistake until after sustaining a loss by fire nearly three months thereafter, equity will reform the policy so as to make it accord with the oral agreement between the parties. *Niagara Fire Ins. Co. v. Jordan* (Ga.), 20-363.

l. Loss and adjustment.

(1) What constitutes loss or damage by fire.

Overheating without ignition. — Under a policy insuring "against all direct loss and damage by fire," the insured is entitled to recover for a loss resulting from the build-

ing of a fire in a furnace in a dwelling house with material of a highly inflammable nature, not intended for use in such furnace, whereby intense heat and great volumes of smoke are forced through the register, greatly damaging the furnishings of the house and other personal property of the insured, even though there is no actual ignition outside of the furnace. Such a fire is a "hostile" fire, as that term is used in the law of insurance, as distinguished from a furnace fire of ordinary character which causes damage by overheating because not properly attended to or watched. For damage caused by a fire of the latter character, known in insurance law as a "friendly" fire, there can be no recovery under an insurance policy, in the absence of actual ignition. *O'Connor v. Queen Ins. Co.* (Wis.), 17-1118.

(2) Rights of mortgagee upon occurrence of loss.

Insured property sold by mortgagor.

— The right of a mortgagee to recover on a fire insurance policy taken out by the mortgagor for his benefit is not affected by the subsequent conveyance of the equity of redemption by the mortgagor. *Union Institute for Savings v. Phoenix Ins. Co.* (Mass.), 13-433.

Policy in possession of mortgagor. —

A policy of fire insurance procured by the mortgagor and made payable to the mortgagee as his interest may appear, in accordance with a covenant in the mortgage that the mortgagor shall keep the property insured for the benefit of the mortgagee, inures to the benefit of the mortgagee in case of loss by fire, although the mortgagor has retained possession of the policy and the mortgagee has not been informed at the time of the fire that the policy has been taken out for his benefit. *Union Institute for Savings v. Phoenix Ins. Co.* (Mass.), 13-433.

Right of mortgagee to make proof of loss. —

Under a provision of a fire insurance policy procured by a mortgagor for the benefit of the mortgagee, that the insured, who is the mortgagor, shall give the insured notice of loss and that an arbitration of the loss shall be held in case the parties fail to agree on the amount, the mortgagee has the right, in case of the failure of the insured to take the action required by the policy, to make the statement of the loss and to ask for an arbitration. *Union Institute for Savings v. Phoenix Ins. Co.* (Mass.), 13-433.

Application of conditions of forfeiture. —

Where a policy of fire insurance contains a clause providing that in the event an interest in the policy in favor of a mortgagee is created with the consent of the insurer "the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," the interest of a mortgagee is free from all conditions for forfeiture contained in the body of the policy, except such as are repeated in substance at

least, at the time of the creation of the policy by being at that time again written upon the policy or attached or appended thereto. *Welch v. British American Assurance Co. (Cal.)*, 7-396.

Tender of amount of mortgage as defense. — An insurance company sued by a mortgagee on a policy taken out by the mortgagor for the mortgagee's benefit cannot avail itself of the fact that several months after the commencement of the action the defendant offered to pay the plaintiff the amount of the mortgage without any offer to pay interest or the costs of the suit. *Union Institute for Savings v. Phoenix Ins. Co. (Miss.)*, 13-433.

- (3) Subrogation of insurer to rights of insured against person causing loss.

Parties to action. — An action to recover for the destruction of insured property by fire as the result of the defendant's negligence is properly brought in the name of the assured for the use of the insurer who has paid the loss. The insured need not be joined as a plaintiff. *Cushman, etc., Co. v. Boston, etc., R. Co. (Vt.)*, 18-708.

Effect of release from assured. — The right of an insurer who has paid a loss under a fire policy to recover from a person whose negligence caused the fire is not defeated by a release obtained from the assured by such person with knowledge of the payment by the insurer. *Cushman, etc., Co. v. Boston, etc., R. Co. (Vt.)*, 18-708.

- (4) Arbitration and appraisal.

Qualifications of appraiser. — The mere fact that the person selected by the insured as his appraiser has, before his selection, made an estimate of the injury to the property for which he has been paid by the insured, is not alone sufficient to disqualify him to act as appraiser, though this fact may be considered by the jury in determining his competency and disinterestedness. *National Fire Ins. Co. v. O'Bryan (Ark.)*, 5-334.

It is a question for the jury whether a person designated as an appraiser is "competent and disinterested" in accordance with the requirements of a fire insurance policy. *National Fire Ins. Co. v. O'Bryan (Ark.)*, 5-334.

Right to sue upon policy where appraisers cannot agree upon umpire. — Under a fire insurance policy providing that in the event of a disagreement as to the amount of the loss each party shall appoint an appraiser, and the two appraisers shall select an umpire and appraise the loss, and that no action shall be maintained on the policy until such appraisal has been made the insured discharges his obligation in that respect when he appoints an appraiser in good faith; and where the two appraisers fail to agree upon an umpire, and the appraisal fails without the fault of the insured, he is not required to propose the selection of other appraisers, but may maintain

an action upon the policy. *Jerrills v. German American Ins. Co. (Kan.)*, 20-251.

- (5) Effect of adjustment.

Adjustment after assignment of policy. — In a suit upon a fire insurance policy brought by the assignee thereof against the company issuing it, the defendant cannot be held bound by an adjustment of a loss sustained under the policy, made after the assignment between the insurer and the assignor of the policy, unless in such adjustment the assignor acted as the agent of the assignee. *Georgia Co-operative F. Assoc. v. Borchardt (Ga.)*, 3-472.

- (6) Notice and proofs of loss.

- (a) In general.

As condition precedent to action on policy. — An action on a fire insurance policy cannot be maintained unless proofs of loss under the policy are furnished within a reasonable time after the fire, or the furnishing of such proofs is waived. *Harp v. Fireman's Fund Ins. Co. (Ga.)*, 14-299.

Where a fire insurance policy provides that proofs of loss shall be made within sixty days from the fire unless the time is extended in writing by the insurer, and that no action shall be maintainable on the policy unless the insured has complied with its requirements, the making of proofs of loss within such time is, in the absence of a reasonable excuse for delay, a condition precedent to the right to recover. *Davis v. Northwestern Mut. Fire Assoc. (Wash.)*, 15-333.

Under a fire insurance policy procured by a mortgagor for the benefit of the mortgagee, providing that in case of loss a statement in writing shall forthwith be rendered to the company by the insured, meaning the mortgagor, and that an arbitration shall be had in case the parties fail to agree as to the amount of the loss, and that the insurer shall have the option of rebuilding the property, the making of the statement required is a condition precedent to the right to recover on the policy, and the fact that no such statement is made either by the insured or by the mortgagee defeats any right of action on the policy by the mortgagee, notwithstanding a provision in the policy that no act or default of any person other than the mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss. *Union Institute for Savings v. Phoenix Ins. Co. (Mass.)*, 13-433.

Effect of failure to furnish on time. — Where a fire insurance policy stipulates that proof of loss must be furnished by the insured within sixty days after the fire, but contains no express provision that the policy shall be void or forfeited upon failure to furnish proofs as required, and the policy expressly declares that the happening of certain other contingencies shall void it and further provides that the loss thereunder shall not be payable until sixty days after such proofs are furnished, and that no suit

on the policy shall be sustainable until after full compliance by the insured with all its requirements, or unless commenced within twelve months after the fire, the failure of the insured to furnish proofs of loss within sixty days from the fire will not work a forfeiture of the policy, but failure to furnish such proofs at least sixty days before the expiration of twelve months from the fire, unless there be a waiver of such proofs, will prevent the maintenance of a suit on such policy. *Harp v. Fireman's Fund Ins. Co. (Cal.)*, 14-299.

Effect of failure to complete before suit. — Under the Insurance Act of Ontario an action on a fire insurance policy cannot be defended on the ground that the proofs of loss were defective and were not completed before suit, there being no suggestion that the defendant has been prejudiced by the delay, and the trial judge having found good faith and a want of fraud on the plaintiff's part. *Thompson v. Equity Fire Ins. Co. (Can.)*, 13-532.

Excuse for failure to file. — Where there is nothing to indicate that the insured has been misled in any way, the mere fact that he is a farmer who is ignorant of insurance methods does not excuse his failure to file such proofs of loss within the prescribed time. *Davis v. Northwestern Mut. Fire Assoc. (Wash.)*, 15-333.

Time to amend. — Where, under a policy of fire insurance allowing sixty days for furnishing proof of loss, the insured furnishes proof within twelve days after sustaining the loss, and no objection thereto is made by the insurer until within a day or two of the expiration of the sixty days, the insured is entitled to a reasonable time after the objection within which to correct the alleged defects in the proof. *Planters' Mutual Ins. Assoc. v. Hamilton (Ark.)*, 7-55.

(b) Waiver of proofs of loss.

Absolute refusal to pay loss. — An absolute refusal by a fire insurance company to pay a loss, made before the expiration of the reasonable time within which the insured must furnish proofs of loss, will be a waiver of such proofs, but a refusal to pay, made after such reasonable time has expired, will not be a waiver of the proofs. *Harp v. Fireman's Fund Ins. Co. (Ga.)*, 14-299.

Denial of liability on other grounds. — A denial by an insurance company of its liability on other grounds within the time allowed for furnishing preliminary proofs of loss is a waiver of the conditions of the policy requiring such proofs. *Medley v. German Alliance Ins. Co. (W. Va.)*, 2-99.

Where an insurer against fire denies liability for a loss and refuses payment on the ground that the insured burned the property, it thereby waives the failure of the insured to furnish proof of loss within the time required by the policy. *Planters' Mutual Ins. Assoc. v. Hamilton (Ark.)*, 7-55.

Proceeding to adjust loss. — The provision of a fire insurance policy requiring

sworn proofs of loss is waived where the insurer's adjuster proceeds to adjust the claim or loss, saying that the proofs "ought to be sworn to," but it is not necessary, that he will "go ahead and settle just the same," and there is no denial of liability for want of the sworn proofs until the time for making such proofs has expired. *McCollough v. Home Ins. Co. (Cal.)*, 18-862.

Representations that proofs are unnecessary. — The provision of a fire insurance policy requiring sworn proofs of loss may be waived by representations by the insurer's adjuster to the insured that the proofs are not necessary, though the policy provides that "any action taken by" the insurer "in investigating the cause of fire and ascertaining the amount of loss . . . shall not waive or invalidate any of the conditions of the policy," because such provision does not refer to affirmative representations calculated to lead the insured into the belief that the proofs will not be required. *McCollough v. Home Ins. Co. (Cal.)*, 18-862.

Denial of all liability by adjuster. — Where a fire insurance company, upon being notified of a loss under a policy issued by it, sends an adjuster to inquire into the loss, and the adjuster while engaged in or at the conclusion of his investigations refuses payment and denies all liability of the company under the policy, his action, if taken within the time stipulated in the policy for the making of formal proofs of loss, constitutes a waiver by the company of such formal proofs. *Ohio Farmers' Ins. Co. v. Vogel (Ind.)*, 9-91.

In an action by the insured on a fire insurance policy, where the evidence shows that the defendant insurance company sent its agent and adjuster to the place where the loss occurred to take the proofs and adjust the loss; that after examination and investigation by such adjuster he informed the insured that the defendant could not and would not pay the loss, and based the refusal to pay on the sole ground that the policy had been assigned; that the adjuster then informed the insured that he had nothing further to do with the matter, and the insured would have to deal directly with the defendant; that the defendant, on the other hand, through its home office, informed the insured that the matter was still in the hands of their adjuster; and that the adjuster thereafter refused to negotiate and deal further with the insured concerning an adjustment of the loss, the evidence is sufficient to establish a *prima facie* case of waiver of proofs and to entitle the plaintiff to have the question of waiver submitted to the jury. *Allen v. Phoenix Assur. Co. (Idaho)*, 10-328.

Power of adjuster to waive. — In an action by the insured on a policy of fire insurance, where it appears that a condition in the policy requiring the presentation of proofs of loss within a specified time was waived by a general agent who was sent out by the insurer for the purpose of representing it in the adjustment of the loss, and that the conduct of such agent was well calculated to lull the insured into a false sense of security, the

insurer is bound by the waiver and is estopped to set up a condition in the policy providing "that no officer, agent, or other representative" shall have power to waive any provision or condition of the policy. *Bernhard v. Rochester German Ins. Co. (Conn.)*, 8-298.

In an action by the insured on a policy of fire insurance, the plaintiff may show that a condition in the policy was waived by the defendant's general agent and that the defendant is bound by such waiver, notwithstanding the fact that the plaintiff pleads in terms a waiver and not an estoppel on the part of the insurer, as an estoppel *in pais* need not be pleaded. *Bernhard v. Rochester German Ins. Co. (Conn.)*, 8-298.

When not inferred. — A waiver of a provision of a fire insurance policy requiring notice of loss is not to be inferred where there is no word or act on the part of the insurance company or any of its agents showing any other attitude of the company as to claim on the policy except that of standing upon all of its legal rights. *Union Institute for Savings v. Phenix Ins. Co. (Mass.)*, 13-433.

Sufficiency of evidence to show. — Evidence reviewed, in an action by the insured on a fire insurance policy, and held sufficient to justify the trial court in finding that a general agent of the defendant waived a condition in the policy requiring proofs of loss to be furnished within a specified time. *Bernhard v. Rochester German Ins. Co. (Conn.)*, 8-298.

New trial to prove. — An appellate court which reverses a judgment for the insured in a fire insurance policy on the ground that proofs of loss were not filed within the time prescribed in the policy will not grant the request of the insured for a new trial to enable him to amend his complaint by alleging a waiver by the insurer, where it appears that notwithstanding the express reliance in the trial court by the insurer on the failure to comply with the terms of the policy, the insured failed to offer any evidence of waiver, and that the evidence introduced by the insurer indicated that it stood upon its strict rights under the policy. *Davis v. Northwestern Mut. Fire Assoc. (Wash.)*, 15-333.

m. Action on policy.

(1) Nature of action.

Whether on policy or adjustment. — An action construed and held to be upon insurance policies and not upon a written adjustment of the loss and a promise in writing by the insurer to pay the amount shown by the adjustment. *George Co-operative F. Assoc. v. Borchardt (Ga.)*, 3-472.

(2) Time to sue.

Six months limitation in policy. — The provision in a policy of fire insurance that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after

full compliance by the insured with all the foregoing requirements, nor unless commenced within six months next after the fire," is unambiguous, and in suit on the policy commenced more than six months after the date of the fire, will be enforced in accordance with the plain meaning of its terms, where no extrinsic facts are alleged excusing the delay in bringing the suit. *Appel v. Cooper Ins. Co. (Ohio)*, 10-821.

When time begins to run. — Where a policy of fire insurance contains the provision that no suit or action shall be sustained thereon unless commenced within six months next after the fire, the period of limitation begins to run from the date of the fire, notwithstanding the policy also contains the provision that "the loss shall not be payable until sixty days after proofs of loss have been received by the company." *Appel v. Cooper Ins. Co. (Ohio)*, 10-821.

Action on contract of reinsurance. — Where a contract of reinsurance against fire is evidenced by a typewritten slip or rider attached to a printed form of an ordinary policy of original insurance, a clause in the printed form providing that no action may be maintained on the policy unless commenced within twelve months next after the fire is not applicable to the contract of reinsurance. *Home Ins. Co. v. Victoria-Montreal Fire Ins. Co. (Eng.)*, 7-35.

(3) Parties.

Where loss is payable to mortgagee. — On a fire insurance policy in the name of the plaintiff on property owned by her, containing a clause to the effect that a loss is payable to the mortgagee as its interest may appear, the plaintiff may sustain an action. *Staats v. Georgia Home Ins. Co. (W. Va.)*, 4-541.

Substitution of assignee as plaintiff. — Where the holder of policies of fire insurance, without notice to the insurers, assigns to a creditor bank, subsequent to a fire, all right and title to any money payable on the policies, and authorizes said bank to give a good discharge to the insurance companies, and in actions on the policies by the insured the bank is added as plaintiff *ab initio* by the trial judge, the actions as originally begun are not nullities, but are at most only defectively constituted, and although the bank is not made a party until more than a year after the loss, its remedy is not barred by statute, but it will be given the benefit of the proceedings from the beginning, the trial judge having seen fit in his discretion to impose no terms in making it a party. *Thompson v. Equity Fire Ins. Co. (Can.)*, 13-532.

(4) Defenses.

Removal of goods before fire. — In an action on a fire insurance policy which contains no stipulation preventing the insured from reducing the amount of the stock of goods in any manner, it is erroneous to instruct the jury that if the plaintiff "re-

moved his property or any part of it from the building before the fire, except in the usual course of selling goods, this would be a fraud on defendant" and would discharge the latter from liability under the policy. *Beavers v. Security Mutual Ins. Co. (Ark.)*, 6-585.

Assignment of policy. — Where a second assignment of the insured's rights in a policy of fire insurance is made subject to the relinquishment of the claim of a prior assignee, the insurance company having notice of the terms of the second assignment and of the fact that the claim of the first assignee has not been relinquished, cannot defend an action on the policy by showing a prejudicial agreement with such second assignee. *Thompson v. Equity Fire Ins. Co. (Can.)*, 13-532.

(5) Declaration, petition, or complaint.

Averment that plaintiff is beneficial owner. — Under the Alabama statute authorizing actions on contracts of fire insurance to be brought by the beneficial owners, the complaint in such an action is demurrable if it does not aver, or allege facts sufficient to show, that the plaintiff is the beneficial owner. *Norwich Union Fire Ins. Co. v. Prude (Ala.)*, 8-121.

Amendment of policy filed with complaint. — A copy of an insurance policy filed with a declaration on a fire insurance policy may be amended to conform to the original in case of variance. *Staats v. Georgia Home Ins. Co. (W. Va.)*, 4-541.

(6) Plea or answer.

Breach of condition subsequent. — Where an insurer against fire relies on a condition subsequent in the policy of insurance to defeat the right of the insured to recover after the loss, the insurer must specially plead such condition and breach thereof, and the plaintiff in an action to recover on the policy has a right to introduce evidence to rebut any proof of breach of condition so pleaded, or to show a waiver of the condition by the insurer. *Allen v. Phoenix Assur. Co. (Idaho)*, 10-328.

(7) Evidence.

Ownership of insured property. — In an action by a corporation on a fire insurance policy the ownership of the insured property is sufficiently established by a deed of the property to the corporation, although such deed was made before the charter of the corporation was granted and the corporation was chartered in a name slightly different from that to which the deed was made. *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co. (S. Car.)*, 11-780.

Membership of defendant in tariff association. — In an action on a fire insurance policy, where the plaintiff seeks to recover the statutory penalty of twenty-five per cent. of the actual loss or damage, because of the membership of the insurer in a tariff association at the time of or subsequent to the issuance of the policy, it is not error to per-

mit an employee of such a tariff association to testify that the defendant insurance company was a member of the same. *Fireman's Fund Ins. Co. v. Hellner (Ala.)*, 17-793.

Mistake in policy. — In an action on a policy of fire insurance on personal property described and insured as located in a certain building, when in fact it was in another, it is not necessary for the plaintiff, before he can recover the amount of insurance, to pray for and secure a decree reforming the policy, but he is entitled to recover upon showing that the agreement of the parties located the property where it actually was, and that by the mistake of fraud of the defendant's agent the agreement was misstated in the policy. *Ætna Ins. Co. v. Brannon (Tex.)*, 13-1020.

Where in an action on a policy of fire insurance which contracts to insure personal property while in a certain house, the plaintiff claims that through mistake or fraud of the insurance agent the policy does not state the true agreement, which was to insure the property while in another house in which the property was actually located, the defendant is not estopped to disprove this contention and show, if it can, that the policy correctly states the contract, or that the agent never assented to a contract to insure the property in the house in which it was actually located. *Ætna Ins. Co. v. Brannon (Tex.)*, 13-1020.

Reason why condition as to appraisers not performed. — In an action upon a fire insurance policy the petition, after alleging the issuance of the policy, the payment of the premium, and a loss by fire, alleged due performance of the conditions of the policy on the part of the insured. The answer alleged that after the fire occurred a disagreement arose as to the amount of the loss, and that the same had never been ascertained by appraisers as provided by the policy. The reply was a general denial. Held, that under the pleadings it was proper for the plaintiff to show that he appointed an appraiser in good faith and that the two appraisers were unable to agree upon an umpire, for which reason no appraisal was made. *Jerrills v. German American Ins. Co. (Kan.)*, 20-251.

(8) Nonsuit or direction of verdict.

When nonsuit is improper. — In an action by the insured on a fire insurance policy, where the plaintiff makes a *prima facie* case establishing the facts of the issuance and delivery of the policy and the payment of the premium thereon, the loss through and on account of the cause insured against and the furnishing of notice and proofs to the insurer as required by the policy (or the waiver thereof on the part of the insurance company), the case should go to the jury, and it is error for the trial court to grant a nonsuit. *Allen v. Phoenix Assur. Co. (Idaho)*, 10-328.

Direction of verdict for plaintiff. — Ordinarily in an action on a fire insurance policy the question whether the loss proved by the plaintiff is within the terms of the policy is one for the jury, but where the evi-

dence showing the loss to be one for which the plaintiff is entitled to recover is practically undisputed, it is not error for the court to direct a verdict in plaintiff's favor. *O'Connor v. Queen Ins. Co. (Wis.)*, 17-1118.

(9) Instructions.

Duty to keep books in safe. — In an action on a fire insurance policy an instruction to the jury concerning the duty of the insured to keep his books of account in an iron safe or in some other safe place, where there is no condition or agreement in the policy or elsewhere imposing such duty, is an abstract instruction. *Beavers v. Security Mutual Ins. Co. (Ark.)*, 6-585.

(10) Judgment.

Inclusion of interest. — In an action by the insured on a policy of fire insurance, the court, in rendering judgment for the plaintiff, may include interest, where it is only by such inclusion that the court can compensate the plaintiff for what he has suffered by reason of the delay resulting from the defendant's wrongful act. *Bernhard v. Rochester German Ins. Co. (Conn.)*, 8-298.

Attorney's fees. — The Florida statute providing for the recovery of attorney's fees in actions against fire insurance companies by holders of policies is constitutional and was not repealed by chapter 4677 of the Laws of 1899. *L'Engle v. Scottish Union, etc., Ins. Co. (Fla.)*, 5-748.

n. Recovery of payment induced by fraud.

Right of recovery. — The payment of a loss by a fire insurance company does not constitute a waiver of all breaches of the policy and prevent a recovery of the money if the payment is procured by fraudulent representations by the insured in regard to material matters. *Palatine Ins. Co. v. Kehoe (Mass.)*, 14-690.

Evidence. — In an action by a fire insurance company to recover money paid on a policy, on the ground that the property was in process of removal and therefore not within the protection of the policy, evidence of the assignment of the policy to the defendant by her husband after the payment to her by the plaintiff, with the assent of the plaintiff's agent indorsed upon the policy, is admissible. *Palatine Ins. Co. v. Kehoe (Mass.)*, 14-690.

Instructions. — In an action by a fire insurance company to recover back money paid for the destruction of property claimed by the plaintiff to have been in process of removal from one authorized location to another, and therefore not within the protection of the policy, an erroneous instruction that the policy might cover a portion of the property while in transmission from one place to another is important as bearing upon the question of the materiality of fraudulent representations by the defendant that the property had not been removed from the place where it was when the policy was is-

sued, there being evidence that such representations were made. *Palatine Ins. Co. v. Kehoe (Mass.)*, 14-690.

6. MARINE INSURANCE.

Persons entitled to benefit of open policy. — Where brokers, instructed by the agents of the owners of a ship, take out a policy of insurance on the same "as well in their own names as for and in the name and names of all and every other person or persons to whom the subject-matter shall appertain in part or in all," and charterers of the ship from such owners are compelled to pay damages to the owner of another ship on account of a collision between the two vessels, such charterers are not entitled to sue on the policy, though it contains a collision clause, there being no evidence of any intention by such owners to insure on behalf of the charterers. *Boston Fruit Co. v. British, etc., Ins. Co. (Eng.)*, 4-498.

Insurable interest in cargo. — A light-erage and towing company has an insurable interest in a cargo which it undertakes to transport, and a policy of marine insurance on such cargo issued to the lighterage company "on account of whom it may concern" does not inure to the benefit of the owners of the cargo or amount to double insurance by reason of the fact that the cargo is covered by another policy of insurance issued to the owners, in the absence of any showing that the owners are in fact the parties concerned in the insurance issued to the lighterage company or have availed themselves of its advantages. *Western Assur. Co. v. Chesapeake Lighterage, etc., Co. (Md.)*, 11-956.

Warranties. — A warranty in a marine insurance policy "not to carry cargo other than kerosene oil" relates to the cargo only, and is not broken by the carriage of passengers. *Yangtze Ins. Assoc. v. Indemnity Mut. Mar. Ins. Co. (Eng.)*, 15-239.

Liability of insurer for loss by negligence. — In an action on a policy of marine insurance by a lighterage and towing company for the value of a scow load of corn, the fact that the crew negligently permitted the scow to drift does not require or warrant a charge that the scow was lost by a peril not insured against, the policy covering all losses and perils of the sea, barratry of master and marines, etc., *Western Assur. Co. v. Chesapeake Lighterage, etc., Co. (Md.)*, 11-956.

Excepted causes. — In an action on a policy of marine insurance by a lighterage and towing company for the value of a scow load of corn, the plaintiff's right to recover the value of the cargo, which value it has paid to other carriers, is not defeated by a provision in the policy that the insurer shall not be bound to pay any loss in case the insurance is made for the benefit of a carrier or bailee of the property other than the plaintiff. *Western Assur. Co. v. Chesapeake Lighterage, etc., Co. (Md.)*, 956.

In such an action papers showing the settlement made between the owners of the cargo and their insurer for the loss of the

cargo furnish competent evidence of the value of the cargo. *Western Assur. Co. v. Chesapeake Lighterage, etc., Co.* (Md.), 11-956.

Total loss. — In an action on a policy of marine insurance, the test of the question as to whether the ship, which has been seriously damaged by the perils insured against, can be treated as a constructive total loss, is whether a prudent uninsured owner would repair the ship, having regard to all the circumstances. *Macbeth v. Maritime Ins. Co.* (Eng.), 12-18.

In making, according to such test, the calculation as to whether the ship can be treated as a total loss, the assured is entitled to add the breakup or wreck value of the ship to the estimated cost of repairs. *Macbeth v. Maritime Ins. Co.* (Eng.), 12-18.

Evidence. — In an action on a policy of marine insurance by a lighterage and towing company for the loss of a scow load of corn which the plaintiff had contracted with a transfer company to carry from an elevator to a steamship, it is competent to prove by verbal testimony that the owner of the corn sued the steamship company which had contracted to carry the same, and was paid the value of the corn by the steamship company, and to trace this payment down to the plaintiff lighterage company, the payment of the money being one of the issues made by the pleadings, and the payment by the steamship company being one of the links of evidence on that subject. *Western Assur. Co. v. Chesapeake Lighterage, etc., Co.* (Md.), 11-956.

In such a case the admission of testimony of the payment by the steamship company is not objectionable because it is not followed by an offer of the record of the suit in which payment was made, showing that the successive payments were not voluntary, as the court cannot control the order in which the plaintiff offers his proof provided he tenders legal evidence material to the issue. *Western Assur. Co. v. Chesapeake Lighterage, etc., Co.* (Md.), 11-956.

In an action on a policy of marine insurance for the value of a scow load of corn, defended on the ground that the scow was unseaworthy at the time the risk was incurred, evidence tending to show that a swell caused by wind and a passing steamboat struck the scow broadside, causing the corn to shift and thereby upsetting her, furnishes an explanation of the accident which justifies the court in refusing to withdraw the case from the jury. *Western Assur. Co. v. Chesapeake Lighterage, etc., Co.* (Md.), 11-956.

7. LIFE INSURANCE.

a. Statutory regulation in general.

Validity of statute precluding certain defenses in actions on policies. — The Missouri statutes which have been construed by the state Supreme Court as cutting off any defense by a life insurance company which is based upon false and fraudulent statements in the application for insurance, unless the matter misrepresented actually

contributed to the death of the insured, are valid as applied to both foreign and domestic corporations, and are not repugnant to the Federal Constitution. *Northwestern National Life Ins. Co. v. Riggs* (U. S.), 7-1104.

b. Validity of contract.

Contract to discriminate between policyholders. — An executory contract between a life insurance company and one of its policyholders whereby the company agrees to treat such policyholder as one of a select body of its policyholders not to exceed a certain number, and to confer upon him, as a member of such select body, a right in a certain fund of the company, by means of which the annual premiums on his policy will be reduced until in a few years the policy will become self-sustaining, is in direct contravention of the North Carolina statute forbidding discrimination between insured persons of the same class and equal expectation of life, and is incapable of enforcement by the policyholder. *Smathers v. Bankers Life Ins. Co.* (N. Car.), 18-756.

Terms not expressed in policy. — Where such a contract as that above considered is the sole inducement for taking out the policy, the fact that its terms are not set forth in the policy presents a further obstacle to its enforcement, since the statute requires all the terms of the contract between the insured and the company to be plainly expressed in the policy. *Smathers v. Bankers Life Ins. Co.* (N. Car.), 18-756.

Parties in pari delicto. — The enforcement of a contract such as that above considered cannot be permitted on the theory that the statute forbidding discrimination was enacted for the benefit of policyholders, and should not be applied to their detriment. The benefit sought to be secured by the statute is the benefit of the policyholders in general, and not the benefit of an individual policyholder who has entered into an agreement of the forbidden class and is seeking to profit by its terms. Such a policyholder is *in pari delicto* with the insurance company as regards the violation of the statute. *Smathers v. Bankers Life Ins. Co.* (N. Car.), 18-756.

Actions on illegal contract. — The rule which permits a party to an illegal contract who has repudiated the same while the illegal portion was entirely executory, to recover what he has advanced thereon, has no application to an action brought by a policyholder to enforce such a contract as that above considered, after he has surrendered his policy and received the full surrender value of the same from the company. In such a case there is no repudiation of the illegal contract by the policyholder, or any wrongful withholding of his money by the insurance company. *Smathers v. Bankers Life Ins. Co.* (N. Car.), 18-756.

Validity of policy taken out to assign to person having no insurable interest. — Policies of life insurance payable to the insured's estate and taken out by him for the sole purpose of assigning them to a

third person having no insurable interest in the life of the insured but who agrees in consideration of the assignment to pay the insured a certain sum in cash and to pay the premiums on the policies, are void, and no action can be maintained on them by the administrator of the insured. *Bromley v. Washington Life Ins. Co. (Ky.)*, 12-685.

c. Nature of contract.

As continuing contract or from year to year. — A policy of life insurance is not a contract of assurance for a single year, with a privilege of renewal from year to year by paying the annual premiums. It is an entire contract of insurance for life, subject, when so stipulated, to discontinuance and forfeiture for nonpayment of any instalments of premium. Such instalments of premium are not intended as the consideration for the respective years in which they are paid, but each instalment is in fact part consideration of the entire insurance for life. *Haas v. Mutual Life Ins. Co. (Neb.)*, 19-58.

d. Parties.

(1) Persons having insurable interest.

Uncle of insured. — An uncle of one whose life is insured has no insurable interest in the life of the insured by reason of kinship. *Metropolitan Life Ins. Co. v. Ellison (Kan.)*, 7-909.

Effect of cessation of interest. — A valid policy of insurance on the life of the husband in favor of the wife is not rendered invalid by the subsequent cessation of insurable interest resulting from the procurement of a divorce by the wife, in the absence of a provision in the policy respecting cessation of insurable interest. *Blum v. New York Life Ins. Co. (Mo.)*, 7-1021.

A divorced wife is not precluded from recovering under a certificate of a fraternal insurance company in which she is named as the beneficiary. *White v. Brotherhood of American Yeomen (Ia.)*, 2-350.

(2) Rights of beneficiaries.

When interest of beneficiary attaches. — The interest of the beneficiary in a policy of old-line life insurance becomes a vested right immediately upon the issuance of the policy. *Blum v. New York Life Ins. Co. (Mo.)*, 7-1021.

Difference between rights of beneficiary in mutual benefit association and old line policy. — There is a difference between a certificate of membership in a mutual benefit association and an ordinary life insurance policy in reference to the vested interests of beneficiaries thereunder. *Perry v. Tweedy (Ga.)*, 11-46.

Right to terminate policy without consent of beneficiary. — The interest of one named as the beneficiary in a life insurance policy is a vested interest and the contract cannot be terminated by the insured or insurer without the consent of the beneficiary

except in the manner provided in the policy or by law. *Washington L. Ins. Co. v. Berwald (Tex.)*, 1-682.

Right to change beneficiary. — In ordinary life insurance, where no power of divestiture or to change the beneficiary is reserved in the policy, the issuance of the policy confers a vested right upon the person so named as beneficiary, and the insured cannot transfer such interest to any other person without the consent of such beneficiary. *Perry v. Tweedy (Ga.)*, 11-46.

Where a policy of life insurance is expressed to be for the benefit of the wife of the insured, if living, and if not living for the benefit of his children, the interest of the children, though contingent upon the death of the wife prior to the death of the insured, is so substantial that they cannot be deprived thereof by a subsequent change of the beneficiary. *Blum v. New York Life Ins. Co. (Mo.)*, 7-1021.

The Missouri statute providing that a husband whose life is insured for the benefit of his wife may, upon her death or divorce before his decease, designate another beneficiary, applies only to a policy in which the wife is the sole beneficiary. *Blum v. New York Life Ins. Co. (Mo.)*, 7-1021.

Where a wife has acquired a vested right as the beneficiary in a policy of insurance on her husband's life, her interest cannot be affected or impaired by a subsequent statute providing that "in the event of the death or divorce of the wife before the decease of her husband, he shall have the right to designate another beneficiary." *Blum v. New York Life Ins. Co. (Mo.)*, 7-1021.

Right of beneficiary to proceeds as against creditors of insured. — The Massachusetts statute (St. 1907, c. 576, § 73) providing that the beneficiary in a policy of life insurance shall be entitled to the proceeds of the policy as against the creditors and representatives of the insured, and that the beneficiary may sue on the policy in his own name merely protects the rights of beneficiaries when ascertained, and has no operation to increase or extend those rights. *Blinn v. Dame (Mass.)*, 20-1184.

Right to proceeds of policy where insured survives beneficiary. — The New York statute authorizing a wife to take out a policy of insurance on the life of her husband, and providing that the proceeds of the policy shall be payable to her for her own use, free from the claims of the representatives of her husband, or of any of his creditors, does not apply to a policy taken out by the husband for the benefit of his wife; and therefore where a husband takes out a policy payable to his wife "for her sole use, if living, in conformity with the statute, and if not living, to their children," the interest of the wife in the proceeds is contingent upon her survivorship of her husband, and if both the husband and wife die without having had any issue, and the wife predeceases the husband, his estate, and not hers, is entitled to the proceeds of the policy. *Bradshaw v. Mutual Life Ins. Co. (N. Y.)*, 10-266.

Where a man insured his life under a regular life policy, and designated, as the beneficiary to whom the amount of insurance should be paid at his death, his wife, her executors, administrators, or assigns, and she died before the death of the insured, without having made any assignment, her interest in the policy was an asset of her estate, and the persons who would be entitled, under the intestate laws, to share in the personal estate of such beneficiary at the time of her death would be entitled also to share in the proceeds of the policy upon the death of the insured. The fact that the policy was not payable until after the death of the insured would not prevent him from being interested in the assets left by the deceased. *Perry v. Tweedy* (Ga.), 11-46.

Where, after the death of an insured, the administrator of his wife, the beneficiary collected the amount due under two policies designating the wife of the insured, her executors, administrators, or assigns, as beneficiary, there having been no children or descendants of children, and the husband having been the sole heir of the wife, and having survived her, his administrators were entitled to recover from her administrators such proceeds, to be distributed as his estate, instead of being distributed among the mother, brothers, and sisters of the beneficiary. *Perry v. Tweedy* (Ga.), 11-46.

e. Construction of contract.

(1) In general.

Application as part of contract. — Where there is a variance between the application for a policy of life insurance and the policy itself as to the designated beneficiaries of the insurance, the designation of the policy prevails. *Burt v. Burt* (Pa.), 11-708.

Although an application for a policy of insurance is made a part of the policy, and is to be read in connection therewith, it confers no rights on persons whom it names as beneficiaries. *Burt v. Burt* (Pa.), 11-708.

Under the Massachusetts statute providing that no application for life insurance shall not be considered a part of the policy unless a copy thereof is attached to the policy, a copy of which is so attached forms a part of the contract, though it does not, as required by the statute, contain the words "under the laws of Massachusetts each applicant for a policy of insurance is entitled to be furnished with a copy of this application attached to any policy issued thereon," as the purpose of this provision is merely to inform the person applying for life insurance that he is entitled to have a copy of his application attached to his policy. *Moore v. Northwestern Mutual Life Ins. Co.* (Mass.), 7-656.

Rights of beneficiary. — Under a life insurance policy payable to "the insured, his executors, administrators, or assigns," on a certain day, or, if he dies before the day named, then payment to be made to his two

children, provided they survive him, otherwise to his executors, etc., with power to the insured to assign the policy or to surrender it at any time and to receive the surrender value, the rights of the children, whether regarded as contingent or as vested subject to divesting contingencies, are subordinate in every respect to the rights given by the policy to the insured; and the rights of the children are therefore defeated where the insured assigns the policy and the assignee surrenders it. *Blinn v. Dame* (Mass.), 20-1184.

(2) Warranties and representations.

(a) In general.

When answers and agreements amount to representations only. — Where an application for a life insurance policy, which is expressly made a part of the policy, stipulates that the insured warrants the statements and agreements made in such application or to the medical examiner to be full, complete, and true, the additional clause "without suppression of any fact or circumstance which would tend to influence the company in issuing a policy under this application," has the effect of qualifying the language by which it is sought to fix the character of warranties upon the answers and agreements of the insured, and makes such answers and agreements amount to representations only. In such stipulation the use of the word "warranty" is not to be taken as creating a warranty in law. *Reppond v. National Life Ins. Co.* (Tex.), 15-618.

A statement made by the assured as to health in order to obtain a revival of a life insurance policy held to be a representation and not a warranty. *Aetna Life Ins. Co. v. Rehlander* (Neb.), 4-251.

Breach of warranty where answers not responsive. — Although a policy of life insurance refers to and makes the application a part of the policy, yet only such statements as are made strictly in answer to the inquiries contained in the application can be regarded as warranties, and if the insurance company accepts an answer which is not responsive to a question contained in the application, and issues the policy, it cannot afterwards set up a breach of warranty upon that point as a defense to an action on the policy. *Peterson v. Manhattan Life Ins. Co.* (Ill.), 18-96.

Breach of warranty in answer to question calling for opinion. — An incorrect answer in an application for life insurance or in a statement made to a medical examiner for the insurer is a false warranty and avoids a policy issued to the applicant, though the question calls for an opinion and an answer is honestly made in the belief that it is true. *Schofield v. Metropolitan Life Ins. Co.* (Vt.), 8-1152.

Effect of false warranty. — Where, by express agreement of the parties, the statements contained in an application for a benefit certificate in a beneficial association are made warranties on the part of the appli-

cant, and the literal truth of each and every statement therein is made a necessary prerequisite to any liability on the part of the association, proof that one or more of the statements contained in the application were false, precludes any recovery upon the certificate. *Beard v. Royal Neighbors (Ore.)*, 17-1199.

In such a case, the fact that the particular statements shown to be false were in no way material to the risk, makes no difference, the only question being whether there has been a breach of the warranties contained in the application. *Beard v. Royal Neighbors (Ore.)*, 17-1199.

An applicant for a life insurance policy warranted in her application that her answers to the medical examiner on the reverse side of her application were "true and accurate," and that they should constitute the basis for the covenant. The policy recited that it was executed in consideration of the warranties made in the application, and that the application should be made a part of the covenant. Held, that the answers of the insured to the medical examiner were her warranties, and that a false statement made therein by her rendered the policy void. *Eminent Household v. Prater (Okla.)*, 20-287.

Misrepresentations as defense where copy of application not delivered with policy. — Under the District of Columbia Code misrepresentations in an application for a life insurance policy are unavailable as a defense to an action on the policy unless a copy of the entire application is delivered with the policy of the insured. *Metropolitan Life Ins. Co. v. Hawkins (D. C.)*, 14-1092.

Right of beneficiary to avoid warranty on ground of insured's infancy. — The beneficiary of a life insurance policy based upon such a warranty cannot disaffirm the warranty on the ground that the applicant was a minor and still enforce the policy. *Metropolitan Life Ins. Co. v. Brubaker (Kan.)*, 16-267.

(b) Breach.

Relationship of beneficiary. — Where a policy of life insurance states that it is issued "in consideration of the statements in the schedule hereinafter contained, which statements the insured . . . warrants to be true," a statement by the insured in answer to a question as to the "relationship" of the woman named as beneficiary, that she is his wife, is a warranty as to a material subject, and not merely a matter of description, and the truth of the statement is a condition to any liability on the policy. *Gaines v. Fidelity, etc., Co. (N. Y.)*, 11-71.

A false statement in an application for a policy of life insurance, to the effect that the beneficiary named in the application is a nephew of the applicant, there being in fact no blood relation between them, will not avoid a policy notwithstanding a clause therein to the effect that misstatements in the application shall forfeit and annul all

rights named in the policy, where under the laws both of the insurance company and of the state creating it, any person having an insurable interest in the life of the assured may be named as beneficiary, and where the beneficiary named has an insurable interest in the applicant's life, being generally known as her nephew and being dependent upon her for his support. *Berdan v. Milwaukee, Mut. Life Ins. Co. (Mich.)*, 4-332.

Refusal by other insurance company.

— The fact that an applicant for life insurance has made a prior application for membership in a fraternal beneficiary society, such as the Modern Woodmen of America, and that such application has been rejected, does not constitute a breach of a warranty in his application for insurance that he has never "been declined or postponed by any company." Although the term "insurance company," in its broader meaning, may include fraternal beneficiary societies, it does not include such societies when used in a warranty of the kind above mentioned. *Peterson v. Manhattan Life Ins. Co. (Ill.)*, 18-96.

Serious illness. — The term "serious illness," as used in an application for a life insurance policy, means such an illness as permanently and materially impairs, or is likely permanently or materially to impair, the health of the applicant. *Eminent Household v. Prater (Okla.)*, 20-287.

Illness. — As used in the questions propounded to an applicant for insurance, "illness" means a disease or ailment which is of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution. *Schofield v. Metropolitan Life Ins. Co. (Vt.)*, 8-1152.

Spitting or coughing of blood. — The phrase "spitting or coughing of blood," as used in a question propounded by a medical examiner to an applicant for a life insurance policy, as to whether she had ever had "spitting or coughing of blood," means the disorder so called, whether the blood comes from the lungs or from the stomach. *Eminent Household v. Prater (Okla.)*, 20-287.

Rheumatism in any form. — Where the medical examination propounded to an applicant for life insurance contains the question, "Have you ever had rheumatism in any form? Number of attacks, dates, duration, parts affected; state also whether there were heart complications," the answer "No," given by the applicant, will be construed as a warranty that he has never suffered from rheumatism with heart complications, and proof that the applicant has suffered from rheumatism alone, without heart complications, does not show a breach of such warranty. *Peterson v. Manhattan Life Ins. Co. (Ill.)*, 18-96.

Consultation with physician. — Having an interview with a physician, acquainting him with the nature of an ailment, and accepting and receiving aid, advice, or assistance from him, constitutes consultation with a physician, within the meaning of an interrogatory in an application for a benefit cer-

tificate or life insurance policy as to whether the applicant has, during a certain period, consulted any physician in regard to personal ailment. The mere fact that the physician in such a case is not sought out by the patient, but instead, is met on the street by the patient's husband, who advises him of her illness and directs him to go to the house and attend to her, does not make the transaction any the less a consultation with a physician on the part of the patient. *Beard v. Royal Neighbors (Ore.)*, 17-1199.

Merely calling at the office of a doctor for some medicine to relieve a temporary indisposition or for a mere examination to ascertain if there is any ailment or complaint about the person, and for nothing more, is not a consultation with a physician within the meaning of a question asked by the medical examiner for a life insurance company as to whether the applicant for the insurance has consulted any other physician. *Schofield v. Metropolitan Life Ins. Co. (Vt.)*, 8-1152.

In an action to recover the amount of a benefit certificate issued to a member of a beneficial association, proof that such member, about a year prior to her application for the certificate, consulted a physician and was treated by him for la grippe, is sufficient to show the falsity of statements contained in the application for the certificate that the applicant had not, within a period of seven years, consulted any physician in regard to a personal ailment, or ever had the disease known as la grippe; and where such proof is absolutely uncontradicted by the plaintiff, and the literal truth of each statement in the application has, by agreement between the member and the association, been made a condition precedent to any recovery on the certificate, the action fails, and it is the duty of the trial court to direct a verdict for the defendant. In such a case the rule that, where the evidence is conflicting, the truth or falsity of statements contained in such an application is for the jury and not for the court, has no application. *Beard v. Royal Neighbors (Ore.)*, 17-1199.

Where an applicant for life insurance warrants the truthfulness of his answer to the question, "Have you consulted any other physician?" and agrees that the policy issued in consideration of the warranty shall be void if the answer is false, the liability of the insurer depends upon the truthfulness of the answer. *Metropolitan Life Ins. Co. v. Brubaker (Kan.)*, 16-267.

Where such applicant has, from motives of his own, sought and obtained a professional interview with a physician regarding the state of his health, he cannot truthfully answer such question in the negative merely because the interview concerned some temporary ailment or indisposition slight in character and not seriously affecting the health. The fact of a consultation with a physician does not depend upon the gravity of the subject of the interview. *Metropolitan Life Ins. Co. v. Brubaker (Kan.)*, 16-267.

Where an application for a life insurance

policy stipulates that the insured warrants the statements and agreements made in such application or to the medical examiner to be full, complete, and true, with the additional clause "without suppression of any fact or circumstance which would tend to influence the company in issuing a policy under this application," which additional clause is construed as making such answers and agreements representations only, the effect, of the omission of the insured to give, in his answer to a medical examiner, the name of a certain physician who has treated him, depends upon its materiality. If not material, the omission constitutes no defense. *Reppond v. National Life Ins. Co. (Tex.)*, 15-618.

f. Provisions of policy.

(1) Beneficiaries.

"Children" as meaning "surviving children." — In a life insurance policy payable to the wife of the insured if she shall survive him, and if not, to his children, "or if there be no such children surviving, then to the executors, administrators, or assigns" of the insured, the words used to designate the beneficiaries show that the surviving children are those intended, and neither predeceased children of the insured nor their children are included among the beneficiaries. *Succession of Roder (La.)*, 15-526.

(2) Incontestable clause.

Validity of incontestable clause as precluding defense of fraud. — A clause in a policy of life insurance providing that the policy is incontestable from the date of issue for any cause except nonpayment of premium, if intended to include fraud among causes for which the policy is not contestable, is void as against the policy of the law. *Reagan v. Union Mut. Life Ins. Co. (Mass.)*, 4-362.

An incontestable clause in a policy of life insurance providing that "after two years from its date the policy will be incontestable, provided the premiums are duly paid, and the requirements of the company as to age, military and naval service in time of war, are observed," cuts off, after the lapse of two years, all defenses to the policy except those specifically enumerated by the language of the clause, and such clause, in depriving the insurer of defenses predicated upon the fraud of the insured, is not void as against public policy. *Kansas Mutual Life Ins. Co. v. Whitehead (Ky.)*, 13-301.

Incontestable clause as rendering actionable policy void as contrary to public policy. — A policy of life insurance, void because contrary to public policy, is not rendered actionable by an incontestable clause. *Bromley v. Washington Life Ins. Co. (Ky.)*, 12-685.

Recovery for death by suicide contrary to constitution of order under incontestable clause. — Where a certificate of membership in a fraternal order provides that it shall be incontestable after two years

from the date, the beneficiary is entitled to the insurance upon the death of the insured by his own hand, although the constitution of the order provides that benefits will not be paid in cases of suicide. *Supreme Court of Honor v. Updegraff* (Kan.), 1-309.

(3) Paid-up insurance.

Surrender of policy as condition precedent to right to paid-up insurance. — The provision in a policy of life insurance that the policy must be surrendered within six months is not a condition precedent to the right to the paid-up insurance, and the time of the surrender therein named is not of an essence of the contract. *Lenon v. Mutual Life Ins. Co.* (Ark.), 10-467.

Lapse of time barring right. — A policy holder's right to a paid-up policy of life insurance is barred if the demand therefor is not made within five years after the lapse of the original policy; but where the demand is made within that time, the rights are fixed. *Lenon v. Mutual Life Ins. Co.* (Ark.), 10-467.

Recovery of paid-up insurance after death of insured where paid-up policy not issued. — Where a policy of life insurance gives the right to paid-up insurance, an action for the paid-up insurance may be maintained on the death of the insured, though no paid-up policy has been issued. *Lenon v. Mutual Life Ins. Co.* (Ark.), 10-467.

(4) Cause of death.

Violation of criminal law. — Where an insured begins a personal difficulty by an assault with a weapon capable of inflicting great bodily harm or death, and is killed afterwards while retreating from the difficulty in good faith and not for the purpose of gaining a vantage ground to renew it, his death is not a proximate result of his original act, and consequently is not within a clause of the policy of insurance limiting the liability of the insurer in case the insured meets his death in consequence of his violation or attempted violation of any criminal law. *Supreme Lodge v. Bradley* (Ark.), 3-872.

Where a policy of life insurance contains a stipulation excepting liability on the policy "if death is caused or superinduced at the hands of justice, or in violation of or attempt to violate any criminal law," and the insured is slain by a husband, either while attempting to have sexual intercourse with the wife, or immediately after the completion of the act, the death of the insured is not caused or superinduced in the violation of, or the attempt to violate, any criminal law, within the meaning of the policy as properly interpreted. *Supreme Lodge v. Crenshaw* (Ga.), 12-307.

Even though the killing by the husband of the paramour of the wife is done under such circumstances that the law would class the act as justifiable homicide, such killing is not "at the hands of justice," either punitive

or preventive, within the meaning of a clause in a life insurance policy excepting deaths "caused or superinduced at the hands of justice," etc. Death by the punitive hand of justice is when the law commands the killing. Death by the hands of preventive justice is where the law permits the killing. In each instance the killing must be by some person authorized to carry out the commands of the law, or who is permitted by the law to do the act in the advancement of public justice. *Supreme Lodge v. Crenshaw* (Ga.), 12-307.

Suicide. — A provision that a policy of life insurance shall be void if the insured shall die by his own hand "whether sane or insane" covers every case of suicide irrespective of the state of mind of the insured. *Moore v. Northwestern Mutual Life Ins. Co.* (Mass.), 7-656.

(5) Limitation of time to sue.

Validity of limitation. — The provision in a policy of life insurance that no suit shall be maintained on the policy unless begun within one year from the death of the insured, which period is much less than the time prescribed by the statute of limitations, is void as against public policy. *Union Central Life Ins. Co. v. Spinks* (Ky.), 7-913.

When time of limitation begins to run. — Where a policy of life insurance provides that no suit shall be brought thereon "unless said suit is commenced within two years from the time when the right of action accrues," the right of action accrues and the period of limitation begins to run when the sum specified in the contract becomes payable according to its terms, and not when an administrator is appointed for the estate of the insured; and this is so though the policy, being payable by its terms to the insured, can only be sued on by his administrator. *Wilkinson v. John Hancock Mutual Life Ins. Co.* (R. I.), 8-1063.

g. Cancellation and forfeiture.

Forfeiture for nonpayment of premiums in absence of provision in policy. — A life insurance policy, when once it takes effect by payment of the first year's premium and delivery of the policy, does not terminate at the end of the year, but it is a contract for the life of the assured. If the policy contains no provision for a forfeiture thereof by reason of a failure of the assured to pay subsequent premiums annually, a failure to pay such premiums on the day named will not constitute a forfeiture of such policy. All that the company can demand in such case is the right to set off against the amount of indemnity it has bound itself to pay the amount of the premiums remaining unpaid, with interest thereon. *Haas v. Mutual Life Ins. Co.* (Neb.), 19-58.

Forfeiture for nonpayment of premium when insurer indebted to insured. — A life insurance policy cannot be forfeited for the nonpayment of a premium

or assessment where the company has in its possession dividends declared under the policy sufficient to pay the same, which it has the right to apply to such payment; but the mere fact that the company is indebted to the insured in a certain amount at the time of his default in the payment of a premium or assessment does not prevent a forfeiture for nonpayment, unless the company has the right, and is under some obligation, to apply the amount in question to the payment of the premium or assessment. *Caywood v. Supreme Lodge (Ind.)*, 17-503.

Return of policy to insurer without consent of insured and beneficiary. — An insurance policy cannot be returned to the company without the consent of the assured and of the beneficiary. *Lawrence v. Penn Mut. L. Ins. Co. (La.)*, 1-965.

h. Assignment of policy.

Validity of assignment to person having no insurable interest. — One has the right to procure insurance on his own life and assign the policy to another, who has no insurable interest in the life insured, provided it be not done by way of cover for a wager policy. *Rylander v. Allen (Ga.)*, 5-355.

An agreement by which one-half of the insurance provided for in a life insurance policy is assigned and transferred by the insured and the beneficiary to one having no insurable interest in the life of the insured, upon consideration that the assignee shall pay the premiums as they accrue, and that the beneficiary shall receive part of the insurance, contravenes public policy, and neither the assignee nor the beneficiary can recover upon the policy. *Metropolitan Life Ins. Co. v. Ellison (Kan.)*, 7-909.

It is against public policy and contrary to law to permit any person to obtain an insurance upon the life of another human being, by an assignment or otherwise, where such person has no insurable interest in the life of the insured. *Metropolitan Life Ins. Co. v. Ellison (Kan.)*, 7-909.

i. Recovery of money paid on policy.

Right of insurer to recover money paid on presumption of death from absence where insured returns. — An administration, by virtue of statute, upon the estate of a person presumed to be dead by seven years' absence, establishes a right of action by the administrator on life insurance policies held by the absentee, and the payment of the insurance money to the administrator to avoid suit on the policies is conclusive on the insurer, and the money cannot be recovered by the insurer after it appears that the insured is in fact alive. *New York Life Ins. Co. v. Chittenden (Ia.)*, 13-408.

j. Actions.

(1) In general.

Right of action for refusal to deliver policy. — Where a life insurance com-

pany retains a policy of insurance that it has agreed to deliver, wholly repudiates it, and absolutely refuses to receive any premium thereon, the insured may maintain an action for damages for breach of contract. *Michaelsen v. Security Mutual Life Ins. Co. (U. S.)*, 12-37.

(2) Defenses.

Legal execution of insured. — The legal execution of the insured for a crime committed by him is no defense to an action by his personal representative on a life insurance policy held by him, in the absence of a stipulation in the policy exempting the insurance company from liability for death from such a cause. *Collins v. Metropolitan Life Ins. Co. (Ill.)*, 13-129.

Right of foreign corporation to question validity of statute. — A foreign insurance company cannot question the validity of a statute providing that misrepresentations in an application for a life insurance policy shall be unavailable as a defense unless a copy of such application is delivered with the policy to the insured. *Metropolitan Life Ins. Co. v. Hawkins (D. C.)*, 14-1092.

(3) Pleading.

Excuse for nonpayment of premiums.

— In an action on a life insurance policy, where the complaint shows that the insured, prior to his death, was in default in payment of an assessment of the policy, a further allegation that the insurance company, at the time of such default, owed the insured a certain amount for services rendered, which sum it had the right to apply and should have applied on the unpaid assessment, but which it failed and refused to apply thereon, is sufficient to avoid the admitted default in payment of the assessment, being a mere statement of the pleader's conclusions as to the right and duty of the company. In order to avoid such a default, the facts from which the right and duty of the company arise must be clearly and positively alleged. *Caywood v. Supreme Lodge (Ind.)*, 17-503.

Answer alleging breach of warranty.

— In an action on a policy of life insurance, an answer which seeks to defeat a recovery on the policy because of a breach of warranty by the insured must not only set up the warranty and the breach but must also allege an election by the insurer to avoid the policy because of the breach, and the return of, or an offer to return, the premiums, especially where the warranty is in regard to a fact immaterial to the risk. *Modern Woodmen of America v. Vincent (Ind.)*, 14-89.

(4) Evidence.

(a) Presumptions and burden of proof.

Good health of insured at time of issuance. — In an action brought by the beneficiary in a life insurance policy to recover the amount of the policy, the burden is upon

the plaintiff to prove that the first premium was paid and the policy delivered while the insured was in good health, where the contract between the insured and the insurance company, consisting of the policy and application taken together, made it a condition precedent to the policy's taking effect that the insured should be in good health at that time. *Lee v. Prudential Life Ins. Co.* (Mass.), 17-236.

Falsity of warranties. — In an action on a life insurance policy, where the defendant pleads that the insured made false warranties in his application for insurance, the burden of proving that fact is upon the defendant. *Schofield v. Metropolitan Life Ins. Co.* (Vt.), 8-1152.

Falsity of representations made for revival of policy. — In order to defeat a recovery upon a policy which has been revived upon a representation by the assured that he was in good health and that there was nothing in his habits or condition which was likely to impair his health or shorten his life, the insurer must prove that the representations are untrue, and were made by the insured knowingly with the fraudulent intent to mislead and deceive, that they were material to the risk, and were relied upon by the insurer. *Ætna Life Ins. Co. v. Rehlaender* (Neb.), 4-251.

Defense of suicide. — In an action against a life insurance company to recover the amount of a policy issued by it on the life of a person since deceased, the burden of proving the defense of suicide by the insured is upon the defendant. *Metropolitan Life Ins. Co. v. De Vault* (Va.), 17-27.

(b) Admissibility.

Proofs of death. — In an action to recover the amount of a life insurance policy or benefit certificate, the proofs of death filed with the company or society are admissible in evidence in its behalf, as admissions on the part of the beneficiary, and suffice to make out a *prima facie* case as to the truth of the facts stated therein, as against the beneficiary. *Beard v. Royal Neighbors* (Ore.), 17-1199.

Continuance of disease after policy issued. — In an action on a benefit certificate, where there is evidence tending to show that the insured was diseased before the policy was issued, evidence of the continuance of the disease after the issuance of the policy and until the death of the insured is competent for the purpose of testing the truth of the statements made in the application for the insurance. *Nophsker v. Supreme Council* (Pa.), 7-646.

Declarations of insured as to disease.

— In an action on a benefit certificate it is competent, for the purpose of contradicting a statement made to the examining physician by the insured at the time of his application for insurance that he had never had a certain disease, to introduce in evidence declarations, made to third persons by the insured at times prior to and not remote from that of

his examination, that he was suffering from such disease. *Nophsker v. Supreme Council* (Pa.), 7-646.

Mailing of letter in Colorado to show insured had tuberculosis. — In an action on a policy of insurance on the life of a person who has died of consumption, where the defendant pleads that the insured had consumption at the time he took out the policy, it is not erroneous to exclude evidence of the fact that during a certain winter the brother of the insured received a single letter from the insured which had been mailed in Colorado, as that fact has no tendency to prove that the insured had consumption or that he resided in Colorado. *Schofield v. Metropolitan Life Ins. Co.* (Vt.), 8-1152.

Motives. — In an action for damages for the cancellation of a life insurance policy upon which the holder voluntarily ceased payment, he cannot testify as to his motive in abandoning the policy, or as to whether he subsequently took out other insurance in lieu of that abandoned. *Green v. Hartford Life Ins. Co.* (N. Car.), 4-360.

(c) Sufficiency.

Falsity of warranties. — Evidence reviewed, in an action on a life insurance policy, and held to justify a trial court in refusing to direct a verdict for the defendant sought on the ground that the insured made false warranties in his application for insurance. *Schofield v. Metropolitan Life Ins. Co.* (Vt.), 8-1152.

Good health of insured when policy issued. — In an action brought by the beneficiary in a life insurance policy to recover the amount of the policy, where the burden is upon the plaintiff to prove that the first premium was paid and the policy delivered while the insured was in good health, where the evidence on behalf of the plaintiff shows that the insurance company examined the insured, with a view to ascertaining the condition of his health before the policy was written; that the policy was delivered by an agent of the defendant, who, to a certain extent, was charged with the duty of ascertaining whether it ought to be delivered and whether the company ought to receive the payment of the premium upon it; and that such agent, on the day of the payment of the premium, did ask the daughter of the insured how her father was, it is error for the trial court to direct a verdict in favor of the defendant. Such evidence, although weak, should be submitted to the jury, and it should be left for them to determine whether the insured was in good health at the time when the first premium was paid. *Lee v. Prudential Life Ins. Co.* (Mass.), 17-236.

Falsity of representation as to use of liquor. — In an action on a policy of life insurance, evidence examined and held insufficient to support the defense that certain representations made by the insured at the time when he applied for the policy in suit, to the effect that he had never used intoxicating liquors to excess, were false, and that

the policy was invalidated thereby. *Metropolitan Life Ins. Co. v. De Vault (Va.)*, 17-27.

Falsity of representation made for revival of policy. — Where an insurance company treats a statement of the assured as to health made to obtain a revival of the policy as a representation, pleads its falsity, alleges that the statement was knowingly and intentionally made in order to deceive and cause the company to revive the policy, and the cause is tried and the jury properly instructed on that issue, a verdict against the company will not be set aside if there is competent evidence to sustain it. *Ætna Life Ins. Co. v. Rehlaender (Neb.)*, 4-251.

Defense of suicide. — In an action on a policy of life insurance, the defense of suicide by the insured cannot avail unless the evidence excludes every hypothesis of accidental death, and, consequently, in a case where the testimony is as consistent with death by accident as with death by suicide, a verdict in favor of the plaintiff will not be disturbed on appeal. *Metropolitan Life Ins. Co. v. De Vault (Va.)*, 17-27.

8. ACCIDENT INSURANCE.

a. Accidents insured against.

(1) External, violent, and accidental means.

Blood poisoning from wound. — An accident insurance policy insuring against death by external violence and accidental means covers a death resulting from the accidental wounding of a finger of the insured, by means of which blood poisoning intervenes, as the wound is the proximate cause of death, and blood poisoning is merely incidental to the wound. *Central Accident Ins. Co. v. Rembe (Ill.)*, 5-155.

In an action on a policy insuring "against the effect of bodily injury caused solely by external, violent, and accidental means" and providing that the insurer shall be liable only for disability or death resulting "proximately and solely from accidental causes," evidence that the insured sustained an accidental fall, which caused an abrasion of the skin of the leg, with the result that blood poisoning set in and death ensued, is sufficient to justify the jury in finding that the death of the insured resulted "proximately and solely from bodily injury caused solely by external, violent, and accidental means." *Cary v. Preferred Accident Ins. Co. (Wis.)*, 7-484.

Where a person intentionally strikes another in the mouth during a quarrel, with the result that the skin of his hand is broken, blood poisoning sets in, and death ensues, the death is not within a policy insuring against death resulting directly "from bodily injuries sustained through external, violent, and accidental means," as the injury from which the blood poisoning results is not due to the accident. *Fidelity, etc., Co. v. Carroil (U. S.)*, 6-955.

Loss of business time by disease. — A policy insuring "against loss of business

time resulting from bodily injuries effected through external, violent, and accidental means" is an insurance against loss of business time by disease, provided the disability is proximately caused by a bodily injury effected through external, violent, and accidental means. *Ætna Life Ins. Co. v. Fitzgerald (Ind.)*, 6-551.

Disease from sleeping on hand. — Disease resulting from a person's sleeping on the hand held to be an accidental and violent injury within the meaning of an accident insurance policy. *Ætna Life Ins. Co. v. Fitzgerald (Ind.)*, 6-551.

Intentional physical exertion. — Under a policy of insurance providing for the payment of a certain sum upon the death of the assured from "bodily injury caused by violent, accidental, and external and visible means," there can be no recovery where the death of the insured results from a violent physical exertion which was intended and therefore not accidental. *In re Scarr (Eng.)*, 1-787.

Question for jury. — In an action on an accident insurance policy to recover for the death of the insured, it is for the jury to determine from the testimony whether the injuries which caused the death were accidental, when the testimony elicited on that subject is consistent with the theory of accident. *Preferred Accident Ins. Co. v. Fielding (Colo.)*, 9-916.

(2) Accident to insured in special occupation.

Physician injured in uncorking bottle. — A provision in a policy of accident insurance, issued to a physician and surgeon, extending the liability of the insurer to an injury "caused by accident while performing any operation pertaining to the business of the insured" covers an accidental injury received by the insured while uncorking a bottle of medicine for the purpose of administering medical treatment to a patient who is present at the time. The word "operation," in such provision, means "treatment pertaining to the business of the insured," and is not limited in its application to the practice of surgery. *Central Accident Ins. Co. v. Rembe (Ill.)*, 5-155.

Injury to dentist's eye by coughing of septic matter by patient. — The provision of an accident insurance policy issued to a dentist that the policy "covers blood poisoning sustained by physicians or surgeons resulting from septic matter introduced into the system through wounds suffered in professional operations," does not embrace an injury to a dentist caused by a patient coughing septic matter into his eye, whereby, without any immediate abrasion or pain, the mucous membrane of his eye became infected and his system diseased. *Fidelity, etc., Co. v. Thompson (U. S.)*, 12-181.

In an action for such an injury it is error to refuse an instruction that the plaintiff has received no "wound" within the meaning of that provision of the policy, and to give an

instruction that "any lesion of the body resulting from external violence, whether accompanied or not by rupture of the skin or mucous membrane" is a wound. *Fidelity, etc., Co. v. Thompson* (U. S.), 12-181.

(3) Total disability.

What sufficient to constitute. — In an action on an accident insurance policy, a finding by the jury that the insured was wholly and continuously disabled from attending to every kind of business, held not to be sustained by the evidence. *Order of United Commercial Travelers v. Barnes* (Kan.), 7-809.

Meaning of word "immediate." — As used in a policy insuring against accidental injury which shall immediately disable the insured and prevent him from the prosecution of any and every kind of business pertaining to his occupation, the word "immediately" is not synonymous with "instantly," "at once," and "without delay," but the disability is immediate, within the meaning of the contract, when it follows directly from an accidental hurt, within such time as the processes of nature consume in bringing the insured to a state of total incapacity to prosecute every kind of business pertaining to his occupation. *Order of United Commercial Travelers v. Barnes* (Kan.), 7-809.

(4) Sunstroke.

Meaning or word. — The word "sunstroke," when used in an insurance policy in describing one of the risks covered, should not be interpreted as applying only to the effect produced by the heat of the sun, unless the context or other special considerations require it. The term unexplained denotes a condition produced by any heat, solar, or artificial. *Continental Casualty Co. v. Johnson* (Kan.), 10-851.

Exposure to heat of furnace. — In an action upon an accident insurance policy containing a provision that loss of time due to sunstroke shall be deemed to be due to external, violent, and purely accidental causes and shall entitle the insured to full benefits according to the terms of the policy, where the plaintiff's claim is based upon the loss which he alleges was due to sunstroke, he is not precluded from recovery by the fact that his disability was occasioned by exposure to the heat of a furnace instead of the sun. *Continental Casualty Co. v. Johnson* (Kan.), 10-851.

(5) Death by accident.

Meaning of term "killed." — A person is "killed" by an accident at the time his death occurs and not at the time of the accident, within the meaning of the constitution of an accident insurance society which provides that if a member is injured while in default in the payment of his dues, "the delinquent member shall receive no indemnity therefor, nor shall his beneficiaries receive

anything should he be killed during such period of delinquency." *Roth v. Traveler's Protective Assoc.* (Tex.), 20-97.

b. Accidents excepted.

(1) Voluntary exposure to unnecessary danger.

Meaning of term. — The term "voluntary exposure to unnecessary danger," as used in an accident policy exempting an insurer from liabilities caused by such exposure, means the conscious or intentional exposure to obvious danger, with the realization that an injury will probably result therefrom, involving gross or wanton negligence on the part of the insured. *Hunt v. United States Accident Assoc.* (Mich.), 10-449.

Evidence. — Evidence in an action on an accident policy examined and held sufficient to require the submission to the jury of the question whether the death of the insured resulted "from voluntary exposure to unnecessary danger or obvious risk of injury." *Bakalars v. Continental Casualty Co.* (Wis.), 18-1123.

(2) Injuries from poison.

Eating spoiled oysters. — Eating spoiled oysters, though an accidental means of death, is within the terms of an excepting clause in an accident insurance policy providing that insurance is not payable for injuries resulting from poison or anything accidentally taken or administered. *Maryland Casualty Co. v. Hudgins* (Tex.), 1-252.

Contact with poison ivy. — Under a policy of insurance against the effects of bodily injury caused solely by external, violent, and accidental means, but excepting from the provisions of the policy injuries resulting from poisoning, no recovery can be had for an injury resulting from inflammation of the eyes in consequence of accidentally coming in contact with poison ivy. *Preferred Accident Ins. Co. v. Robinson* (Fla.), 3-931.

Blood poisoning. — A clause in an accident insurance policy exempting the insurer from liability for death resulting from the "taking of poison or contact with poisonous substance" does not extend to a case where the insured, a physician, accidentally cuts his finger with a bottle while attending a syphilitic patient, with the result that poisonous germs enter the wound and cause blood poisoning, resulting in death. *Central Accident Ins. Co. v. Rembe* (Ill.), 5-155.

Death from blood poisoning resulting from an accidental fall is not within the provision of an accident insurance policy exempting the insurer from liability for any injury "resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled," where the accidental fall is the proximate cause of the death. *Cary v. Preferred Accident Ins. Co.* (Wis.), 7-484.

(3) Injuries caused by disease.

Disease as partial cause. — Under an accident insurance policy providing that the insurer shall be liable for injuries or death caused solely by accidental means, but expressly exempting it from liability for death resulting wholly or in part, directly or indirectly, from any bodily disease or infirmity of the insured, the insurer is not liable for a death caused partly by accidental injury and partly by diabetes. *White v. Standard Life, etc., Ins. Co. (Minn.)*, 5-83.

Death from blood poisoning. — Death from blood poisoning resulting from an accidental fall is not within the provision of an accident insurance policy exempting the insurer from liability for death "resulting either directly or indirectly, wholly or in part, from . . . bodily infirmity or disease of any kind." *Cary v. Preferred Accident Ins. Co. (Wis.)*, 7-484.

Injury caused by bodily infirmity or disease. — Disability only, and not death, as the result of a bodily infirmity or disease, is contemplated by a rule of an accident insurance society that it shall not be liable in case of injury, disability, or death happening to the member while intoxicated or in consequence of his having been under the influence of any narcotic or intoxicant, or disability when caused, wholly or in part, by any bodily or mental infirmity or disease. *Roth v. Travelers' Protective Assoc., (Tex.)*, 20-97.

(4) Injuries received while on roadbed of railroad.

Walking between double tracks. — The provision in an accident policy that the liability of the company shall not exceed a certain limited amount for injuries received by the assured while on the roadbed of any railroad company except crossing the same at a public highway, is applicable where it appears that the insured, at the time of his accident, was walking between double railroad tracks ten feet apart which allowed only four feet of space to be occupied by a man's body between passing trains. *McClure v. Great Western Accident Assoc. (Ia.)*, 12-41.

(5) Injuries while under influence of intoxicants.

Construction of clause. — A condition in an accident policy excepting injuries sustained while the insured is "under the influence of any intoxicant" means not every and any influence however slight, but such degree of influence as will materially impair the ability of the insured to care for himself and guard against casualties, such phrase being the equivalent of "intoxicated" or "drunk" in the ordinary meaning of those words. *Bakalars v. Continental Casualty Co. (Wis.)*, 18-1123.

A provision in an accident insurance policy limiting the amount of the insurer's liability on the policy in case of an injury occurring to the insured "while under the influence of any intoxicant or narcotic," is a

reasonable stipulation intended to require the insured so to limit his use of intoxicants that he will retain full control over his faculties of mind and body, and a recovery for the full amount of the policy is not authorized by a finding that the insured, at the time of the accident, was not under the influence of liquor so as to prevent him from being "fairly able to take care of himself." *Furry v. General Accident Ins. Co. (Vt.)*, 13-515.

Question for jury. — In an action on an accident insurance policy, the question whether the insured was intoxicated at the time of the injury is properly submitted to the jury, where the evidence is conflicting as to any considerable use of intoxicating liquor by the insured or its effect on him. *Bakalars v. Continental Casualty Co. (Wis.)*, 18-1123.

(c) Notice and proof of injury.

Necessity of notice. — Under an accident insurance policy indemnifying "against loss . . . caused by bodily injury effected exclusively by external, violent, and accidental means, provided written notice of the injury, whether fatal or nonfatal, together with the fullest information obtainable at the time, be given by the insured or the beneficiary to the home office of the company within ten days of the event causing such injury," the provision as to notice is a condition precedent to the creation of liability on the policy; and no recovery can be had on the policy where, after the happening of an accident resulting in an injury, the insured, not considering the injury of any consequence, or knowing for more than ten days thereafter that he is injured, fails to give notice of the accident, and thereafter is confined to his bed and dies, although the beneficiary of the insured gives notice within ten days of the time when the injury manifests itself by the sickness of the insured. *Hatch v. United States Casualty Co. (Mass.)*, 14-290.

An accident insurance policy is not forfeited by a failure of the beneficiary to give notice of the death of the insured as required by a clause in the policy providing that "immediate notice in writing of any accident and injury on account of which claim is to be made shall be given the secretary of said company," where the clause contains no suggestion of forfeiture for failure to give the notice, and there is no general clause to the effect that a failure to comply with the terms and conditions of the policy shall work a forfeiture, though there is another clause of the policy providing that a failure to furnish proofs of death within a specified time works a forfeiture of the policy. *Preferred Accident Ins. Co. v. Fielding (Colo.)*, 9-916.

The failure of the beneficiary under a policy of accident insurance to comply with its terms with respect to the notice of the death of the insured will not work a forfeiture of the policy, unless the policy in express terms, or by necessary implication, provides for forfeiture in such case. *Preferred Accident Ins. Co. v. Fielding (Colo.)*, 9-916.

Meaning of immediate notice. — Under the Indiana statutes concerning foreign insurance companies a provision in a policy of accident insurance issued by a foreign insurance company that immediate notice of injury shall be given to the company amounts to a requirement of notice within a reasonable time. *Ætna Life Ins. Co. v. Fitzgerald* (Ind.), 6-551.

Sufficiency of proof of death. — Proof of the death of a person insured against an accident held sufficient. *Ætna Life Ins. Co. v. Milward* (Ky.), 4-1092.

Waiver by rejection of proofs furnished. — Where an accident insurance company refuses the preliminary proofs of death tendered by the beneficiary in a policy, and demands proofs which the policy does not obligate the beneficiary to furnish, it waives the preliminary proofs which the policy does require, and therefore cannot claim that an action which the beneficiary subsequently brings without having made the preliminary proofs is premature. *Preferred Accident Ins. Co. v. Fielding* (Colo.), 9-916.

Waiver by denial of liability on other grounds. — In an action on a policy of accident insurance, it is erroneous to instruct the jury that the failure of the insured to give notice of the injury within a reasonable time as required by the policy was waived by the insurer by its subsequent denial of liability, which was based on another ground and did not mention the failure to give notice. *Ætna Life Ins. Co. v. Fitzgerald* (Ind.), 6-551.

d. Proximate cause.

Meaning of term. — In construing an accident insurance policy, the term "proximate cause" must be understood to have been used by the parties to the contract in its common and accepted meaning, as adopted and approved in law under like conditions and circumstances. *Cary v. Preferred Accident Ins. Co.* (Wis.), 7-484.

The term "proximate cause," as used in an accident insurance policy, means the efficient cause from which the injury results, whether such cause produces the injury directly or through the medium of intervening causes or agencies which it sets in motion, and which are united by close causal connection. *Cary v. Preferred Accident Ins. Co.* (Wis.), 7-484.

e. Actions.

(1) Time to sue.

Validity of limitation in policy. — Under the North Carolina statute (Rev. 1905, § 4809) providing that no insurance company shall limit the time in which suit shall be brought on a policy to less than one year, a stipulation in an accident insurance policy that no legal proceeding shall be brought to recover any sum thereby insured within ninety days after receipts of proof, nor at all unless commenced within one year from the date of the alleged accident, will be construed to give the assured twelve

months after his right of action accrues, which would be a year after the time for filing proofs of injury, plus ninety days. *Heilig v. Ætna L. Ins. Co.* (N. Car.), 20-1290.

Limitation in policy as binding on infant. — Under an accident policy stipulating that an action thereon must be brought within a year after the right of action accruing, the fact that the insured is an infant does not relieve him of the obligation to bring his suit within the year stipulated, since, by suing on the contract, the infant affirms it, and therefore is bound by its terms. *Heilig v. Ætna L. Ins. Co.* (N. Car.), 20-1290.

(2) Pleading.

Negating matters of defense. — In an action on a policy of accident insurance to recover for the death of the insured, if the plaintiff makes out a *prima facie* case by alleging and proving that the death was caused by violent, external, and accidental means within the life of the policy, it is not necessary for him to negative a violation of the provisions of the policy that might be set up as matters of defense to defeat or diminish the recovery. *Ætna Life Ins. Co. v. Milward* (Ky.), 4-1092.

(3) Evidence.

Burden of proof of cause of death. — In an action on an accident insurance policy to recover for the death of the insured, the burden of proof is upon the plaintiff to show that the death was caused by external violence and by accidental means, but when the death by unexplained violent external means is established the evidence raises a presumption against suicide or murder, and is *prima facie* proof that the injuries were accidental, without any direct or positive testimony on that point. *Preferred Accident Ins. Co. v. Fielding* (Colo.), 9-916.

Sufficiency as to cause of death. — In an action on an accident insurance policy to recover for the death of the insured, testimony to the effect that the results which followed the injury as its necessary consequences, and which would not have taken place had it not been for the injury, caused the death of the insured, is sufficient to support the conclusion that the injury was the proximate and sole cause of the death. *Preferred Accident Ins. Co. v. Fielding* (Colo.), 9-916.

Evidence reviewed in an action on a policy of accident insurance and held sufficient to justify the jury in saying that the death of the insured was not due to suicide, but was accidental within the policy. *Ætna Life Ins. Co. v. Milward* (Ky.), 4-1092.

Sufficiency of evidence as to excepted risk. — Evidence reviewed, in an action by the insured on a policy insuring against accident except for injury resulting from "voluntary or unnecessary exposure to danger," and held to show that the trial judge erred in directing a verdict for the defend-

ant, inasmuch as the jury would have been justified in finding that the plaintiff had no anticipation of the accident and did not realize that there was any danger. *Hunt v. U. S. Accident Assoc. (Mich.)*, 10-449.

(4) Instructions.

Cause of death. — In an action on an accident insurance policy insuring against accident and death from external, violent, and accidental means, "independently of all other causes," the giving of an instruction which does not use the language quoted is not reversible error, where the jury are instructed that the plaintiff must establish that the death of the insured was caused by accidental, external, and violent means solely, and the evidence shows clearly that the death was so caused. *Central Accident Ins. Co. v. Rembe (Ill.)*, 5-155.

9. HEALTH INSURANCE.

What constitutes confinement to house. — Within the meaning of an insurance contract for sick benefits, it cannot be said that an assured is not confined "constantly in the house" during an illness characterized by recurring periods of severity, although at intervals he may occasionally step into his yard, or make visits to his physician, or other short and unusual trips, the assured at all times being unable to resume the ordinary duties or pleasures of life. *Breil v. Claus Groth Plattdutchten Vereen (Neb.)*, 18-1110.

Validity of provision requiring notice of illness. — A provision in a health insurance policy requiring notice of any illness for which claim can be made to be given at the office of the insurer within ten days from the beginning of the illness, and stipulating that failure to give such notice shall limit the insurer's liability to one-fifth of the amount payable under the policy, is enforceable except when sudden or extreme illness or other cause renders it impossible for the insured to comply with such provision. *Craig v. U. S. Health, etc., Ins. Co. (S. Car.)*, 15-216.

What notice of illness sufficient. — A provision in a health insurance policy requiring written notice of illness to be given at the office of the insured within a specified time is complied with by mailing a properly addressed notice within such time. The notice need not be mailed in time for the insurer to receive it within the period specified in the policy. *Craig v. U. S. Health, etc., Ins. Co. (S. Car.)*, 15-216.

Where under the provisions of a health insurance policy the regular attendance of the insured by a physician is requisite to a claim for illness, the illness for which claim can be made does not commence until the insured comes under the care of a physician, and therefore a provision in the policy requiring notice "of any illness for which claim can be made" to be given within ten days from the beginning of the illness is complied with by

giving notice within ten days from the commencement of the physician's visits. *Craig v. U. S. Health, etc., Ins. Co. (S. Car.)*, 15-216.

10. LIABILITY INSURANCE.

a. Validity and construction of contract.

Validity of stipulation limiting time to sue. — A stipulation in a policy of employers' liability insurance that no action may be maintained against the insurer unless it is brought within thirty days after final judgment against the employer has been rendered and satisfied, is contrary to public policy and void. *Travelers Ins. Co. v. Henderson Cotton Mills (Ky.)*, 9-162.

Construction in general. — In construing a contract of indemnity insurance containing several provisions, the provisions must be construed together to ascertain the meaning of the contract. *Finley v. United States Casualty Co. (Tenn.)*, 3-962.

As contract of indemnity or directly against liability. — A contract of indemnity insurance construed and held to be a contract of indemnity against loss or damage by reason of liability, and not a contract of insurance directly against liability. *Finley v. United States Casualty Co. (Tenn.)*, 3-962.

b. Parties.

Employee as privy to contract. — Under a policy insuring one against loss or damage by reason of liability for injuries sustained by an employee of the assured, the employee is not in privity with the parties to the contract, but the contract is between the insurer and the employer for the benefit of the latter. *Finley v. United States Casualty Co. (Tenn.)*, 3-962.

c. When liability accrues.

After payment of loss. — Under a policy insuring one against loss or damage by reason of liability for injuries sustained by an employee of the assured, the amount of the insurance does not become available until the assured has paid the loss, after giving notice to the insurer in the manner provided by the policy. *Finley v. United States Casualty Co. (Tenn.)*, 3-962.

After entry of judgment against insured. — Under a contract of indemnity insuring a railroad company against legal liability for injury to or death of persons, the liability of the insurer becomes fixed when a final judgment is rendered against the railroad company, and it is obliged to pay the amount of indemnity, though the judgment has not been paid. *Stephens v. Pennsylvania Casualty Co. (Mich.)*, 3-478.

Payment of judgment by promissory notes. — Where it is provided in a casualty insurance policy that "no action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within sixty days from

date of such judgment, and after trial of issue," the policy constitutes a contract of indemnity, and payment and satisfaction of a judgment rendered against the assured may be made by the execution and delivery of promissory notes, if they are executed in good faith and are so accepted by the judgment creditor, and thereupon a cause of action accrues in favor of the assured and against the company. *Kennedy v. Fidelity, etc., Co.* (Minn.), 10-873.

d. Extent of liability of insurer.

Liability for costs of action by servant. — Under a policy of employers' liability insurance, the insurer is liable for the costs of an action brought against an employer for the death of an employee, where the insurer did not defend the action, and the employer had to defend it and could not make settlement. *Travelers Ins. Co. v. Henderson Cotton Mills* (Ky.), 9-162.

Allowance of interest against insurer. — When, in an action against a railroad company for damages, an appeal is taken from a judgment for the plaintiff and the judgment is affirmed, the liability under the contract of indemnity against legal liability is adjusted and settled by the judgment in the appellate court, and interest can be charged only from the date of the latter judgment and not from the date of the judgment in the lower court. *Stephens v. Pennsylvania Casualty Co.* (Mich.), 3-478.

e. Actions.

Notice of accident as condition precedent. — Where a policy of insurance covering the liability of an employer for injuries received by his employees is subject to conditions, stipulated therein to be of the essence of the contract, that the employer shall give immediate notice of any accident causing injury to a workman, and on an arbitration held in pursuance to a clause in the policy it appears that on December 28th the employer signed a proposal form for the insurance and received a covering note to which no conditions were attached, and that on January 3d following the insurers sealed and on January 9th delivered to the employer the policy, which was expressed to be in force from January 1st, the employer can recover on the policy for a liability arising out of the injury of a workman which occurred on January 2d, although no notice thereof was given to the insured until January 14th, one day before the employee's death, there being no proof that the employer knew or had opportunity to know of the condition as to notice at the time of the accident. *In re Coleman's Depositories* (Eng.), 11-253.

Negating exceptions in policy in pleading. — In an action by an employer on a policy of employers' liability insurance providing that the insurer shall not be liable for injuries to employees under twelve years of age, the petition need not allege that the employee for whose death the plaintiff has paid was over twelve years of age, as the plaintiff

is not required to negative the existence of all exceptions contained in the policy. *Travelers Ins. Co. v. Henderson Cotton Mills* (Ky.), 9-162.

Allowance of interest on recovery. —

In an action on a policy of employers' liability insurance, the jury, in finding for the plaintiff, may, under the prayer of the petition for "all proper relief," allow interest from the bringing of the suit, though the petition contains no specific prayer for such interest. *Travelers Ins. Co. v. Henderson Cotton Mills* (Ky.), 9-162.

11. MUTUAL INSURANCE.

a. Statutory regulations.

Mutual insurance companies within constitutional guaranties. — The property of a mutual insurance company and the equitable property rights of its members are within the guaranties of the state constitution as regards the inhibition against laws impairing the obligation of contracts, and the inhibition of the National Constitution as regards the equal protection of the laws and deprivation of property without due process of law. *Huber v. Martin* (Wis.), 7-400.

Validity of statute distributing assets without consent of company. — A law enacted during the life of a mutual insurance company providing for the distribution of its assets or a bestowal thereof upon another without the consent of all of its members, no authority in that regard being contained in the charter of such company, is unconstitutional. *Huber v. Martin* (Wis.), 7-400.

b. Powers of company.

Making rates with view to create surplus. — It is competent for a mutual insurance corporation, there being no limitation in its charter to the contrary, to make rates for insurance with a view of probably creating a surplus and of subsequently distributing the same to members so far as experience shall show that the same is not needed in the business. *Huber v. Martin* (Wis.), 7-400.

c. Membership.

(1) Commencement and termination.

In absence of charter provision. — If the charter of a mutual insurance company contains no provision on the subject, membership commences only with the taking out of a policy and lasts only for the policy period. *Huber v. Martin* (Wis.), 7-400.

Under charter provisions. — Under the charter of a mutual insurance company providing in effect that one can become a member only by taking out a policy of insurance and that the membership can survive only to the end of the policy period upon which it is based, no one can rightly be treated as a member for any purpose at any time unless he then holds an unexpired policy of insurance. *Huber v. Martin* (Wis.), 7-400.

(2) Rights of members.

In general. — The title to the property of a mutual insurance corporation is in the company, but the equitable interests therein are vested in the members the same as in the case of a stock corporation. While the corporation owns the property, the members own the corporation. *Huber v. Martin* (Wis.), 7-400.

The interests of policy holders in a mutual insurance company are twofold, they being both insurers and insured. As insurers they are enabled to share in the losses and profits of the business on the basis of a partnership, except so far as the charter or policy contract provides otherwise. *Huber v. Martin* (Wis.), 7-400.

Members as stockholders. — As regards rights and remedies, the policy holders in a mutual insurance company are stockholders therein the same as owners of stock in a stock corporation, there being no charter provision to the contrary. *Huber v. Martin* (Wis.), 7-400.

For all except corporate purposes, the property of a mutual insurance company, the same as that of any other corporation, belongs to its members, whether they are stockholders in the technical sense or in the broader one which includes policy holders in such a company. *Huber v. Martin* (Wis.), 7-400.

Right to invoke equitable jurisdiction to prevent misappropriation of assets. — A member of a mutual insurance company, suing for himself and others similarly interested, may invoke equity jurisdiction to redress or prevent any wrong injuriously affecting the property rights of the corporation, when its officers will not move appropriately to that end. *Huber v. Martin* (Wis.), 7-400.

d. Assessments.

When statute of limitations runs against assessments. — The statute of limitations does not begin to run in favor of the policy holder of an insolvent mutual insurance company against an assessment until his contingent liability to assessment has been made absolute in the manner prescribed by law, as by the decree of a court of competent jurisdiction. *Swing v. Brister* (Miss.), 6-740.

Forfeiture for nonpayment of assessments. — A provision in a certificate of mutual insurance that a member failing to pay assessments and dues within thirty days after the date when due, "shall be suspended, and his certificate become null and void, and all rights and benefits, which may have accrued to the insured or his beneficiary, shall be forfeited to the association," is not self-executing but intends that the certificate shall become void only after some affirmative action by the association, especially in view of a subsequent provision for reinstatement after the suspension of a delinquent member which evidently contemplates some act of suspen-

sion or notice thereof after which the privilege of reinstatement may be exercised. *Brooks v. Conservative Life Ins. Co. (Ia.)*, 11-339.

e. Reorganization.

Effect of invalid reorganization. — In case of success in form, of an attempt to reorganize a mutual insurance company on the stock plan under a law authorizing it, and the insurance business formerly carried on by the old company being continued ostensibly by the new creation, using the former's assets and good will, if the attempt is fruitless because of the enabling act being void, such continued business is to be regarded as really that of the old corporation and as belonging to it. *Huber v. Martin* (Wis.), 7-400.

f. Dissolution.

Who are proper distributees of assets on dissolution. — In case of a distribution of the surplus of a mutual insurance company or its other assets, there being no charter provision to the contrary, only existing policy holders are legitimate distributees. *Huber v. Martin* (Wis.), 7-400.

g. Actions.

Right of action for renunciation of contract. — The rule that renunciation of a continuous executory contract by one of the parties before the day of performance gives the other party the right to sue at once for damages, does not apply to a mutual life insurance policy. *Kelly v. Security Mut. Life Ins. Co. (N. Y.)*, 9-661.

Where a mutual life insurance company has wrongfully declared a forfeiture of a policy issued by it, the insured cannot maintain an action at law to recover damages for breach of the contract, as the policy is still in force, and the insured has no right to sue for damages before the arrival of the time for performance by the insurer, his only remedy being a suit in equity to compel the insurer to recognize the contract. *Kelly v. Security Mut. Life Ins. Co. (N. Y.)*, 9-661.

Estoppel to raise defense that contract is ultra vires. — When a mutual fire insurance company authorized by its charter to insure property upon an assessment or mutual plan only enters a state other than that by which it was created, gives the bond required by such state of stock companies issuing standard policies, and proceeds to do an insurance business on standard insurance lines, instead of mutual or assessment lines, both the company and the sureties on the bond are estopped from pleading in an action for loss upon a standard policy issued by it, that such policy is an *ultra vires* contract. *Minneapolis F., etc., Ins. Co. v. Norman* (Ark.), 4-1045.

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Allowance of interest on award in condemnation proceeding, see **EMINENT DOMAIN**, 7 d.
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Pecuniary interest in subject-matter.

Agency coupled with interest, see **AGENCY**, 1 b; **BROKERS**, 1 b.
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 Pecuniary interest as affecting competency of jurors, see **JURY**, 5 c.
 Pecuniary interest as disqualifying judge, see **JUDGES**, 4 a.
 Real parties in interest as concluded by judgment, see **JUDGMENTS**, 6 a (2).

1. **COMPUTATION OF INTEREST.**

Unliquidated claims. — Interest is allowable on unliquidated claims from the date of demand and the institution of a suit is a sufficient demand. *Trimble v. Kansas City, etc., R. Co. (Mo.)*, 1-363.

Money received under mistake. — Where money has been paid and received under a mutual mistake of fact, and no fraud or misconduct can be imputed to the party from whom the money is sought to be recovered, interest will not be allowed except from the time when the mistake was discovered and a demand for repayment made. *Lee v. Laprade (Va.)*, 10-303.

Application of payments. — A partial payment on a note is to be applied first to the payment of the interest due on the note, and then, there being more than enough to pay the interest, the remainder is to be applied to the payment of the principal of the note; and subsequent interest is to be computed on the remainder of the principal. *Jones-Downes Co. v. Chandler (N. Mex.)*, 13-710.

2. RATE OF INTEREST.

Contract for interest without fixing rate. — Where there is an agreement to pay interest and no rate is stated the legal rate is implied. *Patrick v. Kirkland* (Fla.), 12-540.

A promissory note for a certain sum "with interest at the rate of — per cent. per annum, from — until paid," draws interest at the legal rate from its date. *Hornstein v. Cifuno* (Neb.), 20-1267.

Uniform operation of statutes. — The California statute prescribing the interest to be charged on loans of not exceeding a certain sum on certain kinds of personal property, but not prescribing the interest to be charged on loans of greater sum or on other kinds of personal property, violates the provision of the state constitution requiring that all laws of a general nature shall have a uniform operation. *Ex p. Sohneke* (Cal.), 7-475.

3. SUSPENSION OF INTEREST.

Effect of garnishment proceedings. — Garnishment proceedings do not suspend the running of interest when a party fails to avail himself of a statute providing that the defendant in garnishment may admit his liability to the principal defendant and pay the money into court. *Stephens v. Pennsylvania Casualty Co.* (Mich.), 3-478.

INTERFERENCE WITH CONTRACT RELATIONS.

1. PROCURING BREACH OF CONTRACT IN GENERAL, 960.
2. INDUCING MASTER TO DISCHARGE SERVANT, 960.
3. ENTICING SERVANT TO DESERT MASTER, 960.
4. INTERFERENCE WITH CONTRACT OF AGENCY, 960.
5. RIGHT OF INJUNCTION, 961.

See CONSPIRACY, 2; LABOR COMBINATIONS.
Liability for causing discharge of servant, see MASTER AND SERVANT, 8.

1. PROCURING BREACH OF CONTRACT IN GENERAL.

If one wantonly and maliciously, whether for his own benefit or not, induces a person to violate his contract with a third person to the injury of that third person, it is actionable. *Thacker Coal, etc., Co. v. Burke* (W. Va.), 8-885.

To procure another to break his contract is an actionable wrong, unless there be a sufficient justification for such interference. *South Wales Miners' Federation v. Glamorgan Coal Co.* (Eng.), 2-436.

The malicious procurement of a breach of a contract of employment resulting in dam-

age, where the procurement was during the subsistence of the contract, is an actionable wrong. *Employing Printers Club v. Dr. Blosser Co.* (Ga.), 2-694.

Persons who conspire to induce others to break a valid contract with third persons are liable to an action therefor. *Thacker Coal, etc., Co. v. Burke* (W. Va.), 8-885.

2. INDUCING MASTER TO DISCHARGE SERVANT.

Whoever intentionally and without legal justification or excuse has procured an employer to discharge his employee, to the damage of the latter, is liable to an action for damages at the suit of the employee; and this is so though there was no binding contract of employment. *Brennan v. United Hatters, etc.* (N. J.), 9-698.

An action of tort for damages will lie in favor of one who is discharged from his employment by the unjustifiable interference of another. *Berry v. Donovan* (Mass.), 3-738.

3. ENTICING SERVANT TO DESERT MASTER.

One who maliciously entices a servant in the actual service of a master to desert and quit his service is liable to an action therefor. *Thacker Coal, etc., Co. v. Burke* (W. Va.), 8-885.

4. INTERFERENCE WITH CONTRACT OF AGENCY.

Where, in an action by a ticket and tourist agent to enjoin interference with his agency, it appeared that the plaintiff entered into a contract with a hotel corporation conducting a hotel inside the Jamestown Exposition grounds by which it was agreed that the plaintiff should represent the corporation throughout the New England states, establish subagencies in that territory, and use every possible endeavor to secure patrons for the hotel, in consideration of which he was to be the exclusive agent of the corporation in that territory and to receive a stated sum per day for each person he sent to the hotel, and that the defendant, another ticket and tourist agent, knowing of said contract, represented to the hotel corporation that it was a mistake to give an exclusive agency in New England to one man and that more business would be created if all agents were given equal terms, and also that the plaintiff did only an insignificant business, and had falsely stated the extent of his connections, and as a result of such solicitations and representations the hotel corporation entered into a contract with the defendant by which the latter was given the same rights as the plaintiff, it is no defense to the action that the defendant had a right to compete with the plaintiff, or that there was no spite or ill-will towards the plaintiff, the right to relief being made out by proof that the defendant, with knowledge of the plaintiff's contract, induced the hotel corporation to break it. *Beekman v. Marsters* (Mass.), 11-332.

The defense to such an action, that the plaintiff does not come into court with clean

hands, is not made out by a finding by the master that the defendant's representations to the hotel corporation as to the plaintiff's business and connections were not shown to be false, and a finding that the plaintiff's catalogue which was shown to the hotel corporation contained a list of persons at whose offices his tickets and tours were represented to be on sale, when in fact his tickets and tours were not sold by such persons, a sufficient answer to this defense being that the master has not found fraud, that the hotel corporation has not elected to rescind its contract with the plaintiff for fraud or for any other reason, and that the defendant did not confine himself to telling the truth about false representations of the plaintiff by which the contract was procured, but urged other reasons, on general business principles, why the contract with the plaintiff should be broken. *Beekman v. Marsters* (Mass.), 11-332.

5. RIGHT OF INJUNCTION.

In an action for wrongful interference by the defendant with contract relations between the plaintiff and a third party, the plaintiff having shown that the defendant unlawfully threatens to interfere with his rights under the contract, and that his damage will be incapable of accurate ascertainment, an action for damages will not afford an adequate remedy, and equity will issue an injunction. *Beekman v. Marsters* (Mass.), 11-332.

INTERLOCUTORY DECREES.

Affirmance of interlocutory decree as *res judicata*, see JUDGMENTS, 6 c.

INTERLOCUTORY INJUNCTION.

See INJUNCTIONS, 4.

Restraining nuisances, see NUISANCES, 6 b (4).

INTERLOCUTORY ORDERS.

Review on appeal, see APPEAL AND ERROR, 12 a.

INTERMEDIATE APPELLATE COURTS.

See APPEAL AND ERROR, 3 d.

INTERNAL IMPROVEMENT.

Power of states, see STATES, 1.

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See REVENUE LAWS.

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INTERNATIONAL EXTRADITION.

See EXTRADITION, 2.

INTERNATIONAL LAW.

Seizure of foreign vessels. — A foreign vessel found fishing in the Canadian waters contrary to the provisions of the statute of the Dominion of Canada may be pursued and seized though the vessel be not overtaken till she has passed out of the three-mile limit into the high seas. *Ship "North" v. King* (Can.), 3-806.

Contraband of war. — A warranty in a marine insurance policy on a neutral vessel against carrying contraband of war is not broken by carrying as passengers naval officers of a belligerent government, the term "contraband of war" being primarily applicable to goods only. *Yangtze Ins. Assoc. v. Indemnity Mut. Mar. Ins. Co.* (Eng.), 15-239.

Seizure of goods by foreign power. — A seizure of property by a sovereign power is not an act that can be complained of in the courts of the United States. Nor is it material, in this regard, that the property seized is *de jure* within the territorial limits of a third power, if the *de facto* sovereignty of the power making the seizure has been recognized by the United States. *American Banana Co. v. United Fruit Co.* (U. S.), 16-1047.

Conspiracy to do acts in foreign country. — A conspiracy in the United States to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law. *American Banana Co. v. United Fruit Co.* (U. S.), 16-1047.

INTERNATIONAL RELATIONS.

Judicial notice of peace with foreign countries, see EVIDENCE, 1 i.

INTERPLEADER.

In general. — The Indiana statute creates no new cases of interpleader, the statutory remedy being a mere substitute for the equitable remedy by independent suit and being governed by the same rules. *Northwestern Mut. L. Ins. Co. v. Kidder* (Ind.), 1-509.

A bill which seeks discovery as to a person not a party to a pending action at law to recover money paid to the complainant as a carrier on overcharges of freight and for failure to furnish cars according to agreement with the party suing at law, and which seeks to enjoin the action at law, is not a bill of interpleader. *Terrell v. Southern R. Co.* (Ala.), 20-901.

Right to interplead. — In an action against an insurance company upon a check given by it to the beneficiary in payment of

a policy, the company cannot interplead and seek to substitute as defendants creditors of the insured, the company being in privity with the beneficiary alone. *Northwestern Mut. L. Ins. Co. v. Kidder (Ind.)*, 1-509.

In an action against an insurance company upon a check given by it to a beneficiary in payment of the policy, where the creditors of the insolvent corporation in which the insured was a stockholder claim that the insured paid the premiums from the funds of such corporation, the creditors cannot interplead with the beneficiary, the receiver of the corporation being the only person having the right to recover the funds of the corporation so expended. *Northwestern Mut. L. Ins. Co. v. Kidder (Ind.)*, 1-509.

Effect of interpleader. — Where parties interplead, each occupies the position of a plaintiff in a possessory action and must recover on the strength of his own title rather than on the weakness of the other's title. *Conway v. Caswell (Ga.)*, 2-269.

INTERPRETATION.

See **CONSTITUTIONAL LAW**, 26; **CONTRACTS**, 3; **COVENANTS**, 4; **STATUTES**, 4.

INTERROGATORIES.

Failure of jury to answer interrogatories as ground for arrest of judgment, see **JUDGMENTS**, 7 a.

Submitting interrogatories to jury, see **TRIAL**, 8 a.

INTERRUPTION.

Operation of statute of limitations, see **LIMITATION OF ACTIONS**, 4 b.

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INTERSTATE COMMERCE.

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Power of Congress to prohibit discrimination against members of labor unions by interstate carriers, see **LABOR COMBINATIONS**, 1 b.

Power of Congress to regulate hours of labor on interstate railroads, see **LABOR LAWS**, 1 a.

Power of federal courts to pass on validity of state statute regulating freight rates, see **INJUNCTIONS**, 2 d (4).

Power of state to forbid abstraction of water from state, see **WATERS AND WATERCOURSES**, 3 b (3).

Power of state to regulate carriage of interstate passengers, see **CARRIERS**.

Power of state to tax franchise of corporation engaged in interstate business, see **TAXATION**, 11 a.

Prohibiting importation of horses having docked tails, see **ANIMALS**, 5.

Prohibition of preferences by interstate commerce act, see **CARRIERS**, 2 c.

Prohibiting restraint of trade as regulation of interstate commerce, see **MONOPOLIES AND CORPORATE TRUSTS**, 3 a.

Regulation by Congress, see **CONSTITUTIONAL LAW**, 8.

Regulation of rates of interstate ferries, see **FERRIES**, 2.

Riparian rights as affected by use of water in interstate commerce, see **WATERS AND WATERCOURSES**, 3 b.

Validity of license tax on persons engaged in interstate commerce, see **LICENSES**, 3.

Validity of statute requiring railroads to make reports to state officers, see **RAILROADS**, 3 b.

1. DEFINITION.

The terms "commerce" and "interstate commerce" defined. *People ex rel. Stead v. Chicago, etc., R. Co. (Ill.)*, 7-1.

2. REGULATION OF INTERSTATE COMMERCE.

a. Power of Congress.

Plenary nature of power. — Congress may lawfully affect intrastate commerce so far as necessary to regulate effectually and

completely interstate commerce, because the Constitution reserves to Congress plenary power to regulate interstate and foreign commerce, and the Constitution and the Acts of Congress in pursuance thereof are the supreme law of the land. *United States v. Colorado, etc., R. Co.* (U. S.), 13-893.

Employers' Liability Act. — The federal Employers' Liability Act of 1908 (Act of April 22, 1908, c. 149, 35 St. L. 65, Fed. St. Ann. Supp. 1909, p. 584) is unconstitutional in so far as it imposes on a carrier engaged in interstate commerce, liability to a servant employed in that business for the consequences of the negligence of another of its servants occurring when the latter is not engaged in that business, or, indeed, in any business for the common employer. In that regard the enactment clearly transcends the power conferred on Congress to regulate commerce between the states. *Hoxie v. New York, etc., R. Co.* (Conn.), 17-324.

Prohibiting limitation of liability by carrier. — Congress may regulate contracts of interstate transportation by virtue of its power to regulate interstate commerce, and therefore the Carmack Amendment to the Interstate Commerce Act (St. L. 594; Fed. St. Ann., Supp. 1909, p. 273), which provides that any common carrier issuing a receipt or bill of lading for goods received by it for transportation to another state shall be liable to the holder thereof for loss of or injury to the goods while in the hands of a connecting carrier, and that no contract, rule, etc., shall exempt the carrier from such liability, is constitutional. *Louisville, etc., R. Co. v. Scott* (Ky.), 19-392.

b. Power of states.

(1) Police power in general.

Subordination to federal power. — Where the police power of a state conflicts with the power of Congress to regulate interstate commerce, the police power must yield. *State v. Lowry* (Ind.), 9-350.

Importation in original packages. — A state has no power to deny to a proper person the right to hold in an original package cigarettes which he has imported from another state in the original package. *State v. Lowry* (Ind.), 9-350.

Importation of articles for personal consumption. — The declarations of law which have been made as to when the police power of a state attaches to articles of interstate commerce where the purpose of the importation is sale, cannot with any degree of propriety be applied to cases where the purpose of the importation is not sale but personal consumption. *State v. Lowry* (Ind.), 9-350.

If interstate commerce in articles bought for personal consumption is recognized as a matter of national importance, limitation cannot be placed about it by the police power of the state, which would render the right but a dry and technical one. *State v. Lowry* (Ind.), 9-350.

Limiting hours of labor. — The Montana statute of Feb. 5, 1907, limiting the hours of labor of railroad employees on trains running over railroads within the state, and applicable to interstate as well as intrastate lines, is within the police power of the state and not in violation of the Federal Constitution as imposing a burden on interstate commerce. *State v. Northern Pacific R. Co.* (Mont.), 13-144.

Such statute was not immediately superseded by the Act of Congress approved March 4, 1907, regulating the hours of employment of railway employees by substantially the same provisions as the state statute, but remained in full force and effect until March 4, 1908, when the federal statute, by its terms, became operative. *State v. Northern Pacific R. Co.* (Mont.), 13-144.

Requiring reports. — The Illinois statute requiring every railroad company incorporated or doing business in the state to make reports to the railroad and warehouse commission is a valid exercise of the state's police power, and is not repugnant to the commerce clause of the Federal Constitution. *People ex rel. Stead v. Chicago, etc., R. Co.* (Ill.), 7-1.

The Illinois statute requiring every railroad company incorporated or doing business in the state to make reports to the railroad and warehouse commission does not conflict with the federal statute requiring railroad companies to make certain reports to the Interstate Commerce Commission, and therefore the existence of the federal statute does not render the state statute void. *People ex rel. Stead v. Chicago, etc., R. Co.* (Ill.), 7-1.

(2) Effect of nonaction by Congress.

In general. — In the absence of congressional permission, a state has no power to exclude, directly or indirectly, subjects of interstate commerce, or to regulate such commerce by the imposition of burdens thereon. *State v. Lowry* (Ind.), 9-350.

Inspection laws. — A state inspection law which excludes from the state cattle found to be diseased is, in the absence of controlling legislation by Congress, clearly within the authority of the state, even though such law may have an incidental and indirect effect on interstate commerce. *Asbell v. Kansas* (U. S.), 14-1101.

Prohibiting importation of cigarettes. — Inasmuch as Congress has not given its consent to the regulation of interstate traffic in cigarettes, the absence of congressional regulation must be regarded as equivalent to a declaration that interstate commerce in cigarettes shall be free. *State v. Lowry* (Ind.), 9-350.

Laws incidentally affecting interstate commerce. — In the exercise of their police power, states may enact reasonable laws relative to interstate commerce, provided such laws are local in their character and affect interstate commerce incidentally only, but as the regulation of the transportation of goods from one state into another

is a matter which is national in its character, the silence of Congress is equivalent to a declaration that such commerce shall be free. *State v. Lowry* (Ind.), 9-350.

(3) Effect of enabling acts.

Validity of prior state statutes. —

The West Virginia statute making it unlawful to sell or to solicit or receive orders for intoxicating liquors within the state without a state license therefor (Code 1887, c. 32, § 1), enacted before the passage of the Wilson Act (Act Cong. Aug. 8, 1890; 3 Fed. St. Ann. p. 853), which provides that any state shall have power to prohibit the sale therein of intoxicating liquors imported from another state, is void as to the solicitation of orders for liquors to be imported from another state; and therefore a state license for such interstate transactions is not necessary unless the state statute has been re-enacted since the passage of the Wilson Act. *State v. Miller* (W. Va.), 19-604.

Regulation of liquor traffic. — Under the federal statute proiding that an interstate shipment of intoxicating liquors shall be subject to the police authority of the state of its destination upon its arrival in the state, a shipment of that nature which is placed by the carrier in its warehouse for delivery at the point of destination does not lose the protection of the interstate commerce clause of the Federal Constitution until the consignee has been notified to call for the goods, or until a reasonable time for him to call for and accept delivery of the goods has elapsed, notwithstanding the fact that under the local law the liability of a railroad company as carrier ceases and becomes that of warehouseman as soon as the goods reach their ultimate destination. *Heyman v. Southern R. Co.* (U. S.), 7-1130.

Under the federal statute delegating to the states power to regulate the sale of liquors shipped within their territory from other states, a state has power to regulate and control the business carried on within its borders of soliciting proposals for the purchase of liquors, such proposals to be accepted and the liquors shipped in another state, and such regulation is not repugnant to the commerce clause of the Federal Constitution. *Delamater v. South Dakota* (U. S.), 10-733.

The state statute regulating the soliciting of orders for intoxicating liquors by traveling salesmen is within the purview of the federal statute delegating to the states power to regulate the sale of liquors shipped within their territory from other states, and is not a taxing law. *Delamater v. South Dakota* (U. S.), 10-733.

The federal statute passed on the 8th day of August, 1890, known as the "Wilson Act," removed all limitations on the powers of the states to regulate or prohibit all sales, contracts, and other acts and transactions, relating to intoxicating liquors, occurring wholly within their territorial jurisdictions. *State v. Miller* (W. Va.), 19-604.

The provisions of chapter 32 of the West

Virginia Code, respecting sales and other transactions, in the state, pertaining to intoxicating liquors, as amended and re-enacted, since the date of the passage of the Wilson Act, apply to retail dealings of that kind, wholly within the state, on the part of non-residents as well as residents. *State v. Miller* (W. Va.), 19-604.

Said provisions prohibit a nonresident dealer, having no license under the laws of the state to sell at retail and solicit and receive orders for such liquors, from soliciting or receiving orders for the same, to be sold at, and shipped into this state from, a place in another state. *State v. Miller* (W. Va.), 19-604.

c. What constitutes regulation.

Inspection of importations. — A state statute prohibiting the importation of cattle which have not been inspected and passed as healthy by the state officials or by the bureau of animal industry of the federal government recognizes the supremacy of and does not conflict with Congressional legislation providing that cattle certified by an inspector of the bureau of animal industry to be free from infectious disease may be transported into any state without further inspection, and is therefore not an unwarranted interference with interstate commerce. *Asbell v. Kansas* (U. S.), 14-1101.

3. WHAT CONSTITUTES INTERSTATE COMMERCE.

a. Rule stated.

The importation into one state from another is the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from a commencement in one state to a prescribed destination in another is a transaction of interstate commerce, and every carrier that transports such goods through any part of such continuous passage is engaged in interstate commerce, whether the goods are carried on through bills of lading or are rebilled by the several carriers. *United States v. Colorado, etc., R. Co.* (U. S.), 13-893.

Railroad operating within state. — The federal safety appliance acts apply to and govern a railroad company engaged in interstate commerce which operates entirely within a single state, independently of all other carriers, as the transportation of articles of interstate commerce is the test of the application of these acts. *United States v. Colorado, etc., R. Co.* (U. S.), 13-893.

b. Particular transactions.

Conducting correspondence schools. —

A correspondence school which makes contracts with its customers in different states by correspondence, and sends them books and information on the subjects of instruction, is engaged in interstate commerce. *International Textbook Co. v. Pigg* (U. S.), 18-1103.

A contract by a foreign corporation which consists mainly of an obligation to impart instruction, from the state of the corporation's domicile, by the usual transportation agencies, to a resident of another state, continuously for a considerable period of time, and includes only incidentally the transfer by such transportation agencies from the corporation's domicile to the domicile of the other party of a few articles of property which are not objects of sale, barter, or exchange, but merely instrumentalities for imparting such instruction, is not an interstate commerce transaction, and such contract is unenforceable by the corporation if it has not complied with the domestic statutes relating to foreign corporations. *International Textbook Co. v. Peterson* (Wis.), 14-965.

Freight car laden with goods shipped from foreign state. — Where a freight car laden with goods shipped from another state is first delivered to a belt line railway company in the city of its destination for delivery to the consignee, and before the car is ready for delivery to the consignee it is returned to the interstate carrier for slight repairs and is in the latter's yard awaiting repairs and marked "out of order" when an accident occurs, the car is being employed in interstate commerce within the Federal Safety Appliance Act of March 2, 1893. *St. Louis, etc., R. Co. v. Delk* (U. S.), 14-233.

Solicitation of orders for foreign corporation. — A corporation of one state may send its agents to another state to solicit orders for its goods or to contract for the sale thereof without being embarrassed or obstructed by state requirements as to taking out licenses, filing certificates, establishing resident agencies, etc. *International Trust Co. v. A. Leschen, etc., Co.* (Colo.), 14-861.

c. Subjects of interstate commerce.

Cigarettes. — Cigarettes are legitimate articles of commerce between the states. *State v. Lowry* (Ind.), 9-350.

Buying and selling futures. — Orders for the purchase and sale of futures on speculation, which, though transmitted to other states, do not involve interstate shipment of goods, are not subjects of interstate commerce, and brokers engaged in taking such orders are subject to state taxation. *Ware v. Mobile County* (U. S.), 14-1031.

d. When protection ceases.

In general. — When the right to import goods in the original package from another state for personal consumption is recognized, notwithstanding hostile state laws, the shipment will be protected down to the last moment that the goods continue in the hands of the importer in the original package. *State v. Lowry* (Ind.), 9-350.

Breaking original package. — Goods consisting of separate packages and parcels in boxes and shipped from one state to another, where they are received and unpacked

by the shipper preparatory to delivering them to the several purchasers who have previously ordered them from the former state, become, when so opened and removed from the boxes in which they are shipped, a part of the property of the state in which they are found, lacking the character of original packages protected as articles of interstate commerce, and are therefore subject to taxation under the revenue laws of the state. *Parks v. Nez Perce County* (Idaho), 12-1113.

Delivery to consignee. — The delivery to the consignee of merchandise brought from another state by an interstate common carrier, subjects it to the laws of the state, free from the operation of the commerce clause of the Federal Constitution. *State v. Intoxicating Liquors* (Me.), 20-668.

4. STATE STATUTES AFFECTING INTERSTATE COMMERCE.

As to necessity of re-enacting invalid statute after passage of enabling act by Congress, see *supra*, 2 b (3).

Foreign corporations — Right to sue. — A state statute which requires every foreign corporation doing business in the state to file a statement of its condition and obtain a certificate of leave to do business, and which provides that no action shall be maintained in the state courts by any corporation doing business in the state without first obtaining such certificate, is unconstitutional as interfering with interstate commerce. *International Textbook Co. v. Pigg* (U. S.), 18-1103.

5. INTERSTATE COMMERCE ACT.

a. Jurisdictions of state courts.

The state courts have jurisdiction to enforce the liability imposed by the Carmack Amendment to the Interstate Commerce Act (St. L. 594; Fed. St. Ann., Supp. 1909, p. 273) on the initial carrier of goods shipped into another state, for injury to the goods while in the hands of a connecting carrier, notwithstanding a stipulation in the bill of lading that the initial carrier shall not be liable for loss or injury occurring on a connecting line. Such an action is not based on a violation of the statute, but is merely to enforce a liability, where the defendant relies on a special contract which the statute declares invalid. *Louisville, etc., R. Co. v. Scott* (Ky.), 19-392.

Under section 8 of the Interstate Commerce Act. (2 Fed. St. Ann. 83), making a carrier liable in damages to any person injured by its violation of the act, and section 9, which confers on the United States Circuit and District Courts jurisdiction of actions under the act, and prescribes the procedure and rules of evidence, and puts the complaining party to his election between that remedy and the proceeding before the interstate commerce commission, also provided for by the act, the only tribunals authorized to inquire into and decide whether or not there has

been a violation of the act and to apply the remedy are those designated by the statute, and a state court has no jurisdiction in such a case. *Gulf, etc., R. Co. v. Moore (Tex.)*, 4-770.

b. Proceedings in federal courts.

Enjoining excessive freight rates. —

Under the broad powers conferred on the United States Circuit Courts by section 16 of the Federal Interstate Commerce Act, a Circuit Court sitting in equity has power to hear and determine a petition complaining of an advanced and excessive schedule of freight rates and to enjoin the maintenance of such schedule of rates, although an action at law to recover unreasonable rates exacted is forbidden by the Interstate Commerce Act. *Southern R. Co. v. Tift (U. S.)*, 11-846.

Determining amount of reparation. —

The statutory requirement that reparation for amounts collected by a carrier under a schedule of rates declared to be excessive must be by a proceeding before the interstate commerce commission, does not preclude the parties, after action by the commission declaring the rates unreasonable, from stipulating that the Circuit Court shall adjudge the amount of reparation. *Southern R. Co. v. Tift (U. S.)*, 11-846.

On a petition filed in the Circuit Court to enjoin the advance of a schedule of freight rates where the court first grants a temporary injunction and then dissolves the same with a provision that the complainants shall make application to the interstate commerce commission for relief, and the commission, on sufficient pleadings and the testimony adduced, makes a finding for the complainants, a subsequent decree of the Circuit Court, affirmed by the Circuit Court of Appeals, based on the testimony and findings of the interstate commerce commission, which according to stipulation of counsel is filed in the case, will not be reversed on the ground that the Circuit Court has no jurisdiction to grant the relief decreed, or because of the extent of the decree in that it orders a reference to the master to ascertain the sum total of the increase in rates paid by the complainants from the time the excessive rates went into effect to the end that restitution may be made. *Southern R. Co. v. Tift (U. S.)*, 11-846.

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1. POWER TO REGULATE AND CONTROL.

Power of legislature. — The business of selling intoxicating liquors is lawful under the constitution and statutes of Louisiana, and the right of any citizen to engage in it is subject only to the restrictions placed thereon by the legislature in the legitimate exercise of the police power. *State ex rel. Galle v. New Orleans (La.)*, 2-92.

Delegation to municipalities. — The power to regulate local traffic is within the police power of a state, and the legislature may authorize municipal corporations to exact licenses for traffic in liquors within a prescribed distance of their corporate limits. *Jordan v. Evansville (Ind.)*, 2-96.

The power of a municipality to regulate or prohibit the sale, etc., of intoxicating liquors does not include authority to prohibit individuals from bringing liquors into the city for their own use. *Commonwealth v. Campbell (Ky.)*, 19-159.

Dispensary acts. — Under the Alabama laws, the operation of a dispensary for the sale of liquors is an exercise of a franchise, and the right to operate must be derived from authority granted by the state. *Uniontown v. State (Ala.)*, 8-320.

2. WHAT ARE INTOXICATING LIQUORS.

Cider. — Within the meaning of the Maine statute prohibiting the unlawful sale of certain enumerated intoxicating liquors, including "cider when kept and deposited with intention to sell the same for tippling purposes, or as a beverage," cider kept for the prohibited purpose is an intoxicating liquor,

even though it is unfermented and nonintoxicating in fact. *State v. Frederickson* (Me.), 8-48.

Alcoholic medical compounds. — A medical compound with only a sufficient amount of alcohol in it to preserve it or to extract the properties from its ingredients, and usually sold as a medicine and not as a beverage, is not an intoxicating liquor, the sale of which is forbidden by a prohibition statute. *Pearce v. State* (Tex.), 13-636.

Statutory enumeration. — The enumeration of liquors, declared to be intoxicating, contained in the Maine statute prohibiting the unlawful sale of liquors, is referred to by and was intended to include the words "intoxicating liquors" as used in the statute declaring places used for the illegal sale or the keeping of intoxicating liquors to be common nuisances. *State v. Frederickson* (Me.), 8-48.

3. CONSTITUTIONALITY OF LIQUOR LAWS.

a. Prohibiting manufacture and sale.

(1) Power to prohibit.

It is within the power of the Michigan legislature to prohibit the manufacture or sale of spirituous or intoxicating liquors in the state. *White v. Bracelin* (Mich.), 8-256.

The right to sell intoxicating liquors is not an inalienable or constitutional right, nor is it one of the privileges and immunities of the citizens of the United States which the Fourteenth Amendment of the Federal Constitution forbids the states to abridge. *Jordan v. Evansville* (Ind.), 2-96.

(2) Declaring what liquors shall be deemed intoxicating.

The Maine statute prohibiting the sale of certain enumerated intoxicating liquors, including cider, which has been construed as prohibiting the sale of cider which is in fact unfermented and nonintoxicating, is a valid exercise of the state's police power, and is not violative either of the state or the Federal Constitution. *State v. Frederickson* (Me.), 8-48.

(3) Punishment.

Ordinance prescribing imprisonment.

— A city ordinance for the suppression of the sale of intoxicating liquors, enacted in pursuance of the authority conferred by section 2499 of the Kansas General Statutes of 1901, which provides that offenders under such ordinance shall be committed to the city jail, is not void because of such provision. *Wichita v. Murphy* (Kan.), 16-468.

b. Prohibiting or restricting importation.

The North Carolina statute making it unlawful for any person, except a druggist for medical purposes, to bring into a certain prohibition county, in any one day, more than one-half gallon of spirituous, vinous, or malt liquors, under penalty of fine or imprison-

ment in the discretion of the court, has no reasonable or substantial relation to the unlawful sale of liquors, and is therefore not a valid exercise of the police power, but unduly restricts the citizen in the innocent use of his property and violates the provision of the state constitution that "among the inalienable rights of all men are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." *State v. Williams* (N. Car.), 14-562.

c. Regulating sales.

(1) Statutory regulation.

Unjust discrimination. — The police power of a state should be used impartially and without unjust discrimination, and while the legislature may discriminate between liquor selling and other callings, it should not unjustly discriminate between individuals engaged in the same business. *State ex rel. Galle v. New Orleans* (La.), 2-92.

Limiting number of saloons. — Provisions in the charter of the city of Texarkana limiting the number of saloons to be licensed in any one-half block in the city, making the determination of the city council upon applications for licenses final, and authorizing such council to refuse to issue licenses to nonresidents of the state, examined and held to constitute reasonable and valid regulations of the liquor traffic. *Ex p. Abrams* (Tex.), 18-45.

A provision in a state statute regulating the sale of intoxicating liquors, which restricts the right to obtain a license to persons who have resided in the county wherein the license is sought, for more than two years next before the filing of the petition therefor, is valid, and does not, as applied to nonresidents of the state, violate the provisions of the Federal Constitution that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, and that no state shall deny to any person within its jurisdiction the equal protection of the law. Such restriction constitutes a valid exercise of the police power, in that it facilitates the arrest of liquor dealers who violate the laws, and makes them subject to the process of the local courts in civil actions upon their bonds, and also facilitates inquiry into the character of applicants for licenses. *De Grazier v. Stephens* (Tex.), 16-1059.

Place of sale. — The Michigan statute making it a penal offense for any person to keep a saloon where spirituous or intoxicating liquors are sold within one hundred rods of a public school in a specified county, is not unconstitutional, either as being private legislation of a class which infringes the constitutional rights of persons residing in the county named, or as being violative of the Fourteenth Amendment to the Federal Constitution. *White v. Bracelin* (Mich.), 8-256.

Sales of liquor to be drunk on premises. — The sale of intoxicating liquors to be drunk on the premises is not so dangerous

to society or detrimental to the public welfare as to render a statute licensing such traffic in intoxicating liquors unconstitutional. *Sopher v. State* (Ind.), 14-27.

The Indiana statute of 1875, providing for the licensing and regulation of the liquor traffic, is a constitutional enactment, and an affidavit charging the keeping of a place where intoxicating liquors are sold to be drunk on the premises fails to charge a public offense, where the place is kept and the sales are made in pursuance of a license granted under the statute. *Sopher v. State* (Ind.), 14-27.

(2) Municipal regulation.

Discretion of municipal officers. —

The discretion vested in the city of New Orleans to regulate the sale of liquors does not give that body absolute control, and where the refusal to grant permission to sell is arbitrary, discriminatory, and unjust, a writ of mandamus will issue. *State ex rel. Galle v. New Orleans* (La.), 2-92.

Regulations as to infants and females. — A municipal ordinance making it unlawful for any person maintaining a saloon or drinking shop, or an apartment there-to attached, to permit females to enter such place of business, is unconstitutional. *State v. Nelson* (Idaho), 3-322.

A city may by ordinance prohibit females from entering, for immoral purposes, places where intoxicating liquors are sold. *State v. Nelson* (Idaho), 3-322.

A municipal ordinance making it unlawful for a person maintaining a place where intoxicating liquors are sold to permit females to enter the same is not unconstitutional as unreasonable or oppressive because it provides as a punishment for the violation thereof a fine of not less than \$25 nor more than \$200 or imprisonment for not less than ten nor more than sixty days. *State v. Nelson* (Idaho), 3-322.

Forbidding seats for customers. — A municipal ordinance declaring it to be unlawful for a saloonkeeper to keep in his saloon any chairs, seats, or stools, or to permit persons to sit on kegs, boxes, barrels, and casks in a saloon run by him, is a valid and reasonable exercise of the power conferred by statute on the municipality to license and regulate places where intoxicating liquors are sold. *Pate v. Jonesboro* (Ark.), 5-381.

A municipal ordinance making it unlawful for any saloonkeeper to suffer or permit any infant or woman to drink in a saloon or to be or remain therein over five minutes, but providing that it shall be a defense if the person charged with the violation of the ordinance shall show that the infant or female was of good repute, sober, and orderly, and had the consent of the parent or guardian of the infant or husband of the female, or that the presence of such infant or female was a reasonable necessity, is a valid police regulation, as it is competent for the legislative body to provide what shall be a *prima facie*

case of the violation of an ordinance, and to place upon the accused the burden of showing that the case falls within one of the exceptions named in the ordinance. *Commonwealth v. Price* (Ky.), 13-489.

d. Local option laws.

Delegation of legislative power. —

The local option law is not unconstitutional as an unwarranted delegation of legislative power to the people, or as special legislation, or as an incomplete enactment; and whether it is unconstitutional because making no provision for the sale of liquors for medicinal or sacramental purposes, or for sales in imported original packages, is a question which cannot be raised by one not charged with the violation of the law in making these particular sales. *In re O'Brien* (Mont.), 1-373.

A local option statute which is a complete expression of the legislative will is not invalid as a delegation of legislative authority on the ground that such law is to become operative by a vote of the people of the district affected. *People v. McBride* (Ill.), 14-994.

Due process of law. — A local option statute which, by prohibiting the sale of intoxicating liquors in certain districts, has the effect of depriving dramshop keepers within such districts of the use of their bar fixtures for the sale of such liquors, does not deprive them of their property without due process of law. *People v. McBride* (Ill.), 14-994.

Equal protection of laws. — A local option statute which prohibits the sale or exchange of intoxicating liquor in any quantity, and provides a more severe penalty for subsequent offenses, does not deny the equal protection of the laws to persons violating such statute, on the ground that under the general law relating to sales of intoxicating liquors in quantities less than a gallon the punishment is the same for first and subsequent offenses. *People v. McBride* (Ill.), 14-994.

Completeness of enactment. — The Oregon Local Option Act is complete in itself and requires nothing else to give it validity, and it is not violative of a provision of the state constitution that no law shall "be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution." *Fouts v. Hood River* (Ore.), 7-1160.

Special or local laws. — The Oregon Local Option Act does not violate the provision of the state constitution prohibiting special or local laws for the punishment of crimes or misdemeanors or for the regulation of the practice in courts of justice. *Fouts v. Hood River* (Ore.), 7-1160.

There is nothing in the Oregon constitution to prevent the adoption of a special or local law prohibiting the sale of intoxicating liquors within any precinct, county, ward, or city in the state. *Fouts v. Hood River* (Ore.), 7-1160.

Title and subject of statute. — A statute which enables particular communities to determine by popular vote whether sales of liquor may be licensed therein, and prescribes methods for restoring districts which are thus made anti-saloon territory to their former condition, embraces but one subject, and does not violate the constitutional provision that statutes shall not embrace more than one subject. *People v. McBride* (Ill.), 14-994.

A constitutional provision that no act shall contain more than one subject, which shall be expressed in its title, is not violated by provisions in a local option law for the punishment of perjury and forgery committed in connection with petitions for the submission to popular vote of the question whether the sale of intoxicating liquor shall be prohibited in a particular district. *People v. McBride* (Ill.), 14-994.

The exemption from a local option statute of sales of intoxicating liquors by druggists is not invalid on the ground that the title of the statute does not expressly indicate that the statute regulates sales by druggists. *People v. McBride* (Ill.), 14-994.

The use of the words "popular vote" in the title of a local option statute, which provides that the votes cast by a majority of the legal voters voting on the proposition shall govern, is not misleading. *People v. McBride* (Ill.), 14-994.

A provision in a local option statute that "yes" shall be a vote in changing the district to anti-saloon territory and that "no" shall have the contrary effect, is not invalid on the ground that it may deceive the voters. *People v. McBride* (Ill.), 14-994.

Prescribing rules of evidence. — A provision in a local option statute that the issuance and the posting of a United States internal revenue tax stamp or receipt for the sale of intoxicating liquor shall be *prima facie* evidence of the sale of liquor by the person to whom it is issued at the place where it is posted, is not invalid, as the issuance and posting of such receipt tends to prove that such person is engaged in the sale of intoxicating liquor at such place. *People v. McBride* (Ill.), 14-994.

Suspension of license laws. — A provision in a local option statute that during the time any district is anti-saloon territory the operation therein of ordinances relating to intoxicating liquors and dramshop licenses shall, so far as they are inconsistent with the statute, be suspended, is not invalid. *People v. McBride* (Ill.), 14-994.

Provision for refunding unearned portion of license fee. — A provision in a local option statute that in case the territory within which a municipality is situated shall become anti-saloon territory the municipality shall refund the unearned portion of license fees, is not a legislative compulsion of the incurring of a debt by the municipality, and is not invalid. *People v. McBride* (Ill.), 14-994.

Definition of intoxicating liquors. — A provision in a local option statute that

the words "intoxicating liquors" shall include all distilled, spirituous, vinous, fermented, and malt liquors is not invalid on the ground that it does not specify the quantity of water which might be mixed with such liquors without affecting their character as intoxicants. *People v. McBride* (Ill.), 14-994.

Interference with interstate commerce. — A local option statute prohibiting the taking of orders or the making of agreements in anti-saloon territory for the sale or delivery of intoxicating liquors, but not purporting to control the importation of liquor from other states, does not violate the interstate commerce clause of the Federal Constitution. *People v. McBride* (Ill.), 14-994.

Who may raise constitutional questions. — A person who has been convicted of selling liquor in a local option district, but who was not prosecuted for perjury or forgery, on whose trial a United States internal revenue receipt was not offered as evidence of the sale of intoxicating liquors, who did not sell as a druggist, and was not engaged in interstate commerce, cannot dispute the validity of the statute under which he was convicted on the ground that it creates new criminal offenses of forgery and perjury, that it changes the quantum of evidence necessary to convict by making an internal revenue receipt *prima facie* evidence, that it regulates sales by druggists, that it conflicts with the commerce clause of the Federal Constitution, and that it creates debts of municipalities without their consent, unless the invalidity of such provisions affects the validity of the act as a whole. *People v. McBride* (Ill.), 14-994.

The validity of a provision in a local option statute that the failure to give notice of election so required by such statute shall not invalidate the vote can be questioned only on the failure to give notice. *People v. McBride* (Ill.), 14-994.

e. Searches and seizures.

As the Indiana statute of 1907 relative to the seizure of intoxicating liquors unlawfully kept, provides for a judicial hearing, after due notice, in which the owner of the liquor seized has an opportunity to contest the ground upon which the forfeiture is claimed, it cannot be contended that such statute is unconstitutional as authorizing the taking of property without due process of law. *Rose v. State* (Ind.), 17-228.

4. LICENSE LAWS.

a. Operation and effect of statute.

The Indiana statute of 1875, providing for the licensing and regulating of the sale of intoxicating liquors, does not authorize a wrong which would be illegitimate in the absence of statute, but, on the contrary, operates to deprive the retailer of liquors of many of his common-law rights and privileges by imposing regulations and restric-

tions thereon. *Sopher v. State* (Ind.), 14-27.

The Tennessee statute of 1903 imposing a tax on retail liquor dealers in all parts of the state applies to territory covered by the Tennessee "four-mile law," which prohibits the sale of such liquors within four miles from any schoolhouse or incorporated institution of learning. There is no conflict between the two statutes as applied to such territory, the purpose of both being to prevent the sale of intoxicating liquors therein. *Foster v. Speed* (Tenn.), 15-1066.

That portion of the charter of the city of Texarkana which limits the number of saloons to be conducted in any one-half block in the city is not in conflict with article 16, section 20 of the Texas constitution, as prohibiting the sale of intoxicating liquors without first submitting the question to a vote of the people. Such charter provision does not amount to a prohibition of the liquor traffic, but is merely a regulation thereof. *Ex p. Abrams* (Tex.), 18-45.

b. Validity and effect of license.

Quo warranto to test validity. — A liquor license is not a franchise, and consequently its validity cannot be tested by quo warranto proceedings. *State v. Gibbs* (Vt.), 18-525.

c. Who may obtain license.

Corporations. — A corporation may lawfully receive a license to vend intoxicating liquors at wholesale, in Nebraska, but no authority exists for licensing a corporation to engage in the retail traffic in such liquors. Chapter 82, Laws of 1907, which prohibits corporations from being interested in any manner in the retail traffic in intoxicating liquors, is in *pari materia* with the Slocumb law, under which the right of corporations to sell intoxicating liquors at wholesale has long been assumed, if not expressly recognized. *Rohrer v. Hastings Brewing Co.* (Neb.), 17-998.

d. What places may be licensed.

(1) Vicinity of church.

Meeting place of "faith curists." — The fact that an unorganized body of persons known as Faith Curists, who believe in God and Christ, hold meetings for Bible study and religious and secular instruction of the young in a building, the upper part of which is occupied as a dwelling and the downstairs rear portion of which is used for storage purposes, does not constitute such building or such body of persons "a church," within the meaning of the New Jersey statute providing that no license to sell intoxicating liquors shall be granted in any place within a specified distance of a church. *George v. Board of Excise* (N. J.), 9-1112.

(2) Vicinity of schoolhouse.

Public or private schools. — The word "schoolhouse" as used in the New York

statute absolutely prohibiting the sale of intoxicating liquors within two hundred feet of a building occupied exclusively as a schoolhouse, is intended to apply primarily to common public schools devoted to such general elementary and intermediate instruction as is adapted to the education of children and youth, and perhaps secondarily to such semi-public and private schools as are conducted for the same purpose. *Matter of Townsend* (N. Y.), 16-921.

Training school for nurses. — A building used as a training school for nurses is not a "schoolhouse" within the meaning of the word as used in such statute. *Matter of Townsend* (N. Y.), 16-921.

(3) Separate places in same building.

Necessity of separate licenses. — Two places where liquor is sold, having separate bars, a separate set of attendants, a separate stock of liquors, and separate entrances opening on the street, may not be maintained under one license to sell liquor. *Malkan v. Chicago* (Ill.), 3-1104.

The meaning of "place" in the Illinois Dram Shop Act, and an ordinance of the city of Chicago, is a room where a bar is located and a saloon is run and not the whole building in which the right to sell liquor is given. *Malkan v. Chicago* (Ill.), 3-1104.

e. Powers of municipal officers.

In Nebraska the mayor in cities of the second class having more than 5,000 and less than 25,000 inhabitants has the right to cast a deciding vote in a contest over an application for a liquor license in case of a tie vote of the council. *Rohrer v. Hastings Brewing Co.* (Neb.), 17-998.

f. Consent to granting of license.

Park commissioners or owners of public park. — Park commissioners in whom is vested the legal title to park lands are owners thereof and have a legal right to sign an application for a dram shop license. *Theurer v. People* (Ill.), 1-57.

Under an ordinance requiring an application for a dram shop license to be signed by a majority of the property owners according to frontage on the streets surrounding the block on which the saloon is proposed to be kept, all the frontage, including the park frontage, must be included in the estimate whether the owners have a legal right to sign the application or not. *Theurer v. People* (Ill.), 1-57.

Bona fide freeholders. — Under the Nebraska liquor laws a petition for a liquor license must be signed by *bona fide* freeholders. *Dye v. Raser* (Neb.), 16-274.

One made a freeholder for the sole purpose of qualifying him as a petitioner for a liquor license is not a *bona fide* freeholder within the meaning of the Nebraska liquor laws. *Dye v. Raser* (Neb.), 16-274.

Time of acquisition of title. — The lapse of a considerable time after the ac-

quisition of title by such a freeholder does not of itself qualify him to sign a petition for a liquor license. *Dye v. Raser* (Neb.), 16-274.

Owners of unoccupied property. — It seems that under a statute requiring an applicant for a liquor license to obtain the consent of two-thirds of the owners of buildings occupied exclusively as dwellings and located within two hundred feet of the proposed saloon, it is unnecessary for an applicant to obtain the consent of owners of buildings which though originally occupied as dwellings have been vacant for some time, are being held for sale, and are located in a neighborhood which is rapidly becoming a business district. *Matter of Townsend* (N. Y.), 16-921.

Consent procured by purchase. — The consent of a property owner to an application for a dram shop license is not valid if procured by purchase. *Theurer v. People* (Ill.), 1-57.

Withdrawal of consent. — The signer of an application for a dram shop license may withdraw consent at any time before the proper tribunal has acted finally upon the application. *Theurer v. People* (Ill.), 1-57.

Consent by agent of property owner. — A property frontage consent may be signed by an authorized agent of the owner. *Theurer v. People* (Ill.), 1-57.

g. Objections to granting of license.

Right of lessees to object. — A lessee of real property is not the owner thereof within the meaning of the Rhode Island statute which provides that no license shall be granted authorizing the sale of liquor, "at any building or place where the owners of the greater part of the land within two hundred feet of such building or place shall file with the board having jurisdiction to grant licenses their objection to the granting of such license;" and, consequently, an objection filed by such a lessee, either alone or in conjunction with the owner of other adjoining property, is ineffectual to prevent the granting of a license. *American Woolen Co. v. Town Council* (R. I.), 16-1227.

h. Liability for license fee.

Sales without license. — A hotel company which has engaged in the sale of intoxicating liquors without having applied for or obtained the license required by statute is guilty of a violation of law, but does not become indebted to the state for the cost of a license during the period of illicit selling. *Commonwealth v. Central Hotel Co.* (Ky.), 12-172.

i. Bond of liquor dealer.

Under the New Hampshire statutes the state may maintain an action for breach of the bond of a licensed dealer in intoxicating liquors, though he has not been convicted

criminally of the charge alleged as a breach. *State v. Corron* (N. H.), 6-486.

j. Granting or refusing license.

An applicant for a bar-room license to whose character no objection is found should not be refused a license in a neighborhood where others are engaged in selling liquors on the objection of a minority of the property holders or on the ground that no more bar-rooms are needed. *State ex rel. Galle v. New Orleans* (La.), 2-92.

Remedy for wrongful refusal. — Where the authorities vested with power to grant a liquor license, wrongfully and arbitrarily deny an application therefor, the remedy of the applicant is by an action to obtain it and to recover compensation for any damages sustained, or by writ of mandamus to compel the authorities to perform their official duties. *Montpelier v. Mills* (Ind.), 17-57.

k. Revocation of license.

Revocability in general. — A license to sell intoxicating liquors is granted in pursuance of the police power, and not of the taxing power, of the state. Its primary purpose is not revenue, but regulation. It is subject to revocation. *Claussen v. Luverne* (Minn.), 14-673.

Revocation of license as a tort. — A municipality is not liable in tort for the mistaken action of the city council in attempting to revoke a license to sell intoxicating liquors. *Claussen v. Luverne* (Minn.), 14-673.

Recovery of license fee. — Where a license to sell intoxicating liquors fails without fault on the part of the licensee, as where it is revoked because of the adoption of the policy of prohibition by the state in which it is issued, the licensee is entitled to recover back the unearned portion of the license fee, and, consequently, a petition which states the issuance of such a license to the plaintiff, and the subsequent revocation or cancellation thereof by reason of the adoption of a state constitution containing a clause prohibiting the sale of intoxicating liquors within the state, is not demurrable for failure to state a cause of action. *Allsman v. Oklahoma City* (Okla.), 17-184.

5. OFFENSES AGAINST LIQUOR LAWS.

a. Transportation of liquors.

Knowledge or intent of carrier. — The Massachusetts statute (Rev. Laws, c. 100, § 49) providing that intoxicating liquor which is to be transported for hire for delivery in a no-license city shall be delivered to the carrier in packages marked with the names of the seller and the purchaser and with the kind of liquor therein contained, and that the delivery of such liquor by a carrier shall be deemed to be a sale by the person making such a delivery, does not make intent an element of the offense; and a carrier or its servant may be convicted of

illegally transporting intoxicating liquor, though it does not know and has no reason to surmise that there is intoxicating liquor in a package delivered for transportation by a seller who fails to mark the package as required. *Com. v. Mixer* (Mass.), 20-1152.

The general rule that a carrier cannot ordinarily insist on obtaining knowledge of the character of the goods offered for transportation is modified where a statute expressly or impliedly confers that right; and the Massachusetts statute (Rev. Laws, c. 100, § 49) imposing on the carrier criminal responsibility for transporting intoxicating liquors clothes the carrier with the power to obtain such knowledge as may protect it, or to refuse to take the proffered article for transportation. *Com. v. Mixer* (Mass.), 20-1152.

b. Sales of liquors generally.

Loan of liquor as sale. — A loan of intoxicating liquors to be drunk as a beverage and to be repaid out of liquor which the borrower has ordered is a sale in violation of the Texas local option statute, and it is immaterial that the person making the loan is a member of a club. *Tombeaugh v. State* (Tex.), 14-275.

Engaging in business of selling. — Under the statutes of South Dakota there is no material distinction between selling intoxicating liquors without a license and engaging in the business of selling such liquors without a license. The term "engaging in the business without license," used in the statute, is equivalent to the term "selling without a license." *State v. Ely* (S. Dak.), 18-92.

Sale by club. — The furnishing and delivery of intoxicating liquors by a social club to its members for consumption on the premises, with the understanding that the liquors shall be paid for by the individual members to whom they are furnished and delivered, constitutes a sale in a dram shop within the meaning of the Illinois statute prohibiting the sale of liquor without a license, though the sale is merely an incident to the main purposes of the club, and is made without profit, and though the club has been organized in good faith for social purposes, and not as a shift or device to evade the provisions of the licensing statute. *South Shore Country Club v. People* (Ill.), 10-383.

c. Sunday sales.

Bona fide hotel guests. — Where a person enters the café of a hotel on Sunday, and orders beer or other intoxicating liquor, and the person in charge informs him that liquors cannot be served on Sunday except to *bona fide* guests of the hotel, and thereupon the hotel register is brought down from the office to the café, and the person ordering the liquor registers, and is served with liquor and a cheese sandwich, and consumes the same, such person cannot be considered a *bona fide* registered guest of the hotel within

the meaning of the statute which prohibits the sale of intoxicating liquor on Sunday except to such a guest. *Cake v. District of Columbia* (D. C.), 17-814.

Under the circumstances above considered, the hotel keeper cannot be heard to contend that he supposed that the person purchasing the liquor came to the hotel for a meal, and was entrapped into making the sale in that belief. It is the duty of a hotel keeper, making a sale of liquor on Sunday to satisfy himself that the purchaser is a *bona fide* registered guest of the hotel, and whatever subterfuge may be indulged in on the part of the purchaser, none can be tolerated on the part of the hotel keeper. *Cake v. District of Columbia* (D. C.), 17-814.

In a prosecution against the proprietor of a hotel and café for selling intoxicating liquor on Sunday, where the defense interposed is that the person served with the liquor was a *bona fide* registered guest of the hotel the burden of proving that fact rests on the defendant, and the question whether such person was a *bona fide* registered guest is one of fact for the jury, or for the court where the trial is had before the court without a jury. *Cake v. District of Columbia* (D. C.), 17-814.

d. Gifts of liquors.

Dispensing hospitality. — The Missouri statute prohibiting the sale and giving away of intoxicating liquors is not intended to forbid the mere gift of a drink of liquor by a private person who is in no sense a dealer in liquors, to one of his friends as an act of courtesy or hospitality. *State v. Fulke* (Mo.), 13-732.

e. Keeping liquors.

It is not an offense under the Kansas statutes for a person not authorized to sell intoxicating liquors to keep them for his own use, but such a person cannot keep such liquors except in a dwelling house not used in connection with a place of business, without making out a *prima facie* case that they are kept for unlawful purposes. *State v. White* (Kan.), 6-132.

f. Place of sale.

Place of shipment or place of sale. — The giving and forwarding, in prohibition territory, of an order for liquor to be shipped "C. O. D." and the shipment of the liquor in pursuance thereof from license territory, constitute a sale at the point of shipment, and not at the point of destination. *Golightly v. State* (Tex.), 13-827.

Where an order for whiskey is sent by an infant through the mail to the defendant at his place of business, and the defendant fills the order by delivering the whiskey to a carrier consigned to the infant at his place of residence, who there receives it from the carrier, the sale is made at the defendant's place of business and not at the infant's place of residence. *Harper v. State* (Ark.), 18-435.

Place of delivery or place of sale. — Where a liquor dealer, pursuant to an order received at his place of business, selects from his stock liquor of the kind and quantity ordered, and delivers it either in person or by an agent to the purchaser, without the intervention of a common carrier, the place of delivery is the place of sale. *Lochnar v. State* (Md.), 19-579.

g. Quantity sold.

"Wholesale" distinguished from "retail." — The word "wholesale" as used in the Massachusetts statute providing that the prohibition to sell intoxicating liquors shall not apply to "sales of cider at wholesale by the original makers thereof" refers more to the quality of the sale than to the purpose of the purchaser with regard to selling again, the principal distinction between retail and wholesale sales being that the former are sales made in small quantities such as are adapted to the wants of individual purchasers, while the latter are sales made in large quantities such as ordinarily would be beyond the needs or desires of ordinary consumers. *Commonwealth v. Greenwood* (Mass.), 18-183.

h. Sales or gifts to minors.

Sales for medicinal purposes. — A statute prohibiting the sale of intoxicating liquors to minors does not prohibit a sale to them for medicinal purposes. *Atkinson v. State* (Tex.), 3-839.

Liability of physician prescribing liquor for minor. — When a locality adopts the provisions of a local-option law prohibiting the sale of intoxicating liquors except for medical purposes, the operation in such locality of a statute prohibiting the sale of intoxicants to minors except on the written consent of the parents or guardians is suspended, and therefore it is not an offense for a physician to give a minor a prescription for intoxicating liquors to be used as a medicine. *Atkinson v. State* (Tex.), 3-839.

Giving liquor to minor as act of hospitality. — The Michigan statute prohibiting the giving of intoxicating liquors to minors does not preclude one in exercising the hospitality of his home from giving intoxicating liquors to an infant guest. *People v. Bird* (Mich.), 4-1062.

Minor purchasing liquor as agent for another. — The member of a trading company who orders a minor in the employ of the company to purchase intoxicating liquor for him for his personal use is not a person "having the management or control" of the minor, within the meaning of the statute making it lawful to sell liquor to a minor by permission of such person. *Tony v. State* (Ala.), 6-865.

The sale of intoxicating liquor to a minor who is acting as agent for another is a sale to the minor, where a minor does not disclose his agency but merely applies for the liquor

and pays for it when it is handed to him. *Tony v. State* (Ala.), 6-865.

Filling order by delivery to carrier. — The delivery to a carrier of whiskey consigned to an infant pursuant to an order received from him by mail is a sale directly to the infant, and not a sale through the carrier as the infant's agent. *Harper v. State* (Ark.), 18-435.

Ignorance of infancy. — Ignorance of the fact of infancy is no defense to a prosecution under the Arkansas statute (Kirb. Dig., § 1943) which provides that "any person who shall sell . . . any ardent, vinous, malt, or fermented liquors . . . to any minor" shall be guilty, etc. *Harper v. State* (Ark.), 18-435.

i. Persons liable for unlawful sales.

Sales by agent or servant. — It is no defense to a prosecution for selling intoxicating liquors without a license that the defendant was acting not for himself, but as the servant of another. *Lochnar v. State* (Md.), 19-579.

Sale by servant contrary to instructions. — A liquor dealer forbidden by statute to sell liquor to a minor is liable for a sale to a minor, although the sale is made without the knowledge of the dealer by his agent who is under instructions from the dealer not to sell to minors. *State v. Gilmore* (Vt.), 13-321.

In a prosecution for the violation of the Michigan statute requiring saloons to be closed on holidays, it is no defense that the defendant instructed his barkeeper not to open the saloon and was himself innocent of guilty intent. *People v. Kriesel* (Mich.), 4-5.

Person assisting minor in making purchase. — One who assists and directs an intending purchaser of liquor, in a prohibition county, in making out an order for the liquor and in doing so represents the purchaser, and not the liquor dealer, is not guilty of a violation of the prohibition law. *Golightly v. State* (Tex.), 13-827.

6. PROSECUTIONS.

a. Statute applicable.

A general prohibition law repealing all laws in conflict with it supersedes the provisions of a city charter as to sales of liquor without a license, and therefore sales of liquor in the city must be prosecuted under the general law and not under the city charter. *State v. Swink* (N. C.), 19-422.

b. Jurisdiction.

Justices' Courts. — In Montana a justice's court has jurisdiction of the offense of selling intoxicating liquor in violation of a local option law, if the offense was committed in the county in which such court is established, and the prosecution need not be brought in the township in which such offense was committed. *State v. O'Brien* (Mont.), 10-1006.

c. Limitation of prosecution.

A prosecution under the Virginia statutes for selling liquors without a license is governed by the provision of the statute of limitations relating to prosecutions for violations of the revenue laws, and not by the general provision relating to misdemeanors. *Quillin v. Commonwealth* (Va.), 8-818.

d. Indictment, information, or complaint.

(1) In general.

Averring adoption of statute. — Where prohibition has been adopted in a state by the vote at a general election, as provided by statute, an indictment for selling liquor need not allege that the election was held, and resulted in prohibition. The courts take judicial notice of general elections. *State v. Swink* (N. C.), 19-422.

In a prosecution for the violation of a local option law which has become effective not by its own terms but by the observance of certain conditions precedent by the people and officials of the county, the complaint is sufficient which alleges the ultimate fact that the law had become operative and that the sale of liquor was made in violation thereof. *State v. O'Brien* (Mont.), 10-1006.

Charging offense in terms of statute.

— An information for the violation of the Vermont statute making it unlawful to expose or keep for sale intoxicating liquor need not show how the liquor was kept or exposed for sale if it charges the offense in the terms of the statute. *State v. Paige* (Vt.), 6-725.

Informing accused of nature of accusation. — The form of indictment provided in the Florida statute prohibiting the sale of intoxicating liquors is not open to the objection that it does not inform the accused of the nature of the accusation against him. *Cesar v. State* (Fla.), 7-45.

Specification of illegality in sale.

— An indictment for selling intoxicating liquors contrary to the law is fatally defective if it fails to allege in what respect the sale was contrary to the law. *State v. Dolan* (W. Va.), 6-450.

Possibility of obtaining license.

— Since it is no defense to a prosecution for selling intoxicating liquors without a license that it was impossible for the defendant to obtain a license, it follows that an information for the offense is not demurrable for failure to allege facts showing that it was possible for the defendant to procure a license, or that the business of liquor selling could lawfully be engaged in in the county by persons having a license. *State v. Ely* (S. Dak.), 18-92.

(2) Place of sale.

An information for the violation of the Vermont statute making it unlawful to expose or keep for sale intoxicating liquor sufficiently shows where the liquor was kept and exposed if it designates a town in a county within the state as the place. *State v. Paige* (Vt.), 6-725.

(3) Description or character of liquor.

An information for the violation of the Vermont statute making it unlawful to expose or keep for sale intoxicating liquor need not aver that the liquor exposed was not of the kinds which the statute specifically excepts from its prohibition. *State v. Paige* (Vt.), 6-725.

An information for the violation of the Vermont statute making it unlawful to expose or keep for sale intoxicating liquors need not specify the kinds of liquor kept or exposed. *State v. Paige* (Vt.), 6-725.

An indictment charging the defendant with bringing into a certain county "on one certain day, more than one-half gallon, to wit, one gallon of spirituous, vinous, or malt liquors," against the form of the statute, etc., while possibly not fatally defective, is vague and uncertain and subject to criticism, in failing to specify which of the prohibited kinds of liquor the defendant brought into the county. *State v. Williams* (N. Car.), 14-562.

In a prosecution for the illegal sale of liquor of a certain class which the statute makes it unlawful to sell, it is not necessary to allege or prove that the particular liquor is intoxicating. *State v. York* (N. H.), 13-116.

(4) Price of liquor sold.

A complaint for the violation of a city ordinance by selling liquors without a license must allege a price or consideration for the sale. *Cannelton v. Collins* (Ind.), 19-692.

(5) Name or designation of purchaser.

In a prosecution for selling intoxicating liquors under the Ohio statutes, it is necessary to a sufficient charge against the accused that the affidavit, information, or indictment as the case may be, allege the name of the purchaser of such intoxicating liquors, or that his name is to the affiant, informant, or grand jury unknown. *State v. Ridgway* (Ohio), 4-94.

An indictment for the unlawful sale of intoxicating liquors must charge a sale to some person by name or to some person unknown to the jurors. *State v. Tisdale* (N. Car.), 13-125.

A state statute making the possession of a license issued by the United States government to sell or manufacture intoxicating liquors *prima facie* evidence of the doing of the acts permitted by said license when in violation of the laws of the state, does not create the specific offense of carrying on the general business of retailing liquor in prohibition territory which may be so charged in an indictment without naming the purchaser of the liquor. *State v. Tisdale* (N. Car.), 13-125.

e. Election as to offenses.

Where an information for selling intoxicating liquors without a license alleges that the defendant was engaged in the business on May 1, 1907, and thereafter continuously down to June 10, 1907, inclusive, the prose-

cution is at liberty to prove as many sales as it can between the dates specified, and cannot be required to elect on what particular sale it will rely. *State v. Ely* (S. Dak.), 18-92.

One charged in a single count with a sale of intoxicating liquor to a minor, may, when the evidence for the prosecution proves two distinct sales on different days, require the prosecution to elect on which offense it intends to reply, and this right to compel an election is a personal privilege. *Com. v. Coyne* (Mass.), 20-1069.

In such a prosecution, although the accused does not except to the refusal of the court to require the prosecution to elect on which of two distinct offenses shown by the evidence it will rely before he introduces his proof, he does not waive his right to require an election, and a renewal of the request at the close of the evidence, and before the beginning of the arguments, does not come too late. *Com. v. Coyne* (Mass.), 20-1069.

In a prosecution for selling liquor to a minor, the refusal of the court to require the prosecution to elect on which one of two distinct offenses shown by the evidence it will rely for a conviction is not cured by the voluntary concession of the district attorney, in his closing argument, that he will ask for a conviction for but one offense. *Com. v. Coyne* (Mass.), 20-1069.

Purchase with money furnished by prosecuting attorney. — Where, in a criminal prosecution for the sale of intoxicating liquor in violation of a local option law, the evidence shows, *prima facie*, a sale of liquor in violation of the statute, it is no defense that the prosecuting attorney furnished the money with which purchases of the liquor were made by the state's witnesses. *State v. O'Brien* (Mont.), 10-1006.

f. Defenses.

Impossibility of obtaining license. — It is no defense to a prosecution for selling intoxicating liquors without a license, that it was impossible for the defendant to obtain a license because of the fact that prohibition was in force in the county at the time when the sales alleged in the information were made. *State v. Ely* (S. Dak.), 18-92.

Failure of municipality to levy license tax. — Inasmuch as there was a valid ordinance in force in the city of Texarkana, prior to the enactment of the statute known as the Baskin-McGregor law, providing for the levy of an occupation tax equal to one-half the state tax on liquor dealers, which ordinance was continued in force by the special charter afterwards granted to the city, it was unnecessary for the city council to fix or levy any new tax on the business after the enactment of the Baskin-McGregor law, and their failure to do so constitutes no defense to a prosecution for the illegal sale of liquor within the city. *Ex p. Abrams* (Tex.), 18-45.

Wrongful grant of license to others. — In a prosecution for selling intoxicating liquors without a license, in violation of the

provisions of a city charter, it is no defense that the city council has violated the provisions of the charter in granting licenses to liquor dealers other than the defendant. *Ex p. Abrams* (Tex.), 18-45.

Wrongful refusal to grant license. — On a prosecution for the violation of a municipal ordinance forbidding the sale of intoxicating liquors without a license, it is no defense that the municipal authorities declined to consider the defendant's application for a license and wrongfully refused to issue a license to him. *Montpelier v. Mills* (Ind.), 17-57.

On such a prosecution the court cannot try collateral issues properly pertinent and material in the proceedings to obtain a license, and the fact that the defendant may have been amply able and willing to meet all the conditions necessary to entitle him to a license, and that he tendered proof of the necessary facts and payment of the prescribed fees, cannot justify him in making a sale without a license in direct violation of the terms of the ordinance. *Montpelier v. Mills* (Ind.), 17-57.

License issued without authority. — A license emanating from a body without authority to issue licenses is no protection against a criminal prosecution for selling intoxicating liquors without a license; and, when such a so-called license is produced by way of defense to a criminal prosecution, the question of the authority to issue the license not only may, but necessarily must, be investigated in every case. *State v. Laborde* (La.), 12-711.

Where the authority to issue licenses for the sale of intoxicating liquors has been taken away from a town by the paramount authority of a parish election, whereby prohibition has been established throughout the parish within whose limits the town is situated, a license from the town authorities is no protection against criminal prosecution for selling intoxicating liquors without a license. *State v. Laborde* (La.), 12-711.

Ignorance of intoxicating properties of liquor sold. — In a criminal prosecution for selling intoxicating liquors in violation of a statute absolutely prohibiting the sale of intoxicating liquors under certain conditions, ignorance on the part of the accused of the fact that the liquor sold by him had intoxicating properties is no defense, and evidence that the liquor in question was sold to the accused under a guarantee that it contained no alcohol and would not intoxicate, is properly excluded. *Haynes v. State* (Tenn.), 12-470.

g. Evidence.

(1) Admissibility.

Intoxicating character of liquor sold. — In a prosecution for selling intoxicating liquor without license, where the commonwealth elects to prosecute the accused for selling to a particular person, it cannot prosecute him for selling to any other person or show that he made sales to any other per-

son, in aid of its proof; but where the controverted question in the case is the intoxicating character of the liquor sold, testimony that similar liquor procured from the accused by other persons produced intoxication is admissible, and the fact that such testimony discloses that such liquor was bought from the accused is not prejudicial error. *Devine v. Commonwealth (Va.)*, 13-361.

Intent or knowledge of defendant. — The South Dakota statute requiring all saloons in which intoxicating liquors are sold or kept for sale to be closed on Sunday imposes on the keeper of a saloon the affirmative duty to see that his saloon is closed, and in a prosecution under the statute it is not error to exclude testimony tending to show that the defendant had no knowledge of or did not authorize the opening of his saloon. In such a prosecution it is no defense that the defendant's saloon was not legally licensed, since the statute does not exclude such saloons expressly or by implication. *State v. Grant (S. Dak.)*, 11-1017.

Other sales by defendant. — In a prosecution for furnishing a person with whiskey in violation of the local option law, evidence of other similar acts by the defendant may be shown for the purpose of rebutting the inference of accident, mistake, or inadvertence. *People v. Giddings (Mich.)*, 18-844.

Sales by third persons. — In a prosecution for furnishing a person with whiskey in violation of the local option law, it is reversible error to admit evidence that a third person who lived with the defendant had on one occasion furnished some one with liquor. *People v. Giddings (Mich.)*, 18-844.

Tasting of liquor by jury. — In a prosecution for unlawfully keeping intoxicating liquors for sale without a license, it is not error to permit the jury to taste the liquor seized and produced in evidence at the trial, for the purpose of aiding in the determination of the question whether the liquor is intoxicating. *Schulenberg v. State (Neb.)*, 16-217.

(2) Weight and sufficiency.

Keeping liquors for sale. — When ten cases, containing one hundred and twenty quart bottles of whiskey, are deposited in one lot, the quantity alone, in the absence of any other explanation, is sufficient evidence that the whiskey was intended for unlawful sale. *State v. Intoxicating Liquors (Me.)*, 20-668.

Intoxicating character of liquor sold. — In a prosecution for the sale of cider alleged to contain a greater percentage of alcohol than the law allows, evidence examined and held to entitle the accused to a verdict of acquittal. *Devine v. Commonwealth (Va.)*, 13-361.

The jury are warranted in finding from their own knowledge on the subject and without specific proof, that whiskey is spirituous or distilled liquor. *State v. York (N. H.)*, 13-116.

Sunday sales. — In a prosecution for failing to keep a saloon closed on Sunday, evi-

dence examined and held sufficient to sustain a conviction. *State v. Grant (S. Dak.)*, 11-1017.

Sales to minors. — Evidence reviewed in a prosecution for selling intoxicating liquor to a minor child and held sufficient to justify a conviction. *Tony v. State (Ala.)*, 6-865.

h. Instructions.

Quantity of liquor sold. — In a prosecution for the illegal sale of intoxicating liquor, where the defense interposed is that the sales made by the defendant were sales of cider at wholesale and therefore legal under the statute, an instruction to the jury that a sale made to a purchaser for his own consumption and not to sell again is a sale at retail, whether it is made in a quantity of one gallon or more, and that a sale at wholesale is a sale made to one who has the real, or at least the apparent, purpose to sell again to his own customers, is erroneous, because of its failure to call to the attention of the jury the principal distinction between sales at wholesale and sales at retail, viz., that sales at wholesale are sales in large quantities, while sales at retail are sales in small quantities. While the apparent purpose of the purchaser with regard to a resale may be an important circumstance which it is proper to call to the attention of the jury, the decisive point is the quantity sold rather than the purpose of the purchaser. *Commonwealth v. Greenwood (Mass.)*, 18-183.

Intoxicating character of liquor sold. — Under the statutes of South Dakota, which make it a criminal offense to engage in the business of selling or offering for sale any "spirituous, vinous, malt, brewed, fermented, or other intoxicating liquors" at retail without a license, the state, on a prosecution for such offense, is not obliged to prove that the liquor sold by the defendant was intoxicating, provided it belonged to one of the classes of liquor mentioned in the statute, and, consequently, an instruction to the jury that they can find the defendant guilty on proof that he sold liquor which was either brewed, fermented, or malt, the statute "making such liquor intoxicating," is not erroneous. *State v. Ely (S. Dak.)*, 18-92.

In such a prosecution it is not error for the court to instruct the jury that they can find the defendant guilty on proof that he sold "any mixture which contained any percentage of intoxicating liquors," even though the information does not expressly charge a sale of such a mixture, since a sale of a mixture containing any percentage of intoxicating liquor would necessarily involve a sale of such liquor. *State v. Ely (S. Dak.)*, 18-92.

i. Sentence and punishment.

The charter of the city of Atlanta and the ordinances passed under it give authority to the recorder, on conviction of a person charged with keeping spirituous, fermented, or malt liquors for illegal sale, to sentence

him to pay a fine of five hundred dollars, and also to work on the streets and public places of the city for thirty days. *Loeb v. Jennings* (Ga.), 18-376.

j. Appeal and error.

Proof of other violations of law. —

In a criminal prosecution for the sale of intoxicating liquor in violation of a local option law, it is not prejudicial error to admit evidence of another such sale when the evidence is not introduced for the purpose of showing another offense and the court limits the effect of the evidence by appropriate instructions. *State v. O'Brien* (Mont.), 10-1006.

7. LOCAL OPTION.

As to constitutionality of local option laws, see *supra*, 3 d.

a. Adoption of law.

(1) Petition for submission to voters.

Signatures. — Under a liquor license act making it the duty of a municipal council to submit a local option law to a vote of the municipal electors on the filing with the clerk of the municipality of "a petition in writing signed by at least twenty-five per cent. of the total number of persons . . . qualified to vote at municipal elections," a document in the form of a petition but signed by only two electors, and having attached to it the signatures of others sufficient to make up the required number which had been previously affixed to and detached from other petitions in the same form is not a sufficient petition within the meaning of the statute, even in the absence of any fraud. *In re Williams* (Can.), 14-481.

(2) Consent of inhabitants.

Fraudulent census enumeration. —

Where the proportion of the inhabitants of a city whose consent is necessary to authorize the sale of intoxicating liquors therein varies according to the population of the city, a citizen thereof, especially if he is a resident taxpayer, may maintain an action to correct a fraudulent census enumeration of the inhabitants of such city. *Semones v. Needles* (Ia.), 15-1012.

The census enumerator who fraudulently added such census is a proper and necessary party to such action, notwithstanding the fact that before the commencement thereof he had made his return to the county auditor and his enumeration had been forwarded to the state executive council. Such census enumerator is properly taxed with the costs, especially if he defended the suit. *Semones v. Needles* (Ia.), 15-1012.

b. Mode of determining adoption.

Province of court. — In a criminal prosecution for the sale of intoxicating liquor in violation of a local option law, it is the

province of the court to determine whether the local option law under which the prosecution is brought has been adopted, and having determined that the law has become operative, it is proper for the court to instruct the jury that such is the case. *State v. O'Brien* (Mont.), 10-1006.

c. Regularity and validity of election.

In a criminal prosecution for the sale of intoxicating liquor in violation of a local option law, evidence to impeach the regularity of the election adopting the local option law under which the prosecution is brought is properly excluded. *State v. O'Brien* (Mont.), 10-1006.

In a criminal prosecution for the sale of intoxicating liquor in violation of a local option law, where the law under which the prosecution is brought has been put in force by election and other proceedings provided for by statute, it is not incumbent on the state to show that the election was in all respects regular. *State v. O'Brien* (Mont.), 10-1006.

d. Evidence of adoption.

Judicial notice. — On a writ of review from the Circuit Court to a municipal court in a prosecution under the local option law, the Circuit Court cannot take cognizance of the adoption of such law by the voters of the county, though that fact was entered of record in the municipal court, but the transcript must contain the record entry in question. *Gay v. Eugene* (Ore.), 18-188.

Certified copy of results of election. —

In a criminal prosecution for the sale of intoxicating liquor in violation of a local option law, the adoption of a local option law may be proven by a certified copy of the record of the county commissioners, showing the result of the election as declared by the board, and by a certified copy of the affidavit of the publisher of a newspaper, showing the due publication of such result. *State v. O'Brien* (Mont.), 10-1006.

e. Effect of adoption.

Effect of adoption. — The adoption of a local option law in a county prohibits the sale of liquors in the incorporated towns therein, though the latter are given by the general incorporation law the power to license saloons within their corporate limits. *In re O'Brien* (Mont.), 1-373.

The Oregon local option law (Laws 1905, p. 41), which provides that its clauses may be made applicable to any county or subdivision thereof or any precinct therein by a vote taken at an election ordered for the purpose, is in the nature of a floating enactment until it is made applicable to a particular locality in the mode prescribed, but when this has been done, the law attaches to such locality and relates back to the date of its promulgation. *Gay v. Eugene* (Ore.), 18-188.

8. CIVIL DAMAGE ACTS.

a. Who may sue.

Parent of intoxicated person. — If a mother has been injured in her means of support by the intoxication of her minor son, she has a right of action against one who unlawfully sold him the liquors which caused in whole or in part the intoxication, although at the time of such injury she was living with her husband on whom she depended partly for support. *Carpenter v. Hyman* (W. Va.), 20-1310.

Widow of man committing suicide in consequence of intoxication. — The statute permitting a married woman to bring an action on a liquor seller's bond for damages sustained by her or her children on account of such traffic in intoxicating liquors authorizes such action to be brought by a woman whose husband has died from the use of intoxicants, the recovery being not for the death but for the loss of support. *Stafford v. Levinger* (S. Dak.), 1-132.

Intoxication causing suicide. — Where the sale of intoxicating liquors to a married man results in his suicide and is the proximate cause thereof, his widow is entitled to recover, in an action under a civil damage act, the damages she may sustain by reason of the loss of support caused by her husband's death. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

b. Liability of owner of premises.

Remedies against owner. — The Illinois Dramshop Act gives three remedies against one who rents his property to be used for a dramshop, or knowingly permits it to be so used, in favor of a person whose means of support are injured by reason of the carrying on of the business. The owner of the property may be sued jointly with the dramshop keeper and subjected to a personal judgment, or he may be sued separately and a personal judgment be recovered against him, or a lien may be enforced against the property to collect the judgment recovered against the dramshop keeper. If the owner is sued, either with the dramshop keeper or separately, a judgment against him is a lien on all his property not exempt, whether employed in the business of selling intoxicating liquors or not, and he has the same right to contest the plaintiff's cause of action that he would have in any other suit; but where it is sought to enforce against the owner a judgment recovered against the dramshop keeper alone, under section 10 of the statute, the only property which can be reached is that employed in the business, and the issues in the proceeding are determined by the statute. *Wall v. Allen* (Ill.) 18-175.

c. Proximate cause of injury.

Suicide. — Where a person commits suicide as the result of his previous intoxication, such intoxication is the proximate cause of his death, and the seller of the liquor is liable therefor under a civil damage act,

whether the deceased was sober or intoxicated at the time he committed suicide. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

d. Parties.

Joinder of defendants. — Under the Illinois Dramshop Act authorizing the recovery of damages for an injury to the means of support caused by intoxication, the owner of a building wherein intoxicating liquors are knowingly permitted to be sold may be joined as a defendant with the occupant of another building who is engaged in selling such liquors. *Hedlund v. Geyer* (Ill.), 14-1055.

e. Evidence.

(1) Presumption and burden of proof.

Intoxication as cause of suicide. — Under the Iowa Civil Damage Act, giving a right of action to any person injured in person, property, or means of support, "by any intoxicated person or in consequence of the intoxication" of any person, the plaintiff in an action for damages for the death of her husband by suicide while intoxicated does not have to prove that the deceased would not have committed suicide had not the defendant sold him the liquor producing the intoxication, but establishes a right of action by proof that the suicide was committed while the deceased was in fact intoxicated by liquor unlawfully sold him by the defendant. *Bistline v. Ney* (Ia.), 13-196.

(2) Competency and admissibility.

Support furnished by husband when sober. — In an action by a widow to recover for the sale of intoxicating liquors to her deceased husband, who committed suicide, the plaintiff may testify regarding the support of her son and may prove that her deceased husband was a competent barber, that he had a shop of his own, and that when sober he furnished proper means of support for his wife and child. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

Inability to secure or retain work. — In an action by a wife against a liquor dealer to recover damages for the intoxication of her husband, it is competent for the plaintiff to show that the intoxication of the husband prevented him from securing or holding a permanent position during the time in question. *Mathre v. Story City Drug Co.* (Ia.), 8-275.

(3) Weight and sufficiency.

Sufficiency to support verdict. — In an action by a widow to recover damages for the sale of intoxicating liquors to her deceased husband, who committed suicide, the evidence held sufficient to justify a finding that the sale of the intoxicating liquors by the defendant was the proximate cause of the death of the deceased. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

Evidence reviewed, in an action by a widow to recover damages sustained by her in con-

sequence of the sale of liquors to her deceased husband during his lifetime, and held sufficient to justify the jury in drawing the conclusion that the intoxicating liquors sold and furnished by the defendant to the deceased caused the latter to neglect the support of his family, and eventually to commit suicide, thus depriving his widow and son of that support to which they were entitled. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

In civil damage cases, as in ordinary damage cases the evidence must afford data, facts, and circumstances, reasonably certain, from which the jury may find compensation for the loss suffered by reason of the injury proved. *Carpenter v. Hyman* (W. Va.), 20-1310.

f. Defenses.

Ignorance of habits of buyer. — Under the Iowa Civil Damage Act, the seller of intoxicating liquors must "personally know" that the buyer is not addicted to the excessive use of liquor, or have written proof of such fact from some reputable third person, and cannot escape liability under the act on the ground of ignorance of the habits of the buyer and good faith in making the sale. *Bistline v. Ney* (Ia.), 13-196.

g. Trial.

(1) Questions for jury.

Duty to apprehend injuries. — Whether one who sells intoxicating liquors is not bound to apprehend that the intoxication thereby produced is liable to cause unjustifiable assaults and consequent injury to the assailant is a question of fact for the jury. *Currier v. McKee* (Me.), 3-57.

Evidence in an action under the Maine Civil Damage Act as to the sale of intoxicants and the apprehension of the consequences by the seller held properly submitted to the jury. *Currier v. McKee* (Me.), 3-57.

Measure of damages. — In an action by a widow to recover damages sustained by her in consequence of the sale of liquors to her deceased husband during his lifetime, the question as to the amount of damages sustained is one for the determination of the jury under the facts presented by the evidence. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

(2) Instructions.

In cases arising under the civil damage law it is improper to submit to the jury by an instruction whether they shall believe the plaintiff has been injured in person as well as in means of support, when there is no evidence of injury to the plaintiff's person. *Carpenter v. Hyman* (W. Va.), 20-1310.

h. Judgment.

Lien on premises. — In a proceeding under the Dramshop Act of Illinois to subject premises leased as a dramshop to the lien of a judgment for damages recovered against the dramshop keeper, a bill which

sufficiently alleges the nature of the action against the dramshop keeper, the recovery of judgment therein, the renting of the premises for the purpose of a dramshop, and the knowledge of the owner that the business of selling intoxicating liquors was carried on therein, is not demurrable for failure to allege the facts which constituted the plaintiff's cause of action against the dramshop keeper. *Wall v. Allen* (Ill.), 18-175.

Section 10 of the Dramshop Act of Illinois, which provides that in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for and may be sold to pay any judgment for damages and costs that may be recovered against the occupant in consequence of the sale of intoxicating liquors, under section 9 of the statute, and that proceedings may be had to subject the same to the payment of any such judgment, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered, is a valid exercise of the police power of the state and does not violate any provision of the constitution. *Wall v. Allen* (Ill.), 18-175.

9. SEARCHES AND SEIZURES.

Nature of proceeding. — A proceeding under the Indiana statute of 1907 for the seizure and destruction of intoxicating liquors is not a criminal action, but a statutory proceeding which is governed by the rule in civil actions so far as applicable, and, consequently, the failure of the defendant in such a proceeding to enter any plea to the affidavit does not cause a mistrial. *Rose v. State* (Ind.), 17-223.

Who may question constitutionality of statute. — The constitutionality of the search and seizure clauses of the Vermont statute making it unlawful to expose or keep for sale intoxicating liquor, cannot be challenged by the violator of the statute who is not affected by those clauses, as they can be rejected without vitiating the remainder of the statute. *State v. Paige* (Vt.), 6-725.

Summary destruction. — Right to a jury trial in proceedings for the summary destruction of intoxicating liquors. *Kirkland v. State* (Ark.), 2-242.

The constitutionality of an act dispensing with a jury trial in proceedings for the summary destruction of intoxicating liquors. *Kirkland v. State* (Ark.), 2-242.

A proceeding to destroy summarily intoxicating liquors is not a criminal proceeding and the allegations of the complaint need not be proved beyond a reasonable doubt. *Kirkland v. State* (Ark.), 2-242.

Recovery by owner. — Where replevin is brought for intoxicating liquor, and after obtaining possession thereof the plaintiff dismisses his action, evidence that at the commencement of the litigation the defendant

held the property as city marshal, under a warrant issued by the police court, justifies a presumption, in the absence of anything to suggest the contrary, that he was acting under an ordinance passed in aid of the prohibitory law authorizing the seizure and destruction of liquor kept for sale in violation of the statute. *Hines v. Stahl* (Kan.), 17-298.

10. ACTIONS FOR PRICE OF LIQUORS SOLD.

Sale by unlicensed person. — No action can be maintained to recover the price of liquor sold in violation of the law by a person not licensed to sell. *Goldman v. Goodrum* (Ark.), 7-359.

Sale pending appeal from revocation of license. — An appeal by a dealer in intoxicating liquors from a judgment canceling his license does not supersede the judgment, and therefore any sale made by the dealer pending the appeal is unlawful. *Goldman v. Goodrum* (Ark.), 7-359.

Sale made in another state. — In order to avail himself of the provision of the North Dakota statute that no action shall be maintained in any court of the state for the value of intoxicating liquors sold in another state with the intent to enable any person to violate the prohibitory law of North Dakota, the defendant in an action to recover the purchase price of intoxicating liquors sold must plead such intent, unless such intent appears on the face of the contract or from the plaintiff's evidence necessary to establish the contract. In the absence of these contingencies, it is error to direct a verdict for the defendant on the ground of such intent. *Frankel v. Hillier* (N. Dak.), 15-265.

Under the provisions of such statute mere knowledge by the vendor of intoxicating liquors lawfully sold in another state that the vendee intended to resell them in violation of the laws of North Dakota, is not sufficient to defeat an action brought in the latter state by the vendor against the vendee to recover the purchase price thereof. In order to defeat such action for the purchase price, it must appear that the vendor intended by such sale, in some manner, no matter how slight, to aid the vendee in his unlawful design to violate the laws of the latter state. *Frankel v. Hillier* (N. Dak.), 15-265.

The fact that the contract of partnership between the defendants in such action was for an illegal purpose, to wit, the unlawful traffic in intoxicating liquors, is, under such statute, not sufficient to defeat a recovery by the plaintiffs, in the absence of proof that they were connected in some way with such illegal contract. *Frankel v. Hillier* (N. Dak.), 15-265.

Place of sale. — Where pursuant to orders sent by a resident of North Dakota, where the sale of intoxicating liquors is prohibited, to Minnesota, where the sale thereof is permitted, such liquors are delivered to the consignee f. o. b. cars in the latter state, the sale takes place in such state, and the

purchase price is recoverable in the former state. *Frankel v. Hillier* (N. Dak.), 15-265.

Sale for prohibited purpose. — Knowledge on the part of a vendor that liquor sold by him will or may be used for illegal purposes by reselling it in a house of prostitution will not bar an action to recover the purchase price unless the vendor aids or participates in such illegal purpose in some manner beyond the mere act of making the sale. *Washington Liquor Co. v. Shaw* (Wash.), 3-153.

INTOXICATION.

See DRUNKENNESS AND INTOXICATION.

As affecting criminal responsibility, see ASSAULT AND BATTERY, 1 e.

Duty of carrier to intoxicated passengers, see CARRIERS, 6 e (12).

Effect as contributory negligence, see CARRIERS, 6 j (2).

Liability of carrier for injury to passenger by intoxicated persons, see CARRIERS, 6 e (4) (b).

INVENTED WORDS.

Subject of trademark or trade name, see TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION, 1.

INVENTIONS.

Agreement by employee to assign inventions to employer, see MASTER AND SERVANT, 1 e.

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INVOLUNTARY CONFESSIONS.

Admissibility in evidence, see CRIMINAL LAW, 6 n (11) (b).

INVOLUNTARY MANSLAUGHTER.

See HOMICIDE, 4 b.

INVOLUNTARY SERVITUDE.

Confining at hard labor for violating municipal ordinance, see CRIMINAL LAW, 7 a (1).

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Condemnation of private property for irrigation purposes, see **EMINENT DOMAIN**, 4 b.
 License to construct ditches, see **LICENSE (REAL PROPERTY)**.
 Right of one irrigation company to use property of another, see **EMINENT DOMAIN**, 5.

Contracts. — A stipulation in an irrigation contract construed and held to be intended merely to fix the place of delivery, and not to interfere with the right of the consumer to use the water on any portion of his land that he may choose. *Candler v. Washoe Lake Reservoir, etc., Co.* (Nev.), 6-946.

A judgment for damages reviewed in an action against an irrigation company for the destruction of growing crops resulting from its breach of contract, and the propriety of various items included in the judgment passed upon. *Candler v. Washoe Lake Reservoir, etc., Co.* (Nev.), 6-946.

Measure of damages for injury to crops. — In an action against an irrigation company for breach of a contract to furnish water for irrigation purposes, the rule for measuring the damages for the loss of growing crops stated. *Candler v. Washoe Lake Reservoir, etc., Co.* (Nev.), 6-946.

Liability of owner of ditch. — The owner of an irrigation ditch from which water seeps to the damage of a neighbor's land is not liable for the damage unless he has failed to exercise ordinary care in the construction and maintenance of the ditch. *Fleming v. Lockwood* (Mont.), 13-263.

An action for damages for injuries to property caused by the seepage of water from the defendant's irrigation ditch is necessarily an action of trespass on the case, and the burden of proof is on the plaintiff

to show negligence on the defendant's part. *Fleming v. Lockwood* (Mont.), 13-263.

Rates of irrigation company. — Whether rates which have been charged and collected for its services by a public-service corporation, such as an irrigation company, are unreasonable, is a proper subject for judicial inquiry; but the fixing of rates which shall be charged in the future is a legislative act. *Salt River Valley Canal Co. v. Nelssen* (Ariz.), 16-796.

Where statutes do not define a maximum lawful rate for the services of a public-service corporation, such as an irrigation company, if prices are exacted which, in the light of all the facts to be considered, are unreasonably high, one who pays such prices under protest, or under such circumstances as do not amount to acquiescence in the charge, may by suit recover the excess over a reasonable price. *Salt River Valley Canal Co. v. Nelssen* (Ariz.), 16-796.

In determining whether a rate charged and collected by an irrigation company for its services is reasonable, the effect of such rate upon the person to whom the services are rendered is as important a factor as is the effect thereof upon the profits of the corporation, and consequently, in an action against such a company to recover back the excess charged by it over a reasonable price, evidence which tends to show the effect of the rate upon the consumer is properly admitted. *Salt River Valley Canal Co. v. Nelssen* (Ariz.), 16-796.

Right to appropriate water. — An upper riparian owner is entitled to a reasonable use of the water of the stream for irrigation, although it may diminish the flow to a lower proprietor, and put the latter to a substantial inconvenience. *Turner v. James Canal Co.* (Cal.), 17-823.

In California the law is well settled that the so-called common-law right of each owner of land on a stream to have the stream flow by his land without diminution, is subject to the common right of all to a reasonable share of the water for purposes of irrigation. *Turner v. James Canal Co.* (Cal.), 17-823.

The right of a riparian owner to the use of water bordering on his land for the purpose of irrigation does not arise from the fact that the water is flowing, and that any part thereof taken from the stream is immediately replaced by water from the current above it. The right comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefit resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages, and benefits. The law has declared that the use of water for irrigation, so far as it affects the right of others similarly situated, must be reasonable, and must be confined to a reasonable share thereof, but with this limitation the right to use water on adjoining land for irrigation applies as well to the water of a lake, pond, slough, or

any natural body of water, by whatever name it may be called, as a running stream. *Turner v. James Canal Co. (Cal.)*, 17-823.

Where a slough is connected during a portion of the year with one river, and during the remainder of the year with another river, the right of an owner of land bordering on the slough to take water therefrom for irrigation depends on the rights and needs of other lands riparian to the particular river with which the slough is connected at the time of the taking, *i. e.*, when the first river is running into the slough the reasonable share of water apportionable to lands riparian to the slough is fixed by reference to the rights and needs of other lands riparian to that river, and when the second river alone is running into the slough, the amount of water which may be taken is fixed by reference to the rights and needs of other lands riparian to such second river. *Turner v. James Canal Co. (Cal.)*, 17-823.

As regards the taking of water for purposes of irrigation, the rights of persons owning land adjoining a slough connected with a river, are equal and coextensive with those of persons owning land bordering upon the river itself, regard being had to the quantity of land of each, their respective interests, the quantity of water in the slough as compared with that in the river, the quantity the slough is capable naturally of diverting from the river, and all other circumstances affecting the question of a reasonable division of the water in case there should not be enough to supply the needs of all. *Turner v. James Canal Co. (Cal.)*, 17-823.

So long as a riparian owner takes no more than his reasonable share of water for irrigation, and uses it upon his riparian land without unreasonable waste, other riparian owners below have no right to inquire how, or by what means, or at what place he manages to divert his share from the stream, whether at a point on his own land, or at some point far above, where the elevation of the stream will be sufficient to carry it by gravity to the surface of his land, or whether by a dam and headgate, or by pumps and buckets. *Turner v. James Canal Co. (Cal.)*, 17-823.

An upper riparian owner cannot be deprived of his right to use a reasonable share of the water of the stream for irrigation merely because his use prevents the stream from overflowing the land of a lower riparian owner during times of flood, and thus deprives such lower lands of the natural irrigation resulting from the overflow. *Turner v. James Canal Co. (Cal.)*, 17-823.

Enjoining interference with flow of water. — A decree perpetually enjoining an irrigation canal company from preventing the flow of water through its canals on the lands of an appropriator of water, subject to the payment of the company's reasonable charges, and to its reasonable regulations, should also make such water service subject to the prior rights of any prior appropriators served by the company. *Salt River Valley Canal Co. v. Nelssen (Ariz.)*, 16-796.

ISLANDS.

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Power to sentence to jail under statute providing for penitentiary sentence, see **CRIMINAL LAW**, 7 b (7).

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Aider of defects in pleading, see **PLEADING**, 11.

JEOPARDY.

See **CRIMINAL LAW**, 5; **HOMICIDE**, 12.

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Former jeopardy as ground for habeas corpus, see **HABEAS CORPUS**, 2.

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Counts and offenses in criminal prosecutions, see **INDICTMENTS AND INFORMATIONS**, 7.

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Parties on appeal, see **APPEAL AND ERROR**, 5 b.

JOINT ADVENTURES.

Distinguished from agency, see **AGENCY**, 1 a.

Analogy to partnership. — Two or more persons, associated together in a joint enterprise, contemplating pecuniary gain and advantages, under an agreement to combine their energies, or means, or both, for the accomplishment thereof, stand in a relation of confidence analogous to that subsisting between partners, and each must observe towards the others the utmost good faith. *Berry v. Colburn* (W. Va.), 17-1018.

One of such persons cannot, consistently with equity and conscience, take to himself a secret profit, produced by the joint effort or work, and all such gain must be accounted for in the settlement of the social business and distribution of assets, if demanded of him. *Berry v. Colburn* (W. Va.), 17-1018.

JOINT BEQUEST.

See **WILLS**, 7 c (3).

JOINT DEBTS.

Joint debts as subject to garnishment against one creditor only, see **GARNISHMENT**, 1 f.

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See **EXECUTORS AND ADMINISTRATORS**.

JOINT OBLIGORS.

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JOINT RESOLUTIONS.

Effect as law, see **STATUTES**, 1 a.

JOINT STOCK COMPANY.

Unincorporated joint stock company, see **PARTNERSHIP**, 1 a.

JOINT TENANTS AND TENANTS IN COMMON.

1. CREATION OF TENANCY IN COMMON.

2. RIGHTS, DUTIES, AND LIABILITIES INTER SE.

3. RIGHTS, DUTIES, AND LIABILITIES AS TO THIRD PERSONS.

Enforcement of contract of sale by one tenant in common, see **SPECIFIC PERFORMANCE**, 3 f (9).

Homestead in land held jointly by husband and wife, see **HOMESTEAD**, 1.

Partition of joint property, see **PARTITION**.

Purchase by tenant in common at tax sale, see **TAXATION**, 10 f.

Right of tenant in common to sue for conversion of common property, see **TROVER AND CONVERSION**, 3.

Right to maintain ejectment, see **EJECTMENT**, 2.

Right to minerals, see **MINES AND MINERALS**, 6.

1. CREATION OF TENANCY IN COMMON.

Persons who purchase land by joint contributions of labor and money, taking the title in the names of all of them, are tenants in common. *Schuster v. Schuster* (Neb.), 18-1078.

2. RIGHTS, DUTIES, AND LIABILITIES INTER SE.

Payment of mortgage by one tenant.

— Where one tenant in common of mortgaged property pays the mortgage debt, he is entitled to have the lien of the mortgage kept alive until his cotenants pay him their respective shares of the amount paid by him to satisfy the mortgage. *Parsons v. Urie* (Md.), 10-278.

Where land owned in common by adults and infants is mortgaged, and in order to avoid a sale some adult mortgagors tender the full amount of the mortgage debt, and the mortgagee refuses to accept payment except on condition that the mortgage shall be released, his purpose being to extinguish the lien for the benefit of the purchasers of the equity of one of the adult mortgagors, and the mortgagors refuse to consent to such release, but the mortgagee nevertheless executes the release on payment of the money to him, a court of equity will set aside the release as to the entire mortgage, and not simply as to the interests of the infant mortgagors. *Parsons v. Urie* (Md.), 10-278.

Discharge of lien by one tenant. — A tenant in common who discharges a lien on the common property, has a right to contribution from his cotenant, and as security is entitled to a lien on his cotenant's share of the property. The lien may be enforced in equity by treating the tax deed as valid and subsisting for that purpose. *Roll v. Everett* (N. J.), 17-1196.

Purchase of common property at public sale. — Assuming that the circumstances attending a purchase of the common property by a cotenant at a public sale under a power of sale in a trust deed are such as to render the sale voidable for bad faith on the part of the purchaser, it is incumbent

on a cotenant who attacks the sale on that ground to act with reasonable promptness. A delay of four years, during which there has been a large appreciation in the value of the property, is unreasonable, and justifies the court in refusing relief. *Starkweather v. Jenner* (U. S.), 17-1167.

In an action by a tenant in common to set aside a deed of the common property to one of his cotenants, made in pursuance of a public sale of the property under a power of sale in a trust deed, or, in the alternative, to have the purchaser declared a trustee for the common benefit of the cotenants, evidence examined and held insufficient to warrant a decree in plaintiff's favor. *Starkweather v. Jenner* (U. S.), 17-1167.

In a case where a cotenant can properly purchase the common property at a public sale, it is his right to purchase at the lowest price possible, provided he resorts to no artifice to deter others from bidding; and the mere fact that the price for which the property is knocked down is probably less than its estimated market value at the time, is not conclusive of fraud or bad faith on the part of the purchaser, especially where the property is of a speculative character and much depressed at the time of the sale. *Starkweather v. Jenner* (U. S.), 17-1167.

The principle which turns a cotenant who buys for himself a hostile outstanding title to the common property into a trustee for the common benefit, has no proper application to a public sale of the common property, either under legal process or a power in a trust deed. In such a situation, the sale not being in anyway the result of collusion or subject to the control of such a bidder, he is as free, all deceit and fraud out of the way, as any one of the general public. *Starkweather v. Jenner* (U. S.), 17-1167.

Acquisition of tax title. — Where one tenant in common acquires a tax title or redeems land from a tax sale, his act inures to the benefit of his cotenants on their reimbursing him for their proportionate share of the amount paid by him. *Roll v. Everett* (N. J.), 17-1196.

Improvements. — In an action for an accounting between tenants in common the defendants, if they claim compensation for improvements made by their predecessor in title, are chargeable with the rents due from him, even though no claim therefor has been made in the complaint. The statute of limitations cannot be relied on by the defendants, because in an accounting between cotenants improvements are regarded as paid for *pro tanto* by the rents as they accrue. *Vaughan v. Langford* (S. Car.), 16-91.

Liability for rents. — There is no fixed lien on the property of tenants in common for rents due from one cotenant to another. But in decreeing a sale for partition the court has the power, when the rights of persons holding conveyances of or liens on the interest of the cotenant owing the rent are not prejudiced thereby, to require the amount of rent found due to be paid from the portion

of the proceeds of sale to which such cotenant is entitled. *Vaughan v. Langford* (S. Car.), 16-91.

A tenant in common who is in sole, exclusive, and adverse possession under claim of title, is liable to his cotenant for an accounting for rents and profits. *Schuster v. Schuster* (Neb.), 18-1078.

Actions. — A tenant in common may, even after the alienation of his interest, maintain an action for waste committed by his cotenant before such alienation. *Hoolihan v. Hoolihan* (N. Y.), 15-269.

Limitation of actions. — An action for the recovery of rents and profits from a cotenant is not barred by the statute of limitations until four years have elapsed from the accruing of such action. *Schuster v. Schuster* (Neb.), 18-1078.

3. RIGHTS, DUTIES, AND LIABILITIES AS TO THIRD PERSONS.

Conveyance of easement by one tenant. — A conveyance by one tenant in common, of the right to construct and maintain poles and wires over the common estate, is void as against the cotenant who neither affirms nor ratifies the conveyance, and such right cannot be enforced against one who subsequently acquires the land by deed from both tenants. *Benjamin v. American Tel., etc., Co.* (Mass.), 13-306.

A purchaser of land from tenants in common does not take the land subject to an easement granted by the two tenants in common separately, where neither conveyance of the easement purports to ratify or affirm the conveyance by the other tenant, and one of the conveyances is not recorded. *Benjamin v. American Tel., etc., Co.* (Mass.), 13-306.

JOINT TORTFEASORS.

See TORTS.

Judgment against one of several joint tortfeasors, see JUDGMENTS, 4.

Release of one as release of all, see RELEASE AND DISCHARGE, 4.

Removal of action against joint tortfeasors, see REMOVAL OF CAUSES.

JOINT TRUSTEES.

See TRUSTS AND TRUSTEES, 3 b (6).

JOINT WILLS.

Definition, see WILLS, 2.

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1. APPOINTMENT AND QUALIFICATION.

Who may appoint. — Under the constitution and statutes of Kentucky, a city board of council has power to fill by appointment a vacancy occurring in the office of police judge, whether that office was originally filled by election or appointment. The governor of the state has no authority to fill such vacancy. Traynor v. Beckham (Ky.), 3-388.

Qualification by filing oath and bond. — The Wisconsin statutes providing for the filing of the oath of office of a county judge in the office of the clerk of the Circuit Court and requiring that his bonds shall be recorded by him in the office of the register

of deeds are not strictly mandatory, and the office does not become vacant by reason of the fact that the judge elect files his oath of office in the office of the county clerk instead of the office of the clerk of the Circuit Court, or by reason of delay in recording his bonds. State ex rel. Dithmar v. Bunnell (Wis.), 11-560.

Collateral attack on title to office. — A judge's title to the office cannot be questioned in an action brought before him. State v. Bednar (N. D.), 20-458.

De facto judge. — Under the Colorado constitution providing for the election in each organized county of a judge who shall be judge of the County Court, and that such courts shall be courts of record and exercise a defined jurisdiction, a judge elected to the office of county judge under an unconstitutional charter provision increasing the number of judges in the county to two and changing the time of election is in the discharge of the duties of a legally existing office and all his acts in the discharge of the duties of such office must be upheld as the acts of a *de facto* officer. Butler v. Phillips (Colo.), 12-204.

Term of office. — Under the Wisconsin statutes, where a vacancy occurs in the office of county judge, the governor's appointee to fill the vacancy is entitled to hold until the first Monday of June next succeeding the appointment, or until his successor is duly elected, or appointed, and qualified. In all cases of vacancy in this office an election to fill such vacancy is required to be held on the first Tuesday of April next after the vacancy shall happen. State ex rel. Dithmar v. Bunnell (Wis.), 11-560.

The Wisconsin statute which went into effect April 21, 1905, and provided that all county judges theretofore "appointed to fill vacancies shall hold and continue in office until the first Monday in January, 1906," is not retroactive in its operation so as to extend until that date the term of office of a county judge previously appointed to fill a vacancy, where by statute already in effect his successor had been elected on April 4, 1905, to fill the part of the term from June 5, 1906, to January 1, 1906. The legislature had no power to nullify the election of April 4, even if so intended, or to bar the elected judge from taking the office to which he had been elected under the existing statute. State ex rel. Dithmar v. Bunnell (Wis.), 11-560.

Article VII. of the constitution of Wisconsin creates the office of justice of the Supreme Court and fixes the term of office and provides for filling the same, while article IV. prohibits the legislature from changing the salary of any public officer during "his term of office." The term of office fixed by article VII. is a unit, including, so far as that article is concerned, periods within the full term of incumbency by appointment or election to fill a vacancy. State v. Frear (Wis.), 16-1019.

Whether the phrase "his term of office"

in article IV. of the constitution of Wisconsin relates to an incumbency of the office under a particular election or appointment, or to the full term of the office of justice of the Supreme Court, created by article VII., is not so free from doubt as not to be open to solution by judicial construction. The language of article IV. is ambiguous, and might, as an original proposition, be regarded as treating with the term of office created by article VII. or any particular incumbency, whether of a full term or part of a term. *State v. Frear* (Wis.), 16-1019.

2. COMPENSATION.

Increased pay for additional duties.

—The Kansas statute of 1907 (c. 232) contains a provision increasing the salaries of district judges performing the services specified from \$3,000 to \$3,500 per annum. Section 13 of article 3 of the constitution provides that judges of the District Courts shall receive such compensation for their services as may be provided by law, which shall not be increased during their terms of office, and that they shall receive no fees or perquisites. In the light of this constitutional provision, it must be held that district judges in office when the statute took effect were obliged to render the increased service without increased compensation for the remainder of their terms. *Moore v. Nation* (Kan.), 18-397.

Right of appointee to fill vacancy to increased compensation. — In view of the uniform practical construction given by the administrative officers of the state to articles IV. and VII. of the constitution of Wisconsin for many years, it must be held that a justice of the Supreme Court who is appointed to fill a vacancy, after an increase in the salary of the office has been made, is entitled to compensation at the increased rate, although the increase was not made until after the election of the justice in whose place he is appointed. *State v. Frear* (Wis.), 16-1019.

3. POWERS AND DUTIES

a. In general.

Performing duties of jury commissioner. — The Kansas statute (Laws 1907, c. 232) requires the judge of the District Court in certain counties to perform the duties of jury commissioner, and authorizes him to appoint a jury clerk to assist him in the performance of such duties. The duties thus prescribed are not administrative in character, fall within the scope of the office of judge of the District Court, and do not appertain to another office within the meaning of section 13 of article 3 of the constitution forbidding a judge of the District Court to hold any other office of profit or trust. *Moore v. Nation* (Kan.), 18-397.

Keeping account of fees and expenditures. — The statutory duty of a county judge to keep an account of his fees, emolu-

ments, expenditures, etc., and to have those accounts accurate and truthful, is a ministerial duty. *Hamma v. People* (Colo.), 15-655.

b. Appointing power.

Appointment of board of equalizers.

—A statute creating a board to review the equalization of taxes by a county board, and providing for the appointment of members by the circuit judge, is not unconstitutional because it imposes nonjudicial powers upon the circuit judge. *Foster v. Rowe* (Wis.), 8-595.

Appointment of county board of control.

—The provisions of the Minnesota statutes requiring the judges of the District Court of a specified county, or a majority of them, to appoint the members of the board of control of such county are unconstitutional, because they assume to impose on members of the judicial department powers and functions which are by the constitution of the state assigned to another department of the government. *Young v. Brill* (Minn.), 10-425.

The provision of the Minnesota statute requiring the judges of the District Court of a specified county to appoint the members of the board of control of such county is unconstitutional as imposing upon the judiciary duties belonging to another department of the government. *State ex rel. Young v. Brill* (Minn.), 10-425.

Appointment of revisor of statutes.

—The Wisconsin statute (Laws 1909, c. 5461) a statute providing for the revision of the statute law of the state by creating the office of "revisor of the statutes," prescribing his duties, and providing that the justices of the Supreme Court and the attorney-general shall appoint the revisor, fix his salary, have the power to remove him, approve the appointment of his assistants, and approve the printing of any compilation of the statutes, is not unconstitutional as investing the judges with executive or legislative power, or as conferring on them an office not judicial; but it merely imposes on them administrative duties which they may be required to perform as helpful or necessary in the performance of their purely judicial duties. *In re Appointment of Revisor* (Wis.), 18-1176.

Appointment of board of county registrars.

—The duty devolving on the judge of a Superior Court under the Political Code, §§ 50, 51, providing for the appointment of a board of county registrars, is an official act. *Elliott v. Hipp* (Ga.), 20-423.

c. Power after expiration of term of office.

Under the Utah statute a judge who has tried a case may settle and sign a bill of exceptions after he ceases to hold office, notwithstanding the provision of the state constitution limiting the term of office of judges to a specified number of years, as the constitution gives the legislature power to provide by law how appeals shall be taken. *Larkin v. Saltair Beach Co.* (Utah), 8-977.

d. Powers of successor.

Motion for new trial pending before predecessor. — Power, under the federal statute, of the successor of a judge who dies pending a motion for a new trial, to grant a new trial. *Penn Mutual Life Ins. Co. v. Ashe* (U. S.), 7-491.

Duty of the successor of a judge who dies pending a motion for a new trial, to grant a new trial. *Penn Mutual Life Ins. Co. v. Ashe* (U. S.), 7-491.

Where the unsuccessful party to an action, without laches on his part, loses the benefit of his exceptions by the death of the trial judge pending the determination of a motion for a new trial, a new trial will be granted. *Penn Mutual Life Ins. Co. v. Ashe* (U. S.), 7-491.

Under the federal statute, where stenographic notes are taken of the evidence in a criminal prosecution in a federal court, and the trial judge dies after a verdict of guilty and while a motion for a new trial is pending, his successor may pass on and grant or deny the motion. *Meldrum v. United States* (U. S.), 10-324.

Under the federal statute, where stenographic notes are taken of the evidence in a criminal prosecution in a federal court, and the trial judge dies after a verdict of guilty and while a motion for a new trial is pending, his successor may not only deny the motion but may render a judgment upon the verdict. *Meldrum v. United States* (U. S.), 10-324.

4. DISQUALIFICATION.

a. Pecuniary interest.

Taxpayer of county. — The fact that the president judge of the court in which an action against a county is brought is a property owner and taxpayer in the county does not operate to disqualify him to hear the cause under a statute disqualifying any judge "personally interested in the event of such cause, or in the question to be determined thereby." *Brittain v. Monroe County* (Pa.), 6-617.

Consumer of water supplied by city.

— A judge who is a consumer of water from waterworks owned by a city is disqualified to hear and determine a suit in equity brought by consumers of the water in behalf of themselves and all other persons in the same situation to enjoin the city from increasing the water rates. *Grafton v. Holt* (W. Va.), 6-403.

A judge who is disqualified as a consumer from sitting in a suit to enjoin a city from increasing the water rates charged consumers is not rendered competent by a statute providing that the fact that a judge is a citizen and taxpayer of a municipal corporation shall not disqualify him from sitting in a cause in which the corporation is interested, as water rates exacted by a municipal corporation from actual consumers are not taxes. *Grafton v. Holt* (W. Va.), 6-403.

b. Relationship to parties.

(1) In general.

Party in interest. — In the provision of the Arkansas constitution with reference to the disqualification of a judge who is related by consanguinity or affinity to either of the parties to a cause, the word "party" includes any one who has a direct pecuniary interest in the result of the suit, though not a party to the record and not necessarily bound by the judgment. *Johnson v. State* (Ark.), 15-531.

Relative becoming party pending suit. — Notwithstanding the Michigan statute providing that "all cases made, motions for new trials, and bills of exceptions and settlement of cases for review, . . . shall be heard, settled, and certified by the judge before whom the trial or hearing was had," a judge is disqualified to determine a motion to set aside certain judgments where subsequent to the rendition of such judgments a person related to the judge has become a party. *Bliss v. Caille Brothers Co.* (Mich.), 12-513.

(2) Consanguinity.

Attorney employed on contingent fee.

— Under such provision, a judge who is related within the fourth degree of consanguinity, which is the line of prohibition under the Arkansas statute, to an attorney who has a contingent interest in the amount sought to be recovered, is disqualified. *Johnson v. State* (Ark.), 15-531.

(3) Affinity.

What constitutes relation by affinity.

— The doctrine of affinity relationship is subject to the limitation that a husband is related by affinity only to the blood relations of his wife and that a wife is related by affinity only to the blood relations of her husband. *Bliss v. Caille Brothers Co.* (Mich.), 12-513.

Wife's second cousin. — A judge is not disqualified to try a cause by reason of the fact that he and one of the parties married second cousins, but he is disqualified to try a cause to which his wife's second cousin is a party. *Bliss v. Caille Brothers Co.* (Mich.), 12-513.

(4) Waiver of objection.

In the absence of statute, the action of the board of commissioners, appointed in a drainage proceeding, a member of which is interested in the subject-matter of the proceeding, is not void, but voidable only, and objection to the disqualification is waived by taking part in the proceedings with knowledge thereof. *Carr v. Duhme* (Ind.), 10-967.

c. Bias or prejudice.

Public confidence in the judicial system and courts of justice of a state demands that cases shall be tried by unprejudiced and

unbiased judges. *Day v. Day* (Idaho), 10-260.

By the provision of the Idaho constitution that "right and justice shall be administered without sale, denial, delay, or prejudice," as well as by the unwritten dictates of natural justice, the courts of a state are commanded to administer justice without prejudice. *Day v. Day* (Idaho), 10-260.

Political bias. — The allegation that a judge is active in aiding one faction of a political party in a county to gain control of the party and the politics of the country, in order to further his political purposes and interests and those of a faction with which he is in sympathy, does not disqualify him from passing on an application to enjoin the registrars from filing a registration list alleged to have been prepared by them with the names of certain persons opposing such faction illegally left off for the purpose of gaining such control, and to compel them by mandamus to place such names on the registration list. *Elliott v. Hipp* (Ga.), 20-423.

While the petition and the amendment thereto aver political interest and activity on the part of the judge in whose jurisdiction the case falls, and an attempt and conspiracy on his part with others to dominate and control the politics of the county in his own interest and that of others, the allegations made do not show that he has any pecuniary interest in the result of the litigation, nor do they state any other facts sufficient to render him disqualified from presiding in the case. *Elliott v. Hipp* (Ga.), 20-423.

Hostility to liquor traffic. — In a local option election contest instituted by persons favoring the sale of liquor, an affidavit filed by the contestants which states that the trial judge is biased against the liquor traffic, but which admits that the official integrity of the judge is unquestioned and expressly states that the judge is not personally hostile to or biased against the contestants, is not sufficient to disqualify the judge from hearing the contest. *Erwin v. Benton* (Ky.), 9-264.

5. SPECIAL OR SUBSTITUTE JUDGES.

Authority to change judge. — Under the Oklahoma statute but one change of judge can be had. *Johnson v. State* (Okla.), 18-300.

Waiver of objections. — Assuming that the defendant in a prosecution against him for crime could by appropriate action in the trial court in the way of pleas, objections, or otherwise, have raised the question as to the authority and jurisdiction of the judge of the Criminal Court of Record for another county to preside over the court in the trial of such case, where such judge is acting under an order of the governor, based on section 3871 of the General Statutes of 1906, where no objections to the authority or jurisdiction of such judge were made in the trial court and no action of any kind taken by the defendant toward raising such question, he will be deemed to have waived by

his silence and such privilege or right he may have had, and will not be permitted to raise such question for the first time in the appellate court. *Tillman v. State* (Fla.), 19-91.

An objection to the appointment of a special judge to try a cause, or to his sitting in the cause, must be made at the time of the act complained of, or it will be deemed on appeal to have been waived. *Perry v. Pernet* (Ind.), 6-533.

Where an action is tried before a special judge selected by the parties, an objection that such judge has failed to take the oath of office is waived, if not raised during the trial. *Johnson v. Jackson* (Ky.), 17-699.

Presence of regular judge. — The fact that the regular judge of a district may hold court in the same district and at the same time that a special judge is trying a case, in no manner affects the jurisdiction of the special judge to try such case. *Johnson v. State* (Okla.), 18-300.

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1. DEFINITION.

A "judgment" is the decision or sentence of law pronounced by a court or other competent tribunal on the matter contained in the record. It is the final consideration and determination of a court of competent jurisdiction on the matters submitted to it. It includes an order of the probate court on an administrator to pay over a sum of money, or to sell property belonging to the estate, to pay debts. *Orchard v. Wright, etc., Store Co. (Mo.)*, 20-1072.

2. VALIDITY AND REQUISITES IN GENERAL.

Presumption. — The judgment of a trial court is presumed to be correct, and unless

reviewed by an appeal this presumption is conclusive. *State v. Keebler* (N. Car.), 13-496.

Jurisdiction of subject matter. — Jurisdiction is judicial power, and a decree entered in a proceeding as to a matter outside of the judicial sphere of action is not merely voidable, but absolutely void. *Johnson v. McKinnon* (Fla.), 14-180.

In addition to jurisdiction of the parties and subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which the judgment assumes to determine, or the particular relief which it assumes to grant. *Sache v. Wallace* (Minn.), 11-348.

Effect of misnomer of defendant. — An action affecting real property may be brought against the record owner in the name under which he took title, even though such name is not his true name. Such misnomer does not affect the validity of the judgment. *Emery v. Kipp* (Cal.), 16-792.

Married woman sued as feme sole. — Where a married woman who has been sued as a *feme sole* on an obligation contracted by her prior to her marriage suffers judgment to be given against her, either after a trial on the merits or by default, the objection of the nonjoinder of the husband is waived. *Emery v. Kipp* (Cal.), 16-792.

A judgment obtained against a married woman sued as a *feme sole* and in her maiden name, affecting real property which she acquired before marriage, is valid; and it is entirely immaterial, in this regard, whether the summons was served personally or by publication. *Emery v. Kipp* (Cal.), 16-792.

Certainty and definiteness as to amount. — Every judgment must be certain and definite as to its amount. This element of certainty is present when the exact amount of the judgment may be ascertained by the subtraction of one named sum from another named sum, as provided in the judgment. *Moody v. Muscogee Mfg. Co.* (Ga.), 20-301.

Service of process on nonresidents. — A court has no jurisdiction to enter a personal judgment against a nonresident constructively served, who has made no appearance in the action; nor can any finding made in the case touching his personal liability operate as an estoppel so as to prevent him from showing to the contrary in a personal action subsequently brought against him. *Gates v. Tebbetts* (Neb.), 17-1183.

3. CONFORMITY TO PLEADINGS.

In an action to determine adverse claims to real property, or any similar action, the plaintiff is entitled, on default of the defendants to answer, to such relief, and to such relief only, as he demands in his complaint, or such as comes within the scope of its allegations, where the demand for relief is imperfectly framed. *Sache v. Wallace* (Minn.), 11-348.

The Minnesota statute providing for the action to determine adverse claims to real

property was not designed as a means for acquiring title, but merely as furnishing an expeditious mode of quieting and extinguishing claims held adversely to the plaintiff; and even if a transfer of title could be effected in this form of action under proper pleadings, a judgment transferring the title of the defendant to the plaintiffs is void where the complaint is not framed on that theory, but simply alleges that the defendant claims some title or interest in the land adverse to the plaintiff and demands that the defendant be adjudged to have no title. *Sache v. Wallace* (Minn.), 11-348.

4. RENDITION AND ENTRY.

Entry at term subsequent to trial. — A district court has authority to enter a judgment on a verdict at a term subsequent to that at which the trial was had. *Carlson v. Benton* (Neb.), 1-159.

Rendition against one of several joint tortfeasors. — Judgment may properly be rendered against one of two joint wrongdoers who are defendants in the action, without rendering any judgment as to the other. *Ferguson v. Truax* (Wis.), 13-1092.

Judgment notwithstanding verdict. — Where a binding instruction in the plaintiff's favor would be proper at the close of the trial, a judgment for the plaintiff *non obstante veredicto* is properly entered. *American Car, etc., Co. v. Alexandria Water Co.* (Pa.), 15-641.

5. OPERATION AND EFFECT IN GENERAL.

a. Merger of cause of action.

Merger of notes in judgment. — While a judgment on promissory notes merges them therein so that the owner of the judgment may not maintain an action against the judgment debtor on them, they still remain competent evidence of the existence of the debt which they represent in all other actions. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

b. Lien.

Judgments against county. — The Wisconsin statute providing that a judgment shall be a lien on the real property of the person against whom it is rendered is plainly inapplicable to counties, and a county is not brought within its operation by a provision of the statute that in the construction of statutes the word "person" shall extend and be applied to bodies corporate unless plainly inapplicable. *Buell v. Arnold* (Wis.), 4-100.

A county is not a "person" within the Wisconsin statute providing that a judgment properly docketed shall be a lien on the real property in the county where the same is docketed, of every person against whom such judgment shall be rendered, and the docketing of a judgment against a county creates no lien on its real property. *Buell v. Arnold* (Wis.), 4-100.

Constitutionality of statute prescribing duration of lien. — The Washington

statute providing that after the expiration of six years any judgment shall cease to be a lien against the estate or person of the judgment debtor, and prohibiting any proceeding on a judgment by which the lien thereon shall be extended beyond six years from the date of entry, is unconstitutional, as an impairment of the obligation of contracts, as to judgments recovered after the enactment of the statute on contracts entered into prior thereto. *Howard v. Ross* (Wash.), 3-1146.

Effect of stay of execution. — The lien of a judgment is not displaced by a stay of execution, but is continued in the stay bond, and therefore protects the judgment creditor against conveyances made by the judgment debtor, and against liens created after the rendition of the judgment but before the execution of the stay bond. *Cook v. Martin* (Ark.), 5-204.

Priority. — Evidence reviewed in an action to foreclose a mortgage, and held insufficient to show that a lien of junior judgment is superior to a lien of senior judgment. *Bennett v. First National Bank* (Iowa), 5-899.

6. RES JUDICATA.

a. Persons concluded.

(1) General rule.

The doctrine of *res judicata* does not apply where the former case involved different parties from the case at bar, though the questions at issue in the two cases are similar. *Brenau Assoc. v. Harbison* (Ga.), 1-830.

A judgment in an action by a trustee against a bank to compel the bank to issue a certificate of stock to such trustee, and to pay dividends to him, is not conclusive against a former trustee who claims an interest in the stock, and who was not made a party to the action. *Letcher v. German Nat. Bank* (Ky.), 20-815.

Persons who are not made parties originally to an action of attachment and do not appear in the action as interveners, are not party or privy to the proceeding and are not bound by the adjudication. *Albie v. Jones* (Ark.), 12-433.

(2) Persons not parties of record.

Real parties in interest. — Persons who are the real defendants to a suit in equity, and who, as solicitors, conduct and control the defense in the name of the nominal defendant, are bound by the decree rendered in the suit as fully as if they were formal parties defendant, as the term "parties" includes those who are directly interested in the subject-matter of the suit, know of its pendency, and have the right to control and direct or defend it. *Parsons v. Urie* (Md.), 10-278.

Persons in privity with parties. — A judgment is conclusive not only on those who were parties to the action but also on all persons in privity with them. *Schuler v. Ford* (Idaho), 3-336.

Where a person not a party to an action

will be liable to another who is a party if the latter's claim or defense shall fail, and such person has notice of the action and opportunity to participate therein, he will be bound by the result as if he were a party to the action. *Rowell v. Smith* (Wis.), 3-773.

Vendee in executory contract of sale as in privity with vendor. — A party in possession of land under contract to purchase is not in privity with the party who contracted to sell in the sense that he will be bound by a judgment affecting such property where the action is commenced subsequent to the entering into the contract. *Schuler v. Ford* (Idaho), 3-336.

Vendor and purchaser. — Purchasers from a landowner who was not a party to and was not concluded by a judgment in ejectment against his tenant, acquiring such landowner's title subsequent to the judgment, take the title unprejudiced by the judgment, although they were defeated parties to the ejectment suit. *Miller v. Dittlinger* (Kan.), 19-261.

Principal and surety. — In an action by a state for breach of the bond of a licensed dealer in intoxicating liquors, the sureties on the bond are estopped in the same way and to the same extent as the principal obligor by any prior judgment or decree that estops him to deny that he has failed to comply with the condition of bond. *State v. Corron* (N. H.), 6-486.

Trustee and cestui que trust. — A decree by a chancery court authorizing a trustee to make a ninety-nine-year lease is binding on the beneficiaries not *in esse* where their interests are the same as those of persons in being before the court. *Denegre v. Walker* (Ill.), 2-787.

Landlord and tenant. — A landowner who is not a party to, has no notice of, and does not defend, an action of ejectment prosecuted against his tenant is not bound by a judgment in the action adverse to the tenant. *Miller v. Dittlinger* (Kan.), 19-261.

b. Matters concluded.

(1) In general.

When a suit is upon the same cause of action and between the same parties as a former suit, the judgment in the former is conclusive in the latter as to every question which was or might have been presented in the former. When the second suit is upon a different cause, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action; but it is not conclusive relative to other matters which might have been, but were not, litigated and decided. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

The rule stated as to the conclusiveness of a judgment in a second action on the same claim or a different claim. *Rowell v. Smith* (Wis.), 3-773.

An adjudication in an action on a fire insurance policy on company property that a

mortgagee of the property and stockholder in the company, who brought the suit for the benefit of another, had an insurable interest in the property both as mortgagee and stockholder, and an interest in the policy which had not been effectually canceled or surrendered by the cancellation agreement relied on as a defense to the action, and that such interest had been effectually transferred to the beneficial plaintiff in the action, and that judgment should be rendered for the plaintiff for the full amount of the policy, is conclusive as to the effect of the cancellation agreement, and is in direct contravention of a subsequently asserted right on the part of the insurance company to recover the amount of the judgment from the estate of the acting plaintiff in the former suit, on the ground that the judgment was wrongfully and erroneous. *Aachen, etc., Fire Ins. Co. v. Morton* (U. S.), 13-692.

Existence of cause of action. — An adjudication on the merits that the plaintiff never had a cause of action, made by a court of competent jurisdiction, is final and conclusive, and will be followed by all other courts, in actions between the same parties or their privies concerning the matter. *Morrow v. Atlanta, etc., R. Co.* (S. Car.), 19-1009.

Theory of case. — Where a demurrer to a petition is sustained, and the case is therefore dismissed without prejudice at the request of the plaintiff, a theory of the law advanced by counsel for the defendant on the argument is not conclusive on him in a subsequent action on the same matter between the same parties. *First National Bank v. Duncan* (Kan.), 18-78.

(2) Matters not adjudicated.

Matters not referred to in judgment.

— Where the entry of judgment in an action involving several issues of fact recites a finding on one issue that compels a judgment for the defendant, and is silent as to the rest, there is no presumption that they have been passed on, and in the absence of some further showing they will be held open to inquiry in future litigation between the same parties, based on a different cause of action. *Hudson v. Remington Paper Co.* (Kan.), 6-103.

Question not involved in former action. — Where the question of the inchoate dower right of a wife who, for the purpose of releasing such right, has joined her husband in a fraudulent conveyance of his land, is not involved in an action to set aside such conveyance, a judgment rendered therein which in terms divests the right, title, and interest of the husband and wife in such land, is not *res judicata* on the question of the wife's inchoate dower right, and does not bar an action by her to establish such right. *Huntzicker v. Crocker* (Wis.), 15-444.

Matters not essential to determination of controversy. — A decision as to the nature and effect of a final decree made when only the decree was before the court

and in a matter which did not require an exact determination of the question, is not binding on the court in a subsequent suit where the court has before it the entire record of the proceeding on which the decree was entered, and the question as to the nature and effect of the decree is fundamental to the determination of such subsequent suit. *Probate Court v. Williams* (R. I.), 19-554.

Defense applicable to facts not involved. — The decision of an appellate court in an action on a note that the note is not barred by limitation as being on the footing of a bill of exchange is not an adjudication that the defendant cannot on any ground whatsoever again plead limitation in bar of the action, and therefore does not preclude the defendant from pleading, on new trial, that the plaintiff's right of action is barred by limitation on an entirely different ground. *Louisville Banking Co. v. Buchanan* (Ky.), 4-929.

(3) Identity of actions and issues.

A cause of action to enforce the double liability of a stockholder by a motion in the event of an unsatisfied execution on a judgment against the corporation under the Kansas statute held not to be the same as one between the same parties to enforce such a liability on the ground that the corporation had suspended business for a year, under another statute. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

Test of identity. — The test of the identity of causes of action for the purpose of determining the question of *res judicata* is the identity of the facts essential to their maintenance. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

c. Nature and requisites of judgment or order.

Finality of judgment generally.

— Where an action is brought on a promissory note, and the note, when offered in evidence, is excluded on the ground that it is not stamped as required by statute, and the court directs a verdict for the defendant and renders judgment thereon, the judgment is a complete bar to a subsequent action on the same note brought by the plaintiff after he has had the proper stamp affixed; and the finality of the adjudication is not affected by the fact that the judgment is the result of the plaintiff's failure to sustain claim by competent evidence. *Roney v. Westlake* (Pa.), 9-184.

Rulings in case dismissed without prejudice. — Rulings and decisions in the course of an action which is subsequently dismissed without prejudice to a future action raise no estoppel. The only adjudication by such a judgment is that nothing is adjusted and that the parties are as free to litigate the issues as though the action had not been commenced. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

Nonsuit. — A nonsuit on the ground that the evidence introduced by the plaintiff shows affirmatively as a matter of law that he is not entitled to recover is a bar to a

subsequent action in another jurisdiction between the same parties for the same cause. *Morrow v. Atlanta, etc., R. Co. (S. Car.)*, 19-1009.

It is a rule sanctioned by long usage that the plaintiff in an action may submit to a voluntary nonsuit at any time before verdict and thereby preserve his right of action, and there is no good reason for changing such rule. *Deneen v. Houghton County St. R. Co. (Mich.)*, 13-134.

Dismissal for want of jurisdiction. — A judgment in an action before a justice of the peace that the court has no jurisdiction of a certain claim asserted in the action is no bar to another action on such claim in a court having jurisdiction thereof. *Brick v. Atlantic Coast Line R. R. (N. Car.)*, 13-328.

Dismissal because of another suit pending. — The dismissal of a cause in one county for the reason that an action for the same cause between the same parties is pending in another county is not a determination of the cause on the merits or a bar to a further prosecution of the same cause. *State Medical Examining Board v. Stewart (Wash.)*, 13-653.

Dismissal by agreement. — The dismissal of a pending cause by stipulation of the parties, without cost to either party, is not a bar to a subsequent action on the same cause, where there is nothing in the record to show that the cause was settled or determined except the mere fact of dismissal. *State Medical Examining Board v. Stewart (Wash.)*, 13-653.

Decision of appellate court. — An adjudication by the supreme court, whether right or wrong, is binding upon the parties, and it is the imperative duty of the district court to follow it. *Hensley v. Davidson Bros. Co. (Iowa)*, 14-62.

Affirmance of interlocutory decree. — An order modifying a temporary injunction is not *res judicata*, even after it is affirmed by the appellate court, but the whole subject-matter may be retried and reviewed on the final hearing of the case. *Kuchler v. Weaver (Okla.)*, 18-462.

Decision on former appeal. — The principal of *res judicata*, when applied to a second appeal in the same case, is limited to such decisions on the prior appeal as were necessary to a determination of the cause. *Rushville v. Rushville Natural Gas Co. (Ind.)*, 3-86.

d. Actions and proceedings, orders and judgments.

(1) Form of action.

Where a plaintiff has invoked an inappropriate remedy, neither the doctrine of election nor that of *res judicata* applies, though if the second remedy invoked is in equity and the defendant would be seriously prejudiced by the plaintiff's mistake if he were permitted to proceed a second time, the court might apply the principles of estoppel *in pais* if deemed necessary to prevent injustice. *Rowell v. Smith (Wis.)*, 3-773.

Where remaindermen bring an action of ejectment against persons claiming under the purchaser at a sale had under a second mortgage, which mortgage the court decides to have been valid only as to the mortgagor's life estate, and the defendants file a plea on equitable grounds asking to be subrogated to the rights of the mortgagee under a prior mortgage covering the fee, which has been assigned to the second mortgagee but under which no sale has been had, but the court sustains a demurrer to the plea and renders judgment for the plaintiff, the judgment does not preclude the defendants from resorting to a court of equity and seeking there to be subrogated to the rights of the prior mortgage, as the defendants are equitably entitled to have the prior mortgage paid to them unless it is clearly established that by the sale under the second mortgage it was intended to sell the life estate alone and not the fee, or unless there are circumstances showing that the defendants have lost their right to relief. *Stump v. Warfield (Md.)*, 10-249.

(2) Commissioners' opinions, findings, etc.

Opinions expressed by the commissioners on matters not essential to the decision, while properly set forth to advise counsel that their arguments have been duly considered, do not become necessarily the law of the case, and will not preclude further investigation of such points should they come before the court once more. *Williams v. Miles (Neb.)*, 4-306.

Where opinions are prepared by the commissioners, their reasons are not binding on the court, though it concurs in the conclusions of law and express findings of fact. *Williams v. Miles (Neb.)*, 4-306.

Where the state board of license commissioners, in a hearing had pursuant to due notice, finds that a licensed dealer has violated the New Hampshire statutes regulating the sale of intoxicating liquors, the finding is a judicial determination and is conclusive evidence of the violation in a subsequent action brought by the state on the bond given by the dealer to obey the statutes. *State v. Corron (N. H.)*, 6-486.

Where a statute empowers the state board of license commissioners to perform the judicial function of determining whether a licensed dealer has violated the statutes regulating the sale of intoxicating liquors, an intention on the part of the legislature that the board's finding of a violation shall not be conclusive evidence in a subsequent action on the dealer's bond cannot be inferred, either on the ground that the admission of the evidence will deprive the dealer of a jury trial in a matter relating to property, or from the fact that the statute makes no provision for an appeal from the board's decision. *State v. Corron (N. H.)*, 6-486.

Where the state board of license commissioners revokes the license of a dealer in intoxicating liquors without giving him reasonable notice of the hearing provided by

law, its action is administrative and not judicial, and its decision is not admissible in evidence in a subsequent action by the state for breach of the dealer's bond. *State v. Corron* (N. H.), 6-486.

(3) Proceedings to establish boundaries.

A decree establishing the corners and lines of a federal survey under the Illinois act of 1901 is not *res judicata* as to the title to the land on either side of the line established. *Krause v. Nolte* (Ill.), 3-1061.

(4) Criminal prosecutions.

A judgment in a criminal proceeding will not support a plea of *res judicata* in a civil action. *Frierson v. Jenkins* (S. Car.), 5-77.

In an action against a licensed dealer in intoxicating liquors for breach of the bond given by him to obey the provisions of the New Hampshire statutes regulating the sale of liquors, it is no defense that the defendant has been acquitted in a criminal prosecution based upon the same act alleged as the breach. *State v. Corron* (N. H.), 6-486.

A judgment for the defendant in a prosecution against the owner of a building for violating a municipal ordinance prescribing the character of the buildings which may be constructed within the municipality's fire limits is not *res judicata*, as to the legality of the building, in a subsequent action brought by the owner to restrain the municipality from enforcing the ordinance by destroying the building. *Micks v. Mason* (Mich.), 9-291.

e. Pleading and proof.

Sufficiency of plea. — A plea of *res judicata* is fatally defective which contains no averment of a final judgment. *Collins v. Metropolitan Life Ins. Co.* (Ill.), 13-129.

Admissibility of evidence. — Evidence offered in opposition to a plea of estoppel by a judgment, which shows that in a former litigation the parties alleged to be estopped by the judgment therein sought to amend their pleading so as to have the question in controversy in the subsequent litigation determined, and that the court allowed such amendment, is admissible. *Draper v. Medlock* (Ga.), 2-650.

Where several tenants in common brought a joint action for the recovery of land, and the defendant in his plea filed separate defenses, one to the effect that one of the joint plaintiffs was estopped from suing for the recovery of the land, and, for that reason, that none of the joint plaintiff's should recover, the other being that the defendant under color of title and in good faith had been in possession of the land for a sufficient length of time to obtain a title by prescription; and where upon the trial, the case, by consent, having been submitted to the judge to pass upon the law and facts, the judge rendered a general judgment in favor of the

defendant without specifying upon which plea the judgment was rendered; and where to a subsequent suit against the same defendant, by some of the former plaintiffs suing severally for the recovery of the same land, a proper plea is filed, setting up the former suit and judgment therein as an estoppel by judgment, it is competent for the defendant, in support of such plea, to introduce extrinsic evidence to show that the question actually passed upon by the judge in rendering judgment in the former suit was as to whether the defendant had a good prescriptive title, as in such case, if the judge actually based his decision on that question, his judgment is conclusive against the plaintiffs, and they cannot recover in the second suit. *Irvin v. Spratlin* (Ga.), 9-341.

Burden of proof. — The rule stated as to the burden of proof that a certain matter was litigated in a former action, where the record of the latter is such that there may be matter which was not litigated. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

Where a judgment is pleaded as an estoppel, the burden is on the party relying thereon to sustain the plea by showing that the particular matter in controversy was necessarily or actually determined in the former litigation, and if it appear from the record introduced in support of the plea that several issues were involved in such litigation, and the verdict and judgment do not show that this particular issue was decided, this uncertainty must be removed by extrinsic evidence before such plea can be sustained. *Draper v. Medlock* (Ga.), 2-650.

7. ARREST OF JUDGMENT.

a. Grounds of arrest.

Indictment defective or court without jurisdiction. — A motion in arrest of judgment can be granted only when the court has no jurisdiction over the subject of the indictment or when the facts stated in the indictment do not constitute a crime. *People v. Jackson* (N. Y.), 14-243.

Statutory grounds in Montana. — In Montana a motion in arrest of judgment must be founded on some defect in the information mentioned in section 1922 of the penal code. *State v. Tully* (Mont.), 3-824.

Failure of jury to answer interrogatories. — The failure of the jury, upon returning a verdict for the defendant, to answer interrogatories propounded by the defendant, is not ground for a motion in arrest of judgment by the plaintiff. *Freedman v. New York, etc., R. Co.* (Conn.), 15-464.

Another indictment pending. — Under the Indian Territory statute providing that the only ground upon which a judgment shall be arrested is that the facts in the indictment do not constitute an offense within the jurisdiction of the court, the judgment will not be arrested on the ground that at the time of the verdict and judgment another former indictment charging

the defendant with the commission of an identical offense is pending and undisposed of, where it appears that the facts alleged in the indictment are sufficient to constitute the offense. *Clampitt v. United States* (Ind. Ter.), 10-1087.

Matters appearing on face of record. — Judgment may be arrested only for matter appearing on the face of the record, and the evidence is not a part of the record for this purpose. *Demolli v. United States* (U. S.), 7-121.

On the hearing of a motion in arrest of judgment extrinsic evidence as to matters to which the attention of the court was not called at the trial of the cause cannot be admitted and inserted in the record. *State v. Tully* (Mont.), 3-824.

b. Effect of arrest.

Operation as acquittal. — The allowance of a motion in arrest of judgment does not operate as an acquittal of the charge made. *State v. Stephenson* (Kan.), 2-841.

8. AMENDMENT OR CORRECTION OF JUDGMENTS.

Entry for more than amount due. — A judgment for a larger amount than is due the judgment creditor cannot be corrected at the suit of a stranger thereto, unless the judgment is procured by the fraud and collusion of the judgment debtor and creditor. *Stewart Lumber Co. v. Downs* (Ia.), 19-1100.

A petition by a stranger to a judgment entered for a larger amount than was due the judgment creditor does not charge fraud and collusion of the judgment debtor and creditor by an averment that the act of the judgment creditor in taking such judgment was in fraud of the plaintiff's rights. *Stewart Lumber Co. v. Downs* (Ia.), 19-1100.

9. OPENING AND VACATING JUDGMENTS.

a. Jurisdiction.

In equity. — A judgment at law may be vacated by a court of equity in a proper case, but the jurisdiction to do so is only exercised after it has been made to appear clearly that an injustice has been done. *Finn v. Adams* (Mich.), 4-1186.

b. Time for application.

Where a statute provides that a judgment shall not be set aside or vacated after the expiration of one year after its rendition, a judgment relating to alimony will not be disturbed after one year on the ground that it was procured by fraud, if it appears that the plaintiff discovered the fraud within the year, or by the use of reasonable diligence might have discovered it; but if the fraud practiced in procuring the judgment was not known, and was not capable of being discovered within a prescribed time, equity will give relief against it therefor. *Graves v. Graves* (Iowa), 10-1104.

c. Notice.

The inherent jurisdiction of a court to vacate its void judgments does not authorize it to act without notice to the parties even for the purpose of clearing its records of void judgments. *Dwyer v. Nolan* (Wash.), 5-890.

d. Grounds.

Perjury. — False swearing or perjury alone is not a ground for setting aside or vacating a judgment; but if accompanied by any fraud, extrinsic or collateral to the matter involved in the original case sufficient to justify a conclusion that but for such fraud the result would have been different, a new trial will be granted. *Graves v. Graves* (Iowa), 10-1104.

Misapprehension as to allegations of complaint. — Under the Kansas statute (Civ. Code, § 568, subd. 3; Gen. St. 1901, § 5054, subd. 3) providing that a judgment may be set aside at a subsequent term "for mistake, neglect, or omission of the clerk, or irregularity in obtaining" it, a court may vacate a judgment rendered on the pleadings because of a misapprehension as to what allegations they in fact contained. *Cooper v. Rhea* (Kan.), 20-42.

Want of conformity to verdict. — Where in an action to enforce the personal liability of a husband, a judgment is demanded against the community property of the husband and wife, but the question of community liability is not submitted to the jury and their verdict does not refer thereto, a judgment against the community property will be set aside as not in conformity to the verdict. *Swenson v. Stoltz* (Wash.), 2-504.

Want of personal service on defendant. — Under the California statute providing that "when from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action," a defendant served by publication only has the absolute right to have the judgment opened so as to be allowed to answer, the effect of the qualifying phrase, "on such terms as may be just," not being to give the court discretion to refuse the relief where the statutory conditions are met, but only to consider whether the defendant may not have been negligent in a degree amounting to laches or creating an estoppel, and whether the plaintiff or his successor may not have incurred costs and expenses on the faith of the judgment which the defendant should refund, and to impose on the defendant such terms as may be necessary to do justice between the parties. *Gray v. Lawlor* (Cal.), 12-990.

Under such statute, the implied condition that a defendant claiming the right to answer "to the merits of the original ac-

tion" must have a sufficient answer to present, is complied with where, in an action to quiet title, the defendant files an affidavit alleging that he is now and for more than ten years last past has been the owner of and entitled to the possession of the property described in the complaint. *Gray v. Lawlor* (Cal.), 12-990.

Under such statute a defendant applying for leave to answer to the merits of an action in which judgment has been rendered against him is not shown to have been guilty of laches or conduct creating an estoppel, where it does not appear that he had any personal knowledge of the pendency of the action, or that the plaintiff has suffered or will suffer any injury from the vacation of the judgment other than that of being compelled to meet the defense that may be made. *Gray v. Lawlor* (Cal.), 12-990.

Protection of rights of infants. — In an action to recover damages for personal injuries to an infant, where the proceedings in court are merely formal, and are instituted and carried on only to give an apparent sanction to a settlement agreed on between the defendant and the father of the infant, and there is no judicial investigation of the facts on which the right or extent of the recovery is based, a judgment in favor of the infant entered in pursuance of the agreement and by consent merely is only colorable, and will be set aside in a proper proceeding when its effect, if allowed to stand, would be a bar to the infant's substantial rights. *Missouri Pacific R. Co. v. Lasca* (Kan.), 17-605.

10. COLLATERAL ATTACK.

Invalidity of judgment in general. — A collateral attack on a judgment cannot succeed, unless it is established that the judgment is void on its face. *Emery v. Kipp* (Cal.), 16-792.

Although a statutory suit of partition of which a court of equity has jurisdiction cannot be made a substitute for an action of ejectment, such a court has jurisdiction under some circumstances to partition land even where the defendant claims title to the whole tract, and the court having determined that a suit for partition is within its jurisdiction, its judgment cannot be attacked collaterally on the ground that the defendant claimed an independent adversary title, and that the court had no jurisdiction. *Morgan v. Haley* (Va.), 13-204.

Erroneous exercise of jurisdiction. — Where the court has jurisdiction of the parties and the subject-matter, and the subject-matter is brought before it by the pleadings, its decree is not open to collateral attack, although the jurisdiction may be exercised and the subject-matter dealt with erroneously or irregularly. *Cizek v. Cizek* (Neb.), 5-464.

Failure of court to make findings. — In case the pleadings are sufficient to bring the subject-matter before the court the decree may not be attacked collaterally merely

for want of findings. Such defect goes no further than to render the decree irregular or erroneous. *Cizek v. Cizek* (Neb.), 5-464.

Relief not within prayer of complaint. — A judgment in an action to determine adverse claims to real property which awards relief beyond the prayer of the complaint or the scope of its allegations, the excessive relief appearing from the face of the record, is not merely irregular but is void for want of jurisdiction, and is open to attack before or after the time of appeal therefrom, even by a person who is not a party to the action, but who is affected by the judgment in his property rights. *Sache v. Wallace* (Minn.), 11-848.

Judgment based on mistake of law. — Even if the judgment of a court ordering the destruction of an interstate shipment of intoxicating liquors is erroneous, such judgment cannot be impeached either in or out of the state by showing that it was based on a mistake of law. *American Express Co. v. Mullins* (U. S.), 15-536.

Orders and decrees of probate court. — Under the Idaho constitution probate courts are courts of record with original jurisdiction in matters of probate, settlement of decedents' estates, and appointment of guardians, and their orders and judgments in regard to such matters cannot be attacked collaterally. The remedy for one aggrieved by judgment of such court is in said court by proper motion or by appeal. *Clark v. Rossier* (Idaho), 3-231.

A suit in the district court to enforce the specific performance of a parol agreement to devise real property and to quiet title in the plaintiff, as against those claiming under a will duly allowed and admitted to probate in the county court, is not a collateral attack on the judgment admitting such will to probate. *Best v. Gralapp* (Neb.), 5-491.

Direct attack distinguished from collateral attack. — A direct attack on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of the judgment, in a proceeding instituted for that purpose. *Stewart Lumber Co. v. Downs* (Ia.), 19-1100.

11. ASSIGNMENT OF JUDGMENTS.

Necessity of notice. — An assignee of a judgment who causes notice of the assignment to be given to the judgment debtor is a valid holder of such assigned judgment as against the original assignee who had in no way given notice of its assignment. *Citizens' Nat. Bank v. Mitchell* (Okla.), 20-371.

Incidents passing by assignment. — In order for a right to pass as an incident to the assignment of a judgment, it must, in a legal sense, constitute security for the debt. *Commonwealth v. Wampler* (Va.), 7-422.

The assignment of a judgment does not carry with it, as an incident, the right to maintain an action for damages against an officer and the sureties on his official bond

for a prior breach of the condition of the bond. *Commonwealth v. Wampler* (Va.), 7-422.

12. ACTIONS ON JUDGMENTS.

Finality of judgment. — Where, during the pendency of a suit in equity, the complainant prays for leave to discharge his counsel and substitute others, and his petition is referred to a master to report a reasonable amount for counsel fees, a decree of substitution containing the condition that the complainant shall pay the attorneys originally employed the amount found by the master, is provisional only, and in no sense a final decree that will support an action for the amount found to be due. *Dubois v. Seymour* (U. S.), 11-656.

Right to sue at law on decree in equity. — An action at law may be maintained on a decree in equity adjudging finally a certain sum to be due and owing, but if there is a condition annexed to the decree which renders it uncertain whether payment shall ever be obligatory, the decree is not a record on which the common-law action of debt or any other action at law for the purpose of recovering a debt can be instituted. *Dubois v. Seymour* (U. S.), 11-656.

Right to sue on foreign judgment. — An action at law will lie to enforce a decree of another state for the payment of money. *Wagner v. Wagner* (R. I.), 3-578.

Time for commencing action. — Actions can be commenced on a judgment within a year and a day, or before the expiration of the time after the rendition of the judgment within which an execution could be issued on the same. *Kaufman v. Richardson* (Ala.), 4-168.

Inquiry into jurisdiction to render judgment sued on. — The provision of the Federal Constitution as to full faith and credit being given to the judicial proceedings of another state does not prevent an inquiry into the jurisdiction of the court which rendered the judgment, nor does a recital of the jurisdictional facts in the record of such foreign judgment render the judgment conclusive in a suit in another state. *Forsyth v. Barnes* (Ill.), 10-710.

Sufficiency of complaint. — A complaint in an action on a judgment which sets forth the court in which it was rendered, the place at which the court was held, the names of the parties in favor of and against whom it was entered, the date of the rendition, and the sum recovered, contains every essential averment, and a demurrer which challenges the sufficiency of the averments therein is bad. *Kaufman v. Richardson* (Ala.), 4-168.

13. EQUITABLE RELIEF.

Mistake. — A court will not, in an independent suit, relieve against a judgment for mere mistakes at law. *Donovan v. Miller* (Idaho), 10-444.

Erroneous advice of counsel. — The erroneous advice of an attorney is not such

a mistake as will entitle the party to relief from judgment. *Donovan v. Miller* (Idaho), 10-444.

Want of notice of suit. — A bill in equity to vacate a judgment in attachment and a sale thereunder of the property attached will not be entertained where the attachment proceedings were regular and the title which passed was good in law, on the ground that the defendant in attachment was then in jail and was not notified of the suit, if the demand on which the suit was based was one which, in equity and justice, the defendant was under obligation to pay, and the whole interest of the complainant in the land sold did not exceed the amount justly owing by him. *Finn v. Adams* (Mich.), 4-1186.

Allowance of set-off. — A court of equity, in the exercise of a sound discretion, will direct one judgment to be set off against another whenever such relief does not run counter to any established principle of law or equity. *Murray v. Skirm* (N. J.), 17-963.

Jurisdiction of federal courts. — A federal court sitting in equity has jurisdiction to disregard or to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident, or mistake which led the court into the rendition of a wrong judgment, or prevented the judgment defendant from availing himself of a meritorious defense. *Horton v. Stegmyer* (U. S.), 20-1134.

14. REVIVAL OF JUDGMENTS.

Scire facias. — On a petition for *scire facias* to revive a dormant judgment, wherein the plaintiff alleges that the judgment was rendered in a named cause in the same court, a transcript of which is not attached as an exhibit, but full reference to the cause is prayed, and the defendant by his pleadings invokes a construction of the record in aid of his defense, he cannot complain that the court considers such record in determining whether the judgment was void for uncertainty, or whether it was final or interlocutory. *Moody v. Muscogee Mfg. Co.* (Ga.), 20-301.

In *scire facias* to revive a judgment a plea of *nul tiel record* does not entitle the defendant to a jury trial on the issue whether a given judgment had been rendered, as such issue is for decision by the court on an inspection of the record. *Moody v. Muscogee Mfg. Co.* (Ga.), 20-301.

Effect of revival. — A judgment becomes dormant by the death of the party, and its revivor in the name of the representative of such party restores the same to full force and gives it effect for the ensuing period of five years without execution, to the same extent as a revivor in the case of a judgment that has become dormant for want of an execution. *Manley v. Mayer* (Kan.), 1-825.

Criminal jurisdiction, see CRIMINAL LAW, 6. Definition, see JUDGMENTS, 2.

15. CONFESSION OF JUDGMENTS.

By corporation. — A judgment by confession against a corporation based upon its personal appearance by the vice-president and presiding member, and upon an affidavit made by him showing his capacity and the facts regarding the indebtedness, will not be held void upon its face when interposed by the owner as a defense in an action brought to enforce his liability as a stockholder in the corporation. *Manley v. Mayer* (Kan.), 1-825.

A judgment by confession against a corporation in favor of the executor of an estate is not rendered void for all purposes by the fact that it is based upon an appearance and affidavit made by an officer who is individually interested in the estate as a legatee. *Manley v. Mayer* (Kan.), 1-825.

Warrant of attorney. — Not only are warrants of attorney to confess judgment without statutory authorization in Missouri, but they are in direct conflict with the statute of that state relative to the mode and manner of entering a judgment by confession. Inasmuch as this statute purports to cover the whole subject of judgments by confession, it would have abrogated the practice of confessing judgment by warrant of attorney if such practice had ever existed at common law in Missouri. *First Nat. Bank v. White* (Mo.), 16-889.

Even if a warrant of attorney of the nature above considered were lawful, the only judgment which could properly be entered thereunder would be a judgment by confession, and a judgment which recites a trial and the hearing of evidence is not such a judgment. *First Nat. Bank v. White* (Mo.), 16-889.

A warrant of attorney forming part of a promissory note, which purports to empower any attorney at law to appear for the obligor in any court of record, and to waive the issuing and service of process against the obligor, and to confess judgment against him, and to waive all errors in the action and judgment and all appeals or writs of error therein, is void. Such warrants of attorney are not recognized in Missouri, either at common law or by statute, but are held to be contrary to public policy, in that they place the obligor completely at the mercy of the obligee, and constitute secret or hidden securities for debt, and attempt to oust the jurisdiction of the courts of the state both by cutting off the right of appeal and by authorizing the creditor to bring suit in a foreign jurisdiction. *First Nat. Bank v. White* (Mo.), 16-889.

A warrant of attorney given by a debtor conferring power on a creditor, or third person for him, to enter judgment against such debtor without process, is the equivalent of process or a waiver by defendant of his right to have suit brought against him by process. *Hazel v. Jacobs* (N. J.), 20-260.

A judgment on a note was entered by a justice of the peace in the state of Delaware by virtue of a warrant of attorney signed by the maker of the note, which warrant

read: "I do authorize and empower any justice of the peace within the state of Delaware or elsewhere to enter judgment on the above obligation without process, against me, my heirs, etc., at the suit of Frank Moncur, his executors, administrators, or assigns." Held, that a record of a judgment so entered is entitled to full faith and credit in the courts of this state, although there was no process served on, or appearance by the defendant in the proceeding to enter the judgment in Delaware. *Hazel v. Jacobs* (N. J.), 20-260.

16. DEFAULT JUDGMENTS AND JUDGMENT ON PLEADINGS.

Necessity for order of court. — Under the statutes of North Dakota, a judgment in a civil action, whether by default of otherwise, can be entered only on an order of the court or judge, and a judgment entered by the clerk without such an order is void. *Dibble v. Hanson* (N. Dak.), 16-1210.

Compliance with court rules. — A judgment by default, rendered by the superior court of Cincinnati, on default in every way regular on its face, cannot be suspended nor execution thereon stayed by that court on a motion filed at a subsequent term for an alleged irregularity in obtaining such judgment, where such irregularity consists solely in the failure of the clerk to note such judgment on his appearance docket, and of the plaintiff to give notice thereof in the Court Index, a newspaper, for three successive days, notwithstanding both such acts purport to be required by a rule of that court. *Van Ingen v. Berger* (Ohio), 19-799.

Effect of motion for judgment on pleadings. — A defendant's motion for a judgment in his favor upon the pleadings has the effect of admitting all the allegations of the complaint and all the affirmative averments of the reply, considered together, and with such admission there is no necessity for any proof upon the part of the plaintiff. *Fishburne v. Merchants Bank* (Wash.), 7-848.

Sufficiency of answer to prevent judgment on pleadings. — In an action, based on a note and chattel mortgage, to recover a liquidated sum, where the answer admits the execution of the note and mortgage, a denial therein that the defendant owes the plaintiff the amount sought to be recovered, or any other sum or amount whatsoever, on account of said note and mortgage, or at all, is insufficient to prevent a judgment in plaintiff's favor on the pleadings, in the absence of any valid affirmative defense. *Mendenhall v. Davis* (Wash.), 17-179.

17. JUDGMENTS IN REM.

A judgment *in rem* may be obtained against property within the jurisdiction of the court belonging to an absent nonresident; or where the property of such resident is seized by the process of attachment, the court may in such suit dispose of the property, but cannot give a personal judgment except one which can be enforced as to the

seized property against such nonresident.
First Nat. Bank v. Eastman (Cal.), 1-626.

18. FOREIGN JUDGMENTS.

Operation and effect in general. — A judgment enforceable in the state where rendered must be given effect in another state, under the full faith and credit clause of the Federal Constitution, although the modes of procedure to enforce its collection may not be the same in both states. *Sistare v. Sistare* (U. S.), 20-1061.

Custody of children. — The decree of a foreign court, having jurisdiction over the parties and subject matter, awarding the custody of a child six years old to his mother, is of such validity and effect in Ontario — no fraud or collusion being shown — as to render the child's father liable, under section 316 of the criminal code, to conviction for the offense of unlawfully taking or enticing away the child with intent to deprive the parent (mother) of the possession thereof. *Rex v. Hamilton* (Can.), 20-868.

Compelling conveyance of land. — A court of equity, acting *in personam*, may well decree the conveyance of land in another state, and may well enforce its decree by process against the defendant; but neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court rendering it. *Fall v. Eastin* (U. S.), 17-853.

The doctrine above stated is entirely consistent with the provision of the Constitution of the United States which requires a judgment in any state to be given full faith and credit in the courts of every other state. This provision does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit. It does not carry with it into another state the efficacy of a judgment on property or persons, to be enforced by execution. To give it the force of a judgment in another state it must become a judgment there, and can only be executed in the latter as its laws permit. *Fall v. Eastin* (U. S.), 17-853.

Defenses. — In an action on a judgment rendered in another state, it is no defense to show that the note on which judgment was entered was paid before such entry. *Hazel v. Jacobs* (N. J.), 20-260.

JUDICIAL DECISIONS.

See COURTS, 7; STARE DECISIS.
Effect as impairment of obligation of contract, see CONSTITUTIONAL LAW, 15 a.

JUDICIAL DICTUM.

Distinguished from *obiter dictum*, see STARE DECISIS, 4.

JUDICIAL FUNCTIONS.

Selection of jurors, see JURY, 4 b.
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JUDICIAL NOTICE.

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JUDICIAL OFFICERS.

See JUDGES; JUSTICES OF THE PEACE.
Duties incidental to judicial office, see JUDGES, 3 a.

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Of United States, see CONSTITUTIONAL LAW, 6.

JUDICIAL PROCEEDINGS.

Contracts relating to, see CONTRACTS, 4 d.
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JUDICIAL SALES.

1. CONDUCT OF SALE.
 - a. Sale *en masse* or in parcels.
 - b. Chilling or puffing bidding.
2. OBJECTIONS AND SETTING ASIDE.
 - a. Failure to comply with order of sale.
 - b. Chilling or puffing bidding.
 - c. Inadequacy of price.
 - d. Advance bid.
3. CONFIRMATION.
4. RIGHTS AND LIABILITIES OF PURCHASER.
5. COLLATERAL ATTACK.

Expression in title of subject of statute relating to judicial sales, see STATUTES, 3 b.

Review of refusal to confirm sale, see APPEAL AND ERROR, 13.

Rights of purchaser of railroad property at judicial sale, see RAILROADS, 6.

1. CONDUCT OF SALE.

- a. Sale *en masse* or in parcels.

Except where the matter is controlled by statute, it rests within the sound discretion of the trial court, in ordering a judicial sale of disconnected parcels of land, to determine whether the sale shall be *en masse* or in parcels, and the ruling of the court in this respect will not be disturbed on appeal unless it is plainly erroneous. *Miller v. Trudgeon* (Okla.), 8-739.

b. Chilling or puffing bidding.

It is inequitable for a judgment creditor, while using the process of a court to collect a debt, to avail himself of the occasion of a judicial sale to start a question of title and to cheapen what he proposes to sell, and a court of equity will enjoin him from pursuing the legal process until such question of title is settled. *Brady v. Carteret Realty Co.* (N. J.), 3-421.

It is inequitable for a judgment creditor or other party in interest in the land about to be sold at a judicial sale, not only to state facts, but to express an opinion as to the title, which injures and prejudices the sale of the interest which the debtor has or which will pass under the conveyance by the sheriff or other officer. *Brady v. Carteret Realty Co.* (N. J.), 3-421.

2. OBJECTIONS AND SETTING ASIDE.

a. Failure to comply with order of sale.

The failure of an official to comply with the statutory provisions or decree of a court ordering and confirming a sale renders it nonjudicial and void. *International Wood Co. v. National Assur. Co.* (Me.), 2-356.

b. Chilling or puffing bidding.

A person claiming to have an interest in the land being sold at a judicial sale, whether he be a judgment creditor or otherwise, may state facts as to the title, possession, or the alleged right of possession of the property about to be sold, and such statements cannot be deemed inequitable, oppressive, or a slander of the title; but a failure to state such facts will not work an estoppel of the assertion of any right or remedy which such judgment creditor or other person in interest may have in such land. *Brady v. Carteret Realty Co.* (N. J.), 3-421.

c. Inadequacy of price.

A judicial sale will not be set aside on account of mere inadequacy of price, unless the inadequacy is so gross as to shock the conscience or as to raise a presumption of fraud or unfairness. *George v. Norwood* (Ark.), 7-171.

d. Advance bid.

In the absence of fraud, irregularity, or misconduct affecting the validity of a judicial sale, the sale will not be set aside and confirmation refused in order to allow the purchaser's bid to be advanced by another person. *George v. Norwood* (Ark.), 7-171.

3. CONFIRMATION.

Though it may be true that the successful bidder at a judicial sale acquires no independent rights until the sale is confirmed by the court, and that the court may exercise discretion in confirming or rejecting the sale, this discretion must be exercised according

to fixed rules and not arbitrarily, and the bidder has the right to insist upon its exercise in this manner only. *George v. Norwood* (Ark.), 7-171.

4. RIGHTS AND LIABILITIES OF PURCHASER.

Necessity of instrument of transfer.

— In judicial sales of personal property the execution and delivery to the purchaser of an instrument of transfer of the property sold is essential to the validity of the transaction. *International Wood Co. v. National Assur. Co.* (Me.), 2-356.

Rule of caveat emptor. — At a judicial sale the rule of *caveat emptor* applies and the purchaser buys only such estate or interest as the debtor has. *Brady v. Carteret Realty Co.* (N. J.), 3-421.

Effect of reversal of decree for sale.

— The law imputes to an attorney knowledge of defects in legal proceedings for the sale of property taken under his direction, and the title of such attorney to land purchased by him at a judicial sale decreed in proceedings in which he has acted as an attorney falls with the reversal of the decree directing the sale. *Johnson v. McKinnon* (Fla.), 14-180.

5. COLLATERAL ATTACK.

A decree of annulment of a judicial sale based on a finding that the sale has not been completed and the title has not passed determines the status of the title as between the parties and cannot be impeached collaterally. *International Wood Co. v. National Assur. Co.* (Me.), 2-356.

JUNCTIONS.

Stoppage of trains at junctions with other railroads, see RAILROADS, 3 b.

JUNK SHOPS.

Regulation of junk shops in municipalities, see MUNICIPAL CORPORATIONS, 5 f.

JURISDICTION.

See COURTS, 2; CORONERS; JUSTICES OF THE PEACE, 2.

Action on judgment as involving inquiry into jurisdiction, see JUDGMENTS, 12.

Allowance of alimony, see ALIMONY AND SUIT MONEY, 2.

Ancillary jurisdiction of bankruptcy court, see BANKRUPTCY, 17.

Appellate jurisdiction, see APPEAL AND ERROR, 3.

Appointment of personal representatives, see EXECUTORS AND ADMINISTRATORS, 2 d.

Bastardy proceedings, see BASTARDY.

Bankruptcy courts, see BANKRUPTCY, 5.

Control of receivers, see RECEIVERS, 4.

Condemnation proceedings, see EMINENT DOMAIN, 9 a.

Criminal jurisdiction, see CRIMINAL LAW, 6.

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Jurisdiction in attachment dependent on property, see ATTACHMENT, 2.

Jurisdiction in equity to avoid multiplicity of actions, see EQUITY, 2 c.

Jurisdiction of federal courts enjoining judgments of state courts, see JUDGMENTS, 13.

Local jurisdiction, see VENUE.

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JURY.

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Right to jury trial in condemnation proceedings, see EMINENT DOMAIN, 9 i.

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Right to jury trial in proceeding to remove public officer, see PUBLIC OFFICERS, 7 b (2).

Summary conviction without jury for violating municipal ordinance, see CRIMINAL LAW, 7 a (1).

Trial of issues in bankruptcy, see BANKRUPTCY, 7.

1. RIGHT TO JURY TRIAL.

a. In general.

What constitutes a trial. — As used in the provision of the Montana constitution that "in all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury," the word "trial" includes all the proceedings in the progress of the prosecution after the issues are made up, down to and including the rendition of the verdict. *State v. Koch* (Mont.), 8-804.

The right of trial by jury secured by the North Dakota constitution includes all of the substantial elements of the trial by jury as known to and understood by the framers of the constitution and the people who adopted it. *Barry v. Truax* (N. Dak.), 3-191.

Jury of vicinage. — The term "jury of the vicinage," as used in a constitutional guaranty as to the place of trial of a person accused of crime, signifies literally the neighborhood where the crime was committed. *Commonwealth v. Jones* (Ky.), 4-1192.

Right to jury trial in Philippine Islands. — The Constitution does not require Congress to enact for ceded territory, such as the Philippine Islands, not made a part of the United States by congressional action, a system of laws including the right of trial by jury, and the Constitution does not, without legislation and of its own force, carry such right to territory so situated. *Dorr v. U. S.* (U. S.), 1-697.

b. Criminal cases.

(1) Felony.

A judge of the district court has no jurisdiction to try and determine the guilt or innocence of a defendant charged with a felony who pleads not guilty, without a trial to jury; and such jurisdiction cannot be conferred by consent of the accused. *Michaelson v. Beemer* (Neb.), 9-1181.

(2) Commitment of wayward children.

The Pennsylvania statute defining the powers of several courts of quarter sessions of the peace with reference to delinquent children is not unconstitutional as denying the right of trial by jury. *Commonwealth v. Fisher* (Pa.), 5-92.

(3) Violation of municipal ordinance.

Effect of state constitution. — The Georgia constitution does not guarantee a trial by jury to one charged with the violation of a municipal ordinance, but he may be summarily tried and convicted without a jury in a police court having jurisdiction to try petty offenders against the peace and good order of the municipality. *Pearson v. Wimbish* (Ga.), 4-501.

The provision of the Georgia constitution that "no person shall be deprived of life, liberty, or property, except by due process of law," does not guarantee a trial by jury to one charged with the violation of a valid municipal ordinance, but he may be summarily tried and convicted, without a jury, in a police court having jurisdiction to try petty offenses against the peace, good order, and security of the municipality; and this is true although, under such ordinance and the charter of the city, the offender is sentenced to pay a fine of \$500 and also to work on the streets or other public places of the city for thirty days. *Loeb v. Jennings* (Ga.), 18-376.

Effect of federal constitution. — Such a trial without a jury, and the sentence so imposed, are not violative of the provision of the Constitution of the United States which declares, "nor shall any state deprive any person of life, liberty, or property without due process of law." *Loeb v. Jennings* (Ga.), 18-376.

c. Civil cases.

Action for damages. — The right of the plaintiff in an action to recover damages for a nuisance to a trial by jury of the questions of the existence of the nuisance and the amount of the damage. *Chessman v. Hale* (Mont.), 3-1038.

Action to recover possession of real estate. — In an action commenced for the purpose of settling disputed questions of title to real estate, and to recover the possession thereof, either party is entitled to a jury trial as matter of right, regardless of the form in which the action may be brought. *Atkinson v. J. R. Crowe Coal, etc., Co.* (Kan.), 18-242.

Action to quiet title. — An action brought in the district court by the party actually in possession of the property, for the purpose of quieting title to his leasehold estate under the provisions of the Idaho statute, is a suit in equity and neither party is entitled to a jury trial as a matter of right. *Shields v. Johnson* (Idaho), 3-245.

Action for injunction. — An action to enjoin the continuance of a nuisance and for damages is not triable, as of right, by a jury, even though equitable relief is denied. *Miller v. Edison Electric Illuminating Co.* (N. Y.), 6-146.

Where a person is in the actual, exclusive, and peaceable possession of real estate, claiming to be the owner thereof, and another person, claiming to be the owner of the coal and mineral in such land and to have a right to use the surface for mining purposes, attempts to enter thereon for such purpose, but is forcibly prevented by the person in possession, who denies such claimed ownership of the coal, and the person out of possession then commences a suit to obtain a perpetual injunction to restrain the person in possession from interfering with the mining and removal of the coal, it is error, in that suit to deny a request by the defendant for a trial by jury. *Atkinson v. J. R. Crowe Coal, etc., Co.* (Kan.), 18-242.

Eminent domain proceedings. — The owner of property taken under expropriation proceedings has the right to have the issues tried before a jury legally constituted. *Louisiana, etc., R. Co. v. Moseley* (La.), 5-920.

Section 7, article 1 of the Constitution, which provides that "the right of trial by jury shall remain inviolate," has reference to the right of jury trial as the same existed at the time of the adoption of the Constitution, and therefore does not guarantee to the citizen the right of trial by jury in condemnation proceedings in the exercise of the right of eminent domain pursuant to the provisions of section 14, article 1 of the Constitution. *Portneuf Irrigating Co. v. Budge* (Idaho), 18-674.

Quo warranto proceedings. — In a statutory proceeding in the nature of a *quo warranto* proceeding, brought in a court of original jurisdiction to annul, vacate, and cancel a charter or franchise or any other property right, not including title to public

office, the right of trial by jury of issues of fact is a constitutional right. *Louisiana, etc., R. Co. v. State* (Ark.), 5-637.

Probate proceedings. — The constitutional right to trial by jury does not apply to will contests or other probate proceedings, and as to such contests or proceedings the right to trial by jury does not exist unless it is expressly conferred by statute. *Estate of Dolbeer* (Cal.), 15-207.

Under the provisions of the California code of civil procedure the plaintiff in an action to revoke the probate of a will which has been probated after a contest is not entitled as of right to a trial by jury. *Estate of Dolbeer* (Cal.), 15-207.

Where before the probate of a will a contest which has been instituted is tried before a jury, and their verdict is sustained on appeal, it is not an abuse of discretion, but, on the contrary, within the policy of the California statute, for the court to refuse a jury trial in a contest instituted after probate by a brother of the former contestant. *Estate of Dolbeer* (Cal.), 15-207.

d. Submission to jury.

The submission of a case to a jury contemplated by the Nebraska code is the submission of an issue of fact which the jury is at liberty to decide in favor of either party. *Bee Building Co. v. Dalton* (Neb.), 4-508.

A jury impaneled to try issues of fact is practically eliminated by a decision sustaining a demurrer to evidence. Such a decision is essentially a denial of the litigant's claim that he is entitled to a jury trial. *Bee Bldg. Co. v. Dalton* (Neb.), 4-508.

e. Waiver and loss of right to jury trial.

(1) Power to waive.

The waiver of a jury by a defendant prosecuted under the Oleomargarine Act, which subjects persons violating the same to a penalty, is not in conflict with the law and will not invalidate the judgment obtained in the proceeding. *Schick v. U. S.* (U. S.), 1-585.

In such an action, where the trial court rules that the action shall be treated as an equitable one solely and that the verdict of the jury shall be advisory merely, and refuses to give instructions requested by the plaintiff, the plaintiff does not, by proceeding with the trial of the cause, waive his constitutional right to trial by jury, notwithstanding the fact that he takes no exception to the rulings of the court other than an exception to the refusal of his instructions. *Chessman v. Hale* (Mont.), 3-1038.

(2) Mode of waiver.

Failure to demand. — Under the Ohio statute for the prevention of cruelty to animals, which provides that a person accused of violating the statute shall have the right to trial by a jury, unless he waives the right, the waiver must clearly and affirmatively appear on the record, and a waiver cannot be assumed or implied by the

reviewing court from the silence of the accused, or from his mere failure to demand a jury. *Simmons v. State* (Ohio), 9-260.

In a prosecution under the Ohio statute for the prevention of cruelty to animals, on a plea of not guilty, the accused must waive his right to a jury trial before a justice of the peace can acquire jurisdiction to hear the complaint and render final judgment in the case without the intervention of a jury. *Simmons v. State* (Ohio), 9-260.

Nonpayment of fees of jurors. — The constitutional right of trial by jury is not infringed by the New Jersey statute providing that unless the party demanding a trial by jury in the district court shall at the time of making such demand pay the cost of the venire, the demand for trial by jury shall be deemed to be waived. *Humphrey v. Eakeley* (N. J.), 5-929.

(3) Effect of waiver.

The waiver by a complainant of demand for a trial by jury, and the consent of all parties to the cause that the judge may hear the case without the intervention of a jury on the first trial, will not remain in force on the second trial, the cause having been remanded by the appellate court to secure a finding on all the material issues raised in the pleadings, and either party has the right on the second trial to withdraw his former consent and have the issues of fact tried before a jury. *Worthington v. Nashville, etc., Ry.* (Tenn.), 4-1002.

f. Denial of right.

Requiring prepayment of fees. — The provision of the Illinois constitution that the "right of trial by jury as heretofore enjoyed shall remain inviolate" is not violated by the Illinois Municipal Court Act requiring the payment, when a jury is demanded, of six dollars to be applied on their fees. *Williams v. Gottschalk* (Ill.), 12-376.

2. QUALIFICATIONS OF JURORS.

Property qualifications. — Though the North Carolina constitution provides that the real property of a married woman shall be her sole and separate estate, a husband, whose wife is seized of a fee and has had children by him, has such an "interest" in her land that his eligibility as a juror cannot be challenged on the ground that he is not a freeholder. *Hodgin v. Southern R. Co.* (N. Car.), 10-417.

Residence. — The temporary absence of a juror from the parish of his residence will not destroy his qualification for jury service therein, when, though living and working in another part of the state, he had no intention to change his permanent abode. *State v. Wimby* (La.), 12-643.

Conviction of crime. — Conviction of crime is not an absolute disqualification for jury service in Massachusetts. *Com. v. Wong Chung* (Mass.), 1-193.

Desertion from military service. — Whether one who has lost his citizenship

because of desertion from the military service is deprived of the right to serve as a juror under the Massachusetts statutes is doubtful. *Com. v. Wong Chung* (Mass.), 1-193.

New trial for disqualification of juror. — A party to an action is not entitled as a matter of law to have a verdict set aside because of the disqualification of a juror, but a new trial may be granted in the discretion of the court. *Com. v. Wong Chung* (Mass.), 1-193.

Where a competent and impartial jury has been secured in an action, their verdict will not be set aside because the trial judge erred in retaining on the jury one who was in fact disqualified and who was then peremptorily challenged, although it appears that the party afterwards exhausted all his peremptory challenges. *Pearce v. Quincy Mining Co.* (Mich.), 12-304.

3. EXEMPTIONS FROM JURY DUTY.

Validity of exemptions. — The Fourteenth Amendment to the Federal Constitution is not violated by the exclusion of certain classes of citizens from jury service if the exclusion is not the result of race or class prejudice, but is on the *bona fide* ground that it is for the good of the community that the regular work of the excluded classes shall not be interrupted. *Rawlins v. Georgia* (U. S.), 5-783.

Nature of exemption. — The right of exemption from jury service is not a vested or a contract right, but is a mere gratuity which may be withdrawn at the pleasure of the legislature, even though the persons from whom it is withdrawn have performed the services specified in the grant of exemption. *State v. Cantwell* (N. Car.), 9-141.

Members of fire companies. — A constitutional provision for the alteration or repeal of the charters of corporations subsequently formed gives the legislature the right to repeal a subsequent statute chartering a fire company and conferring on its members exemption from jury service. *State v. Cantwell* (N. Car.), 9-141.

The provisions of the North Carolina code which exempt active members of fire companies from jury service and which repeal prior inconsistent private statutes and prior public statutes not contained in the revisal, repeal a prior statute providing that the members of a specified fire company "shall, during membership, be exempt from all jury and militia duty, and in case of active service in said company for five successive years, said exemption shall continue during the life of the member rendering such active service." *State v. Cantwell* (N. Car.), 9-141.

4. SUMMONING AND ATTENDANCE OF JURORS.

a. Jury list.

Failure of jury commissioners to take oath of office. — A motion, made by a prisoner about to be tried for crime, to quash the venire and discharge the panel on the

ground that the list of names of persons to serve as jurors, from which the panel was drawn, was selected by two jury commissioners one of whom had not taken the oath prescribed by such statute, is properly overruled. *State v. Medley* (W. Va.), 18-761.

De facto commissioners. — A jury commissioner, who has been regularly appointed by the court and who is otherwise qualified, but who has failed to take and subscribe the oath prescribed by the West Virginia statute (Code, c. 116, § 3), is, notwithstanding, a *de facto* officer; and, as between third persons, his acts performed in the discharge of his duties as such jury commissioner are valid. *State v. Medley* (W. Va.), 18-761.

Time of meeting of commissioners. — A statute prescribing the time of meeting of the jury commissioners for the purpose of selecting the annual list of persons to serve as jurors is simply directory, and a substantial compliance therewith is sufficient. *State v. Medley* (W. Va.), 18-761.

Appointment of elisors. — Municipal courts in Minnesota, organized under the provisions of the statute (Laws 1895, p. 575, c. 229) being courts of record with common-law jurisdiction, are authorized to appoint an elisor to make a list of names of persons from which to select a jury, where no officer qualified to make such list is present. The character and form of the evidence necessary to show disqualification on the part of an officer who is present, in such a case, rests in the discretion of the trial court. *Wellcome v. Berkner* (Minn.), 17-366.

Term of service. — The Montana code of civil procedure prescribing the term of service for persons on a jury list construed. *State ex rel. Clark v. District Court* (Mont.), 3-841.

b. Selection and summoning of regular panel.

Time. — The statutory provisions in Florida for procuring jurors in advance of a term of the circuit court, compliance with which requires action by the court officials at least fifteen days before the term, do not forbid the calling of a special term within less than fifteen days from the date of the order. If circumstances demand that a term be held at an earlier date, jurors therefor may be procured as in other cases where none have been previously drawn or summoned. *Peoples v. State* (Fla.), 4-870.

Number of jurors. — Code W. Va., c. 116, § 7, respecting the number of jurors to be summoned by the clerk is directory, and the issuance of the writ for a greater number than thirty, without an order of court directing it, is a substantial compliance with the statute. *State v. Medley* (W. Va.), 18-761.

Summoning jury from subdivision of county. — The Alabama statute authorizing a jury, under certain circumstances, to be drawn from a district less than a county, is constitutional. *Wray v. State* (Ala.), 16-362.

Waiver of rights to statutory mode of selection. — The right of the defendant

in a criminal case in a municipal court to trial by a jury selected from a list of persons chosen for that purpose (Bell. & C. Codes & St. Or., § 2251) is waived by accepting a jury summoned by the city marshal from the body of the city. *Gay v. Eugene* (Ore.), 18-188.

Competency of officer. — The action of the trial court in a capital case in refusing to quash the venire on the ground that the sheriff who summoned the panel was prejudiced against the defendant in that he had exercised all due diligence in pursuing and arresting the defendant, and was a witness for the prosecution, will not be reversed on appeal, especially where it appears that the defendant failed to make a timely motion objecting to the competency of the sheriff before the panel was summoned. *State v. Jeffries* (Mo.), 14-524.

Judicial function of court. — To make effectual the constitutional guaranty of the right of trial by jury the district court possesses, by virtue of the sovereignty reposed in it, inherent power to provide itself with a jury. The legislature may aid and regulate the exercise of this power, but the selecting of jurors from the inhabitants of the proper territory to determine issues of fact in court is a court function, cognate with that of hearing and deciding, and is not "administrative" in origin, purpose, or character in the true sense of that term. *Moore v. Nation* (Kan.), 18-397.

c. Drawing or selection of trial jury.

Right to select from panel in attendance. — The statutes of Washington do not give a person charged with a capital crime the right to have the jury before which he is to be tried selected from the panel in attendance on the court at the time his case is called. *State v. Mayo* (Wash.), 7-881.

Right to have negroes on jury. — There is no irregularity in the formation of a jury, composed entirely of white men, for the trial of a negro, in violation of the rights of the accused under the Fourteenth Amendment of the U. S. Constitution, when there is nothing showing what race or races were included in the venire, and objection to the jury is not made in the trial court. *Merriweather v. Com.* (Ky.), 4-1039.

d. Special venire.

Exhaustion of regular panel. — Under the Arizona statutes the trial court has authority to order a special venire before the jurors constituting the regular venire have been exhausted, and when the court has so ordered a special venire it is proper when the cause is called for trial to place the names of the special veniremen in the same box with the names of the remainder of the regular veniremen and from such box to draw the jurors to try the cause. *Elias v. Territory* (Ariz.), 11-1153.

Quashing of regular panel. — When the regular panel of petit jurors is quashed for any reason, the district court may order

jurors to be summoned under section 664 of the Nebraska code. *Russell v. State* (Neb.), 15-222.

e. Compensation and expenses.

Fees. — Under the Missouri statute providing for the payment of jurors, veniremen who are not chosen on the panel of forty jurors provided for in capital cases are not entitled to their *per diem* and mileage. *State ex rel. Suter v. Wilder* (Mo.), 7-158.

Expenses. — While courts of justice have the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the discharge of the duties thereof in the administration of justice, an expense incurred by order of the court for shaving jurors and hair-cutting, while the jury are kept together in the progress of the trial, is not such a necessary expense incident to and necessary in the administration of justice as to become a county charge. The necessity for a juror shaving and having his hair cut does not arise out of or depend on his services on a jury, and is no more necessary while serving on a jury than at any other time. *Schmelzel v. Board of County Com'rs* (Idaho), 17-1226.

By the Idaho statutes (Rev. Codes, §§ 7900, 7901) it is provided that the county commissioners shall provide a room with suitable furniture, fuel, lights, and stationery for the use of the jury upon retirement for deliberation, and that when the jury are kept together they must also be provided, at the county's expense, with suitable and sufficient food and lodging. These sections, however, are not sufficiently broad and comprehensive to include or authorize the payment by the county of a bill for shaving and hair-cutting for jurors while kept together, either in the progress of the trial or during their retirement for deliberation. *Schmelzel v. Board of County Com'rs* (Idaho), 17-1226.

5. COMPETENCY OF JURORS.

a. In general.

The court should resolve all doubts as to the competency of the juror in favor of the defendant in a criminal case. *Johnson v. State* (Okla.), 18-300.

b. Bias or prejudice.

In general. — The court must be clearly satisfied of the fairness of a juror, and his freedom from prejudice or bias against the defendant, or he should be excluded from the jury. *Johnson v. State* (Okla.), 18-300.

Race prejudice. — The trial judge, being afforded an opportunity to observe the manner of jurors in giving answers to questions affecting their competency, commits no error in holding competent a juror who, in response to questions as to his ability to give the accused — a colored man charged with the murder of a white man — a fair trial, and return a verdict according to the law and the evidence, answers "I think I

can," and "I think so," although in response to one question as to whether the fact that the accused man was a colored man charged with the killing of a white man would influence the juror at all in the decision of the case, he answers "It might." *Strong v. State* (Ark.), 14-229.

Membership of association. — The mere fact that a person is a member of an association organized for the purpose of detecting and prosecuting thefts of live stock, and pays dues as a member of such association, does not necessarily disqualify him from sitting as a juror on the trial of a defendant charged with the larceny of sheep, in the absence of anything to show that the association in question is connected with or interested in the prosecution of the particular case on trial. *Starke v. State* (Wyo.), 17-222.

Membership in "anti-saloon league."

— In a prosecution for the illegal sale of spirituous liquors, a person who is a member of an "anti-saloon league," but who testifies that he has not contributed to, or taken any part in, the prosecution of the case at bar, is competent to sit as a juror. *State v. Sultan* (N. Car.), 9-310.

Prejudice against liquor business.

— The fact that one is prejudiced against the business of selling intoxicating liquors does not render him incompetent as a juror on the trial of an action for damages arising under a liquor law, if he has no prejudice against the party engaged in that business from whom the damages are claimed. *Carpenter v. Hyman* (W. Va.), 20-1310.

Coreligionists. — In an action against a Roman Catholic bishop, involving the real property of a certain parish in his diocese, of which property he holds the title as a corporation sole, it is reversible error for the trial court to rule, at the request of the plaintiff, that no person of the Roman Catholic faith is competent to sit as a juror in the case, and to exclude from the panel, under such ruling, two jurors, neither of whom belongs to the parish in question. A person is not disqualified from sitting as a juror in a case simply because he holds the same religious belief as one of the parties in the same church; and even if it is assumed that members of the particular parish whose property is in suit could properly be excluded from the jury in such a case, on the ground of interest, such disqualification would not extend to all members of the same faith, without reference to their residence or membership in the local church. *Searle v. Roman Catholic Bishop* (Mass.), 17-340.

Such erroneous ruling of the trial court, in excluding from the panel, at plaintiff's request, all persons of the Roman Catholic faith, renders the plaintiff's right of peremptory challenge relatively more valuable, and the defendant's similar right relatively less valuable, and, therefore, the defendant, being prejudiced by the error, is entitled to a new trial. No error which affects a party's right of peremptory challenge, can be considered harmless. *Searle v. Roman Catholic Bishop* (Mass.), 17-340.

Testing bias or prejudice. — The defendant in a prosecution for homicide committed by means of a spring gun kept in his trunk, may, for the purpose of enabling him to challenge for cause or to exercise intelligently his right of peremptory challenge, ask a juror on his *voir dire* whether the fact that the defendant put a spring gun in the trunk kept in his room and that some one was killed by opening the trunk, would create in the juror's mind any prejudice or bias that would affect his fairness and impartiality. *State v. Marfaudille* (Wash.), 15-584.

c. Pecuniary interest.

Taxpayer of county. — In an action for damages against a county, a taxpayer residing in the county is not rendered incompetent as a juror by a statute authorizing challenges for cause "when it appears the juror . . . shows such a state of mind as will preclude him from rendering a just verdict." *Wilson v. Wapello County* (Iowa), 6-958.

Condemnation proceedings. — The persons selected by the clerk of court and the sheriff to serve as jurors in matters of expropriation should be taken, not only from parties having no pecuniary interest in the issue to be tried, but from men who have taken no specially active steps towards the accomplishment of the object sought to be obtained by the expropriation. The wide scope given for selection, the narrow margin left for objection by the owner, and the great weight attached to the verdict of the jury in such cases, make it the duty of courts rigidly to construe and to enforce the requirements of the law touching the competency of jurors. *Louisiana, etc., R. Co. v. Moseley* (La.), 5-920.

d. Relationship to party.

A juror on the panel put on the accused in a murder case, whose niece was the first wife of the father of the deceased, but who was not related in any way to the mother of the deceased, the second wife of his father, was not disqualified, by reason of relationship, to sit as a juror on the trial of the case. *McCray v. State* (Ga.), 20-101.

e. Business connection with party.

Employee of party. — An employee of a party to an action is disqualified to sit as a juror in such action. *Pearce v. Quincy Mining Co.* (Mich.), 12-304.

The relation of employer and employee between a party to an action and a salesman is sufficient ground for a challenge for cause. *Hufnagle v. Delaware, etc., Co.* (Pa.), 19-850.

Employee of lessee of party. — Servants of the lessee of a railroad company are, as to acts for which the lessor may be held liable, as much the servants of the lessor as of the lessee, and are therefore not competent to serve as jurors in an action for damages against the lessor based on an injury received as a result of the negligence

of the servants of the lessee. *Georgia R., etc., Co. v. Tice* (Ga.), 4-200.

Employee of government. — Under the common-law rule disqualifying as a juror an employee of a party to the cause, a challenge by a defendant, indicted for conspiring to defraud the government, to the competency as a juror of a druggist, whose drug store is a subpost station, and who as clerk in charge receives a salary from the government, should be sustained. *Crawford v. United States* (U. S.), 15-392.

f. Opinion previously formed.

Opinion formed from reading newspaper. — Ordinarily a juror in a criminal prosecution is not disqualified by the fact that he has formed an opinion from a newspaper report, but when the author of the newspaper report is known to the juror to be a witness in the case, and such author is a person in whom the juror has confidence, an opinion formed by the latter from reading such report disqualifies him as a juror, in the same manner that an opinion formed from talking with a witness would disqualify. *Sullins v. State* (Ark.), 9-275.

Under the Arkansas statute providing that it shall be no ground for challenging a juror that he has an opinion formed from rumor merely, a juror in a criminal prosecution should not be rejected on the ground that he has formed an opinion concerning the guilt or innocence of the defendant that it would take evidence to remove, where it appears that the opinion has been formed from rumor or from reading newspapers only, unless his examination shows that his opinion is a fixed one and one which is not liable to yield to evidence. *Sullins v. State* (Ark.), 9-275.

Previous jury service. — Jurors impaneled for the trial of one charged with accepting a bribe may be challenged for cause, where it appears that a few days before they sat and rendered a verdict of guilty in the case of a coconspirator charged with the same offense, the information being exactly alike except the names of the defendants, and the evidence being substantially the same. Such jurors were not impartial jurors within the meaning of the Michigan constitution. *People v. Mol* (Mich.), 4-960.

The fact that a juror states, on his *voir dire* examination, that he has previously sat as a juror on the trial of a murder case, does not render him subject to challenge on the ground of implied bias. *Johnson v. State* (Okla.), 18-300.

Susceptibility to influence of evidence. — No error is committed in a capital case in disallowing challenges by the defendant to jurors on the ground of bias, where one of such jurors, although challenged for bias, is accepted after further examination and the other two testify that they have read of the case and heard it discussed by persons knowing about as much in reference to the facts as themselves, and that from what they have read and heard they have formed an opinion as to the guilt of the defendant which it would take evidence to re-

move, but that they would disregard what they had heard and read if in conflict with the evidence and would have no difficulty in trying the case impartially. *State v. Megorden* (Ore.), 14-130.

The Oregon statute providing that on the trial of a challenge for actual bias, "although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied from all the circumstances that the juror cannot disregard such opinion and try the issue impartially," is not in conflict with a constitutional provision that "the accused shall have the right to public trial by an impartial jury." *State v. Megorden* (Ore.), 14-130.

The trial court's refusal to sustain a challenge for cause will not be disturbed by an appellate court where it appears from the examination of the juror that he had not talked with any one who purported to know about the case of his own knowledge, but that he had taken newspaper statements for facts, that he had no opinion other than that derived from the newspapers, and that evidence would change it very easily, although it would take some evidence to remove it, and he testified that if the evidence failed to prove the facts alleged in the newspaper, he would decide according to the evidence or lack of evidence at the trial, and thought he could try the case solely on the evidence, fairly and impartially. *Holt v. U. S.* (U. S.), 20-1138.

When a juror has an opinion as to the guilt of the defendant in a criminal case, based on rumor or from reading the public press, and the court is satisfied that the opinion is such that it will not combat the evidence or resist its force, such opinion, of itself, will not render the juror incompetent to sit in the case. *Johnson v. State* (Okla.), 18-300.

Sufficiency of evidence. — Testimony of certain jurors on their *voir dire* examination held not to show that such jurors were disqualified as having formed or expressed an opinion as to the guilt of the accused. *Elias v. Territory* (Ariz.), 11-1153.

6. CHALLENGES AND OBJECTIONS.

a. In general.

Application of state statute in federal court. — Under the federal statutes, on the trial of an indictment in a federal court, the prosecution has the right to exercise a conditional or qualified mode of challenging jurors permitted by the laws of the state in which the court is sitting, notwithstanding the federal statute granting peremptory challenges to the prosecution; but the right must be exercised under the supervision of the court, which must not permit it to be exercised unreasonably or to the undue prejudice of the interest of the defendant. *Sawyer v. United States* (U. S.), 6-269.

Effect of statutory enumeration of grounds of challenge. — The enumerated causes for challenges in the Oklahoma statute are not exclusive of all other causes not enumerated. *Johnson v. State* (Okla.), 18-300.

Challenge by joint parties. — Where there are several parties on either side of a controversy, all of the parties on a side must, under the Washington statutes, join in a peremptory challenge, even though they have severed in their defenses. *Colfax Nat. Bank v. Davies* (Wash.), 16-264.

b. Standing jurors aside.

Where the jury in a criminal cause are impeached before either side has exhausted its peremptory challenges, it cannot be maintained that the trial court in permitting the prosecution to exercise its right of standing jurors aside, has permitted an unreasonable exercise of the right or has permitted the defendant's interests to be unduly prejudiced. *Sawyer v. United States* (U. S.), 6-269.

c. Examination of jurors.

Laying foundation for challenge. — In a personal injury action brought by a servant against his master, where the plaintiff, for the purpose of laying a foundation for interrogating the jurors as to whether they have any interest in or connection with the employers' liability insurance company which is interested in the lawsuit, has served notice on the defendant to produce the insurance policy, but the policy has not been produced, the plaintiff, provided he acts in good faith for the purpose of laying such foundation, may examine a supposed representative of the insurance company, in the presence of the jury, as to the connection of the company with the defense. *Viou v. Brooks-Scanlon Lumber Co.* (Minn.), 9-318.

The connection of an employers' liability insurance company with the defense of a personal injury action brought by a servant against his master may or may not be a collateral issue. The interest or connection of jurors and of witnesses in or with an insurance company interested in the result of a law suit is a proper matter for inquiry by the plaintiff, and within reasonable limits the plaintiff will be protected in the exercise of his right to make such inquiry, and, strictly within the right, admissions by the defendant may be received, though they indirectly involve the insurance company. *Viou v. Brooks-Scanlon Lumber Co.* (Minn.), 9-318.

Limiting scope of examination. — A litigant has the right to ascertain the fitness of the jurors called, by an examination within the scope of that provided by statute; but the trial court in the exercise of a sound discretion, may properly limit the extent of the examination in relating to any of the qualifications contemplated by the statute. *Carpenter v. Hyman* (W. Va.), 20-1310.

Conclusiveness of answer of juror. — The court is not bound by the answers of a

juror on his *voir dire* examination, but may take such other means as may be necessary to determine the competency of the juror. *Johnson v. State* (Okla.), 18-300.

Previous jury service. — It is proper to allow the attorney for the defendant in a criminal case to inquire as to what was the verdict rendered by the jury of which a particular juror was formerly a member, in order that he may intelligently exercise his peremptory challenge. *Johnson v. State* (Okla.), 18-300.

Pecuniary interest. — In an action by an employee against his employer for personal injuries, in the examination of the jurors on their *voir dire*, it is proper to ask them whether they are interested, as agents or otherwise, in the employers' accident insurance company in which the defendant is insured, when such questions are pertinent and are asked in good faith for the purpose of excluding from the panel partial or prejudiced persons, or those who, by reason of interest in the result, would be incompetent, and not for the purpose of prejudicing and influencing the jury in favor of the plaintiff. *Victindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

d. Waiver of objections.

Failure to examine juror as to ground of objection. — Where there is a discrepancy between the name of a juror called and the name of the juror as it appears on the list, the discrepancy, if it is a ground of challenge, should be ascertained on the preliminary examination of the juror, so that he can be challenged for cause if the disqualification is made to appear, and if the competency of the juror is not inquired into at that time the misnomer cannot thereafter be made the basis of an assignment of error. *State v. Matheson* (Iowa), 8-430.

Waiver of right of peremptory challenge. — The right of peremptory challenge given by statute is an absolute one, but it may be waived; and there is a waiver where the party has twice examined the jurors on their *voir dire* without challenge, and no reason is shown why the juror twice passed by the party as satisfactory has been discovered to be unacceptable. *McDonald v. State* (Ind.), 19-763.

e. Review of rulings on challenges.

(1) In general.

Reviewable decisions. — A decision of a trial judge overruling a challenge to the favor of jurors may be reviewed on appeal when it raises a legal question. *People v. Mol* (Mich.), 4-960.

Discretion of trial court. — The trial court is vested with great discretion in excluding veniremen or talesmen from a jury, and its rulings in that particular are not subject to review unless a fair jury is not obtained. *Pumphrey v. State* (Neb.), 18-979.

Denial of motion for new trial. — A statute providing that "no verdict shall be

set aside for any cause which might be alleged as ground for challenge of a juror before the jury is sworn, except when the objection to the juror is that he had a bias against the defendant such as would have disqualified him, and such disqualification was not known to or suspected by the defendant or his counsel before the juror was sworn," does not give a convicted defendant a right to a new trial for the cause mentioned, the denial of which is reviewable on appeal. *Paolucci v. United States* (D. C.), 12-920.

The fact, appearing by affidavits, that a juror in a capital prosecution against an Italian, resulting in conviction, made general statements months before the trial, showing strong prejudice against all Italians but having no reference to the particular case, is no ground for appellate review of the order of the trial court, after a hearing on the affidavits, denying a motion for a new trial. *Paolucci v. United States* (D. C.), 12-920.

(2) Error not apparent in record.

Refusal to quash panel. — A panel of jurors in a criminal case should be drawn in accordance with the commands of the statute providing for their selection. The overruling of a motion by the defendant to quash a panel of jurors will not be held error where the counsel for the defendant does not indicate in what way his rights were prejudiced by reason of the manner of selecting and impaneling the jury. *State v. Campbell* (Mo.), 14-403.

(3) Harmless error.

Allowance of peremptory challenge. — The mistake of the trial court in allowing a party to a civil action a peremptory challenge to which he is not entitled is not ground for reversal where it does not appear that the jury were rendered partial by the mistake, and the juror taking the place of the challenged juror was passed for cause. *Creech v. Aberdeen* (Wash.), 12-370.

Overruling challenge for cause. — In a criminal prosecution, the erroneous refusal of the trial court to sustain the defendant's challenge for cause to a juror makes out a *prima facie* case of prejudice to the defendant when the defendant exhausts his peremptory challenges before the panel is completed; but this *prima facie* case may be overcome, and the appellate court will not reverse a judgment of conviction, where it is shown that under the undisputed facts the verdict could not have been otherwise had challenge for cause been sustained and had the case been tried by any other unbiased and impartial jury. *Sullins v. State* (Ark.), 9-275.

A judgment of conviction for murder in the second degree will not be reversed on the ground that the trial court erroneously refused to sustain the defendant's challenge for cause to a juror and that the defendant thereafter exhausted his peremptory challenges before completion of the panel, where the evidence is such as to show that the only

possible prejudice that the error could have caused was that another jury might have found the defendant guilty of manslaughter; but the conviction for murder will be set aside and the cause remanded with instructions to the trial court to enter judgment for manslaughter. *Sullins v. State* (Ark.), 9-275.

A party to a civil action cannot complain of the improper rejection of a juror, if he has not exhausted his peremptory challenges and an unobjectionable jury is secured. *Ives v. Atlantic, etc., R. Co.* (N. Car.), 9-188.

The defendant in a criminal prosecution will not be heard on appeal to complain of the trial court's refusal of his challenge for cause to jurors, where it appears that he subsequently peremptorily challenged such jurors, and that no juror sat to whom he offered any objection, notwithstanding the fact that he exhausted his peremptory challenges before the completion of the panel. *State v. Sultan* (N. Car.), 9-310.

The erroneous overruling of a good challenge for cause, thereby compelling the use of a peremptory challenge, is not prejudicial error where the challenger is not thereby compelled to accept an objectionable juror but, after the peremptory challenges are exhausted and eleven jurors obtained, accepts the last juror without question as to his qualifications. *State v. Megorden* (Ore.), 14-130.

7. CUSTODY AND CONDUCT OF JURY.

a. Coercion of jury.

Language tending to coercion generally. — A verdict cannot stand where the jury have been subjected to any statements or directions naturally tending to coerce or threaten them to reach an agreement, unless it is clearly shown that such statements or directions have had no influence on the verdict. *Brown v. State* (Wis.), 7-258.

Urging desirability of agreement. — Language of the court in urging on the jury the desirability of an agreement held not a ground for reversal. *Fields v. Dewitt* (Kan.), 6-349.

Stating that jury will be kept together until agreement. — In a criminal prosecution for keeping open a saloon on Sunday, where the issues and evidence are such that each juror must have reached a conclusion soon after retiring, it is error for the judge to state to the jury after they have been out all night and all the following forenoon, without reaching a verdict, that they will have to agree and will be kept together until they do agree; and a verdict reported after a further short retirement of the jury will be set aside. *State v. Place* (S. Dak.), 11-1129.

Sufficiency of evidence of coercion. — Affidavits of the jurors considered, in a prosecution for rape, and held to show that the verdict was rendered under such threats and coercion that it should be set aside. *Brown v. State* (Wis.), 7-258.

b. Communications with court.

Responding to communications from jury. — Where a jury during their deliberations request the court whether they can recommend the defendant to the mercy of the court, and the trial judge replies in the affirmative and informs them that he has made it an invariable rule to follow such recommendations, the latter statement is an improper communication to the jury and is calculated to influence their verdict and is reversible error. *State v. Kiefer* (S. Dak.), 1-268.

Discretion of trial judge. — After a jury have been charged with the consideration of a case, and have spent one night and a portion of two days in deliberation, it is within the discretion of the trial judge, on being informed by a member of the jury that they are not likely to agree on a verdict, to remand them to their room for further deliberation, remarking to them at the same time, "I would regret, after you have given the case as long consideration as you have, for you to fail to agree on a verdict. I will send you back to your room for you to see if you cannot agree on a verdict." And there is no impropriety in the conduct or remark of the judge. *Southern R. Co. v. Fleming* (Ga.), 10-921.

Entry of jury room by judge. — The action of a trial judge in entering the jury room at the request of the jurors, after they have retired to deliberate on their verdict, and having any communication or conversation with the jury in reference to the case, in the absence of the attorneys, requires the granting of a new trial, without consideration of the question whether such conversation was prejudicial. *State v. Murphy* (N. Dak.), 16-1133.

Where, after the jury in a criminal case have retired for deliberation, the presiding judge, in response to a request to come before them for the purpose of answering some inquiries concerning the case, steps into the doorway of the room where they are deliberating, and there, in the absence of the defendant, his counsel, and the court officers, communicates with them in regard to such inquiries, such conduct constitutes reversible error. The fact that the communications are not prompted by improper motives, and do not influence the jury in arriving at their verdict, is immaterial. *Havenor v. State* (Wis.), 4-1052.

Communications in open court. — It is misconduct for which judgment will be reversed for the trial judge, after a cause has been submitted to the jury, to confer with the foreman otherwise than in open court and in the presence of the whole jury. The Texas statute (Rev. St., arts. 1307, 1308) provides in respect to communication between the judge and the jury after retirement, that, "they [the jury] shall appear before the judge in open court in a body, and through their foreman state to the court," etc. *Texas Midland R. Co. v. Byrd* (Tex.), 20-137.

c. Separation of jurors.

Separation by consent of counsel. —

Where, on the submission of a civil case, the jury are instructed regarding their duties during any separation that may take place before their deliberations are concluded, and the attorneys for both parties afterwards assent to a proposal by the court that the jury be permitted to separate for a definite time, the proposal being made in such a manner that the court is justified in understanding that the attorneys consent to the dismissal of the jury by the bailiff in the absence of the judge, the objection that the jury were not given an additional admonition before such separation is not available on review. *Fields v. Dewitt* (Kan.), 6-349.

Admonition as to conduct during separation. — Where the jury, on the submission of a civil case, are told that if they have not reached an agreement within a certain time they may then separate for a definite period, and at the same time are given the statutory admonition with regard to their conduct during such separation, it is not necessary that the admonition be repeated before the separation actually takes place. *Fields v. Dewitt* (Kan.), 6-349.

Illness of juror. — On the second day of a trial for murder a jurymen became ill and was taken out of court, but not out of the building, accompanied by two medical men and a court usher, to a space at the bottom of the building at the back of the court where there was open air and to which the public had no access. After a consultation between the medical men, one of them returned into court and gave an opinion as to when the jurymen would probably recover. The court then adjourned for a short time, and the medical man was sworn to take charge of the jurymen during the adjournment. He then returned to the jurymen, and the two medical men, a constable, and the usher remained with him in the open air for about three-quarters of an hour. The jurymen then rejoined his fellows, the usher having been with him the whole time he was absent from the rest of the jury. The usher had been sworn on the first day of the trial to take charge of the jury during the adjournment for that night, but was not sworn for the particular purpose of taking charge of the jurymen who became ill on the second day. During the whole time the jurymen was absent no one spoke to him about the trial. The medical men only spoke to him, and no one else had an opportunity of doing so. On the way to the open air less than a dozen persons had to be passed, and the jurymen was in a state of collapse and was in such a condition as to be quite unable to communicate with any one: Held, that it was not necessary that the usher who conducted the juror to the open air should be sworn as a court bailiff to take charge of him upon that occasion, that nothing was done which was not justified in law, and that therefore there was no ground for quashing the conviction. *Rex v. Crippen* (Eng.), 20-653.

The rule that the jury must not separate during a trial for murder does not mean that in no circumstances must they physically part from one another. The rule is subject to the qualification that upon an emergency, or where it is necessary, a juror may leave the rest of his fellows. *Rex v. Crippen* (Eng.), 20-653.

Harmless error. — The separation of the jurors in a capital case, though irregular, is not a sufficient cause for setting aside the verdict if the prisoner has sustained no injury; but where there has been an improper separation and the verdict is against the prisoner, the latter is entitled to the benefit of a presumption that the irregularity has been prejudicial to him and the burden of proof is upon the prosecution to show to the contrary. *Gamble v. State* (Fla.), 1-285.

d. Misconduct of jurors.

(1) Custodian in jury room.

Evidence considered relative to misconduct of the jury in a criminal action in permitting the bailiff of the court to be present during their deliberations and take part therein, and held to show that the wrongful presence of the bailiff in the jury room was an immaterial error. *Graves v. Territory* (Okla.), 8-649.

(2) Use of intoxicants.

Proof by affidavits of jurors. — On a motion to set aside a verdict on the ground that during the trial the successful party "treated" the jurors to liquor, the affidavits of the jurors are not admissible to prove that fact. *Pickens v. Coal River Boom, etc., Co.* (W. Va.), 6-285.

Presumption of prejudice. — Where the jury in a capital case have used intoxicants, the presumption is that the convicted defendant was injured thereby, and the burden is on the prosecution to show to the contrary. *Gamble v. State* (Fla.), 1-285.

A new trial will not be granted on the ground of the misconduct of the jurors consisting in the use of intoxicants during the trial, unless the circumstances are such as to raise a reasonable suspicion that such misconduct improperly influenced the verdict. *Easterly v. Gater* (Okla.), 10-888.

(3) Taking papers and exhibits to jury room.

Objection after verdict. — A judgment of conviction for forgery will not be reversed on the ground that the jury took to the jury room certain exhibits introduced in evidence by the people, though the defendant did not give the consent required by statute to such action, where it appears that the exhibits thus taken had been examined by the jury during the trial, and it further appears that the defendant made no objection to the jury's possession of the papers until after the verdict against him had been rendered, and it does not appear how the jury obtained possession of the papers, or what use they made

of them while in the jury room. *People v. Dolan* (N. Y.), 9-453.

Papers taken inadvertently and not read in jury room. — A verdict will not be disturbed on the ground that the jury had with them in their deliberations the bill of exceptions reserved on a former trial of the cause, where it appears that the bill was inadvertently handed to the jury when they retired, and that it was not read by them. *Birmingham R., etc., Co. v. Mason* (Ala.), 6-929.

Exhibit taken inadvertently. — In a civil action to recover damages for assault and battery, the action of a juror in taking with him to the jury room, the plaintiff's hat, which had been introduced in evidence in a damaged condition, as an exhibit on behalf of the plaintiff, although an irregularity, does not justify the reversal of a judgment in the plaintiff's favor and the granting of a new trial, where the evidence presented on the motion for a new trial shows that the hat was taken to the jury room by mistake and inadvertence, that little, if any attention was paid to it by the jurors, that it was on the table around which the jurors assembled and was used as a ballot box for a part of the time, but that it was not used in any way for the purpose of influencing the minds of the jurors and did not influence them. *Morris v. Miller* (Neb.), 17-1047.

Right to take exhibits to jury room. — In an action to recover from a state printer alleged overpayments on the ground that he was paid for binding pamphlets with covers, whereas the pamphlets were in fact bound without covers, where the jury are called on to determine whether the pamphlets were bound with "covers" as the term is used in the binding trade, and certain of the pamphlets are introduced in evidence, it is error to withdraw them from the consideration of the jury or to refuse to allow the jury to take them to the jury room. *State v. Young* (Iowa), 13-345.

(4) Reading newspapers.

Necessity of showing prejudice. — To support an application for a new trial on the ground of misconduct of the jurors, it is not sufficient to show that during the trial they read newspaper comments relating to the case, without showing also that the comments were of such character that they might have resulted in prejudice to the losing party. *Fields v. Dewitt* (Kan.), 6-349.

Reading editorial comments on case. — It is improper for jurors charged with the trial of a murder case to read from a newspaper editorials which directly or indirectly tend to influence their minds and to destroy their perfect freedom from bias or prejudice, either for or against the accused. *Styles v. State* (Ga.), 12-176.

Where jurors impaneled to try a murder case have read such an editorial, and, in a motion for a new trial, it is affirmatively shown that neither the defendant nor his counsel consented thereto, and that neither of them knew of the fact until after verdict,

it is error for the court to refuse to grant a new trial. *Styles v. State* (Ga.), 12-176.

A newspaper editorial alleged to have been read by a jury and made the basis of a motion for a new trial, considered, and held to be of such character as to comprehend, among others, the case on trial, although its reference was only to cases of that class generally. *Styles v. State* (Ga.), 12-176.

Where a motion for a new trial, predicated on the improper conduct of certain of the jurors charged with the trial of the case, recites that "the jurors, after they had been impaneled and before all the evidence had been submitted, read copies" of a certain "newspaper containing a certain editorial," which was "calculated to mislead the jurors, prejudice their verdict," etc., and there is no denial by the state, and the recitals of the motion are certified by the judge to be true, the motion and certificate will be construed to mean that the jurors actually read the editorial to which the objection related. *Styles v. State* (Ga.), 12-176.

(5) Effect of information given jury by one of their number.

Where it appears by an undisputed showing in an action for damages for the change in a street grade that a juror had a prior knowledge of the premises involved, that he based his own conclusion partly thereon and used it to influence his fellow jurors in arriving at the verdict, the verdict must be set aside. *Falls City v. Sperry* (Neb.), 4-272.

(6) Communication with outsiders.

A communication to a jury by the custodian to the effect that the case was very important and was being tried for the second time, and that the jury ought to be able to agree and had better get further instructions, is not ground for the reversal of the judgment on the verdict, where the remarks are not shown to have influenced any juror and the trial court passed on the effect of the remarks in denying a motion for a new trial. *Charlton v. Kelly* (U. S.), 13-518.

(7) Expression of opinion during trial.

An expression of opinion by a juror as to the guilt of the defendant uttered while the jury are in the jury room during the progress of the trial, based only on the testimony that had been given, is not such misconduct as can be shown by the affidavit of a juror to impeach the verdict. *State v. Aker* (Wash.), 18-972.

(8) Discussion of former trial.

A verdict supported by the evidence in a case tried according to law should not be set aside because the jury referred to or discussed a former trial or a former conviction, unless the court may fairly and reasonably see, in the light of all the circumstances that such reference or discussion did or might have prejudiced the appellant's case. It should not be set aside because of the

mere mention of such former conviction. *Smith v. State* (Tex.), 15-357.

(9) **Exhibition of bias.**

Where during the argument, on a motion for a nonsuit, of the attorney for the defendant in an action to recover for the death of a person killed at a railroad crossing, an incorrect statement of the trial judge that the railroad company should have had some one at the crossing to give warning is followed by applause from the audience in the court room, in which one of the jurors impaneled in the case joins by clapping his hands, the trial court should withdraw the juror and continue the case. *McKahan v. Baltimore, etc., R. Co.* (Pa.), 16-173.

The defendant's right to have such juror declared to be disqualified from trying the case is not affected by the fact that the trial judge, in his subsequent charge to the jury, tells them that the case will have to be considered and disposed of "without reference to that little incident," stating that he is confident that the offending juror will so dispose of it. *McKahan v. Baltimore, etc., R. Co.* (Pa.), 16-173.

(10) **Commenting on failure of defendant to testify.**

Where it appears on appeal in a criminal case that after the jury had retired and first stood nine for conviction and three for acquittal, the question was asked whether the accused did not testify, and a juror stated that he knew better, and on another occasion a juror mentioned the fact that the accused did not testify, and asked the reason, to which the reply was made that there was no necessity for it, and that at another time a juror asked why the accused did not testify, to which the reply was made that the jury could not consider that, it is shown that there was a violation of a statute prohibiting juries from commenting on, criticising, or alluding to the failure of the accused to testify, and a verdict of conviction must be reversed. *Carroll v. State* (Tex.), 14-426.

(11) **Evidence as to misconduct.**

Verdict influenced by misconduct. — A new trial on the ground of misconduct on the part of the jury is properly refused where the affidavits offered to establish such misconduct do not tend to show that the result was reached by a resort to chance or any other means than by a compromise by the jurors of their differences by mutual concessions. *State v. O'Brien* (Mont.), 10-1006.

Affidavit of juror. — Where the defendant's motion for a new trial in a criminal case is based on a juror's assertion prior to the verdict that an attempt had been made to bribe him to return a verdict of not guilty, the motion will be denied unless the defendant submits an affidavit that he had neither knowledge of, nor connection with, the peculiar circumstances which are alleged to have led to the misconduct. *State v. Wilson* (Wash.), 7-418.

Under the Washington statute requiring that when a new trial is sought on the ground of the jury's misconduct "the facts on which it is based shall be set out in an affidavit," it is not erroneous for the trial court to refuse to permit an applicant for a new trial to call jurors to testify orally concerning the alleged misconduct, where the applicant does not make it appear clearly that it is impossible for him to procure the affidavits of the jurors. *State v. Wilson* (Wash.), 7-418.

Taking papers to jury room. — Where a verdict is attacked on the ground that the jury improperly had with them during their deliberations the bill of exceptions reserved on a former trial of the cause, it may be supported by affidavits of the jurors that they did not read the bill. *Birmingham R., etc., Co. v. Mason* (Ala.), 6-929.

e. **Conduct of custodian.**

A verdict of murder is not vitiated by the fact that during the progress of the trial the sheriff, with two of his deputies, took the jury to a public minstrel show consisting of dancing and the singing of comic and sentimental songs, where the jury and officers sat in a section by themselves, and no member of the jury had any communication with any one or was subjected to any outside influence, and the performance contained no reference of any nature to the trial of the case. *State v. Jeffries* (Mo.), 14-524.

A new trial will not be granted on the ground of misconduct of the bailiff in charge of the jury, where the moving affidavit merely shows that the bailiff opened the door to the jury room and, standing partly within and partly without the room, spoke to the jurors, but the affidavit does not show what he said or that he said anything about the case, though the affiant was within hearing distance. *State v. Aker* (Wash.), 18-972.

8. **SWEARING JURORS.**

A judgment of conviction in a criminal prosecution will be reversed on appeal if the record proper fails to show that the jury were sworn to try the cause and render a true verdict according to the law and evidence. *State v. Mitchell* (Mo.), 8-749.

The record in a criminal cause held not to be open to the objection that it fails to show affirmatively that the jury were sworn to try the cause. *State v. Temple* (Mo.), 5-954.

A judgment of conviction in a criminal prosecution will not be reversed for the failure of the clerk of the trial court to comply strictly with statutory requirements in administering the oath to a talesman, where it appears that the defendant failed to object at the time to the manner in which the oath was being administered, and merely moved to discharge the jury after it had been impaneled, without moving that the jurors should be resworn and re-examined. *Preston v. State* (Tenn.), 5-722.

Where the clerk of a trial court in swearing a talesman substantially complies with

statutory requirements, the oath is binding, though he fails to comply with mere non-essential formalities prescribed by statute. *Preston v. State* (Tenn.), 5-722.

JUSTICE.

See OBSTRUCTION OF JUSTICE.

JUSTICES OF THE PEACE.

1. APPOINTMENT, QUALIFICATION, AND TENURE.
 - a. Filing bond and oath of office.
 - b. Term of office.
2. JURISDICTION AND POWERS.
3. PLEADING.
4. JUDGMENTS.
5. COMPENSATION.
6. ADMISSIBILITY OF RECORD IN EVIDENCE.

See COURTS.

Commitment by justice not legally appointed, see HABEAS CORPUS, 2.

Identification of justice's record, see CRIMINAL LAW, 6 n (1).

Jurisdictional amount, see BILLS AND NOTES, 12 a.

Jurisdiction in garnishment proceedings, see GARNISHMENT, 7.

Jurisdiction in prosecution for violating liquor laws, see INTOXICATING LIQUORS, 6 b.

Notary public as *ex officio* justice of peace, see EXTRADITION, 4 a.

Power of governor to reinstate justice after removal in impeachment proceedings, see PARDON, REPRIEVE, AND AMNESTY, 1.

Power to punish for contempt, see CONTEMPT, 2.

Remarks of justice as privileged, see LIBEL AND SLANDER, 3 b.

Review of judgment, see CERTIORARI, 1.

Trial *de novo* on appeal, see APPEAL AND ERROR, 12 b.

1. APPOINTMENT, QUALIFICATION, AND TENURE.
 - a. Filing bond and oath of office.

Under the statutes of Wyoming (Rev. St. 1899, §§ 1223, 4317, 4318) the time for an elected justice of the peace to qualify is fixed at the commencement of his term or within twenty days thereafter, and while he may take and execute his official oath and bond, and deposit them with the county clerk, prior to that time, in anticipation of his induction into the office at the time provided by law, his acts in that respect do not operate or become effective as a qualification until after the arrival of the time when the law provides that he shall qualify. *Ballantyne v. Bower* (Wyo.), 17-82.

- b. Term of office.

Commencement of term. — Although justices of the peace in Wyoming are required

to be elected in precincts established by the county commissioners, they are, nevertheless, county officers within the meaning of the statute (Rev. St. 1899, § 1224) which provides that all county officers shall qualify and enter on the discharge of their respective duties on the first Monday in January immediately following their election, and, consequently, the term of a person who has been elected justice of the peace commences on the first Monday in January following his election. *Ballantyne v. Bower* (Wyo.), 17-82.

Holding over. — The office of justice of the peace in Wyoming is a civil office under the state within the meaning of the provision in the state constitution (art. 6, subdivision Elections, § 4) that every person holding any civil office under the state or any municipality therein shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified. *Ballantyne v. Bower* (Wyo.), 17-82.

Resignation. — Under the Tennessee statutes a county judge has jurisdiction to receive and accept the resignation of a justice of the peace of the county. *Murray v. State* (Tenn.), 5-687.

Creation of vacancy by death. --

Where a person who has been elected justice of the peace in Wyoming, and who has filed his official bond and oath with the proper officer, died before the arrival of the time fixed by law for the commencement of his term, his death does not create a vacancy in the office within the meaning of the statute (Rev. St. 1899, § 1225) which authorizes the board of county commissioners to fill a vacancy in the office of justice of the peace. In such a case, an appointment by the county commissioners to fill the supposed vacancy is void, and confers no authority upon the appointee. *Ballantyne v. Bower* (Wyo.), 17-82.

In such a case, the justice of the peace in office at the time of the death of the elected officer, being the lawful incumbent, is entitled to hold over and exercise the duties of the office until his successor is duly elected or appointed and duly qualified; and no person can be lawfully appointed as his successor, except in the event of his death, removal, or other disqualification under section 381 of the statutes. *Ballantyne v. Bower* (Wyo.), 17-82.

2. JURISDICTION AND POWERS.

Powers limited by statute. — Justices' courts are courts of limited jurisdiction having such powers only as are conferred on them by statute, and in the exercise of the powers granted they must pursue the statute not only as to the class of cases they may hear and determine, but as to the procedure they must observe. *State ex rel. Collier v. Houston* (Mont.), 12-1027.

Power to entertain suit by owner of equitable title. — Though a justice of the peace has no power to administer equity, the owner of an equitable title may sue in a justice's court. *Walker v. Miller* (N. Car.), 4-601.

Holding criminal case under advisement. — Where a justice of the peace tries a

criminal cause without a jury, he has power to take the cause under advisement for a reasonable time, such as a day, before rendering his judgment. *State v. Davis* (Mo.), 5-1000.

Termination of jurisdiction in particular case. — When a justice of the peace has heard a cause and adjudged that the accused give bond for his appearance, and such bond has been accepted, his jurisdiction of the cause is at an end, and if he reverse his decision and fine the accused such action will be void. A plea of former conviction based on such a void reversal after recognition taken, is bad and is properly overruled. *State v. Lucas* (N. Car.), 4-764.

Certifying transcript of predecessor. — A justice of the peace is not disqualified from certifying for entry in the district court the transcript of a judgment rendered in his favor by his predecessor in office, as such act of certification is purely ministerial. *Hass v. Levertton* (Iowa), 5-974.

3. PLEADING.

Sufficiency of complaint in general. — A statutory civil action in a justice's court being entirely informal both in that court and in the circuit court on appeal, a complaint which shows the object of the action is sufficient. *Kuykendall v. Fisher* (W. Va.), 11-700.

Sufficiency of complaint by assignee. — Where, in an action in a justice's court, on a nonnegotiable note, brought by an assignee, who declares on the common counts in assumpsit, and especially on the note which he files with the indorsement thereon by the payee, the defendant alleges in a special notice that the note was executed and that the payee therein transferred the same to the plaintiff, the declaration sufficiently shows the assignment of the note. *Worden Grocer Co. v. Blanding* (Mich.), 20-1332.

Answer after adjournment. — Where the parties to an action in a justice court appear on the return day named in the summons, and on the plaintiff's motion the hearing is adjourned for one week, the answer may be filed on the day to which the hearing is adjourned, as by implication the justice designates that day for the pleading, and by moving the adjournment the plaintiff consents thereto. *Nohre v. Wright* (Minn.), 8-1071.

Amendment of pleadings. — The objection that the declaration in an action in a justice's court on a nonnegotiable note, brought by the assignee, which declares on the common counts in assumpsit, and especially on a note made by the defendant, which note is filed with the justice, does not sufficiently state the assignment, may be obviated by an amendment. *Worden Grocer Co. v. Blanding* (Mich.), 20-1332.

4. JUDGMENTS.

Rendition and entry. — Under a statute providing that judgments by justices of the peace sitting without a jury "must be entered

at the close of the trial," where a justice at the close of a trial takes the cause under advisement, without the consent of the parties, and without appointing a time or place for the rendition and entry of judgment, a judgment several weeks later without notice to the parties is without jurisdiction and void. *State ex rel. Collier v. Houston* (Mont.), 12-1027.

Default judgments. — A judgment by default entered by a justice of the peace on a summons served an insufficient number of days before the return day is not void, though it is irregular. *Kerr v. Murphy* (S. Dak.), 8-1138.

A person against whom a justice of the peace has rendered judgment by default on a summons served an insufficient number of days before the return day is not entitled to an injunction restraining the enforcement of the judgment, as his right to move in a justice's court to set aside the judgment, and to appeal from the denial of such motion, affords him an adequate remedy at law. *Kerr v. Murphy* (S. Dak.), 8-1138.

Prima facie evidence of recitals. — The record of the judgment of a justice of the peace is only *prima facie* evidence of its recitals and can be impeached by competent evidence. *Albie v. Jones* (Ark.), 12-433.

Sufficiency to sustain order of sale under attachment. — A judgment rendered by a justice of the peace in an attachment proceeding, reciting service of publication of warning order, is sufficient to authorize a judgment sustaining the attachment and an order of the sale of the property. *Albie v. Jones* (Ark.), 12-433.

5. COMPENSATION.

Right to fees. — A justice of the peace has no right to receive from a person who is charged with an offense a fee for taking a bail bond before such person has been adjudged to be liable for costs. *State v. Cooper* (Tenn.), 15-1116.

Action for fees. — A justice of the peace, after he has rendered judgment in a case, may recover his unpaid fees in an action on the implied contract. *Conlon v. Holste* (Minn.), 9-372.

In an action by a justice of the peace to recover his unpaid fees from a litigant against whom he has rendered judgment, it is not material that though the action is brought against the defendant by name the complaint charges that he is liable as administrator. *Conlon v. Holste* (Minn.), 9-372.

6. ADMISSIBILITY OF RECORD IN EVIDENCE.

Identification. — The record of a proceeding in a justice's court is sufficiently identified by the testimony of the person who was the justice at the time the proceeding was had, though his successor in office is not called as a witness, and the record book is produced by a person who describes himself as a clerk of the new justice and testifies that the book is an official record in the justice's office. *Grimés v. Greenblatt* (Colo.), 19-608.

JUSTIFIABLE HOMICIDE.

See HOMICIDE, 5.

JUSTIFICATION.

Defense to prosecution for malicious injury to animals, see ANIMALS, 3 c.
As defense to trespass, see TRESPASS, 2 c.
Killing to effect arrest of felon, see ARREST, 1 a.
Pleading justification in action for libel, see LIBEL AND SLANDER, 4 e (2).
Plea of justification in action for assault and battery, see ASSAULT AND BATTERY, 2 c.

JUVENILE OFFENDERS.

See INFANTS, 4 c.
Commitment of wayward children, see JURY, 1 b (2).
Singleness of subject of statute relating to delinquent children, see STATUTES, 3 b.
Special punishment for delinquent children, see CRIMINAL LAW, 7 a (1).

KEEP.

Construction of words "keep" and "own" in statute, see STATUTES, 4 d.
Keeping liquors as violation of liquor law, see INTOXICATING LIQUORS, 5 e.
What constitutes keeping dogs. see ANIMALS, 2 d.

KEEPER.

Keeper of boarding house distinguished from innkeeper, see INNS, BOARDING HOUSES, AND APARTMENTS.

KIDNAPPING.

Jurisdiction to try offender forcibly and unlawfully brought from another state or country, see CRIMINAL LAW, 6.

Indictment. — As kidnapping was a misdemeanor at common law, and the Louisiana statute does not use the word "feloniously" in describing the offense, the use of the word "feloniously" is not essential in the indictment, though the accused, if convicted, may be, in the discretion of the court, punished by imprisonment at hard labor. *State v. Holland* (La.), 14-692.

An indictment for kidnapping is not bad because the word "unlawfully" is substituted for the words "without authority of law." *State v. Holland* (La.), 14-692.

Evidence. — As the offense of kidnapping denounced by the Louisiana statute does not involve any particular criminal intent or evil motive, evidence tending to show another kidnapping by the accused of the same person is admissible. *State v. Holland* (La.), 14-692.

LABOR.

Confining at hard labor for violating municipal ordinance, see CRIMINAL LAW, 7 a (1).

Right of individual to sell his labor, see CONSTITUTIONAL LAW, 9.

LABOR COMBINATIONS.

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1. STATUTES AFFECTING.
 - a. In general.

Prohibiting discrimination by employers. — The New York statute making it a misdemeanor for an employer to "coerce or compel" any of his employees not to join or become a member of any labor organization as a condition of securing employment or continuing in the employment is the substantial equivalent of an enactment that a person shall not make the employment or continuance of the employment of another person conditional on the latter's non-membership in a labor organization. *People v. Marcus* (N. Y.), 7-118.

Adoption of means to enforce rules and by-laws. — The Pennsylvania statute providing that labor unions may devise and adopt ways and means to make their rules, by-laws, etc., effective, does not sanction rules, by-laws, etc., to commit wrong, nor does it authorize interference with constitutional rights. *Purvis v. Local No. 500, United Brotherhood, etc.* (Pa.), 6-275.

Effect of statute prohibiting pools and trusts. — As the right to combine for the purpose of securing higher wages is recognized as lawful at common law, a statute enacted to prohibit pools and trusts should not be held to apply to combinations to fix the wages for labor, or compensation for services, unless it clearly appears that

such was the legislative intent. *Rohlf v. Kasameier* (Ia.), 17-750.

b. Constitutionality of statutes

Prohibiting discrimination by employers. — The New York statute providing in substance that it is a misdemeanor for an employer to make non-membership in a labor organization a condition of entering or remaining in his employment is unconstitutional as interfering with the employer's freedom of contract. *People v. Marcus* (N. Y.), 7-118.

A statute prohibiting the discharge of an employee because he belongs to a labor organization is unconstitutional. *Coffeyville Vitrified Brick, etc., Co. v. Perry* (Kan.), 1-936.

Congress has no power to pass a statute making it a criminal offense against the United States for an agent or officer of an interstate carrier, having full authority in the premises from the carrier, to discharge an employee from service simply because of his membership in a labor organization, as such statute is a violation of the Fifth Amendment of the Constitution of the United States declaring that no person shall be deprived of liberty or property without due process of law, and embracing in its meaning the right to make contracts for the purchase of the labor of others as well as for the sale of one's own labor, provided such contracts are not reasonably forbidden as inconsistent with the public interests or detrimental to the common good. *Adair v. United States* (U. S.), 13-764.

There is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership. *Adair v. United States* (U. S.), 13-764.

2. LEGALITY OF LABOR COMBINATIONS.

Means employed in exercise of rights.

— Where individual laborers or labor organizations combine for the purpose of securing higher wages, shorter hours, and more favorable conditions generally than employers of labor would otherwise be willing to concede, their purpose cannot be said to be unlawful or criminal, and hence the question whether their combination constitutes a conspiracy depends on the lawfulness of the means employed by them to effect their purpose. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

3. RIGHTS AND DUTIES OF MEMBERS.

Right to receive weekly benefits during strike. — A labor combination has a right to pay to its members who are on strike, and members have a right to receive, weekly benefits, expenses for transportation to other places, etc., and therefore the giving or taking of such benefits is not itself bribery.

Everett Waddey Co. v. Richmond Typographical Union (Va.), 8-798.

Effect of oath of membership. — The obligation which an initiate in a labor union is required to take is to be construed with reference to the declared purposes of the organization, and is binding only in so far as those purposes are lawful and are to be obtained by lawful means, and when such union attempts the accomplishment of these purposes by unlawful means, the member may deny that he entered into any such contract. *Schneider v. Local Union* (La.), 7-868.

A member of a labor union who is also a public officer held not bound by his obligation to the union to appoint a fellow member of the union to office. *Schneider v. Local Union* (La.), 7-868.

4. RIGHTS OF LABOR COMBINATIONS IN GENERAL.

Pursuit of trade or calling. — A labor union, being an organization brought about by the exercise on the part of its members of the right of every citizen to pursue his calling as he thinks best, is limited in what it can do by the existence of the same right in each and every other citizen to pursue his or their callings as he or they think best. *Pickett v. Walsh* (Mass.), 7-638.

Injury to business of others. — A labor combination engaged in a course of conduct, the immediate purpose of which is to injure the business of another, is in pursuit of an illegal object whether the result is accomplished by mere persuasion or physical violence. *Barnes v. Chicago Typographical Union* (Ill.), 13-54.

Designation of work to be treated as separate trade. — Unions of bricklayers and of masons have a right to insist that the "pointing" of bricks and stone shall not be treated as a separate trade so far as union work is concerned, therefore it is not an act of oppression for them to protest to a federation of labor unions against allowing the "pointers" to organize a union, in the absence of a showing that the pointing is foreign to the work of a bricklayer or a stone mason and that the unions are unwilling to admit to membership pointers who are qualified as bricklayers or stone masons. *Pickett v. Walsh* (Mass.), 7-638.

5. LIABILITIES OF LABOR UNIONS GENERALLY.

a. Liability to members.

Procuring discharge from employment. — Where a labor union, acting without jurisdiction, imposes a fine on one of its members, and, on the refusal of the member to pay the fine, withdraws his membership card with the intention that he shall be discharged by his employer, and the member is in fact discharged as a natural and proximate result of the union's action, the member, if he sustains actual damage, may maintain an action against the union for procuring his discharge. *Brennan v. United Hatters, etc.* (N. J.), 9-698.

Where the rules of an incorporated labor union concerning the trial of its members provide that the accused member shall be entitled to "due notice and fair trial" and shall not be put on trial unless charges have been submitted in writing by a member of the union, the action of the union in putting a member on trial without the submission of written charges and without due notice, and in sentencing him to pay a fine and to give up his place of employment for one year, does not, unless the irregular procedure is consented to by the member, justify the association and its officers in subsequently procuring the member's discharge from his employment. *Brennan v. United Hatters, etc.* (N. J.), 9-698.

b. Liability to third persons.

Inducing employees to break contract. — The officers of a federation of miners are liable in damages for procuring the members of the federation to break their contracts of employment, though the wrong thus committed be done without ill-will towards the employers and for the sole purpose of keeping up the price of coal and the wages of the miners. *South Wales Miners' Federation v. Glamorgan Coal Co.* (Eng.), 2-436.

Rules of union. — Inducing employees to break their contracts with their employer is an actionable wrong, though done without malice or ill-will to the employer; and it is no defense to an action for such wrong that the defendant acted in obedience to the by-laws of the union of which he and the employees were members, but of which the employer was not a member. *Brauch v. Roth* (Ont.), 4-1024.

Unauthorized acts of officials. — A labor union is not liable in damages for the unauthorized action of its officials in inducing employees to break their contracts by striking. *Denaby, etc., Collieries v. Yorkshire Miners' Assoc.* (Eng.), 5-591.

Inducing employees to quit. — It is not unlawful for strikers to persuade employees to leave the service of their employer or to dissuade other workmen from seeking employment with him, but the strikers have no right to use force or violence or to intimidate the employees. *Everett Waddey Co. v. Richmond Typographical Union* (Va.), 8-798.

Statute legalizing moral suasion. — The West Virginia statute making it a penal offense for any person or persons or combination of persons to prevent others by threat or intimidation from working in or about any mine, and providing that the statute shall not be construed so as to prevent labor organizations "from using moral suasion or lawful argument, to induce any one not to work on or about any mine," does not authorize any individual or number of individuals maliciously to entice servants to desert the service in which they are engaged, or to prevent others from engaging in such service under a contract therefor. *Thacker Coal, etc., Co. v. Burke* (W. Va.), 8-885.

Preventing employment of nonunion workmen. — The refusal of a workman to join a labor union does not justify the union in procuring the discharge of the workman from his employment. *Berry v. Donovan* (Mass.), 3-738.

Contract between union and employer. — A contract between a labor union and an employer providing that the latter will not retain in his employ any employee who is objectionable to the union from any cause, does not of itself justify the union or its representative in procuring the discharge of one in the employ of the contracting employer. *Berry v. Donovan* (Mass.), 3-738.

6. COERCION OF EMPLOYERS.

Threat of strike. — Any attempt on the part of the leaders of labor unions to coerce an employer, by threats to order a strike, into signing an agreement concerning the conduct of his business or the regulation of his relations with his employees, is unlawful. *O'Brien v. People* (Ill.), 3-966.

Compelling employer to pay "fine." — Where the members of a labor union conspire to compel a manufacturer who is not a member of the union, to pay a "fine" which they have assessed against him for selling goods to an employer of nonunion labor, and in pursuance of such a conspiracy they coerce him into payment by threatening as an alternative to prevent employers of union laborers from using his goods, the act is one of pure extortion, though its purpose is to promote the general welfare of the union's members, or some other lawful object; and the manufacturer may recover back from the labor union and its members the money so paid by him. *March v. Bricklayers, etc., Union* (Conn.), 6-848.

The action of a labor union in coercing a manufacturer who is not a member of the union into paying a "fine" which it has assessed against him for selling goods to employers of nonunion labor, by threatening as an alternative to stop its members from using his goods, is not justifiable, either on the ground that as the union's members have the right to decline to handle the manufacturer's goods they may waive an exercise of that right upon such conditions as they may see fit to impose, or on the ground that the action is an exercise of the right of fair competition. *March v. Bricklayers, etc., Union* (Conn.), 6-848.

7. STRIKES.

Right to strike generally. — The right of laborers to organize unions and to utilize such organization by instituting strikes is an exercise of the right of every citizen to pursue his calling, whether of labor or business, as he in his judgment thinks fit. *Pickett v. Walsh* (Mass.), 7-638.

Labor unions are not unlawful, and the members thereof may strike and by peaceful means persuade others to join them, and may refuse to allow their members to work with

nonunion laborers. *Gray v. Building Trades Council* (Minn.), 1-172.

It is not unlawful for unions of bricklayers and of masons to refuse to lay bricks and stone where the "pointing" thereof is given to other laborers working at pointing as a separate trade for lower wages than are paid bricklayers and masons, and to enforce such refusal by a strike, though the action of the union is disastrous to the pointers and works a hardship on the contractors affected by the strike. *Pickett v. Walsh* (Mass.), 7-638.

Right as affected by injury to employer. — Employees who are under no contractual restraint may form a combination to strike for the purpose of securing an advance in wages, shorter hours, or any other legitimate benefit, even though they know at the time that their action will injure the employer, provided they carry on the strike in a lawful manner. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union* (Ind.), 6-829.

Resort to unlawful means. — Laborers may organize for their own protection and to further the interests of the laboring classes, and they may strike and persuade and induce others to join them, but when they resort to unlawful means and cause injury to others with whom they have no relation, contractual or otherwise, the limit permitted by the law is passed and they may be restrained. *Everett Waddey Co. v. Richmond Typographical Union* (Va.), 8-798.

Unlawful acts by minority of strikers. — Where a labor union orders a peaceful strike and a great majority of the union's members conduct the strike in a lawful and peaceful manner, the strike is not rendered unlawful by the fact that a small number of the members act on their own initiative in an unlawful manner. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union* (Ind.), 6-829.

Motive of strike. — The right of workmen to strike, that is, to cease working in a body and by prearrangement until a grievance is redressed, where such action on their part does not involve a breach of contract and the strike is conducted without threats, violence, or intimidation, does not admit of question; and in such a case the court will not inquire into the motive of the strikers. So long as their acts are lawful, the motive which inspires them is immaterial. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Arbitrary strike. — The members of a labor union cannot by a strike refuse for an arbitrary cause to work with other workmen, although a single person may so refuse. *Pickett v. Walsh* (Mass.), 7-638.

Wanton disregard of rights of others. — Evidence considered in an action to enjoin certain unions of bricklayers and masons from continuing a strike ordered for the purpose of compelling contractors to discharge nonunion laborers engaged in the work of "pointing" bricks and stone, and held not to show that the defendants' action

was due "to a reckless and wanton, if not malicious, disregard of the rights of the plaintiffs and all others engaged in the business of pointing." *Pickett v. Walsh* (Mass.), 7-638.

Strike against contractor to coerce owner. — A strike against a contractor erecting a building, with whom strikers have no trade dispute, to compel him to force the owner of the building to yield to the strikers' demands concerning laborers employed by the owner, is an unjustifiable interference with the right of the contractor to pursue his calling as he thinks best. *Pickett v. Walsh* (Mass.), 7-638.

Announcing intention to strike. — Conceding that laborers banded together in a labor union have a lawful right to withhold their labor from a certain person unless he refrains from patronizing another, there can be nothing unlawful in their simple announcement that they intend to do so. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Giving money and advice to strikers. — The mere fact that a labor union gives money and advice to the strikers in a strike which it has not ordered or authorized does not render it liable in damages as for inducing breaches of contract, though the money is given in violation of its rules. *Denaby, etc., Collieries v. Yorkshire Miners' Assoc.* (Eng.), 5-591.

Placing employer on unfair list. — It is not unlawful for a labor organization to present to an employer of labor an agreement embodying the conditions on which members of the organization who are on strike will consent to re-enter his service and handle the output of his mill and shops. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Where an employer of labor has been placed on the unfair list by a labor organization, it is no less his duty than that of the organization to notify contractors with whom he has been in the habit of dealing, of that fact, in order that such contractors may not be subjected to loss by further dealings with him, and consequently, the giving of such notice, technically known as an unfair notice, by a labor organization to contractors, cannot be considered unlawful. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

The action of a labor organization in sending notices to contractors that a certain employer of labor has been placed on the unfair list, cannot be considered unlawful, since the right of one who is under no contract relations with another person to withdraw from business relations with such person includes the right to cease to deal with persons who aid the latter by their patronage. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

8. PICKETING.

Use of peaceable means. — Where a labor union has ordered a strike, it is lawful for it to picket the employer's place of

business, provided the pickets observe peaceable means only and do not resort to force, menaces, threats, or intimidation. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union (Ind.)*, 6-829.

Strikers have a right to picket the place of business of an employer for the purpose of inducing his employees to leave his service and of preventing other workmen from entering his employment, where they rely on argument and persuasion and act in a quiet and orderly way, and do not use threats or violence or otherwise act unlawfully. *Everett Waddey Co. v. Richmond Typographical Union (Va.)*, 8-798.

Injunction. — A decree enjoining the members of a labor union from congregating about or near the places of business of the complainants for the purpose of inducing or soliciting employees to leave their employment is not too broad because directed against peaceful picketing, since even a peaceful picketing of the complainants' premises is an act of intimidation and an unwarrantable interference with their rights. *Barnes v. Chicago Typographical Union (Ill.)*, 13-54.

The members of a labor union who are endeavoring to compel certain employers of labor to submit to the dictation of the union by interfering by means of threats, intimidation, or persuasion, accompanied by actual malice, with the right of the employers to employ such laborers as they may choose, are not engaged in legitimate labor competition and are subject to injunction. *Barnes v. Chicago Typographical Union (Ill.)*, 13-54.

A bill for an injunction against picketing by a labor union alleging that the defendants composing the union are acting in concert in pursuance of a common plan to injure the complainants and interfere with their business for the purpose of compelling them to agree to terms imposed by the union; that a strike against the complainants has been declared and is being maintained by the defendants by surrounding the places of business of the complainants with pickets under the control of the union who maintain a constant watch upon employees going to and from their work, intimidating them in many cases and endeavoring by threats, and in some cases by violence, to compel said employees to leave the employment of the complainants, and detailing particular acts of the members of the union and their pickets, by all of which the complainants have lost many of their employees and are seriously interfered with in their business, is not defective on the ground that the allegations of the bill are not sufficiently specific. *Barnes v. Chicago Typographical Union (Ill.)*, 13-54.

9. BOYCOTTS.

What constitutes boycott. — A boycott is a combination of several persons to cause loss or injury to a third person by causing others, against their will, to withdraw from him their beneficial business intercourse,

through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, or other acts which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs. *Gray v. Building Trades Council (Minn.)*, 1-172.

Elements of boycott. — Intimidation, coercion, or threats of injury are essential elements of a boycott, but what constitutes acts of that character depends on the facts in the particular case. *Gray v. Building Trades Council (Minn.)*, 1-172.

Validity of statute prohibiting injunction. — A state statute which could be construed as prohibiting a court of equity from enjoining a conspiracy by a labor union and its members to injure the business of the employer by intimidating his customers would be void as violating the employer's constitutional right to acquire, possess, enjoy, and protect property. *Goldberg, etc., Co. v. Stablemen's Union (Cal.)*, 9-1219.

Complaint in action to enjoin. — Complaint considered, in an action by an employer to enjoin a labor union and its defendants from boycotting the plaintiff's business and picketing his place of business, and held to state facts sufficient to constitute the cause of action alleged. *Goldberg, etc., Co. v. Stablemen's Union (Cal.)*, 9-1219.

Extent of injunctive relief. — A boycott is an unlawful conspiracy and may be restrained by an injunction; but the injunction should not go to the extent of restraining the members of the labor unions from going on the premises to notify the members of the allied unions to desist from work thereon. *Gray v. Building Trades Council (Minn.)*, 1-172.

A decree enjoining a labor combination from putting the plaintiff on the "unfair list" is not too broad where it appears that the purpose of the act enjoined is not merely to notify members of the union to cease patronizing the person listed but that the purpose and effect of the act is to establish a boycott. *Wilson v. Hey (Ill.)*, 13-82.

Right to boycott. — Members of a labor union have the right to cease patronizing any person when they regard it to their interest to do so, but they have no right, by unlawful means and with the motive of injuring such person, to compel others to break off business relations with him. *Wilson v. Hey (Ill.)*, 13-82.

For a labor combination to give notice to the business people of a community that a certain person or firm is on the "unfair list" and, by means of such notice, to excite the reasonable apprehension of the persons notified that unless they cease business relations with the person listed their own business will be injured by the withdrawal of the patronage of the union, creates a boycott and is unlawful, although no threat is made in connection with the notice, and

no existing contracts with the person listed are broken. *Wilson v. Hey* (Ill.), 13-82.

Violation of anti-trust law. — A combination of laborers and labor organizations to destroy the business of a manufacturer by preventing the manufacture of his goods in the state where his factory is located, and also by preventing his customers from reselling them in other states, is an unlawful combination in restraint of trade between the states within the federal Anti-trust Act of 1890, although a part of the business affected is purely intrastate. *Loewe v. Lawlor* (U. S.), 13-815.

A combination by laborers and labor organizations to destroy the business of a manufacturer by preventing the manufacturer from making in the state where his factory is located articles then and there intended for transportation beyond the state, and also by preventing the buyers of his goods in other states from there reselling the same or from negotiating with the manufacturer for the purchase and inter-transportation of the goods from the factory to the various places of destination, is unlawful under the federal Anti-trust Act of 1890, although the means whereby the interstate traffic is to be destroyed are within a single state, and considered alone are beyond the scope of the federal authority; for if the purpose and effect of the plan, considered as a whole, is to prevent interstate transportation, it is immaterial that the actual means employed operate at one end in a single state, before physical transportation commences, and at the other end in another state after physical transportation ceases. *Loewe v. Lawlor* (U. S.), 13-815.

The federal Anti-trust Act of 1890, declaring any contract or combination or conspiracy in restraint of trade or commerce between the states illegal, prescribing the punishment therefor, and providing that any person injured in his business or property by any contract or combination forbidden by the act may recover threefold the damages so sustained, applies to a contract or conspiracy by a labor organization which essentially obstructs the free flow of commerce between the states or restricts in that regard the liberty of a trader to engage in business; and the application of the statute to a labor organization is not affected by the fact that such organization is not itself engaged in interstate commerce. *Loewe v. Lawlor* (U. S.), 13-815.

In an action by a manufacturer for threefold damages for injuries inflicted on his business by a labor combination in violation of the federal Anti-trust Act of 1890, a complaint alleging in substance that the plaintiff was a manufacturer of hats in the state of Connecticut, and was then and there engaged in an interstate trade in some twenty other states, upon which trade he was almost entirely depending to consume the product of his factory, and that the defendants, being members of the labor organization called The United Hatters of North America, caused, by means of threats and coercion, the concerted withdrawal of all makers and fin-

ishers of hats working for him who were not members of such organization, as well as withdrew those who were members, thereby crippling the operation of the plaintiff's factory, and preventing the filling of orders then on hand from wholesale dealers in other states, and that the defendants, acting through the American Federation of Labor, of which they were also members, declared a boycott against the plaintiff's goods and any wholesale dealer who should handle them, and by distributing circulars among such dealers notified them that they and their customers were to be boycotted, whereby the plaintiff's trade with dealers in other states was destroyed to his damage in a certain sum, states a good cause of action within the federal Anti-trust Act of 1890, and is not subject to demurrer. *Loewe v. Lawlor* (U. S.), 13-815.

10. ACTIONS.

Averment of malice or conspiracy. — In an action by a workman against a labor union and its walking delegate to recover damages for their acts in procuring the plaintiff's discharge by threatening and intimidating his employer, the plaintiff's complaint need not allege either conspiracy or malice on the part of the defendants. *Wyeman v. Deady* (Conn.), 8-375.

Parties. — An unincorporated labor union cannot be made a party defendant to a suit to enjoin the maintenance of a strike. *Pickett v. Walsh* (Mass.), 7-638.

Unlawful agreement between union and member. — Where a member of a labor union has entered into an agreement with the union which is void because contrary to public policy, he may repudiate the agreement and maintain an action against the union on a ground which is independent of the agreement—such as an action for wrongfully procuring his discharge from employment; and his right of action is not barred by the operation of the maxim *in pari delicto*. *Brennan v. United Hatters*, etc. (N. J.), 9-698.

Contract terminable at will. — In an action by a workman against the representative of a labor union to recover damages on account of an act of the latter in procuring the plaintiff's discharge from his employment, the fact that the plaintiff's contract was terminable at will does not affect his right to recover but affects only the amount recoverable as damages. *Berry v. Donovan* (Mass.), 3-738.

Sufficiency of evidence, in general. — Evidence considered in an action by a workman against a labor union and its walking delegate to recover damages for their acts in procuring the plaintiff's discharge by threatening and intimidating his employer, and held sufficient to justify the jury in rendering a verdict for the plaintiff. *Wyeman v. Deady* (Conn.), 8-375.

Proof of malice. — In an action by a workman against a labor union and its walking delegate to recover damages for their acts in procuring the plaintiff's discharge by threatening and intimidating his employ-

er, it is not necessary for the plaintiff to prove any malice other than that which the law implies from the proof of the defendant's unlawful acts, even though the complaint contains an allegation of malice. *Wyeman v. Deady* (Conn.), 8-375.

Within the meaning of a rule of law that malice is an essential ingredient of an action to recover damages for an interference with contract relations, malice consists of the intentional doing of a wrongful act without justification or excuse; and a "wrongful act," within the meaning of this definition, is any act which in the ordinary course will infringe upon the rights of another to his damage, except an act done in the exercise of an equal or superior right. *Brennan v. United Hatters, etc.* (N. J.), 9-698.

Proof of conspiracy. — In an action by a workman against a labor union and its walking delegate to recover damages for their acts in procuring the plaintiff's discharge by threatening and intimidating his employer, which acts are made unlawful by statute, the gist of the action is not conspiracy but the injury to the plaintiff caused by the defendant's unlawful acts, and in order to entitle the plaintiff to a verdict against both defendants, no further proof of conspiracy is required than that they were joint tortfeasors in unlawfully procuring the plaintiff's discharge. *Wyeman v. Deady* (Conn.), 8-375.

Measure of damages. — The verdict considered in an action by a workman against a labor union and its walking delegate to recover damages for their acts in procuring the plaintiff's discharge by threatening and intimidating his employer, and held not to be for an excessive amount of damages. *Wyeman v. Deady* (Conn.), 8-375.

11. INJUNCTION AGAINST UNLAWFUL ACTS.

Inadequacy of remedy at law. — Where an employer seeks relief against strikers who are wrongfully interfering with his business, a court of equity is the proper forum and the remedy is by injunction, as the employer's remedy at law is inadequate. *Everett Waddey Co. v. Richmond Typographical Union* (Va.), 8-798.

Interference with contract rights. — A constitutional guaranty that all men shall have the right of acquiring and protecting property embraces the good will, right to carry out contracts, and other intangible property pertaining to a valuable business; an invasion of such right may be restrained by injunction. *Underhill v. Murphy* (Ky.), 4-780.

Intimidation of employees. — Where the property rights of an employer in his business are invaded by the forcible and violent intimidation of his employees by strikers, resulting in injury to his business and to the good will thereof, he is entitled to an injunction restraining the unlawful acts, notwithstanding that they are also punishable as criminal offenses. *Underhill v. Murphy* (Ky.), 4-780.

A court of equity has jurisdiction to grant

an injunction to restrain the forcible and violent intimidation of employees by strikers, and the granting of such an injunction is not open to the objection that it amounts to a trial and conviction of the defendants for a criminal act without the intervention of a jury, or to the objection that the plaintiff has an adequate remedy under the criminal code by having the defendant give security to keep the peace and be of good behavior. *Underhill v. Murphy* (Ky.), 4-780.

Intimidation of customers. — An employer is entitled to an injunction restraining a labor union and its members from boycotting him and from maintaining, in front of his place of business, pickets carrying placards bearing inscriptions designed to injure the plaintiff's business, where the acts complained of have been done and are being done pursuant to a conspiracy between the defendants to intimidate the plaintiff's customers, and where such acts have had the effect of intimidating the customers and will probably continue to have such effect. *Goldberg, etc., Co. v. Stablemen's Union* (Cal.), 9-1219.

An injunction restraining a labor union and its members from injuring the plaintiff's business by intimidating its customers should not be made so broad as to enjoin expressions of mere opinion which at the worst would consist only of slander. *Goldberg, etc., Co. v. Stablemen's Union* (Cal.), 9-1219.

Trespass on employer's premises. — While it is a technical trespass for an agent of a labor organization to enter the premises of an employer of labor for the purpose of calling out the latter's employees on a strike, for which the owner of the premises might recover nominal damages in an action at law, such conduct furnishes no ground for an injunction, in the absence of a threatened repetition of the act. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Completed wrongs. — Assuming that an employer of labor who has been placed on the unfair list by a labor organization, and notified against as unfair, may recover damages in an action at law against the organization, on proof that contractors to whom the unfair notices have been sent have countermanded orders for merchandise previously given, such proof furnishes no ground for an injunction, in the absence of evidence of threats to continue the sending of the notices. An injunction lies only to prevent threatened injury, and has no application to wrongs which have been completed, and for which the injured party may obtain redress at law. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Threats. — Threats made by an agent of a labor organization during a dispute with an employer of labor, to the effect that the organization will drive him out of business if he does not observe its rules, do not, in themselves, warrant an injunction against the organization. Such threats amount, at most, to evidence that the course pursued by the organization is dictated by a malici-

ous purpose to injure the employer, rather than by a desire to benefit its own members, and, conceding that such malicious purpose exists, it cannot render unlawful acts of the organization which are lawful in themselves. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Evidence that an unfair notice given by a labor organization with reference to an employer of labor is continuous in its operation, and that union men cannot work for an employer named in such a notice, or handle his material, so long as the notice remains in force, does not constitute such proof of threatened or continuous injury as to warrant an injunction. The court has no power to compel laborers to return to work against their will. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Threats by individuals. — While threats made by individual strikers against other members of their union, who have spoken of returning to work, may justify an injunction against the individuals making the threats, they do not warrant an injunction against the union or against members thereof who have made no threats. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Coercion of employer. — Where a labor union and its members conspire to coerce an employer into employing none but union labor by forbidding union workmen to work for him or with his goods, by boycotting him, and by threatening to drive him out of business, the employer is entitled to an injunction restraining the coercing acts, as the conspiracy is unlawful, though no violence is used or threatened against him. *Purvis v. Local No. 500, United Brotherhood, etc.* (Pa.), 6-275.

Sufficiency of evidence. — In an action by an employer of labor against a voluntary association known as a building trades council, composed of delegates from various labor unions, the officers of such council, the labor unions composing it, and numerous individual members of such unions, to enjoin a strike and an alleged boycott in connection therewith, a judgment awarding an injunction against the defendants is not warranted by proof that the defendant council and unions, some time before any controversy with the plaintiff had arisen, adopted a rule forbidding union men to work on the same job or in the same shop with nonunion men, or to handle or use material supplied by a dealer who had been declared unfair by the council because of the employment by him of nonunion men; that thereafter the council declared the plaintiff to be unfair, because of his retention in his employment of a laborer who had refused to join the union; that thereupon the business agent of the council went upon the plaintiff's premises and notified his union employees that the plaintiff had been declared unfair, and reminded some of them of their pledge to quit work for an employer declared unfair, and also mailed or delivered notices to all of the contractors doing business in the same city

and who employed union men, notifying them that the plaintiff had been placed on the unfair list, and that union men could not work for or handle material furnished by him until further notice; that as a result of these notices all of the union employees of the plaintiff quit work, and most of the contractors who had formerly purchased building material from the plaintiff ceased to deal with him, and some of such contractors canceled orders for material previously given; that on the day following the strike, the council, by its agent, presented to the plaintiff a draft of an agreement setting forth the conditions upon which the unfair notice against the plaintiff would be withdrawn, and demanded that the plaintiff execute the same, but that plaintiff refused to execute such agreement; that, after a brief interruption, the plaintiff's business was resumed with nonunion laborers, but with a substantial loss of profits by reason of the withdrawal of the patronage of the contractors who had acted upon the unfair notices; that all of the men who quit the plaintiff's employment did so peaceably and quietly; and that there was no picketing of plaintiff's premises, or interference with his customers or with the nonunion laborers employed in place of the strikers. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Evidence reviewed, in a suit by an employer to restrain strikers from wrongfully interfering with his business, and held insufficient to show that the defendants had in any way so molested and annoyed or damaged the complainant in the conduct of his business as to entitle him to an injunction. *Everett Waddey Co. v. Richmond Typographical Union* (Va.), 8-798.

Evidence reviewed, in a suit by an employer to restrain strikers from wrongfully interfering with his business, and held insufficient to show that the defendants, with the malicious intent of annoying, molesting, and injuring the complainant, paid to one of the complainant's employees a bribe as an inducement to quit his employment and leave the city. *Everett Waddey Co. v. Richmond Typographical Union* (Va.), 8-798.

Parties subject to injunction. — A decree restraining labor unions and their members from maintaining a strike should not include in its prohibition a union and the members thereof not participating in the strike, though the union has adopted rules similar to those adopted by participating unions. *Pickett v. Walsh* (Mass.), "

12. CRIMINAL LIABILITY.

Connecticut statute. — To deprive a workman of his employment by intimidating his employer into discharging him is a criminal offense under the Connecticut statute making it an offense to threaten or use any means to intimidate any person, or compel him to do or abstain from doing, against his will, any act which such person has a right to do, *Wyeman v. Dedy* (Conn.), 8-375.

LABOR CONTRACTS.

See CONVICTS.

LABOR LAWS.

1. CONSTITUTIONALITY, 1025.
 - a. In general, 1025.
 - b. Public works, 1026.
2. CONSTRUCTION, 1026.

Child labor laws, see INFANTS, 4 b.

Power of municipality to require work under municipal contracts to be done within the state, see MUNICIPAL CORPORATIONS, 5 f (2).

Regulation of hours of labor as interference with interstate commerce, see INTERSTATE COMMERCE, 2 b (1).

1. CONSTITUTIONALITY.

- a. In general.

Employment of females. — The Oregon statute prohibiting under a penalty the employment of any female in any mechanical establishment, or factory, or laundry, more than ten hours a day, is a police regulation having a substantial relation to the promotion of the public welfare, and does not violate the Fourteenth Amendment of the Federal Constitution or the constitution of the state, as interfering with the right to labor and to employ labor on such terms as the parties may agree upon, or as making an arbitrary and unwarrantable discrimination against the particular business specified by the statute. *State v. Muller* (Oregon), 11-88.

The New York labor law providing that "no female shall be employed, permitted, or suffered to work in any factory in this state before six o'clock in the morning, or after nine o'clock in the evening of any day," without regard to the healthfulness of the employment or the length of the time of labor, is in violation of the state and federal constitutions as unwarrantably interfering with the right of adult females, who are in no sense wards of the state, to pursue lawful employment in a lawful manner. *People v. Williams* (N. Y.), 12-798.

The difference between man and woman in structure of body and physical strength, in the functions to be performed by each, and the capacity for long-continued labor, particularly when done standing, and the influence of the health of women on the future well-being of the race, justifies a difference in legislation as to the hours of labor by the two sexes. *Muller v. Oregon* (U. S.), 13-957.

The Oregon statute providing that no female shall be employed in any mechanical establishment, or factory, or laundry in the state more than ten hours during any one day, is not invalid so far as it affects the work of a female in a laundry, either as at-

tempting to prevent persons *sui juris* from making their own contracts and thereby depriving them of liberty or property without due process of law or equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States, or as class legislation, or as prescribing a limitation having no reasonable relation to the public health, safety, or welfare. *Muller v. Oregon* (U. S.), 13-957.

Inspection of factories. — The Missouri statute providing for the inspection of factories and the collection of an inspection fee is a valid police regulation. *State v. Vickens* (Mo.), 2-779.

Unhealthy occupations. — The legislature may restrict the hours of labor in occupations not considered healthy. *Ex p. Boyce* (Nev.), 1-66.

Bakeries. — The New York statute limiting the hours of labor in bakeries held to be unconstitutional as interfering with the freedom of contract between employer and employee in contravention of the Federal Constitution. *Lochner v. New York* (U. S.), 3-1133.

Mines and ore mills. — The statute providing an eight-hour day for workmen in mines, smelters, and mills for the reduction of ores not violative of either the state or federal constitution. *Ex p. Boyce* (Nev.), 1-66.

With respect to work carried on or aided by any municipal, county, or state government, or on contracts made by such government, and with respect to private work which is of such character as to imperil the health or life of workmen, as for instance, work in mills and smelters for treatment of ores, and in underground mines, the state may prescribe reasonable rules regulating the hours of labor and the conditions under which the work shall be done; but with respect to contracts relating to other classes of private work, the state, except where women and children are employed, may not interfere. *State v. Livingston Concrete Bldg., etc., Co.* (Mont.), 9-204.

The Nevada statute making it a penal offense for any workman to work more than eight hours per day in an underground mine or in a smelter or any other institution for the reduction or refining of ores or metals, is a valid police regulation of an unhealthy occupation and is not unconstitutional. *Ex p. Kair* (Nev.), 6-893.

Judicial notice of unhealthfulness of occupation. — In a prosecution, under the Nevada statute making it a penal offense for any workman to work more than eight hours per day in an underground mine or in a smelter or any other institution for the reduction or refining of ores or metals, against workmen in a wet-crushing quartz mill, the court will not admit evidence to show that labor of the character performed by the defendant is not unhealthful or injurious, as it is a matter of common knowledge, of which the court will take judicial notice, that the health of many men is impaired by labor in such mills, and that fact is sufficient

to render the statute a valid police regulation. *Ex p. Kair* (Nev.), 6-893.

Railroads. — It is within the power of a state legislature, in the absence of Congressional legislation on the subject, to enact laws operative within the boundaries of the state regulating the number of hours an employee of a railroad company can be required to remain on continuous duty, even though the railroad company may be a common carrier engaged in interstate commerce. *State ex rel. Atkinson v. Northern Pacific R. Co.* (Wash.), 17-1013.

The power of the Congress to regulate interstate commerce is plenary, and as an incident to this power it may regulate by legislation the instrumentalities engaged in the business, and may prescribe the number of consecutive hours that an employee of a carrier so engaged shall be required to remain on duty; and when it does legislate upon that subject, its act supersedes any and all state legislation on the same subject. *State ex rel. Atkinson v. Northern Pacific R. Co.* (Wash.), 17-1013.

A state statute providing that a certain class of railroad employees shall not be kept on duty more than eight hours per day does not conflict with a federal statute forbidding such employees to be kept on duty more than nine hours per day. The state statute merely supplements the federal legislation in respect to local conditions. *People v. Erie R. Co.* (N. Y.), 19-811.

Operators of signal towers. — It is a valid exercise of the police power to make eight hours a day of employment for operators of block signal towers on railroads, and to forbid the keeping of such operators on duty more than eight hours per day. *People v. Erie R. Co.* (N. Y.), 19-811.

b. Public works.

In general. — The District of Columbia statute limiting the hours of labor on public works to eight hours in any one calendar day, and making it a criminal offense for contractors for public works to permit or require their employees to work for a longer period in one day, except in case of an extraordinary emergency, is not unconstitutional, either as infringing upon the personal liberty of the contractors or their employees, or as denying to the contractors the equal protection of the law. *Penn Bridge Co. v. United States* (D. C.), 10-719.

The United States eight-hour law limiting the service and employment of all laborers and mechanics employed by the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the District of Columbia, to eight hours in any one calendar day, and making it a misdemeanor to require or permit any such laborer or mechanic to work more than eight hours except in case of extraordinary emergency, is not repugnant to the Constitution of the United States. *Ellis v. United States* (U. S.), 11-589.

The Montana statute limiting the hours of labor upon public works, etc., is not violative of any of the provisions of the Fourteenth Amendment to the Federal Constitution. *State v. Livingston Concrete Bldg., etc., Co.* (Mont.), 9-204.

A statute prohibiting the employment of a laborer under municipal contracts for more than eight hours per day is unconstitutional, and the contractor may recover the amount of the contract from the municipality. *People v. Grout* (N. Y.), 1-39.

Omission to provide for emergencies.

— The Montana statute limiting the hours of labor upon public works, etc., is not rendered invalid by the fact that it makes no provision for cases of emergency where life or property is in peril. *State v. Livingston Concrete Bldg., etc., Co.* (Mont.), 9-204.

Laborers employed by the hour.

— The Montana statute limiting the hours of labor upon public works, etc., is not rendered void by the fact that it applies to laborers who work by the hour and who are paid according to the number of hours they work. *State v. Livingston Concrete Bldg., etc., Co.* (Mont.), 9-204.

Municipal ordinance. — The constitutionality of a municipal ordinance providing that eight hours shall constitute a day's labor on work done for the municipality. *Matter of Broad* (Wash.), 2-212.

2. CONSTRUCTION.

Mandatory nature of statute. — The New York statute of 1897 limiting the hours of labor in bakeries is mandatory in all cases and absolutely prohibits an employer from requiring, and also from permitting, an employee to work more than a certain number of hours per week, even if such employee contracts or desires to do so. *Lochner v. New York* (U. S.), 3-1133.

Prohibitory provisions. — The Montana statute limiting the hours of labor upon public works, etc., is not open to the objection that it merely defines the length of a working day and does not forbid the employment of labor for more than eight hours in a day, even though it does not in terms prohibit employees from working more than eight hours in a day or specifically prohibit employers from hiring laborers to do more than eight hours' work in a day. *State v. Livingston Concrete Bldg., etc., Co.* (Mont.), 9-204.

Persons liable for violation. — The Montana statute limiting the hours of labor upon public works, etc., provides for the punishment of both employer and employee, and is not indefinite as failing to state whether it is intended to punish the employer, the employee, or both. *State v. Livingston Concrete Bldg., etc., Co.* (Mont.), 9-204.

The Montana statute providing that a period of eight hours shall constitute a day's work on all public undertakings or contracts, and in ore mills, smelters, and underground mines, and that every person violating the provisions of the statute shall be guilty of a misdemeanor, was passed for the purpose of preventing the employment of laborers in

any of the specified employments for more than eight hours in a day, and is not rendered void for indefiniteness by the fact that it does not specify in express terms whether the prescribed penalty is to be imposed upon laborers who work less than eight hours in a day or upon those who work more than eight hours per day. *State v. Livingston Concrete Bldg., etc., Co. (Mont.)*, 9-204.

What constitutes extraordinary emergency. — The disappointment of a contractor with regard to obtaining some of his materials — a matter which he knew involved some difficulty and of which he took the risk — does not create that "extraordinary emergency" which the federal statute makes an exception to the eight-hour requirement. *Ellis v. United States (U. S.)*, 11-589.

Under the District of Columbia statute limiting the hours of labor on public works except in case of an extraordinary emergency, the term "extraordinary emergency" imports a sudden and unexpected happening; an unforeseen occurrence or condition calling for immediate action to avert an imminent danger to health, or life, or property; an unusual peril, actual, and not imaginary, suddenly creating a situation so different from the usual or ordinary course in the prosecution of a public work that the court may and must conclude that Congress contemplated excepting from the operation of this law such an occurrence, so sudden, rare, and unforeseen. *Penn Bridge Co. v. United States (D. C.)*, 10-719.

Under the District of Columbia statute limiting the hours of labor on public works except in case of an extraordinary emergency, what amounts to an "extraordinary emergency" is a question of statutory construction for the court. *Penn Bridge Co. v. United States (D. C.)*, 10-719.

Evidence examined in a prosecution under the District of Columbia statute limiting the hours of labor on public works except in case of an extraordinary emergency, and held not to show an existence of "extraordinary emergency" excusing the defendant for its violation of the statute. *Penn Bridge Co. v. United States (D. C.)*, 10-719.

What constitutes intentional violation. — The penal clause of the federal eight-hour law making those guilty and subject to punishment who "intentionally violate" the provision of the law, does not exclude from the penalty one who works his employees more than eight hours under the mistaken belief that an "emergency" has arisen which justifies his conduct, the intentional adoption of a certain course of conduct which is actually in violation of the law being an intentional breaking of the law. *Ellis v. United States (U. S.)*, 11-589.

Laborers and mechanics. — The federal eight-hour law, being limited to "laborers and mechanics" employed "upon any of the public works" of the United States, does not include in its operation employees on scows, dredges, and tugs engaged in dredging channels in a harbor, such persons not

being "laborers and mechanics," nor employed on the "public works" of the United States. *Ellis v. United States (U. S.)*, 589.

LABOR UNIONS.

See **LABOR COMBINATIONS**.

LABORERS.

Breach of contract of employment as crime, see **MASTER AND SERVANT**, 2 c.

Laborers' liens, see **LIENS**; **MECHANICS' LIENS**, 3.

Preference of claims of laborers, see **INSOLVENCY**.

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Application for mandamus, see **MANDAMUS**, 3 d.

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Loss of right to subrogation, see **SUBROGATION**, 3 c.

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See **WATERS AND WATERCOURSES**.

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Validity of unrecorded deed as against subsequent lease, see RECORDS, 5.

1. CREATION OF RELATION.

Acceptance of rent under invalid lease. — Where a lessee of land under an invalid written lease enters on the land and occupies and pays rent for it and the rent is accepted by the owner, the legal relation of landlord and tenant arises between the parties. Such tenancy is not created by the invalid lease, but is implied by law from the occupancy of the premises and the payment and receipt of rent therefor, and the periodical payment by the tenant of a yearly rent, either in one or more instalments, accepted by the landlord, makes the tenancy one from year to year. *Falck v. Barlow* (Md.), 17-538.

Acceptance of crops grown by occupant. — Where it appears that an owner of land accepted crops grown thereon by an occupant thereof not with the intention of recognizing the latter as his tenant on shares, but because he claimed the title to all the crops grown on the land, having from the beginning the occupant's right of possession, and having been at the time of such acceptance litigating that question with him, the acceptance of such crops is not evidence

See CROPS.

Apartment houses, see INNS, BOARDING HOUSES, AND APARTMENTS.

of a tenancy. *Myer v. Roberts* (Ore.), 15-1031.

Agreement for joint occupancy. — Where the owner of a farm, living on the premises, enters into an agreement with another person by which the latter is to cultivate and carry on the farm for an equal division of the profits, and is to have the occupancy, free of rent or expense, of a tenement house on the premises, as a part of the agreement under which he occupies the farm, and it is stipulated that neither party is to interfere with the exclusive possession of the other, the relation of the parties, both as to the farm and the tenement house, is that of tenants in common and not of landlord and tenant, and the owner cannot eject the occupant of the tenement house by the statutory action of ejectment, of which a justice of the peace has jurisdiction, and which is applicable only to landlord and tenant. *Mead v. Owen* (Vt.), 13-231.

Occupation by servant as incidental to employment. — Where a servant, in connection with his services, and for the necessary or better performance thereof, occupies a house, free of rent, upon the premises of the master, such possession is not adverse to the master, nor as a tenant, but is treated as the possession of the master. In such a case a tenancy at will or by sufferance does not spring up immediately upon the discharge of the servant. To have that effect, the subsequent occupancy, if alone relied on, must be sufficiently long to warrant an inference of consent to a different holding. *Mackenzie v. Minis* (Ga.), 16-723.

In such a case, where the servant is discharged, it is his duty to leave the premises and remove his personal goods therefrom. To insist on retaining possession of the house, and entering on the land and continuing to treat it as if there had been no discharge, makes him a trespasser, although he contends that his discharge was wrongful. *Mackenzie v. Minis* (Ga.), 16-723.

Under such circumstances an injunction is properly granted against the servant upon a complaint alleging that he is insolvent and is continually trespassing and causing damage of such a character as not to be capable of compensation or of being satisfied by an ordinary suit at law. Assuming that the master might lawfully remove the discharged servant from the premises by force, he is not bound to do so, nor does his right to resort to force constitute the adequate remedy at law which will defeat an application for an injunction. As between force and the extraordinary writ of injunction, the law favors the latter. *Mackenzie v. Minis* (Ga.), 16-723.

When the essential nature of the interlocutory injunction granted in such a case is to restrain a continuing trespass, it is not subject to objection as being mandatory in character, although it includes a restraint against the servant from keeping his goods on the master's premises. *Mackenzie v. Minis* (Ga.), 16-723.

If it is error for the court, in such a case,

to exclude from evidence an affidavit made by the master, on the day after the discharge of the servant, for the purpose of obtaining a warrant to dispossess the latter as a tenant by sufferance, such error does not require a reversal where the making of the affidavit has been proved by other evidence without objection or conflict, and it is clear that no injury has arisen therefrom, the injunction being nevertheless fully authorized. *Mackenzie v. Minis* (Ga.), 16-723.

2. LEASES.

Necessity of acknowledgement and record. — Under the statutes of Maryland, a lease of real property for a term greater than seven years is ineffectual to convey any legal estate to the lessee, unless acknowledged and recorded; and although equity will, in a proper case, treat a defective deed or lease as a contract and enforce its execution, and otherwise protect the rights of the parties, it cannot make an unacknowledged and unrecorded lease for a longer term than seven years effectual to convey any legal estate to the lessee. *Falck v. Barlow* (Md.), 17-538.

Construction. — Where the lessees under a written lease agree in the lease to put into the premises a heating plant, to renew the plumbing, to make other improvements and to pay taxes and premiums on insurance in lieu of rent, and to give a bond conditioned for the performance of their contract, and to pay for the work and materials used in the improvements to the end that no lien shall be fastened upon the property by their creditors, and they give a bond with a surety conditioned that they will perform all the obligations assumed by them by virtue of the lease, but this bond contains no additional condition that they will pay for the work and material, the lease and the bond must be construed as evidencing an express agreement by the lessees and the surety that the lessees will not only furnish the heating plant, and the plumbing, but will pay for the work and material employed therein, to the end that no lien of any creditor of theirs shall be fastened upon the property; and the surety will be liable to the lessor for the amount the latter necessarily has to pay to relieve the property from a lien for such labor and material. *American Bonding Co. v. Pueblo Investment Co.* (U. S.), 10-357.

3. TENANCY FOR YEARS.

a. Nature of tenant's estate.

Personal property. — The Missouri statute (Ann. St. 1906, p. 1807) relating to executions which provides that every lease of lands for an unexpired term of more than three years shall be subject to sale under execution "as real property," and that the term "real estate" shall include all estates and interests in lands, tenements, and hereditaments, does not change the legal character of leaseholds from personalty to realty, but merely prescribes the mode of sale thereof

under execution. *Orchard v. Wright, etc., Store Co. (Mo.)*, 20-1072.

Tenements and hereditaments. — A lease of lands for a term of years is neither a "tenement" nor a "hereditament" within the legal definition of those words. *Orchard v. Wright, etc., Store Co. (Mo.)*, 20-1072.

b. Duration of term.

Agricultural leases. — A lease of agricultural land for the period of twenty years from the date of its execution, which is to be delivered to the lessee on the death of the lessor, becomes effective on the latter's death, and if the date of the expiration of such lease is more than twelve years from that time, the lease is void as in contravention of the provision of the Michigan construction that leases of agricultural lands for a longer period than twelve years shall be invalid. *Waldo v. Jacobs (Mich.)*, 15-343.

In an action of ejectment against the occupant of a farm under a lease which was to take effect on the death of the lessor, it is not error to exclude evidence of a conversation between the lessor and the lessee's wife, antedating the execution of the lease, to the effect that it was intended that the lessee, who was at that time in possession of the farm, should have a continuous possession. *Waldo v. Jacobs (Mich.)*, 15-343.

c. Assignment or subletting.

(1) In General.

Right of tenant to sublet. — In the absence of any covenant in the lease to the contrary, a tenant has the right to sublet the leased premises or any part thereof. *Mattox v. Westcott (Ala.)*, 16-604.

Waiver of covenant against subletting. — A covenant in a lease that the lessee will not sublet the property without the written consent of the lessor is for the benefit of the latter, and may be waived by parol. *Mattox v. Westcott (Ala.)*, 16-604.

What constitutes assignments as distinguished from sublease. — Where a lessee conveys his entire term to a third person, without reserving any reversion, and the terms and covenants are in the exact words of the original lease, and no other or new covenants are included therein, the instrument is an assignment of the lease, and not a sublease, though it is in the form of a lease and is designated as such, and though it reserves a right of re-entry for condition broken. *Weander v. Claussen Brewing Assoc. (Wash.)*, 7-536.

Transfer by executor to himself as trustee. — The bequest of a leasehold interest to executors on certain trusts, making it necessary for them to transfer the estate from themselves as executors to themselves as trustees, is not a breach of a covenant not to assign the lease, especially where the lease provides in terms that the leasehold shall go to the lessee's "personal representatives" and the covenant not to assign is made binding on the lessee "or others having his estate

in the premises." *Squire v. Learned (Mass.)*, 12-977.

(2) Consent of lessor.

Consent by one of several joint owners. — Where leased premises are owned by several persons jointly, but one of the owners acts as general agent for the others in renting the property and collecting the rents, his consent to a subletting of the premises is binding on his colessors. *Mattox v. Westcott (Ala.)*, 16-604.

Necessity of written consent. — Where the lessor, in answer to a request by the lessee for permission to sublet a portion of the premises, replies that he has "no objection," and also states that it is unnecessary for the consent to be in writing, such oral consent is sufficient, notwithstanding a covenant in the lease forbidding underletting without the written consent of the lessor. *Mattox v. Westcott (Ala.)*, 16-604.

Consideration for oral consent. — Where the lessor, under a lease providing that the lessee shall not sublet the premises without the written consent of the lessor, consents orally to the subletting of the premises, and the lessee, in reliance on such consent, enters into a binding contract to sublet the premises, the consent is founded on a sufficient consideration. *Mattox v. Westcott (Ala.)*, 16-604.

Restrictions as to withholding consent. — A corporation, such as a limited company, is a person within the terms of a lease whereby the lessee covenants to use the demised premises for the business of a jobmaster and livery stable keeper, and not to assign or underlet or part with the possession of the premises without the written consent of the lessor, which is not to be withheld in respect to "a respectable and responsible person," and therefrom a limited company is capable of being "a respectable and responsible person" within the meaning of the covenant. *Willmolt v. London Road Car Co. (Eng.)*, 20-733.

Revocation of consent. — Where the lessor, on application by the lessee for permission to sublet a portion of the leased premises, makes no inquiry as to the business proposed to be carried on by the sublessee, the original lessee is under no obligation to volunteer information on that point, and his failure to do so does not constitute bad faith warranting a revocation of the consent given by the lessor. *Mattox v. Westcott (Ala.)*, 16-604.

Where a lessor, who has consented orally to the subletting of a portion of the demised premises by his lessee, subsequently, in a conversation with the lessee over the telephone, relative to the necessity of putting the consent in writing, states that he "will see" the lessee personally "about it" on a certain day, such statement does not amount to a revocation of the consent theretofore given. *Mattox v. Westcott (Ala.)*, 16-604.

3. RIGHTS AND LIABILITIES OF PARTIES.

Liability of assignor for acts of lessor. — An assignee of a full leasehold

term cannot maintain an action against the assignor for an act committed by the original lessor. *Weander v. Claussen Brewing Assoc.* (Wash.), 7-536.

d. Renewal of term.

(1) Who may renew.

Assignees of part of premises. —

Where an assignment of a part of the demised premises includes an assignment of the right to renewal of the lease for such part, the lessor, by executing a consent to the assignment, does not agree that his covenant for renewal will be exercised in respect to a part only of the demised premises. *Alex. Brown Milling, etc., Co. v. Canadian Pac. R. Co.* (Can.), 17-109.

In such a case, the lessee who has severed his term cannot, when the land demised is expropriated by a railway company, obtain compensation on the basis of his right to a renewal of his lease. *Alex. Brown Milling, etc., Co. v. Canadian Pac. R. Co.* (Can.), 17-109.

Colessee acquiring entire lease. —

Under a lease to a partnership for a specified term "with the privilege of three years more," containing no stipulation restraining the lessees from a sale or assignment of their term, the lease is an asset of the partnership, and a lessee who purchases the interest of his colessee and partner becomes the owner of the lease and has the right to enforce the covenant for renewal. *Barbee v. Greenberg* (N. Car.), 12-967.

Right to renew as defense to action against assignee for possession. —

The right of an assignee of a lease to demand a renewal thereof in accordance with the terms of the lease, is available as a defense to an action by the lessor for the possession of the property commenced before a justice of the peace. *Barbee v. Greenberg* (N. Car.), 12-967.

(2) Nature and extent of right.

Form of covenant. — A covenant by the lessor to renew a lease need not be in technical form, and when sufficiently definite, will be enforced as an incident of the lease and as constituting a part of the tenant's interest in the land itself. *Barbee v. Greenberg* (N. Car.), 12-967.

Renewal by holding over. — The lessee in a lease giving the privilege of an additional term at an increased rental does not accept the privilege by holding over and paying rent at the original rate, and it is immaterial that the lessor's acceptance of rent at the original rate is due to oversight. *Carhart v. White Mantel, etc., Co.* (Tenn.), 19-396.

Term of renewal. — Where a lease for one year gives a tenant the option to renew at a specified rental, but for no definite term, the tenant has the right to claim the lease for at least one year after the expiration of the original term. *Austin v. Newham* (Eng.), 6-102.

Number of renewals. — A lease providing that "it is covenanted and agreed by and between the said parties, that at the end of the term hereby demised this lease shall be renewable at the option of said parties of the second part, their executors, administrators, or assigns; the party of the second part, their executors, administrators, or assigns, giving the party of the first part, in every instance, a notice in writing of their wish to renew the same, at least three months before the end of the term, and in case of failure to give such notice, the parties of the second part shall be entitled to no further renewal of the lease or of the terms thereby created," and that "every renewal lease shall contain all the covenants, agreements, clauses, and stipulations herein contained, with these exceptions only that the covenants for renewal shall be in conformity with the foregoing provisions," etc., does not by reason of the provisions requiring notice "in every instance" of a wish to renew, and requiring "every renewed lease to contain all the covenants . . . herein contained," and that "the covenants for renewal shall be in conformity with the foregoing provisions," authorize more than one renewal of the lease, as no agreement for subsequent renewals is to be inferred from the provisions in question. *Drake v. Board of Education* (Mo.), 13-1002.

Perpetual renewal. — The renewal of a lease for all time to come is to create a perpetuity, which the law does not favor, and unless it appears from the covenants in the lease, by express terms or by clear implication, that the lessee is entitled to have successive renewals, a court of equity will not decree specific performance of the covenant for that purpose. *Drake v. Board of Education* (Mo.), 13-1002.

(3) Option to renew.

Notice of intention. — Where a lessee has the option to renew on giving notice of his intention, his failure to give the required notice causes the lease to expire by its own limitation, and he acquires no right to a renewal by holding over, though the lessor continues for a time to accept rent at the same rate without question. *Murkland v. English* (Pa.), 6-339.

(4) Forfeiture of right to renewal.

Breach of covenant against assignment or subletting. — Where a lessee's right to a renewal of the lease is conditional on his observance of all of the covenants therein contained, as well as on his giving written notice of his desire for such renewal at a certain time before the expiration of the original term, a breach by him of a covenant not to assign without the written consent of the lessor works a forfeiture of his right to a renewal, even though such breach does not occur until after the required notice for a renewal has been given. *Loveless v. Fitzgerald* (Can.), 16-316.

Assignment of part of premises. — The covenant for renewal of a lease for a

term of years is indivisible and if the lessee assigns a part of the demised premises neither he nor his assignee can enforce the covenant for renewal as to his portion. *Alex. Brown Milling, etc., Co. v. Canadian Pac. R. Co. (Can.)*, 17-109.

e. Extension of term.

Where, under a lease for three years with the privilege of five years, the lessee continues in possession after the three years without any agreement as to the possession of the land after that time, the subsequent possession does not create a tenancy from year to year or a tenancy at will, entitling the lessee to three months' notice to quit, but is an election to continue in possession for the remaining two years under the lease. *Gensler v. Nicholas (Mich.)*, 14-452.

A lease of land for three years "with privilege of five years," for a certain annual rental, cannot be construed as a lease for three years with the privilege of five additional years. *Gensler v. Nicholas (Mich.)*, 14-452.

f. Option to purchase.

Consideration. — A contract of lease for five years of a lot and building thereon for a certain price, payable in monthly instalments, is a sufficient consideration for a stipulation, inserted thereon, giving the lessee the right to purchase the property for a fixed price at any time during the continuance of the lease. Such a stipulation is not a *nudum pactum*, and the lessor cannot withdraw the option before the termination of the lease. *Succession of Witting (La.)*, 15-379.

A stipulation for a fixed price means cash, and not terms of credit. *Succession of Witting (La.)*, 15-379.

Right to assign option. — Where a mining lease gives the lessee "but no other person" the option to purchase the land leased, the option is merely a personal privilege and cannot be assigned by the lessee. *Myers v. Stone (Iowa)*, 5-912.

Estoppel to deny assignability of option. — Evidence reviewed in an action by the lessor on a mining lease given the option to purchase and held to show that the plaintiff is not estopped to claim that the option was not assignable and that the assignee of the lease acquired no right to exercise the option. *Myers v. Stone (Iowa)*, 5-912.

Forfeiture of right — Where a lease gives the lessees the option to purchase the leased premises during the lifetime of the lease, and the lessees agree that on their default the lessor may terminate the lease, and take possession as of his former estate, and the lessees give a bond with a surety for the performance of all the obligations of the lease, and thereafter make default, of which the surety is notified, and the default continues, and before the expiration of the lease the lessees, without notice to the surety, surrender the leased premises to the lessor, who accepts them, the surrender terminates the lease, but does not relieve the surety from liability for the matured obligations of the

lessees, because it constitutes an enforcement and not an alteration of the terms of the lease. The option to purchase ceases with the lease, but the surrender does not wrongfully deprive the surety of his right to exercise the option subsequently, because that right is conditioned on the performance by the lessees of their obligations guaranteed by the surety, and the lessees and the surety are both in default. *American Bonding Co. v. Pueblo Investment Co. (U. S.)*, 10-357.

g. Termination of tenancy.

Notice to quit. — After a person who occupies a farm which he has managed on shares has had a full settlement of his rights with the administrator of the owner, he is not entitled to notice to quit where his claim to the possession of the farm is based solely on a void lease which was to have taken effect upon the death of the owner. *Waldo v. Jacobs (Mich.)*, 15-343.

Breach of covenants generally. — A clause in a lease, providing for a forfeiture of the term if the lessee fails in the performance of any covenant thereof, applies to covenants not to do something as well as to covenants to do something. *West Shore R. Co. v. Wenner (N. J.)*, 1-790.

A mortgage of the lease made by the lessee to secure his debt, followed by failure to pay the debt at maturity and a sale of the leasehold estate under foreclosure, is a transfer of the estate by the lessee in violation of a covenant not to transfer and a legal cause of forfeiture under the clause providing for forfeiture for failure to perform the covenants, and the forfeiture is not prevented because the lessee died before the sale under foreclosure, nor because the lessor accepted the rent with knowledge of the mortgage but without notice of the default or foreclosure. *West Shore R. Co. v. Wenner (N. J.)*, 1-790.

Breach of covenants by assignee. — Under a clause in a lease providing for forfeiture for failure of the lessee or his assignees to perform the covenants, a purchaser under foreclosure of the leasehold estate is an assign of the lessee, and a subletting by him is a violation of the covenant in the lease that the lessee and his assigns will not sublet. *West Shore R. Co. v. Wenner (N. J.)*, 1-790.

Breach of covenant against assignment or subletting. — Where partners are lessees for a term of years and have covenanted not to assign or sublet without the written consent of the lessor, an assignment by one of his interest in the lease to his co-partner without such consent is a breach of the covenant. *Loveless v. Fitzgerald (Can.)*, 16-316.

Subletting to an electrician a part of a storeroom leased to a plumber is a breach of a condition that the lessee shall use the premises "as a plumbing store and for no other purpose whatever" and "will not . . . underlet said premises under the penalty of a forfeiture of all its rights under this lease." *Denecke v. Miller (Ia.)*, 19-949.

Subletting a part of the demised premises

without the lessor's consent is not a breach of a condition against subletting which will work a forfeiture of the lease. *Denecke v. Miller* (Ia.), 19-949.

An action of right or to recover possession of real property will lie on behalf of a landlord against his tenant where the landlord claims a forfeiture of the lease by breach of condition. The action of forcible entry and detainer does not supersede the landlord's common-law remedy. *Denecke v. Miller* (Ia.), 19-949.

The assignment by a lessee of a lease which is unassignable without the lessor's consent, and putting of the assignee into possession, works a forfeiture of the lease, which authorizes the lessors immediately to re-enter and take possession of the premises. *Myer v. Roberts* (Ore.), 15-1031.

Destruction of premises. — The assignee of a lease is not liable for rent accruing after the destruction of the premises by fire, in the absence of evidence that he bound himself for the balance of the term or for a period extending beyond the fire. *Norton v. Hinecker* (Ia.), 15-474.

Where a lease of part of a building provides that the landlord, in the event he desires to remodel the building, shall have the right to require the tenant to remove temporarily, and further provides that the tenant shall have the right to reoccupy the premises after the building has been remodeled, the lease is not terminated by a fire which destroys part of the building but which does not render the leased portion incapable of occupancy, and therefore after such fire the lessee is entitled to hold under his lease unless the landlord elects to exercise his right to require a temporary removal for the purpose of remodeling. *Jones v. J. W. Fowler Drug Co.* (Ky.), 9-105.

Nonpayment of rent. — In the absence of a statute providing otherwise, the demand for rent on the day it becomes due is necessary to work a forfeiture of the lease for the nonpayment of rent, unless such demand is waived by the terms of the lease. *Godwin v. Harris* (Neb.), 8-579.

Lease construed and held to contain no waiver of demand for rent on the day it becomes due. *Godwin v. Harris* (Neb.), 8-579.

Surrender. — The surrender of leased premises by the lessee and their acceptance by the lessor during the term closes the term and the lease, and destroys all rights conditioned on its continuance thereunder. Such surrender releases the lessee from liability for the rents accruing, but not yet due, from the rents to accrue, and from immature obligations, but leaves him liable for all rents accrued and due, and for all obligations the performance of which is due. *American Bonding Co. v. Pueblo Investment Co.* (U. S.), 10-357.

The surrender of leased premises between rent days releases the lessees and their sureties from the liability for rent for the current period between them. *American Bonding Co. v. Pueblo Investment Co.* (U. S.), 10-357.

Where the tenants under a written lease agree to pay the taxes as they become due and payable, in lieu of rent, and to give a bond conditioned for the performance of their contract, and the tenants make default as to certain other undertakings on their part and surrender the premises before the expiration of the lease and before the time when the taxes for a certain year have become due and payable, the surrender releases the tenants and their surety from the obligation to pay such taxes as for rent accruing but not completely accrued or due, as the obligation has not matured at the time of the surrender. *American Bonding Co. v. Pueblo Investment Co.* (U. S.), 10-357.

Where the tenants under a written lease agree to make certain improvements and to pay taxes in lieu of rent, and to give a bond conditioned for their performance of the contract, to the end that no lien shall be fastened upon the property by their creditors, and the tenants make default and thereafter surrender the premises to the landlord, and as a result of such default a lien for the work and materials used in the making of the improvements is fastened upon the leased premises more than a year before the surrender, but a suit to foreclose the lien is pending at the time of the surrender and does not ripen into a decree until a few days thereafter, the surrender does not release the lessees or their surety from the obligation to pay for the labor and material as for rent accrued, as that obligation has matured before the surrender. *American Bonding Co. v. Pueblo Investment Co.* (U. S.), 10-357.

Where a lease contains no covenant against subletting, the lessee has the right to sublet all or any part of the leased premises, and after he has done so he cannot, by surrender of the leased premises to the lessor, defeat the rights of his undertenant. The interests of the undertenant will continue as if there had been no surrender, the owner of the property becoming the direct landlord of the undertenant. *Mitchell v. Young* (Ark.), 10-423.

Rights of landlord on abandonment by tenant. — If a tenant wrongfully abandons leased premises before the expiration of the term, the landlord may, at his election, at once enter and terminate the contract and recover the rent due up to the time of abandonment, or he may suffer the premises to remain vacant and sue on the contract for the entire rent, or he may give notice to the tenant of his refusal to accept a surrender, when such notice can be given, and sublet the premises for the unexpired term for the benefit of the lessee to reduce his damages. *Higgins v. Street* (Okla.), 14-1086.

Waiver of forfeiture by acceptance of rent. — The receipt of rent by that name, accruing after the occurrence of causes of forfeiture under the terms of a lease for a definite term, to the knowledge of the lessor, bars his right of entry for condition broken. *Kenny v. Lun* (Minn.), 11-60.

Where month after month the lessor has been receiving payment of the rent a few

days later, without objection, if he desires in the future to hold the lessee strictly to payment on the day the rent falls due, he must give him notice to that effect; otherwise the lessee will not be in legal default from delaying the usual time. *Standard Brewing Co. v. Anderson* (La.), 15-251.

4. PERIODICAL TENANCIES.

Creation by holding over. — A lessee who holds over without accepting the privilege of an additional term given by the lease is only a tenant from month to month and may vacate the premises at any time. *Carhart v. White Mantel, etc., Co.* (Tenn.), 19-390.

Notice to quit. — A notice to end a tenancy from year to year must designate the time when the tenancy is to close, either by specifying the close of a current year or by saying that it is to close at the end of a current year. *Arbenz v. Exley* (W. Va.), 4-625.

Under a tenancy from year to year, a letter to the lessor from the lessees saying that the lessees have vacated the premises, though accompanied by such vacation, and a defense by the lessees in court of an action by the lessors for rent for a part of the time after such notice, does not operate to end the tenancy or discharge the lessees from rent accruing after that involved in the first action. *Arbenz v. Exley* (W. Va.), 4-625.

Under a tenancy from year to year, a letter from the tenants to the landlord held not a sufficient notice to quit, and not to discharge the tenant from liability for rent. *Arbenz v. Exley* (W. Va.), 4-625.

Service of notice to quit. — A service of notice to quit on the wife of the tenant is sufficient to terminate a monthly tenancy. *Cranston Print Works v. Whalen* (R. I.), 8-1143.

5. POSSESSION AND USE OF PREMISES.

a. Appurtenances.

A lease for restaurant purposes of a room in a hotel building, with a door opening into the hotel lobby as well as a street door, does not give the lessee an implied right to the lobby entrance. *Jemo v. Tourist Hotel Co.* (Wash.), 19-1199.

b. Tenant's right to possession generally.

Implied covenant to give possession. — Ordinarily there is an implied covenant in a lease that the demised premises shall be open to entry by the lessee at the time fixed in the lease as the beginning of the term. *Herpolsheimer v. Christopher* (Neb.), 14-399.

Right of landlord to put "for rent" sign on premises. — The lessee of certain rooms in a large building occupied by many tenants, and whose contract of lease provides that the lessee must give thirty days' notice of an intention to move, cannot complain that the landlord, after notice of an intention to move is given, hangs a "for rent" notice on the inside of a front window of the leased rooms where this is not inconsistent with a

proper enjoyment of the rooms by the lessee, and the lessee is not within his rights in tearing down such sign. *Whippel v. Gorsuch* (Ark.), 12-38.

Right of landlord to put advertisements on roof. — Where a lease of business premises specifically describes the same as a store and basement, and imposes the duty of making exterior repairs on the lessor, and specifies the business to be carried on by the lessee, and prohibits the latter from making any alterations in the premises without the consent of the lessor, and other portions of the building are occupied by other tenants, the lessee has no right to use or control the roof of the building, nor can he prevent the lessor from using the same for advertising purposes, or for any other purpose which does not endanger or interfere with the use of the leased portion of the building. The fact that the building consists of a basement and ground floor only, with nothing but an air space between the ceiling of the store and the roof, does not alter the rule. *Macnair v. Ames* (R. I.), 16-1208.

Restrictions as to use. — A provision in a lease of a dancing hall that the lessee shall not allow therein "improper or disreputable characters" does not preclude him from allowing the use of the hall by negroes. The fact that persons are negroes does not of itself make them disreputable. *Central Business College Co. v. Rutherford* (Colo.), 19-688.

Sale of leased premises. — The owner of land leased to another can sell only his reversionary interest, and cannot, by a sale and conveyance, disturb the lessee in his possession and enjoyment of the premises or a part thereof during the term. *Stern v. Sawyer* (Vt.), 6-356.

Erecting telephone pole on premises. — A licensee of the owner of the reversion in the bed of an alley under a lease for ninety-nine years, renewable forever, commits a trespass by erecting a telephone pole in such alley against the prohibition of the owner of the leasehold. *Maryland Tel., etc., Co. v. Ruth* (Md.), 14-576.

Dedication of part of premises to public. — The rights of a tenant in possession of real property under a valid unexpired lease are not affected by a replatting of the land by the owner of the fee, or the dedication of a portion of such land for a public alley. He cannot be disturbed in the possession of the land until his lease is legally terminated. But such platting cannot confer on him the right to remain in possession after his lease is legally terminated, and he must therefore surrender possession to the owners of the fee. *Budds v. Frey* (Minn.), 15-24.

c. Duty of tenant to surrender premises at end of term.

Damages for refusal. — Where a lessee, after the termination of his lease, continues to occupy the premises against the protest of the lessor, his liability in damages is to be measured by the rental market value of the property, and not by the price of the expired

lease made several years before. *Jackson Brewing Co. v. Wagner (La.)*, 17-233.

Liability of tenant for refusal to surrender. — In an action to recover damages against a tenant who refused to surrender possession after forfeiture of the lease, the jury may consider the lease as evidence of the rental value of the premises, but it is not conclusive. *Denecke v. Miller (Ia.)*, 19-949.

d. Action for failure to give possession.

Damages. — The measure of damages for a breach of an implied covenant by the lessor to give possession to the lessee is the difference between the rental value of the premises and the rent reserved in the lease, and the lessee may also recover such special damages as he pleads and proves to have resulted necessarily from the breach of the agreement. *Herpolsheimer v. Christopher (Neb.)*, 14-399.

Evidence. — In an action for damages for the breach of an implied covenant in a lease to put the lessee into possession of the demised premises, evidence examined and held to require the question whether the plaintiff rescinded the contract and abandoned the claim to damages to be submitted to the jury. *Herpolsheimer v. Christopher (Neb.)*, 14-399.

e. Farm leases.

Crops. — A stipulation inserted in an ordinary farm lease that no straw is to be removed from the farm does not give the lessor any property rights in straw produced on the leased premises while the same are in the possession of the lessee, but is a mere personal covenant of the lessee, and consequently the lessor's remedy for a violation thereof is by action for breach of covenant, or to enjoin waste, and not by an action for conversion. *Munier v. Zachery (Ia.)*, 16-526.

In an action by the lessor of a farm against the lessee for breach of a covenant not to remove straw from the leased premises, the measure of damages is not the market value of the straw, but the detriment to the farm occasioned by its removal. *Munier v. Zachary (Ia.)*, 16-526.

Manure. — A tenant has no right to remove from the premises manure produced in the usual course of husbandry upon the farm during his tenancy, as such manure became appurtenant to the realty and is to be considered and treated as a part of the same. *Brigham v. Overstreet (Ga.)*, 11-75.

f. Repairs and improvements.

Liability of tenant generally. — Where a lessee covenants "that all repairs shall be paid by him," and at the time of the execution of the lease a drain is out of repair, and subsequently the lessor is required to repair or reconstruct the drain and to use for that purpose more expensive material than that originally used, it is the duty of the lessee to reimburse the lessor to the extent at least of such proportion of the entire cost of the reconstruction as would have been incurred if the less expensive material used in the orig-

inal construction had been used; and if the lessee fails to do so, he violates his covenant and gives the lessor the right to exercise his option to declare the lease forfeited. *Keroes v. Richards (D. C.)*, 8-575.

Where the lessee of old premises has covenanted to keep them in repair, his duty is not limited to keeping them and returning them in as good condition as they were when leased, but he is under obligation first to put them in reasonable repair, and then to keep them so, particularly if the defects are open to observation and there was no fraudulent representation or concealment by the lessor at the time of making the contract. *Keroes v. Richards (D. C.)*, 8-575.

A lessee's covenant "that all repairs shall be paid by him" and that he will surrender the premises at the expiration of his tenancy in good order, ordinary wear and tear excepted, binds him to pay for all repairs that were needed at the time of the letting to render the premises fit for their ordinary use in compliance with all valid public regulations for the public health and safety. *Keroes v. Richards (D. C.)*, 8-575.

Covenant to surrender premises in good condition. — The age, class, and general condition of property when leased are to be taken into consideration in determining the liability of the tenant under his covenant to surrender the premises in good condition. *Drouin v. Wilson (Vt.)*, 13-93.

Where a lease contains no general covenant by the tenant to repair, but contains a covenant to surrender the premises in as good condition as when taken, damages caused by "ordinary wear" being excepted, the breaking of a plate-glass window during the proper use and occupancy of the premises, caused by an insufficient foundation and the consequent settling of the building, or by an improperly constructed window frame, is not an injury for which the tenant is liable under his covenant. *Drouin v. Wilson (Vt.)*, 13-93.

In an action by the owner of a building against the tenant for the breaking of a plate-glass window, alleged to be in breach of a covenant to surrender the building in good condition, ordinary wear excepted, where the defendant claims that the breaking was caused by the settling of the building and is therefore within the exception, the plaintiff, having testified that the defendant has never said anything about paying for the window, and that the building had not settled, is properly asked on cross-examination in regard to an offer by the defendant as to what he would do if the plaintiff would repair the window at once, in regard to an inability to bring the top of the door of the building within the casing, and in regard to the defendant's repairs in that respect. *Drouin v. Wilson (Vt.)*, 13-93.

Condition of premises as termination of tenancy. — Slight extrinsic circumstances, indicating an intention to that effect, are sufficient to show that a covenant in a lease to commence at a subsequent date that the lessee will surrender the premises at the end of the term in the same condition as they "now are" refers to the commencement of the term

and not to the date of the lease. *Chesapeake Brewing Co. v. Goldberg* (Md.), 15-879.

Where evidence is admitted without objection that there was a collateral agreement between the parties to such lease that the lessor should improve the property before the taking of possession by the lessee, and that after the making of the lease the lessor spent a large sum of money in renovating the property, which was before that time unfit for occupancy, it is unreasonable to suppose that the parties intended that the premises should be returned at the end of two years in the condition in which they were when the lease was made. *Chesapeake Brewing Co. v. Goldberg* (Md.), 15-879.

In such case the omission of the day of the month from the date in the lease indicates that the minds of the contracting parties were not directed to the time of the making of the lease, because the words "now are" are inapplicable to any particular day of that month. *Chesapeake Brewing Co. v. Goldberg* (Md.), 15-879.

Liability of landlord. — Where an action is brought to recover possession of farm premises because of failure to pay rent, and the defense is set up that the landlord has broken the covenant to make improvements, and a judgment is rendered against the lessees for the recovery of possession, and the latter appeal without giving bond to stay execution and move from the premises and continue to resist the case in the appellate court, where the judgment of the lower court is affirmed, such removal from the premises is not voluntary, and in a subsequent action for breach of the lessor's covenant to make improvements the lessees are not entitled to an allowance for work done by them while in possession, as the judgment of the lower court for possession was effectual in fixing the rights of the parties until reversed. *Kellogg v. Malick* (Wis.), 4-893.

There is no implied covenant by the lessor that the leased premises are in good repair or are fit for the intended use. *Keroes v. Richards* (D. C.), 8-575.

Liability of landlord's assignee. — In an action for damages for breach of a covenant in the lease of a farm rented for the purpose of carrying on the dairying business, in which it appeared that the lessor had agreed to provide pasture for a certain number of cattle and cleared land enough to provide feed for them, but that the season was dry and the lessees' stock ran down and they failed to make a success of the business, claiming that it was due to lack of pasturage, the measure of damages, in the absence of circumstances, special or otherwise, brought home to the knowledge of the lessor, is the difference between the value of the use of the premises in the condition as contracted to be, and the rental value in their actual condition. *Kellogg v. Malick* (Wis.), 4-893.

In such a case the lessees are entitled to no damages for injuries which might have been avoided by them in the exercise of reasonable care on their part, nor to damages which are remote, contingent, uncertain, and

speculative. *Kellogg v. Malick* (Wis.), 4-893.

Measure of damages for failure to make repairs. — A covenant in a lease, whereby the lessor expressly stipulates that he will not be bound to make repairs, alterations, additions, or improvements on the leased premises, but agrees that the lessee, at his option, may make such repairs, etc., as shall be necessary, and that he will reimburse him therefor to an amount named, is a personal obligation on the part of the original lessor, and does not run with the reservation so as to bind an assignee thereof. *Willcox v. Kehoe* (Ga.), 4-437.

One who buys subject to a lease containing a covenant of the character indicated in the preceding note is not bound for the breach of the purely personal covenant of his predecessor, made prior to the sale of the land to him. *Willcox v. Kehoe* (Ga.), 4-437.

In an action for the breach of a tenant's covenant to keep the premises in repair, brought after the expiration of the term, the plaintiff's measure of damages is the cost of putting the demised premises into the state of repair contemplated by the broken covenant; and the right to recover this amount is not affected by the subsequent act of the new tenant in making repairs. *Appleton v. Marx* (N. Y.), 14-150.

Repairs to premises. — The general rule is that for the breach of a covenant by the landlord to repair, the measure of damages is the difference between the rental value of the premises as they were and what such value would have been if they had been put and kept in repair. *Miller v. Sullivan* (Kan.), 15-561.

The foregoing rule is, however, not of universal application. Thus where it appears that the tenant gave seasonable notice to the landlord, and the landlord made continual, although ineffectual, efforts to repair, the tenant may recover for damages to goods in his storeroom on the leased premises, when the extent of such damage is shown with reasonable certainty, all vague and speculative claims being withdrawn. *Miller v. Sullivan* (Kan.), 15-561.

g. Liability of landlord for water and light supplied to tenant.

The Minnesota statute making the owner of leased premises liable for water and light furnished to the tenant by a municipality is not unconstitutional, either as resulting in the taking of property without due process of law, or as causing one person to pay the debts of another. *East Grand Forks v. Luck* (Minn.), 7-1015.

Where it is necessary that leased premises shall be supplied with water and that the supply shall be furnished by a local water board, the water rate comes within the covenant in the lease binding the lessor to pay "all rates and taxes payable in respect of the demised premises." *Bourne v. Salmon* (Eng.), 8-110.

h. Injuries caused by defective condition of premises.

(1) In general.

In the absence of any valid agreement by the lessor of premises to repair a defect therein, the lessee who continues in possession with full knowledge of the defect assumes the risk of injury occasioned thereby. *Reams v. Taylor* (Utah), 11-51.

No duty is imposed by law on a landlord to make repairs on the leased premises, and the landlord is not liable for personal injuries to the tenant due to the landlord's failure to perform his agreement to repair the premises. *Dustin v. Curtis* (N. H.), 13-169.

A landlord who maintains a passenger elevator in his private building is bound to use only reasonable care and prudence in the construction, maintenance, and operation of the elevator to avoid injuring passengers. *Edwards v. Manufacturers' Bldg. Co.* (R. I.), 8-974.

(2) Injuries to tenants.

Failure to make repairs. — A landlord who has agreed with a tenant to make repairs is not liable in tort to a member of the tenant's family, who receives personal injuries from the landlord's neglect to repair. *Davis v. Smith* (R. I.), 3-832.

Negligence in making repairs. — Where a landlord, acting without the consent of his tenant, employs an independent contractor to take the roof off of the leased premises for the purpose of adding an additional story to the building, the landlord is liable to the tenant for the injury to the latter's goods resulting from the negligent manner in which the work is done. *Nahm v. Register Newspaper Co.* (Ky.), 9-209.

In an action by a tenant against his landlord to recover damages for injury to the plaintiff's goods caused by the negligence of an independent contractor in repairing the leased premises, where the plaintiff does not make the independent contractor a party defendant, it is proper to sustain a demurrer to a cross-petition filed by the landlord against the contractor, as, if the contractor is answerable to the landlord, his liability must be litigated in an independent action. *Nahm v. Register Newspaper Co.* (Ky.), 9-209.

Verdict for plaintiff considered, in an action by a tenant against his landlord to recover damages for injury to the plaintiff's goods caused by the negligence of the independent contractor in repairing the leased premises, and held not to be excessive, in view of the evidence and the instructions. *Nahm v. Register Newspaper Co.* (Ky.), 9-209.

Evidence in an action by a tenant against a landlord to recover damages for injury to the plaintiff's goods caused by the negligence of the independent contractor in repairing the leased premises, held sufficient to justify the jury in finding that the tenant did not consent to the making of the repairs. *Nahm v. Register Newspaper Co.* (Ky.), 9-209.

Premises infected with contagious disease. — Where the owner of a house in which there has been a case of contagious disease has intrusted the disinfecting of the house to an experienced physician and a trained and competent nurse, he is not liable to one to whom he leases the house, because a member of the latter's family contracts the disease, although there is testimony of experts to the effect that the means of disinfecting employed by the physician and nurse were not the best. *Finney v. Steele* (Ala.), 12-510.

(3) Injuries to employees of tenants.

In the absence of an express or implied contract by the landlord to light a staircase by which access is obtained to different floors of a building let by him to different tenants, the landlord is under no obligation to light such staircase, and is not liable to an employee of one of the tenants who, after descending the stairs in the dark, falls through a door opening on a courtyard and is injured. *Huggett v. Miers* (Eng.), 14-760.

The fact that such staircase is lighted by gas jets belonging to the different tenants and supplied by gas from their meters, each tenant, on leaving for the night, extinguishing the light on his landing, negatives an implied undertaking by the landlord to light the staircase. *Huggett v. Miers* (Eng.), 14-760.

(4) Injuries to tenant's goods.

Concealed defects in premises. — The owner of a building who leases the same with knowledge of dangerous defects therein, which the tenant cannot by reasonable diligence discover, is liable to the tenant for advance rent paid and the loss occasioned to the goods by their enforced removal because of a judgment obtained by the municipal authorities declaring the building unsafe and directing its demolition. *Steefel v. Rothschild* (N. Y.), 1-676.

The owner of a building, who is not aware of the dangerous condition of the premises at the time of the lease, but acquires such knowledge before the tenant takes possession, is liable for damages suffered by the latter, it being his duty to abate the nuisance and to violate the lease if necessary, remaining liable for the breach, in order to make the premises secure, or to remove them altogether. *Steefel v. Rothschild* (N. Y.), 1-676.

Freezing of water pipes. — A landlord is liable to his tenant for an injury to the tenant's goods caused by the freezing and bursting of water pipes on the floor above that occupied by the tenant, where it appears that the building was in charge of a janitor employed by the landlord, and that it was the exclusive business of the janitor to keep the water pipes in repair and to cut off the water on the upper floor. *Kecoughtan Lodge v. Steiner* (Va.), 10-256.

Liability of overholding tenant. — An overholding tenant whom the landlord has taken no steps to evict may recover dam-

ages from the landlord for injury to his goods caused by the negligence of the latter. *Sievert v. Brookfield* (Can.), 2-646.

(5) Injuries to third persons.

Family of tenant. — While under the Scottish law a landlord is under an implied obligation to maintain the leased premises in a habitable condition, yet the wife and children of the tenant of a dwelling house, inasmuch as they are not parties to the contract of tenancy, are not entitled to recover damages from the landlord for loss and injury through illness caused by the insanitary condition of the premises. *Cameron v. Young* (Eng.), 12-47.

The wife of a tenant who is injured by reason of the defective condition of the leased premises cannot maintain an action against the landlord either for letting the premises in a dangerous condition, or for failing to repair them according to his promise, as she is a stranger to the contract. *Cavalier v. Pope* (Eng.), 5-713.

A landlord who knowingly lets premises infected with a contagious disease and fails to inform the tenant thereof, or fails to disclose concealed defects in the premises, is liable for injuries to the tenant and family, but is not liable for such defects as become known to the tenant and for such injuries as result from the tenant knowingly continuing to expose his family to dangerous conditions. *Davis v. Smith* (R. I.), 3-832.

Licensees of tenant. — A licensee of a tenant injured through the defective condition of the rented premises has no right of action against the landlord on the latter's covenant to repair. *Brady v. Klein* (Mich.), 2-464.

Strangers. — A landlord is liable to a third person for injuries caused by a defect in the rented premises only when such defect amounts to a public nuisance. *Brady v. Klein* (Mich.), 2-464.

i. Eviction.

(1) Acts constituting.

Making premises unfit for lessee's purposes. — An act of a landlord, or of any person who acts under authority or legal right given him by the landlord, which so disturbs the tenant's enjoyment of the premises as to render them unfit for occupancy for the purpose for which they are leased, is an eviction, and whenever it takes place the tenant is released from the obligation under the lease to pay rent accruing thereafter. *Wade v. Herndl* (Wis.), 7-591.

Interference with use of premises. — It is a constructive eviction of the lessee of a dancing hall for the lessor to lock the doors and prevent the use of the hall by persons to whom the lessee has rightfully let it for the evening for the purpose of dancing. *Central Business College Co. v. Rutherford* (Colo.), 19-688.

Intention of lessor. — It is not for the lessor to determine whether a particular act by him was intended as an eviction of the

tenant. The effect of such act as an eviction is a matter of law for the court to determine. *Central Business College Co. v. Rutherford* (Colo.), 19-688.

Acts of third persons. — A stipulation in the lease of a room in a building, exempting the lessor from liability to the lessee for damage occasioned by "acts or neglect of co-tenants or other occupants," does not apply to a constructive eviction by acts or neglects of such persons authorized or permitted under any rights given them by their leases. *Wade v. Herndl* (Wis.), 7-591.

Acts authorized by lessor. — Evidence reviewed in an action by a landlord for rent where the defendant sets up a constructive eviction as a defense due to the use of a portion of the premises by an automobile company, and held sufficient to raise the presumption, remaining uncontradicted, that the use made of the premises by the automobile company must have been within the contemplation of the parties when the lease thereof was made, and that the acts of the automobile company were within the rights granted it by its lease. *Wade v. Herndl* (Wis.), 7-591.

In an action by a landlord to recover the rent for a room leased for use as an art studio, where the defendant sets up a claim for damages resulting from a constructive eviction arising from the vibration incidental to the use of another portion of the premises by an automobile company holding under a lease subsequent to the defendant's, and the evidence raises an uncontradicted presumption that the automobile company has a right under the lease to use the premises in the manner complained of, it is proper for the trial court to instruct the jury that the plaintiff is liable for the damages. *Wade v. Herndl* (Wis.), 7-591.

(2) Action for damages.

Amount of recovery. — Where a tenant has been constructively evicted by virtue of the action of the landlord in rendering the premises unfit for the conduct of the business for which they were leased, the tenant is entitled to recover as damages expenses incurred by him in removing from the premises, together with the loss of time in his business resulting from the eviction. *Wade v. Herndl* (Wis.), 7-591.

A tenant who has been unlawfully evicted is entitled to recover as damages whatever loss results to him as the natural and direct consequence of the landlord's wrongful act; and if the rental value of the premises was greater than the price he agreed to pay, he may recover the excess and, in addition thereto, any other loss directly caused by the eviction, such as the expense of removal to another place. *McElvaney v. Smith* (Ark.), 6-458.

Where the tenant of a farm is unlawfully evicted in the middle of winter under circumstances compelling him to seek a temporary abode to shelter his family until he can find a suitable farm to rent, he may possibly be entitled to recover as damages the

cost of the second removal as well as of the first. *McElvaney v. Smith* (Ark.), 6-458.

j. Nuisances.

An ordinance providing that "no owner or occupant or other person having the control or management of premises shall allow any nuisance to exist or remain on the premises," must be construed to be directed only at persons who at the time have control or management of the premises and allow a nuisance to exist and remain thereon; and the owners of premises who are not the occupants in possession and control cannot be held guilty under the ordinance. *People v. Kent* (Mich.), 14-208.

On the joint conviction of several tenants for the violation of an ordinance prohibiting the maintenance of a nuisance, no error is committed in imposing a fine on the tenants. *People v. Kent* (Mich.), 14-208.

In a prosecution for the violation of such ordinance, the joint conviction of the tenants and owners of premises is not prejudicial error as to the tenants, although the conviction has to be vacated and set aside as to the owners. *People v. Kent* (Mich.), 14-208.

6 RENT.

a. Rights and liabilities in general.

Liability of lessee's surety. — The sale of part of leased premises by the lessor without the consent or knowledge of the lessee's surety discharges the latter, though the lease gives the lessor the right to sell the entire premises on the giving of a specified notice. *Stern v. Sawyer* (Vt.), 6-356.

A surety for the lessee in the lease of a hotel is discharged by the lessor's breach of his covenants to repair and furnish, though the lessee takes possession of the property notwithstanding such breach. *Stern v. Sawyer* (Vt.), 6-356.

Deposit by tenant. — In a lease contract an owner undertook to erect a building and let it to a tenant for five years at a stipulated rental payable monthly, the tenant to make an advance payment of \$4,200, to be applied on the fifth year's rent. The advance payment was made, the building erected, and it was occupied for some time by the tenant, who paid the accruing rentals. Before two years of the term had expired default was made in the payment of rent, and because of the nonpayment of rent the landlord took possession of the premises and also of property belonging to the tenant, and relet the premises at a reduced rent. The tenant brought an action to recover the deposit advanced, and the landlord claimed that it was part performance of a violated contract and that he was therefore entitled to retain it. Held, that the deposit could not, under the circumstances, be regarded as liquidated damages, and that when the landlord elected to dispossess the tenant he terminated the lease and ended the obligation of the tenant under it for the remainder of the term, and was not entitled to retain the deposit, except so much of it as was necessary to pay the rentals

which had accrued when possession was taken. *Cunningham v. Stockton* (Kan.), 19-212.

Inability of tenant to use premises for purposes intended. — Notwithstanding the fact that in a five-year lease of a hotel the leased premises are described as consisting of "the corridor, office, bar, barber shop, cigar stand, billiard room, on the first floor, boiler house and kitchen fronting on Ellis street, the second, third, fourth, and fifth stories of the hotel proper, the open court on the second floor, the open courts fronting on Ellis street," and that it is provided therein that the lessee may sublet the news stand, cigar stand, barber shop, billiard room, and barroom, and that if he shall do so, such part of the premises subleased, and especially the bar and billiard rooms, shall be kept free from disorder, and maintained in an orderly and reputable manner, the passage by the legislature, after the commencement of such lease, of an act prohibiting the sale of alcoholic, spirituous, malt, or intoxicating liquors, which prevents the use of the barroom for the purpose of conducting such business, does not, in the absence of any provision in the lease for that purpose, entitle the lessee to a reduction or proportional abatement of the agreed rental. *Lawrence v. White* (Ga.), 15-1097.

Premises used for immoral purposes. — If a house be let with intent that it shall be used for the purpose of prostitution, the landlord cannot recover the rent. But if the lease be for lawful uses, and the circumstances do not show the transaction to be colorable or a cloak to conceal the illegality of the contract, subsequent knowledge by the landlord of the immoral use to which the tenant has subjected the premises will not invalidate the lease or preclude the landlord from collecting the rent. If, however, the landlord, after he is made aware of the illegal use of his premises, does any affirmative act indicating his sanction of the illegal practices of his tenant he becomes *in pari delicto* with him, and courts will not lend any aid in the collection of the rent. *Kessler v. Pearson* (Ga.), 8-180.

b. Determination of amount.

Appraisement. — An objection to the competency of an appraiser appointed under the terms of a lease to appraise the leased property for the purpose of fixing the rent, if known at the time of the hearing before the appraisers and not made at that time is waived, and cannot afterwards be raised in a proceeding to set aside the appraisement. *Chicago Auditorium Assoc. v. Corporation of Fine Arts Bldg.* (Ill.), 18-253.

An appraiser appointed under a lease to appraise the leased property for the purpose of fixing the rent is not disqualified because he owns property in the immediate neighborhood. *Chicago Auditorium Assoc. v. Corporation of Fine Arts Bldg.* (Ill.), 18-253.

Evidence considered and held sufficient to show that a provision in a lease of a city lot for fixing the rent by a periodical appraisement of the "demised premises" meant that

the entire lot should be appraised, and not that the appraisal should exclude a portion of the lot as to which the lessor had reserved certain rights. *Chicago Auditorium Assoc. v. Corporation of Fine Arts Bldg.* (Ill.), 18-253.

In determining whether, in a lease of a city lot, a provision for a periodical appraisal of the "demised premises" as a basis for fixing the rent referred to the entire lot, or only to the portion of which the lessee had the exclusive possession (certain rights to a part of the lot having been retained by the lessor), the court is not governed alone by the rules applicable to exceptions and reservations in leases but will proceed, as in the case of the construction of other contracts, to ascertain and give effect to the intention of the parties. *Chicago Auditorium Assoc. v. Corporation of Fine Arts Bldg.* (Ill.), 18-253.

c. Distress.

(1) In general.

Right to maintain. — The cessation of the relationship of landlord and tenant does not destroy the statutory remedy by distress as to rent theretofore accrued. *Owens v. Wilson* (Fla.), 19-267.

Second distress. — Distress for rent held void, and therefore that a second distress would lie. *Grunnell v. Welch* (Eng.), 3-819.

New trial. — New trials may be granted in distress proceedings. *Owens v. Wilson* (Fla.), 19-267.

(2) Seizure of property of stranger.

Remedies of owner. — A landlord may distrain for rent on the goods of a stranger found on the leased premises, including goods of a subtenant or goods of a tenant or subtenant which are subject to a mortgage; but a stranger whose goods are so levied upon is entitled to redeem them, and to be reimbursed by the tenant, or, if they are sold, he can recover their value from the tenant by action. *Swartz v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.* (Md.), 16-1156.

Liability of tenant. — Where a subtenant of leased property gives a chattel mortgage on certain goods located on the premises to a third person, and afterwards defaults in payment of the debt secured by the mortgage, and surrenders the leased premises to the original lessee, and the latter, with knowledge that the landlord is about to distrain for rent, refuses to deliver the key of the premises to the chattel mortgagee upon demand, and thereby prevents such mortgagee from removing the mortgaged property and certain other property belonging to him from the premises, and all of the property is levied upon and sold under distress for rent against the original lessee, the latter is liable to the mortgagee, in an action of trover, for the value of the property. *Swartz v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.* (Md.), 16-1156.

In such an action, an instruction that the refusal of the lessee to deliver the key of the premises to the chattel mortgagee was not a

taking of possession or conversion of the property, is properly refused. *Swartz v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.* (Md.), 16-1156.

Duty of tenant to protect stranger's property. — In such a case it is the duty of the tenant to protect the property from seizure irrespective of any privity between himself and the chattel mortgagee, and therefore, in an action of trover brought by the mortgagee, an instruction that it was not the duty of the defendant to protect the property from seizure, as there was no privity of contract or estate between him and the owner, is properly refused. *Swartz v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.* (Md.), 16-1156.

Measure of damages in action for conversion. — In such an action the defendant cannot complain of an instruction as to the measure of damages which authorizes the jury to consider the price realized on the sale of the property as evidence of its value. *Swartz v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.* (Md.), 16-1156.

7. RE-ENTRY AND RECOVERY OF POSSESSION.

Rights of landlord after forfeiture.

— Where a lease provides for a forfeiture for nonpayment of rent and gives the landlord the right to re-enter with or without process of law, the act of the landlord in shutting off the heat from the tenant's apartment after such forfeiture is within the rule that a landlord who has the right to re-enter on a breach of the tenant's covenant may render the tenement uninhabitable and that where he uses no unnecessary force in making the re-entry, such act confers no right of action on the tenant. *Howe v. Frith* (Colo.), 15-1069.

In such a case the tenant is also estopped from claiming any damages which he may have sustained by the shutting off of the heat from the apartment if he has stipulated in the lease that in case he is dispossessed from the premises by reason of a forfeiture for nonpayment of rent he will maintain no action for trespass or any similar action. *Howe v. Frith* (Colo.), 15-1069.

The fact that after such forfeiture the landlord was, at the instance of the tenant, enjoined from re-entering the premises, does not render him liable for shutting off such heat, and does not relieve the tenant from the covenant whereby he waived his right of action against the landlord. *Howe v. Frith* (Colo.), 15-1069.

Damages for holding over. — The damages awarded to a landlord for the detention of the premises by the tenant after the expiration of the term do not arise out of contract, but are indemnity, and compensation is the proper measure. *Murtland v. English* (Pa.), 6-339.

8. ESTOPPEL TO DENY LANDLORD'S TITLE.

One who goes into possession of land as the tenant of another cannot set up title adverse to the landlord without a surrender of the premises to the landlord; but if a tenant thus in possession expressly agrees to pay rent to another for a given time, for a consideration,

he will be bound by these terms, but after the expiration of the time fixed by the agreement no promise to pay rent will be implied and the tenant may deny liability for the rent after that time, though he remains in possession of the premises as the tenant of the person who placed him in possession. *Hodges v. Waters* (Ga.), 4-106.

Where a landlord files a bill in equity to set aside on the ground of fraudulent procurement a judgment rendered against his tenant in an action of ejectment to which the landlord was not made a party, and such bill raises no question as to the landlord's title, the action of the court in dismissing the bill does not constitute a decision that the landlord has no title, nor does it estop those claiming under him from bringing an action of ejectment against the successful plaintiff in the former action of ejectment. *Eldred v. Johnson* (Ark.), 5-59.

Judgment rendered in an action of ejectment against a tenant, where the landlord is not made a party, is not, in respect to the title to the land, binding upon either the landlord or those claiming under him. *Eldred v. Johnson* (Ark.), 5-59.

9. ACTIONS FOR BREACH OF COVENANTS.

Answer or plea. — In an action for breach of covenant in a lease in that the defendant did not surrender the premises at the expiration of the lease in as good condition as they were when taken, a plea that the defendant has not broken his covenant—*non infregit conventionem*—is not a proper plea because it pleads a negative to a negative, but such plea, though informal, is not immaterial, and is sufficient to sustain a verdict and is good upon motion in arrest. *Drouin v. Wilson* (Vt.), 13-93.

Where in an action for breach of covenant in a lease it is alleged by the plaintiff that the breaking a plate-glass window in the leased building was not due to any of the causes of damage excepted in the covenant to surrender the building in good condition, a plea of *non infregit conventionem* admitting the leaving of the broken window unrepaired, but alleging that the window was broken in the course of the ordinary wear of the building, which was an excepted cause of damage, is a traverse of an essential allegation of the declaration and places the burden of proving the issue on the plaintiff. *Drouin v. Wilson* (Vt.), 13-93.

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1. NATURE AND ELEMENTS OF OFFENSE.

a. In general.

Under the New York statute defining larceny as the taking of property with intent to deprive or defraud the true owner, and the statute providing that "upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable," the appropriation of a corporation's money to reimburse one of its officers the amount paid by him as a contribution to the campaign fund of a political party in behalf of the corporation does not, in the absence of a statute prohibiting a corporation from making such contributions, render the officer to whom the payment is made guilty of larceny, where the officer made the campaign contribution under the honest belief that he was benefiting the corporation, and without deriving any personal advantage therefrom, and his claim for reimbursement is openly presented and paid; and this is so though the corporation has no right under the law of its existence to agree to make contributions for political campaigns. *People ex rel. Perkins v. Moss* (N. Y.), 10-309.

It is larceny for a person who has knowledge of a bailee's interest in property to obtain the property from the bailee with the felonious intent of stealing it. *Aldrich v. People* (Ill.), 8-284.

A person who obtains property from the owner or custodian thereof by some sort of trick or device for the purpose of stealing and converting the property to his own use is guilty of larceny. *Aldrich v. People* (Ill.), 8-284.

One who receives a check from another to invest the proceeds in property for the latter does not acquire title to the proceeds, and a misappropriation of the same by him constitutes larceny and not embezzlement. *Hunt v. State* (Ark.), 2-33.

Distinction between larceny and false pretenses. — If one obtains possession of the property of another by fraud, and the owner intends to part with the title as well as the possession, the offense is that of obtaining property by false pretenses; but if the possession is fraudulently obtained,

with intent upon the part of the person obtaining it to convert it to his own use, and the owner intends to part with the possession merely* and not the title, the offense is larceny. *State v. Buck* (Mo.), 2-1007.

Acquittal of receiving stolen goods as bar to prosecution for larceny. —

An acquittal, by a court having jurisdiction of the offense, on a charge of receiving stolen goods is a bar to a subsequent prosecution for larceny of the goods, where a statute (Gen. St. Conn., § 1210) provides that a receiver of stolen goods shall be prosecuted and punished in the same manner as the person who committed the theft. *State v. Fox* (Conn.), 19-682.

b. Intent.

Larceny is the felonious taking of the property of another against his will with the intent to convert it to the use of the taker or a third person. Personal gain to the taker is not an essential element of the offense, the intention to deprive the owner of his property being sufficient. *Canton Nat. Bank v. American Bonding, etc., Co.* (Md.), 18-820.

In a prosecution under the Oklahoma statute for larceny, an instruction defining what facts the jury should find to constitute the offense is erroneous, if it omits the requirement of the statute that the taking of the property by the defendant must have been "with the intent to appropriate the same for his own use and benefit." *Miller v. Oklahoma* (U. S.), 9-389.

Appropriation of lost goods. — A finder of lost goods is not guilty of larceny thereof, where he has no felonious intent to withhold them from the owner at the time they are found, though he afterwards appropriates them to his own use. *Brewer v. State* (Ark.), 20-1379.

c. Title to property.

It is not essential to the crime of larceny that the person from whom the property is taken should have the actual right of possession. *Rex v. Beboning* (Ont.), 13-491.

2. SUBJECTS OF LARCENY.

a. Illuminating gas.

Gas used for illuminating and heating purposes may be the subject of larceny. *Woods v. People* (Ill.), 6-736.

The crime of larceny is a separate and distinct offense from that created by the Illinois statute making it unlawful to tamper with a gas meter with the view of consuming or utilizing the gas without having it registered by the meter, and therefore one charged with unlawfully abstracting gas from the pipes should be prosecuted for larceny and not under such statute. *Woods v. People* (Ill.), 6-736.

b. Undelivered check.

An undelivered check may be the subject of larceny under article 866 of the penal code of Texas, which provides that the term "property," as used in relation to the crime

of theft, includes any writing containing evidence of existing debt, contract, liability, promise or ownership of property, real or personal, and, in a general way, every article commonly known as and called personal property, and all writings of every description, provided such property possesses any ascertainable value. *Worsham v. State* (Tex.), 18-134.

c. Railroad tickets.

Tickets issued by a railroad company and authorizing the transportation of the owner between certain points on such railroad or its connecting lines are property which is the subject of theft. *Patrick v. State* (Tex.), 14-177.

d. Property of Indian.

The taking of hay, under circumstances of larceny, from an Indian's premises forming a part of an Indian reserve, is theft regardless of any right of possession by the Indian by location of title under the Canada Indian Act, or the right of the superintendent of Indian affairs to prevent the removal of the property. *Rex v. Behoning* (Ont.), 13-491.

e. Property kept for unlawful purpose.

Property kept for an unlawful purpose, such as gambling paraphernalia or intoxicating liquors kept for sale in violation of the law, may be the subject of larceny. *Osborne v. State* (Tenn.), 5-797.

A pistol may be the subject of larceny, notwithstanding a statute prohibiting the sale but not the ownership of pistols, as such statute does not destroy the actual value of pistols, though it may prevent them from having a market value. *Osborne v. State* (Tenn.), 5-797.

3. CHARACTER OF TAKING.

a. Obtaining goods by trick

Where, with the felonious intent to steal, a person shifts the checks on trunks while they are in the possession of a transportation company, and by virtue of this trick obtains possession of a trunk belonging to another person, and converts the trunk and its contents to his own use, he is guilty of larceny, notwithstanding the fact that the transportation company, being deceived by the trick, delivers the trunk to him voluntarily. *Aldrich v. People* (Ill.), 8-284.

Where the owner of goods parts with both the possession and the title without expecting the goods to be returned to him or to be disposed of in accordance with his directions, neither the taking nor the conversion of the goods amounts to larceny, even though the owner is induced to part with the title and possession through the fraud and misrepresentation of the person to whom the goods are delivered. But if the owner merely parts with the possession and retains the title, expecting and intending that the goods shall be returned to him or shall be disposed of in some particular manner agreed upon,

the subsequent felonious conversion of the property will relate back and make the taking and conversion larceny. *Aldrich v. People* (Ill.), 8-284.

b. Procuring another to take.

The taking in larceny need not be by the hand of the accused. If the latter procures a person innocent of any felonious intent to take the goods for him, his offense will be the same as if he had taken the goods himself. Where the person who actually takes the property is also guilty, he who procured him to commit the larceny is, if present, guilty as principal, and if absent, is guilty as an accessory before the fact. *Canton Nat. Bank v. American Bonding, etc., Co.* (Md.), 18-820.

Where, with the intent to steal, a wrongdoer employs or sets in motion any agency, animate or inanimate, with the design of effecting a transfer of the goods of another to him in order that he may feloniously convert or steal them, and in pursuance of such agency the goods come into the hands of the wrongdoer and he feloniously converts them to his own use, he is guilty of larceny, and he may be convicted thereof under a common-law indictment charging the felonious taking and carrying away of the goods. *Aldrich v. People* (Ill.), 8-284.

c. Purchasing stolen property.

Under a statute making larceny and receiving of stolen goods distinct offenses, one who has had nothing to do with the theft of an article does not become a participant therein by subsequently purchasing the article, even though he knows that it has been stolen. *State v. Moxley* (Ore.), 20-593.

d. Converting article concealed in goods purchased.

Although a purchaser of an article, who finds therein and appropriates something of a nature entirely different from the article purchased, may be guilty of larceny, such purchaser is not necessarily guilty of larceny if he appropriates something found therein which is of the same nature as the article purchased, notwithstanding the fact that the article found has an additional value for other purposes. *People v. Hoban* (Ill.), 16-226.

e. Taking by procurement of owner.

Where a person procures his property to be taken by another person who intends to commit larceny, or delivers his property to such other person, the element of trespass is wanting, and the crime is not fully consummated, no matter how plain the guilty purpose of the person possessing himself of the property may be. *Topolewski v. State* (Wis.), 10-627.

Where the owner of goods practically delivers them to a would-be thief instead of merely placing them where the latter can readily trespass upon the rights of the owner by taking the property, one of the essential

elements of larceny, namely, trespass, is wanting. *Topolewski v. State* (Wis.), 10-627.

The owner of property may set a trap to catch one whom he suspects of an intention to commit larceny, but the setting of such trap must not go further than to afford the would-be thief the amplest opportunity to carry out his purpose, formed without such inducement on the part of the owner as to put the owner in the position of consenting to the taking. *Topolewski v. State* (Wis.), 16-627.

Where the owner of property, acting himself or by his agent, actually or constructively aids in the commission of the offense of taking his goods as intended by a wrongdoer, by performing or rendering unnecessary some act in the transaction essential to the offense of larceny, the would-be criminal is not guilty of all the elements of the offense. *Topolewski v. State* (Wis.), 10-627.

4. WHO MAY COMMIT.

a. Husband of owner.

Under the Arkansas constitution a husband may be convicted of larceny of the wife's property. *Hunt v. State* (Ark.), 2-33.

b. General owner of goods in transit.

The general owner of goods shipped by a common carrier may be guilty of larceny by fraudulently taking them from its possession with the intent of defeating its lien upon them for the transportation charges. *Atchison, etc., R. Co. v. Hinsdell* (Kan.), 13-981.

5. INDICTMENT OR INFORMATION.

a. Description of property.

In general. — In an indictment for larceny, a description of property charged to have been stolen held not so vague and indefinite as to require a quashal of the indictment. *Peebles v. State* (Fla.), 4-870.

Bank notes and money. — By the Florida statute bank notes and money are made the subject of larceny; and where the required degree of certainty cannot be used in specifying the pieces or denominations of coins stolen, or the number and denomination of bank bills, it will be enough to state that a better description than that given is unknown to the prosecuting solicitor or to the grand jury, as the case may be. *Enson v. State* (Fla.), 18-940.

Railroad tickets. — An indictment for the theft of a certain number of railroad tickets reading from one stated point to another and of specified values, which fails to allege that the tickets were issued by a named railroad company and that they authorized transportation between the points indicated, is fatally defective. *Patrick v. State* (Tex.), 14-177.

Allegation of inability to give particular description. — In a prosecution for larceny under the plea of not guilty, an allegation in the information of the prosecuting solicitor's want of knowledge of a bet-

ter description of the property stolen is traversable and the subject of inquiry, and an information false in this respect will not support a conviction. *Enson v. State* (Fla.), 18-940.

Where in a prosecution for the larceny of bank bills and notes and silver specie, the information alleges that a more particular description than is given of the same is to the prosecuting solicitor unknown, the accused may upon a proper showing timely made move the court to order the solicitor to give such other or more particular description, in the nature of a specification or bill of particulars of the property, as may have been acquired by the solicitor after filing the information, and the trial may be suspended until this can be done. *Enson v. State* (Fla.), 18-940.

In a prosecution for larceny under the plea of not guilty, where the information alleges the prosecuting solicitor's want of knowledge of a better description of the property stolen, the defendant may not be acquitted upon proof that the solicitor could easily have known a better description of the property stolen. The fact that the solicitor could have easily ascertained a better description of the property may be evidence that he knew the same, but it is not conclusive, and cannot be made an absolute test of the sufficiency of the allegation that he did not know. *Enson v. State* (Fla.), 18-940.

In a prosecution for larceny, where the information alleges that a more particular description of the property is unknown to the prosecuting solicitor, and there is no evidence that the solicitor knew a more particular description of the property alleged to have been stolen, it is proper for the court to refuse to give an instruction predicating defendant's right to an acquittal on the fact that the solicitor could easily have known a better description of the property than that given in the information. *Enson v. State* (Fla.), 18-940.

Traversing indictment alleging inability to give better description. — Where an indictment for stealing a domestic animal fails to describe fully the property alleged to have been stolen, and avers that a better description cannot be given, such allegation of description is not traversable, and the defendant will not be allowed to introduce evidence tending to show that the grand jury did have or could have obtained a more perfect description. *Woodring v. Territory* (Okla.), 2-855.

b. Ownership of property.

Actual owner or bailee. — The actual status of the legal title to stolen property is no concern of the third. In an information charging larceny the title to the property may be laid either in the owner or the person in whose possession it was when it was taken, even though that person had stolen it from some one else. *State v. Pigg* (Kan.), 18-521.

It is proper in a prosecution for larceny to describe the property as that of the real owner or of the person in possession, and it

may be alleged to be the property of one who is in possession as bailee, agent, trustee, executor, or administrator, and such bailee, etc., may be alleged to be the owner thereof by name without describing his trust character. *State v. Tillet (Ind.)*, 20-1262.

Property of wife of accused. — Under the English Married Women's Property Act, an indictment for stealing a wife's separate property is insufficient if it lays ownership in the husband, though the goods were stolen from his house in which she was residing. *Rex v. Murray (Eng.)*, 6-161.

Property of several owners. — An indictment charging the theft of various articles of property belonging to different owners, in a single count, must, in order to avoid duplicity, show that all of the property was taken at the same time and place, and that the taking was a single transaction. *Peck v. State (Tex.)*, 16-583.

An indictment which charges, in a single count, that the defendant "did then and there unlawfully and fraudulently take from the possession of Frank Pape one bale of lint cotton, and did then and there fraudulently take from the possession of William McKay one bale of lint cotton, . . . the said two bales of cotton being then and there respectively the corporeal personal property of and belonging one bale to the said Frank Pape and one bale to the said William McKay," charges but one offense, and is not bad for duplicity. *Peck v. State (Tex.)*, 16-583.

Fixtures on leased premises. — The lessee of a railroad is the owner of fixtures detached therefrom where the lease requires him to replace all parts which shall wear out or be removed; and therefore an indictment for stealing bond-wires which have been detached from the rails properly lays the ownership in the lessee. *State v. Fox (Conn.)*, 19-682.

Property of corporation. — An information for larceny is insufficient where it charges that the goods alleged to have been stolen were the property of the "Chicago, Burlington, and Quincy Railway Company," without alleging that such company is either a natural or artificial person. *State v. Clark (Mo.)*, 18-1120.

c. Value of property.

In a prosecution for stealing a domestic animal under the Oklahoma statutes the indictment need not allege and the prosecution need not prove the value of the property alleged to have been stolen. *Woodring v. Territory (Okla.)*, 2-855.

d. Time and place of larceny.

Information held to be sufficient in its allegations of the time and place of the larceny alleged. *Enson v. State (Fla.)*, 18-940.

e. Charging more than one offense.

Under the Iowa statute providing that an indictment must charge but one offense, an indictment containing counts of embezzlement

and larceny charges two offenses, and a conviction thereunder cannot be had unless the prosecution is required to elect upon which count it will proceed. *State v. Finnegan (Iowa)*, 4-628.

6. TRIAL.

a. Evidence.

(1) Presumptions.

Possession of stolen goods. — Where it is shown that a building has been entered and property stolen therefrom, and soon thereafter the property is found in the possession of the person charged with entering the building with intent to steal, such possession unexplained may warrant the jury to infer guilt of the crime of entering the building with intent to steal. The guilt of the accused does not follow as a presumption or conclusion of law from the unexplained possession of property recently stolen, but an inference of guilt as a matter of fact may be drawn therefrom by the jury to be considered by them in connection with the other evidence. *Thompson v. State (Fla.)*, 19-116.

The possession of stolen goods shortly after the larceny is evidence of guilt. *State v. Record (N. Car.)*, 19-527.

Disappearance of property from accustomed place. — The disappearance of property from the place where the owner put and kept it, without his knowledge or consent, is evidence that it has been taken with felonious intent. *Mason v. State (Ind.)*, 16-1212.

Intent. — In a criminal prosecution for larceny the accused is not bound to satisfy the jury that he took the property in question under an honest, though mistaken, belief as to ownership. *State v. Weckert (S. Dak.)*, 2-191.

(2) Admissibility.

Ownership of property. — Where, in a prosecution for the larceny of a calf, the ownership thereof is claimed by a third person, it is error to permit the prosecuting attorney to state to the jury that the defendant should have brought a civil action to recover the calf in controversy, and to permit evidence of ownership to be introduced, especially where the defendant does not claim to be the owner of the property alleged to have been stolen. *Clampitt v. United States (Ind. Ter.)*, 10-1087.

Statements of accused. — On a prosecution for larceny, acts, statements, and conduct of the accused at the time when the stolen goods were found in his possession, or when his right to them was first called in question, are admissible in evidence on his behalf as a part of the *res gestæ*; but it is otherwise as to acts performed or statements made by him at other times, and which are open to the suspicion of being part of his plan of defense. *Mason v. State (Ind.)*, 16-1212.

In a prosecution for larceny the defendant may give in evidence statements made by him while the stolen property was in his

possession and before he knew that he was accused of having stolen the same, to the effect that such property belonged to another. *State v. White* (Vt.), 2-302.

Offer to return property. — On a prosecution for larceny, an offer on behalf of the accused to prove that the latter took steps to have the stolen property returned to its owner, for the purpose of identification, is properly refused where the evidence shows that the accused, when first asked about the property, made a false statement denying all knowledge of it, and where counsel, in making the offer of proof, does not state whether the steps in question were taken by the accused before or after the property had been found in his possession. *Mason v. State* (Ind.), 10-1212.

Circumstances of defendant. — Where larceny of money is at issue, evidence tending to show that the defendant had no money before and considerable money after the larceny, is admissible to be considered with other circumstances in the case. *Thompson v. State* (Fla.), 19-116.

Possession of money corresponding to description of that stolen. — Where money found on a defendant corresponds in description with stolen money the circumstances may be relevant in an issue involving larceny of the money. *Thompson v. State* (Fla.), 19-116.

Possession of other stolen property. — In a prosecution for the larceny of a calf, evidence that two calves belonging to a third person were recovered from the defendant's pasture a day or two before his arrest for the crime charged, is inadmissible to show possession of other stolen property, in the absence of proof that the calves were in the possession of the defendant, or that they were stolen property, as such evidence is only competent when it connects the defendant with the crime of which he stands charged. *Clampitt v. United States* (Ind. Ter.), 10-1087.

Intoxication of accused. — In a prosecution for larceny it is not erroneous to exclude evidence that the defendant was drunk at the time of the unlawful taking, unless such evidence is offered to show that the defendant was so drunk as to have been incapable of forming the intent to steal, as it is only intoxication of the latter character that constitutes a defense. *Ryan v. United States* (D. C.), 6-633.

Conduct of other charged with same offense. — Evidence of the conduct of two of three persons charged with feloniously breaking and entering a storehouse and stealing goods therefrom, is not admissible against the third where he is not shown to have been present at the time of such conduct, or to have been responsible therefor. *Eaton v. Commonwealth* (Ky.), 12-874.

In such case evidence that after the crime was committed a small amount of money was found in the trunk of one of the defendants is not admissible against another defendant, especially where the money is not identified as taken from the storehouse. *Eaton v. Commonwealth* (Ky.), 12-874.

(3) Sufficiency.

In general. — Evidence examined and held sufficient to sustain a conviction of general larceny of a horse, and not of a larceny by lettering and branding. *State v. Moxley* (Ore.), 20-593.

Evidence held to be sufficient to support a verdict of guilty of grand larceny. *Enson v. State* (Fla.), 18-940.

Where, in a prosecution against A and B for larceny, there is satisfactory proof that A followed the prosecuting witness into a crowded street car and picked his pocket, either while they were in the act of boarding the car or immediately thereafter while they were standing on the rear platform, but where the only evidence tending to connect B with the crime is the testimony of the prosecuting witness to the effect that B was one of two men who "jostled" him when he endeavored to go inside the car, and "backed him out on the platform," and there is no evidence to show that B had any previous association or acquaintance with A, or that he boarded the car at the same time as A and the prosecuting witness, and where his identification by the prosecuting witness as one of the two men who jostled the latter is unsatisfactory, a judgment of conviction against him will be reversed, as not warranted by the evidence. *People v. Williams* (Ill.), 17-313.

In such a case as that above considered, the testimony of the prosecuting witness that he is certain that the defendant A is the person who followed him in boarding the car, because he looked carefully at such person at the time and noticed certain peculiarities about his mouth and teeth, coupled with the fact that such witness was able to identify A among a large number of other persons, without hesitation, when he next saw him, is sufficient evidence of A's identity to warrant his conviction, the proof of his guilt being sufficient in other respects. Nor is such proof of identity overcome by the fact that the prosecuting witness was unable to identify A's picture among others which were shown to him in the rogue's gallery, or by the adverse testimony of other witnesses, who claim to have seen the thief at the time when the larceny was committed, but whose opportunity of identifying him was less favorable than that of the prosecuting witness. *People v. Williams* (Ill.), 17-313.

In such a case, evidence examined and held sufficient to support a judgment of conviction against the defendant A. *People v. Williams* (Ill.), 17-313.

On a prosecution for larceny, where the evidence shows that the accused denied any knowledge of the whereabouts of the stolen property, but that such denial was false, and also that the accused was near the place where the theft was committed at or about the time of its commission, a finding by the trial court that the property of the prosecuting witness was stolen and that the accused committed the larceny is justified, and will not be disturbed on appeal. *Mason v. State* (Ind.), 16-1212.

Corpus delicti. — The *corpus delicti* in larceny, like other facts in general, may

be established by circumstantial evidence. While the unexplained possession by one person of the goods of another is not of itself sufficient to prove that a larceny has been committed, yet such fact, in connection with the other circumstances, may be sufficient for that purpose. *Mason v. State* (Ind.), 16-1212.

Possession of stolen property as sufficient. — The exclusive possession of stolen property soon after the larceny, if unexplained, is sufficient to sustain a conviction. *Mason v. State* (Ind.), 16-1212.

Intent. — In a prosecution for the larceny of a horse and buggy, where it is contended that the evidence in its aspect most favorable to guilt fails to show that the accused took the horse and buggy with the intent of depriving the owner permanently of his property, but shows that the rig was taken merely for the purpose of driving it some miles and then abandoning it, evidence examined and held sufficient to support a finding of the jury that the accused took the property with the intent of stealing it, the question of intent at the time of the taking having been submitted to the jury by instructions as favorable to the accused as he was entitled to demand. *Stoddard v. State* (Wis.), 13-1211.

In a prosecution for larceny against a purchaser of waste paper who appropriated forty stamped envelopes found therein belonging to the vendor's bailor, evidence examined and held that the defendant was not guilty of a felonious intent to steal the property of such bailor. *People v. Hoban* (Ill.), 16-226.

Evidence reviewed in a prosecution for the larceny of a trunk which the defendant had checked from a point in the District of Columbia to a point in Tennessee and thence to a point in Texas, and held to show an intent to steal, irrespective of whether the defendant was drunk when he had the trunk checked originally, and to show further that the intent completed the offense in the District of Columbia. *Ryan v. United States* (D. C.), 6-633.

Ownership of property. — In a prosecution for larceny, where the property is described as that of the person in possession, evidence of possession is sufficient proof of ownership, and where property is described as the property of L., proof of possession of L., as executor of an estate is sufficient proof of his ownership as charged. *State v. Tillet* (Ind.), 20-1262.

Identity of stolen money. — The identity of stolen money may be determined by the jury from circumstantial evidence. *Thompson v. State* (Fla.), 19-116.

(4) Questions for jury.

On a prosecution for larceny, evidence tending to explain the possession of the stolen property by the accused in a manner consistent with his innocence may be given; and if, upon the whole evidence, there is a reasonable doubt of his guilt he should be acquitted. The jury, or, on a trial without a jury, the court, is the sole judge as to

whether the explanation or other evidence given by or on behalf of the accused is sufficient to raise a reasonable doubt of his guilt. *Mason v. State* (Ind.), 16-1212.

In a prosecution for larceny the jury have a right to consider the fact that the cattle alleged to have been stolen bore the brand of the complaining witness, as some evidence that they were owned by him. *State v. Wolfley* (Kan.), 12-412.

(5) Variance.

Larceny of money. — Bank notes are lawful money, and an indictment charging a conversion of "lawful money" is sustained by a proof of conversion of bank notes. *State v. Finnegan* (Iowa), 4-628.

In a prosecution for larceny, where the money described in the information and claimed to have been stolen is introduced in evidence and exhibited to the jury, it is not necessary that the particular bills should be identified as the ones described in the information. *State v. Pigg* (Kan.), 18-521.

There is no variance between an indictment charging the larceny of money and the evidence showing the misappropriation of the proceeds of the check. *Hunt v. State* (Ark.), 2-33.

Larceny of cow. — Where the statute makes it a felony to commit larceny of "any . . . cow, bull, ox, steer, heifer, or calf," an information charging the larceny of one cow is not sustained by proofs showing, without dispute, that the animal stolen was a three or four-years old steer. *Mobley v. State* (Fla.), 17-735.

Larceny of railroad tickets. — Railroad tickets which are not stamped and issued by the company and are not in the condition authorizing transportation are not of equivalent value to a ticket regularly issued by the company. *Patrick v. State* (Tex.), 14-177.

Larceny and ownership. — Where an indictment charges the defendant with having stolen a quantity of sugar from a certain building, both being the property of and in the possession of a person named in the indictment, and the proof is that the defendant was not present when the sugar was stolen, but that he procured his accomplices to steal it, and that the person named as owner of the building was in possession of the building and has possession of the sugar as bailee, but that the general ownership of the property was in others, there is no material variance between the allegations and proof, either as to the stealing of the property or as to the ownership of the sugar and the building from which it was stolen. *State v. Whitman* (Minn.), 14-309.

Ownership. — Where an indictment for the theft of a bale of cotton alleges ownership in M., but the proof shows that the cotton was raised by F., a renter of M., under an arrangement whereby the proceeds of its sale were to be divided between M. and F., and that M. had never had the cotton in his possession, or ever seen it until after the theft, there is a fatal variance which calls

for the reversal of a judgment of conviction. *Peck v. State* (Tex.), 16-583.

Evidence showing accused guilty of two offenses. — In a prosecution under the Washington statute for the larceny of neat cattle, the fact that evidence admitted to show the commission of the offense charged in the information also tends to show the commission by the defendant of another and distinct statutory offense, does not necessarily constitute a variance. *State v. Wilson* (Wash.), 7-418.

b. Instructions.

Circumstantial evidence. — In a prosecution for larceny, where the defendant, testifying as a witness in his own behalf, admits the possession of the stolen property, but claims that his possession thereof was obtained in such manner as not to constitute theft, the case is not one of circumstantial evidence, and consequently the failure of the trial court to charge the jury as to the doctrine of circumstantial evidence does not constitute error. *Worsham v. State* (Tex.), 18-134.

In a prosecution for larceny, where the defendant admits that he had the stolen property in his possession, but claims that he purchased it from a stranger, and the court instructs the jury on the question of purchase, presumption of innocence, and reasonable doubt, it is not erroneous to refuse to instruct the jury specifically upon the question of circumstantial evidence. *State v. Overson* (Utah), 8-794.

Intent. — In a prosecution for larceny, an instruction that if the defendant found the prosecutor's pocketbook and contents, and within a reasonable time thereafter made inquiry as to the ownership thereof, the defendant is not guilty of larceny as charged, unless "he knew, or soon learned, who the owner was, and denied having it," is rendered erroneous by the addition of such quoted clause. *Brewer v. State* (Ark.), 20-1378.

In a prosecution for larceny, a request to charge that if the defendant found the prosecutor's pocketbook, and either knew, or ascertained to whom it belonged, and on demand of the owner denied having it, or did not voluntarily return it to him, he is guilty of larceny, is erroneous as eliminating the idea of good faith in making inquiry for the owner, or the absence of a felonious intent at the time of the original taking. *Brewer v. State* (Ark.), 20-1378.

In a prosecution for the theft of a horse, where there is evidence that the accused was an escaped convict being pursued by officers, and that to escape arrest he took the horse in question, rode it to a certain point and turned it loose, an instruction that if the defendant took the horse fraudulently with the intent permanently to deprive the owner of it, and did not intend simply to use it temporarily, and that he abandoned the horse at the point where he left it because the animal was ridden down and unable to travel further, they should find him guilty, is correct as far as it goes, but should be accompanied by the converse of the proposition and should

charge that if he did not take the horse fraudulently with intent to appropriate him, but simply to steal a ride, the fact that the horse was ridden down and abandoned would not be evidence of an original fraudulent taking. *Carroll v. State* (Tex.), 14-426.

Ownership of property. — Bond-wires when attached to the rails of an electric railroad are real estate and not the subject of larceny. Therefore it is not error for the court, in a criminal prosecution for the larceny of such wires, to refuse to charge as to the ownership thereof on the hypothesis of the severance and asportation constituting a single transaction. *State v. Fox* (Conn.), 19-682.

In a prosecution for larceny of a check, evidence that the maker of a check, shortly before it was stolen, crumpled or wadded it up and threw it on the floor is insufficient to raise the issue of an intention to abandon the property, and consequently a refusal by the trial court to instruct the jury that if the maker of the check intended to abandon it the defendant cannot be convicted does not constitute error. *Worsham v. State* (Tex.), 18-134.

Reasonable doubt. — A conviction upon a charge of larceny will not be reversed because in referring to the defendant's story the court instructs the jury that they are to determine from all the facts and circumstances whether his defense is probably true, where in the same instruction they are also told that the defendant is not required to prove his innocence and that if after consideration of all the evidence in the case, including the defendant's explanation, there exists a reasonable doubt of his guilt, he must be acquitted. *State v. Wolfley* (Kan.), 12-412.

Accomplice testimony. — In a prosecution for larceny of a check, where the evidence shows that a certain person other than the defendant was present with the defendant and others at or about the time when the check was stolen, and that he afterwards cashed the check as an accommodation to the defendant, but there is nothing in the evidence to suggest that he was an accomplice of the defendant, the failure of the court to instruct the jury that such person was an accomplice, and that the defendant cannot be convicted upon his testimony unless corroborated by other evidence, does not constitute error. *Worsham v. State* (Tex.), 18-134.

Weight of evidence. — On appeal from a conviction of larceny, instructions to the jury examined and held not to be erroneous as instructions upon the weight of the evidence. *Worsham v. State* (Tex.), 18-134.

c. Verdict.

Necessity of finding value. — A general finding of guilty under an information for larceny which alleges the value of the thing stolen includes a finding that the value is as stated, and a specific finding as to the value is not necessary. *State v. Fox* (Conn.), 19-682.

Principal and accessory. — The offenses of principal and accessory before the fact in larceny are distinct. There cannot be a conviction of one charge upon an allegation of the other, and an acquittal upon one charge is no bar to a trial upon the other. *Canton Nat. Bank v. American Bonding, etc., Co.* (Md.), 18-820.

d. Sentence and punishment.

Order of restitution. — Ordering the restitution of stolen property is not a part of the punishment prescribed by the Maryland statute which provides that every person convicted of simple larceny to the value of five dollars or more shall restore the thing stolen to the owner or pay him the value thereon "and be sentenced to the penitentiary," etc. (Pub. Gen. Laws, art. 27, § 261), but is merely intended to effect an immediate restoration of stolen property in the custody of the court or the state's attorney without the necessity of a civil suit for its recovery. *Downs v. Mayor* (Md.), 19-644.

Determination of degree. — For the purpose of determining whether a person convicted of stealing gas is guilty of grand larceny, the abstraction of gas for a number of consecutive days by means of appliances allowed to remain in place during all of such time should be treated as one continuous taking, and the value of the gas stolen should be fixed on the basis of its selling price. *Woods v. People* (Ill.), 6-736.

7. APPEAL.

Harmless error. — In a prosecution for larceny an appellate court will regard as having been harmless the improper admission of hearsay evidence tending to prove that prior to the taking in question the defendant had been a party to appropriating criminally the property of the prosecuting witness, unless it clearly appears that but for such evidence the finding of the jury would probably have been different. *Topolewski v. State* (Wis.), 10-627.

In a prosecution for larceny, an erroneous admission of evidence against the accused is of no consequence where he confesses, or where, in testifying in his own behalf, he relates facts establishing his guilt. *Ryan v. United States* (D. C.), 6-633.

In a prosecution for larceny where the jury are not charged with the duty of fixing the punishment, it is not reversible error to admit evidence that, on the day the offense was committed, the defendant had in his possession a forged letter containing false statements, by means of which he had sought to obtain charitable aid. *Ryan v. United States* (D. C.), 6-633.

On a prosecution for larceny a judgment of conviction will not be reversed because of the failure of the trial court to quote the statute relative to the offense, or otherwise define the word "larceny," in its charge to the jury, where all of the material allegations of the information have been called to the attention of the jury, and the latter have been in-

structed, in substance, that it is incumbent upon the prosecution to prove such allegations beyond a reasonable doubt. *Starke v. State* (Wyo.), 17-222.

Variance. — In a prosecution for larceny of a check, where the indictment describes the check as drawn on a certain bank, and the drawer of the check and the defendant both testify that it was intended to be drawn on the bank named in the indictment, it is too late for the defendant to contend for the first time on appeal that there is a variance between the indictment and the proof, in that the check was made out on the printed form of another bank, and that the name of such other bank was not completely obliterated or cancelled. *Worsham v. State* (Tex.), 18-134.

8. VALIDITY OF STATUTES.

Michigan statute. — The Michigan statute (Act No. 102, Pub. Acts 1905) which provides that "if any officer, agent, clerk, or servant of any voluntary association, limited partnership association, or incorporated company . . . shall embezzle . . . any money or other property of another, which shall have come to his possession, or shall be under his charge by virtue of such office or employment, he shall be deemed by so doing to have committed the crime of larceny," is constitutional. *People v. Wilson* (Mich.), 17-628.

9. CIVIL LIABILITY OF THIEF.

Necessity of criminal prosecution. — In Maryland the owner of stolen goods may sue the thief for their recovery without regard to the institution or prosecution of criminal proceedings. *Downs v. Mayor* (Md.), 19-644.

Attachment in civil action. — The civil liability of a thief to make restitution is an indebtedness within the meaning of the Maryland attachment law (Pub. Gen. Laws, art. 9, § 6) which provides that the property of a defendant who is "indebted" to the plaintiff may be attached on certain grounds. *Downs v. Mayor* (Md.), 19-644.

Effect of statute of limitations. — Though the right to sue for the conversion of stolen property may be barred by the statute of limitations, the owner may nevertheless maintain an action in equity on the theory of following trust funds, or to compel an accounting for the value of the stolen property and the profits made therefrom by the thief. *Lightfoot v. Davis* (N. Y.), 19-747.

Acquisition of title by thief by lapse of time. — A person who obtains possession of property by larceny and conceals his possession cannot acquire title by lapse of time, however long. *Lightfoot v. Davis* (N. Y.), 19-747.

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- 1. ELEMENTS OF OFFENSE.
 - a. Publication.

Communication to person defamed.

— There is no publication of a defamatory writing where the words are only communicated to the person defamed. *Western Union Tel. Co. v. Cashman* (U. S.), 9-693.

Sending a libelous letter through the mail to the person libeled is not a publication of the libel unless the writer has reason to believe that the letter is likely to be opened and read by other than the addressee. *Rumney v. Worthley* (Mass.), 1-189.

Repetition to third person by person defamed. — Where a person writes a defamatory letter and sends it in a sealed envelope, through the United States mail, to the person defamed thereby, who receives it and reads the contents thereof to a third person, such reading will not constitute a publication of the libel by the writer thereof for the purposes of a civil action. *Lyon v. Lash* (Kan.), 11-424.

Having defamatory matter copied by stenographer. — Where the manager of a corporation hands to a stenographer to be typewritten a letter written in the interest of the company but unconnected with its ordinary business and containing defamatory statements, there is a publication of a libel for which the corporation is liable. *Puterbaugh v. Gold Medal Furniture Mfg. Co.* (Ont.), 1-100.

Communication to one person only. — It is not necessary in matters of libel that the defamation should be made known to the public generally, or even to a considerable number of persons. It is sufficient if it be communicated to only one person other than the person defamed. *Jozsa v. Moroney* (La.), 19-1193.

b. Malice.

Malice is an essential ingredient of an action for libel. Without malice, expressed or implied, the action fails. *Western Union Tel. Co. v. Cashman* (U. S.), 9-693.

Under the Washington statute malice is not an essential element of libel. *Byrne v. Funk* (Wash.), 3-647.

Under the Montana code the existence of malice is not a necessary ingredient to entitle the plaintiff to recover in an action for libel. *Faxton v. Woodward* (Mont.), 3-546.

c. Damage.

Necessity of special damage. — By the law of libel defamatory language is actionable without special damage when it contains an imputation upon one as an individual, or in respect to his office, profession, or trade, but it is not actionable when it is merely in disparagement of one's property, or of the quality of the articles which he manufactures or sells, unless it occasions special damage. *Victor Safe, etc., Co. v. Deright* (U. S.), 8-809.

Extent of damage necessary. — An unprivileged falsehood need not entail universal hatred in order to constitute a cause of action for libel. It is sufficient that it will come to the notice of a large number of persons, and will lead an appreciable faction of that number to regard the person concerning whom it is published with contempt. *Peck v. Tribune Co.* (U. S.), 16-1075.

2. WORDS CONSTITUTING LIBEL OR SLANDER.

a. In general.

Interpretation of language. — In interpreting language complained of as

slandrous, accompanying explanations and surrounding circumstances which were known at the time to the persons who heard the words uttered and which tend to modify their meaning, may be taken into consideration, but attending circumstances which were unknown to the hearers cannot be considered. *Greer v. White* (Ark.), 17-270.

While a publication may be libelous *per se*, and needs no colloquium or innuendo, if the words are connected with other language which limits or affects their meaning, or may tend to mitigate the damage, their construction must be in reference to such other language, and in determining the sense in which they are employed, it is proper to consider the cause and circumstances of the publication and the entire language used. *Paxton v. Woodward* (Mont.), 3-546.

The contents of a letter from a stockholder to another stockholder concerning a third stockholder considered, in an action for libel, and held to show that some of the statements contained in the letter are libelous *per se* under the Washington statute. *Chambers v. Leiser* (Wash.), 10-270.

Words harmless in themselves. — Words which are harmless in themselves may be libelous in the light of extrinsic facts. *Pavesich v. New England Mut. L. Ins. Co.* (Ga.), 2-561.

Title of article as part thereof. — The title or heading of a published article is a part thereof and must be considered in determining whether the publication is libelous. *Sheibley v. Nelson* (Neb.), 13-373.

Publication of photograph of one person with article concerning another. — Where a newspaper publishes a defamatory article concerning a person and publishes with the article a fairly accurate photograph of another person, the article and the picture together constitutes a libel of the person whose photograph is published. *Wandt v. Hearst's Chicago American* (Wis.), 9-864.

In an action against a publishing company for libel, a complaint which alleged, in substance, that the defendant published in its newspaper the advertisement: "Nurse and Patients Praise Duffy's — Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of Duffy's Pure Malt Whiskey," followed by a portrait of the plaintiff, with the name of another person under it, and also a testimonial, purporting to be signed by the same person to the effect that "after years of constant use of your Pure Malt Whiskey, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run-down conditions," and which also alleges that the plaintiff is not Mrs. Schuman, is not a nurse, and is a total abstainer from whiskey and all other spirituous liquors, states a cause of action without allegation of special damage. *Peck v. Tribune Co.* (U. S.), 16-1075.

Misrepresenting sentiments of person. — A publication of an advertisement of an insurance company containing a person's picture and a statement that he has a policy of insurance with the company and is pleased therewith, when such is not the truth, is libelous. *Pavesich v. New England Mut. L. Ins. Co.* (Ga.), 2-561.

Charging participation in foreign revolution. — The publication by a newspaper of an article charging an individual with taking part in a revolt in a foreign country not libelous *per se*. *Crashley v. Press Pub. Co.* (N. Y.), 1-196.

"Indifferent repute." — A complaint alleging that the plaintiff was charged in a newspaper article with being "an Englishman of more or less indifferent repute," without further allegations of the libelous meaning of the language, is insufficient. *Crashley v. Press Pub. Co.* (N. Y.), 1-196.

Meaning of term "character." — The term character, as used in the statute and in the decisions in libel actions, is synonymous with reputation. *Lydiard v. Daily News Co.* (Minn.), 19-985.

b. Charging commission of crime.

In general. — Spoken words falsely imputing to another a criminal offense are actionable *per se* and the law presumes malice in their utterance; therefore, it is not necessary in such case for the plaintiff in an action for slander to prove express malice, unless the words as spoken constitute a privileged communication. *Abraham v. Baldwin* (Fla.), 10-1148.

Robbery. — The following written statement in regard to the robbery of a safe containing county funds is actionable *per se*: "Turn your searchlights on your treasurer and the man that boards with him and the postmaster, and you will find where the money went." *Logan v. Hodges* (N. Car.), 14-103.

Arson. — The words, "he burnt my house down," amount in their common acceptation to a charge of having committed the crime of arson, and are, therefore, slanderous *per se*. In an action for slander the language complained of must be interpreted in its usual and ordinary sense. *Greer v. White* (Ark.), 17-270.

Blackmailing. — Charging a person with being a blackmailer is libelous *per se*, blackmailing having been made a criminal offense by statute in Nebraska. *Sheibley v. Nelson* (Neb.), 13-373.

c. Holding up to ridicule and contempt.

Attempted suicide. — A printed statement to the effect that a person is a suicide fiend, that she has attempted suicide twenty-five times, and that she would usually go to the hospital and ask to be pumped out, is libelous, as it has a tendency to bring the person into public contempt and ridicule. *Wandt v. Hearst's Chicago American* (Wis.), 9-864.

Attack on author of literary production. — A publication which under the pre-

text of criticising a literary production attacks the author personally and portrays him in a ridiculous light is libelous *per se* and cannot be justified as a mere jest. *Triggs v. Sun Printing, etc., Assoc. (N. Y.), 1-326.*

d. Affecting credit.

Charging nonpayment of debt. — It is not libelous *per se* to write and publish of another person that he owes a debt, and that although he is able to pay he has refused to do so, where the person of whom the publication is made is not a trader or merchant, and the publication is not made of or concerning his business affairs. *Nichols v. Daily Reporter Co. (Utah), 8-841.*

It is not unlawful for dealers in a common line of goods to form an association and agree among themselves not to extend credit to a person who has defaulted in a payment to some one of them, nor is it libelous for one party to the agreement to report to the others the names of such parties as have become delinquent. *Woodhouse v. Powles (Wash.), 11-54.*

e. Affecting veracity.

In general. — A publication which imputes to one language which is known to those among whom he lives to contain false statements is libelous. *Pavesich v. New England Mut. L. Ins. Co. (Ga.), 2-561.*

A newspaper article, charging a person with originating and circulating false and malicious reports attacking the character of another, is libelous, and is actionable *per se*. *Sheibley v. Huse (Neb.), 13-376.*

"Liar." — Words in a newspaper publication charging a person with being a "liar" held to be libelous *per se*. *Byrne v. Funk (Wash.), 3-647.*

"A common liar." — To publish by written charge of an individual that he is "a common liar" is libelous *per se*. *Paxton v. Woodward (Mont.), 3-546.*

f. Imputing unchastity to female.

In general. — To charge a woman with being of lewd character, with using her body for commercial purposes, and with keeping a gambling room, is actionable *per se*. *Battles v. Tyson (Neb.), 15-1241.*

"Bitch." — The word "bitch" as applied to a woman, does not, when standing alone, imply unchastity, and, therefore, in an action by a woman for slander, when it is admitted that the defendant, in an altercation with the plaintiff and her husband over some horses, called the plaintiff "a damned old bitch," it is error for the court to instruct the jury that the language used by the plaintiff was slanderous *per se*. *Warren v. Ray (Mich.), 16-514.*

g. Affecting race or color.

It is libelous *per se* to publish a white man as a negro. *Flood v. News and Courier Co. (S. Car.), 4-685.*

The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitu-

tion have not destroyed the law of South Carolina making the publication of a white man as a negro libelous. *Flood v. News and Courier Co. (S. Car.), 4-685.*

h. Affecting honesty.

In general. — To say of one candidate for an office that he is honest does not carry an implication that the other candidates are dishonest. *Nichols v. Daily Reporter Co. (Utah), 8-841.*

Public officer. — It is libelous *per se* to charge a city officer with being a part of a system of jobbery and graft in the management of city contracts. *Quinn v. Review Pub. Co. (Wash.), 19-1077.*

i. Affecting trade, business, or profession.

In general. — In determining whether words are actionable *per se*, a distinction is generally recognized between words written or printed and words spoken, but this distinction does not exist in the case of words affecting a person in his profession or business. *Dallavo v. Snider (Mich.), 8-212.*

A letter published in a newspaper charging that during a coal famine a coal company not only charged extortionate prices for coal, but even refused to sell coal at such prices is libelous *per se*. The same words when spoken are slanderous *per se*, and are actionable without proof of special damage. *Gröss Coal Co. v. Rose (Wis.), 5-549.*

False statements regarding merchant. — It is libelous *per se* to publish of and concerning a merchant false statements touching him in his business and naturally tending to injure him therein. *Dallavo v. Snider (Mich.), 8-212.*

Charge that corporation is a "trust." — a circular which by direct averment and by necessary and inevitable implication accuses a corporation of being a trust and thereby violating the laws of the United States and of the state in which it does business, is libelous *per se*. *Sternberg Mfg. Co. v. Miller, etc., Mfg. Co. (U. S.), 18-69.*

Charge that firm belongs to monopoly. — A publication which charges a business firm with entering into a pool to control the price of a commodity is libelous *per se*, in that it tends to expose the members of the firm to public hatred or contempt, and to deprive them of the benefits of public confidence or social intercourse, and to injure them in their trade or business; and this being so, it is immaterial that a doubt exists as to the constitutionality of certain statutes, in force at the time of the publication, making pools or combinations to regulate or fix the price of any commodity a crime. *Dorn v. Cooper (Ia.), 16-744.*

Charge of attempted monopoly and deception of courts. — A circular which charges that a corporation falsely pretends to be the owner of certain valid and subsisting patents entitling it to monopolize the manufacture of a certain article, and that it has misused and deceived the courts in order to secure unwarranted protection of its business by means of injunctions, and in

order to prevent competition and raise the price of the manufactured article to the consumer, is libelous *per se*. *Sternberg Mfg. Co. v. Miller, etc., Mfg. Co. (U. S.), 18-69.*

Reflection on clergyman. — It is libelous *per se* to write of a clergyman, an applicant for a pulpit, "I would not have anything to do with him or touch him with a ten-foot pole," if under all the circumstances the words used would expose the person written of to hatred or contempt, or injury in his business or occupation. *Cole v. Millsbaugh (Minn.), 20-717.*

Notice that contractor is on "unfair" list. — The publication of a notice that a certain contractor has been placed on the "unfair list" of a carpenters' union, together with a statement that the publication of such notice will be continued until he has decided to set himself square with organized labor, is merely a declaration of his unfriendliness toward organized labor and of his refusal to recognize its rules, regulations, and authority, and is not susceptible of the meaning ascribed to such publication by an innuendo that such contractor is dishonest, unreliable, and undeserving of the confidence of the public in his vocation. *Labor Review Pub. Co. v. Galliher (Ala.), 15-874.*

Statement relating to class of merchants. — Where a class of persons in a city is engaged in the conduct of trading-stamp concerns, a publication in a newspaper which refers generally to the trading-stamp concerns of the city as "the trading-stamp fake" or "the get-rich-quick industry," but does not refer to any particular trading stamp concern or to all of the persons engaged in the business in the city, will not sustain an action for libel by one of the trading-stamp concerns. *Watson v. Detroit Journal Co. (Mich.), 8-131.*

A newspaper publication commenting upon a murder and stating that the killing was the result of the violation of the law by wine joints which were selling adulterated wine, and that "the first trouble which led up to the killing occurred in one of these joints," affects only a class, and, there being nothing in the article which by proper inducement and colloquium can be given personal application to a particular wine dealer, the publication affords no ground for an action for libel by such individual dealer. *Comes v. Cruce (Ark.), 14-327.*

j. Affecting property.

Report that house is "haunted." — A reckless publication of a report that a certain house is haunted by a ghost raises a presumption of malice sufficient to support an action by the owner of the house to recover damages for the depreciation in the value of the property and loss of rent resulting from the publication, and for expenses incurred by the owner in consequence of the publication. *Manitoba Free Press Co. v. Nagy (Canada), 9-816.*

Disparaging quality of manufactured goods. — A letter disparaging the quality

of goods manufactured by third persons held not libelous *per se*. *Victor Safe, etc., Co. v. Deight (U. S.), 8-809.*

3. PRIVILEGED COMMUNICATIONS.

a. In general.

Ground of privilege. — A communication, although it contains criminating matter, is privileged when made in good faith upon any subject in which the party communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest, right, or duty, and made upon an occasion properly to serve such right, interest, or duty, and in a manner and under circumstances fairly warranted by the occasion and the duty, right, or interest, and not so made as unnecessarily or unduly to injury another, or to show express malice. *Abraham v. Baldwin (Fla.), 10-1148.*

A subject in relation to which a communication is made may be privileged, yet a communication made upon that subject may not be privileged. If the restraints and qualifications imposed by law upon the publicity to be given such communications are disregarded, the communication is not privileged. If reasonable bounds are exceeded in making the communication, or if the communication is made knowing it to be false, malice might be inferred which would destroy the privilege. *Abraham v. Baldwin (Fla.), 10-1148.*

Good faith, a right, duty, or interest in a proper subject, a proper occasion and a proper communication to those having a like right, duty, or interest, are all essential to constitute words spoken that are actionable *per se*, a privileged communication, so as to make the proof by the plaintiff of express malice essential to liability. *Abraham v. Baldwin (Fla.), 10-1148.*

Communications between stockholders of corporation. — A letter from a stockholder in a corporation to another stockholder concerning a third stockholder is written on a privileged occasion, and therefore is not actionable, though it contains statements which are libelous *per se*, unless it contains matter tending, upon its face, to show malice or reckless disregard on the part of the writer for the truth of his statements, or tending to show that the writer exceeded his privilege by incorporating in the letter impertinent and unnecessary matters of a libelous character. If the letter contains anything tending to prove affirmatively any of these matters, it cannot be said as a matter of law to be a privileged communication, and can be treated as such only after the jury have found from the evidence that the writer did not exceed or abuse the privilege of the occasion and was not actuated by malice. *Chambers v. Leiser (Wash.), 10-270.*

Accusation made to employer against employee. — An intemperate and violent letter written to an employer, making groundless and unprovoked charges against an employee, calculated to injure and degrade

him and cause his discharge, cannot be recognized as a privileged communication by means of which the writer can with impunity destroy the confidence of the employer in his subordinate and break up the relations between them. *Jozsa v. Moroney* (La.), 19-1193.

Newspaper article concerning physician. — A newspaper article concerning the professional conduct of a practicing physician is not privileged merely because of the relation of physician as such to the general public in the territory to which his practice extends. A newspaper owes no duty to inform the public as to such matters. *Rood v. Dutcher* (S. D.), 20-480.

Newspaper article concerning clergyman. — A newspaper editorial wherein the defendant does not confine itself to comment upon and criticism of the public acts of the plaintiff, a clergyman, but, without stating the sources of its information, makes a false statement, upon its own responsibility, that the plaintiff has committed in his private life certain acts of an immoral nature, is not privileged as containing fair and *bona fide* comment. *Russell v. Washington Post Co.* (D. C.), 14-820.

b. In respect to judicial proceedings.

Words spoken in general. — Words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. *Schultz v. Strauss* (Wis.), 7-528.

Statement for purpose of originating criminal prosecution. — An unsworn letter to a justice of the peace concerning the commission of a crime and urging an investigation, which does not state the facts, but merely states rumors which the informant might easily have ascertained to be untrue, is not privileged if written maliciously. *Miller v. Nuckolls* (Ark.), 7-110.

Statements made to a district attorney and his assistants in their official capacity for the purpose of originating or forwarding a judicial proceeding for bringing an offender to justice are privileged. *Schultz v. Strauss* (Wis.), 7-528.

Remarks of magistrate. — A magistrate when sitting in the course of judicial duties is a "judge" within the meaning of the rule that defamatory observations by a judge in the course of judicial duties are not actionable, and the rule applies to a defamatory statement by a magistrate made while sitting in the course of judicial duties although made falsely and maliciously and without reasonable cause. *Law v. Llewellyn* (Eng.), 4-431.

Remarks of counsel. — The privilege of counsel in the trial of a cause is not absolute and unqualified, and slanderous words spoken by him are actionable if they have no relation or reference to the cause being tried or to any subject-matter involved therein. *Carpenter v. Ashley* (Cal.), 7-601.

Where the prosecuting attorney, while conducting a prosecution for larceny, charges the defendant's attorney, who is not a witness in the case, with perjury and subornation of perjury, the words are not privileged, as they have no pertinency, relevancy, or reference to the charge being tried. *Carpenter v. Ashley* (Cal.), 7-601.

Privilege of witness. — A witness who testifies under oath in a court of justice is not subject to an action for libel or slander for any statement that he may make upon the subject under consideration. *Sebree v. Thompson* (Ky.), 15-770.

Statements and communications made to a grand jury, which result in an indictment for crime of the person concerning whom they are made, are privileged, as they are made in the course of a judicial proceeding and are applicable and pertinent to the subject of the inquiry. *Schultz v. Strauss* (Wis.), 7-528.

Defamatory words spoken by a witness under compulsory attendance before a duly constituted legislative investigating committee are absolutely privileged, if they are pertinent to the matters under investigation, even though they are uttered maliciously. *Sheppard v. Bryant* (Mass.), 6-802.

Statements as to the testimony he is about to give made by a witness before trial to a party to the action and the latter's counsel are surrounded by the same privilege of protection against prosecution for slander as is the evidence actually given by the witness in court. *Watson v. Jones* (Eng.), 3-124.

Allegations in pleadings. — Libelous matter in pleadings filed in a court, if relevant and pertinent to the subject to be inquired into, is absolutely privileged, and all doubts should be resolved in favor of the relevancy and pertinency of such matter. *Kemper v. Fort* (Pa.), 12-1022.

Where a testator designates the "issue" or "children" of his daughter as his legatees, the legitimacy of a person claiming as a legatee is material in an action involving his right as such, and an allegation of his illegitimacy in a pleading in such action is relevant and absolutely privileged. *Kemper v. Fort* (Pa.), 12-1022.

Publication of report of judicial proceedings. — The rule that fair reports of judicial proceedings are privileged does not apply to the publication of statements contained in pleadings relating to private transactions which have not formed the basis of the subject of a judicial hearing. *Gazette Printing Co. v. Shallow* (Can.), 15-610.

A publication of judicial proceedings, if fair and impartial, is privileged; but a complaint or other pleading in a civil action, which has never been presented to the court for its action, is not a judicial proceeding within the rule, and its publication, if it contains libelous matter, can only be justified by showing that it is true. *Nixon v. Dispatch Printing Co.* (Minn.), 11-161.

Within the Philippine libel act permitting a newspaper publication of a report of a judicial proceeding without liability for libel, but excepting from the privilege libelous com-

ments connected with the report, striking headlines printed over the report of a criminal trial, which are likely to raise inferences detrimental to the person concerning whom they were printed, are libelous remarks connected with the report, although quoted therefrom, and are not privileged. *Dorr v. United States* (U. S.), 1-697.

c. Concerning candidate for office.

The fact that a person is a candidate for an office affords, in many instances, a legal excuse for publishing concerning him as such candidate language for which there would be no legal excuse if he did not occupy the position of a candidate. *Nichols v. Daily Reporter Co.* (Utah), 8-841.

d. Concerning public officers.

Charges imputing moral delinquency.

— The official acts of public officers may lawfully be made the subject of fair comment and criticism by the public, but charges imputing moral delinquency to such officer cannot, if false, be privileged, though made in good faith and relating to his acts in the discharge of his duties. *Byrne v. Funk* (Wash.), 3-647.

Imputing corruption and dishonesty.

— A false charge imputing corruption and dishonesty to a public officer, though in respect to his official acts, is not privileged by reason of the fact that it is made in good faith. *Quinn v. Review Pub. Co.* (Wash.), 19-1077.

A communication by the superintendent of public instruction of a county to that officer of another county imputing to the treasurer of the latter county the theft of public funds, is neither absolutely nor qualifiedly privileged, as the official to whom such communication is addressed is not one having jurisdiction to entertain the complaint or any authority or interest in regard to the matter. *Logan v. Hodges* (N. Car.), 14-103.

e. Communications between officers of corporation.

Relating to honesty of employee. —

A qualified privilege attaches to a communication from one officer of a corporation to a fellow officer, expressing doubt as to the honesty of an employee of the corporation, who has failed to give a satisfactory explanation of the disappearance of corporate property intrusted to his care, and ordering the discharge of the employee. *Denver Public Warehouse Co. v. Holloway* (Colo.), 7-840.

Where a letter from one officer of a corporation to a fellow officer expressing doubt as to the honesty of an employee of the corporation and ordering his discharge is privileged, the privilege is not lost by the action of the recipient of the letter in disclosing its contents to another employee as a reason for the discharge of the first employee. *Denver Public Warehouse Co. v. Holloway* (Colo.), 7-840.

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f. Communication by one owing duty to another.

Where a limited company sends a communication containing defamatory statements of a third person to another company to which it owes a duty to make the communication and which has an interest in receiving the communication, the occasion is privileged, notwithstanding the fact that the duty is one of imperfect obligation, only. *Edmondson v. Birch & Co.* (Eng.), 7-192.

Where, on privileged occasions, the managing director of a limited company, acting in the reasonable and ordinary course of business, dictates to the servants of the company a letter and a telegram to another company containing statements defamatory of a third person, and the communications are duly transcribed, copied, and forwarded, the privilege covers a publication to the company's servants. *Edmondson v. Birch & Co.* (Eng.), 7-192.

g. Communication between mercantile agency and subscriber.

A mercantile agency engaged in the business of obtaining information with reference to the commercial standing and position of persons in business, and communicating such information confidentially to subscribers in response to their specific inquiries, is carrying on a business for profit out of motives of self interest as distinguished from an enterprise in the general interest of society, and its communications are not privileged within the law of libel and slander. *Macintosh v. Dun* (Eng.), 12-146.

h. Defense of attack on character.

While one attacked by the publication of charges against his character has the right to defend himself, if he goes further than to make a full answer and reasonable explanation and uses statements unnecessarily defamatory, the communication is not privileged. *Byrne v. Funk* (Wash.), 3-647.

4. ACTIONS.

a. Nature and form of action.

At common law. — At common law trespass on the case was the form of action to recover damages for a libel, and persons charged with a joint libel are "joint trespassers" within the constitution and suable within the county of the residence of any one thereof. *Cox v. Strickland* (Ga.), 1-870.

Gist of action. — The gist of an action for libel is the damage occasioned to the reputation or general character of the party attacked by the publication. *Lydiard v. Daily News Co.* (Minn.), 19-985.

b. Who may maintain.

Corporation. — A corporation may sue for the libel or slander of its business or trade. *Gross Coal Co. v. Rose* (Wis.), 5-549.

Nonresident. — A nonresident may maintain an action for libel in the New York

courts against resident defendants. *Crashley v. Press Pub. Co.* (N. Y.), 1-196.

c. Persons liable.

Liability of master for act of servant.

— A corporation is not liable for a slanderous utterance made by its agent or employee concerning a person to whom the corporation owes no independent duty, unless the slanderous utterance was authorized, expressly or impliedly, or has been ratified by the corporation. *Sawyer v. Norfolk, etc., R. Co.* (N. Car.), 9-440.

Where a person goes voluntarily to the office of the superintendent of a railroad company, who is authorized to select and employ agents, for the purpose of seeking employment, and the superintendent, after rejecting the application of such person, insults and defames him in the presence of others, the company is not liable for the slanderous utterances, as the superintendent has no express authority to make them, and authority cannot be fairly implied from the nature of his employment or of the duties incident thereto. *Sawyer v. Norfolk, etc., R. Co.* (N. Car.), 9-440.

Editor of newspaper. — The editor in chief of a newspaper, who is not the proprietor, cannot be held liable personally for the libel published in the newspaper, where it appears affirmatively that he was not on duty during any part of the time between the reception of the libelous matter by the newspaper and the publication, that he did not participate in the publication, and that he had no knowledge of the libel until after its publication. *Folwell v. Miller* (U. S.), 7-455.

In an action against the editor of a newspaper for libel, where it appears that he is not personally liable because he did not participate in the tortious act, the fact that he sets up as a partial defense the truth of certain statements in the libel does not render him liable as though he had originally directed the publication. *Folwell v. Miller* (U. S.), 7-455.

President of newspaper corporation.

— The president of a newspaper corporation is not personally liable for a libel published in a newspaper in the absence of personal participation in the tortious act. *Folwell v. Miller* (U. S.), 7-455.

Member of merchants' credit association.

— A member of a merchants' credit association is liable for all damages caused to a person by reporting him delinquent when in fact he is not. *Woodhouse v. Powles* (Wash.), 11-54.

Slanders uttered in pursuance of common agreement.

— If two slanders are uttered in pursuance of a common agreement between two persons that such slanders shall be uttered, each is jointly liable with the other for their utterance, and separate causes of action against them for slander may be joined in the same complaint. *Green v. Davies* (N. Y.), 3-310.

d. Defenses.

Truth. — Under section 5 of the Bill of Rights in the Nebraska constitution, the truth alone is not a complete defense in a civil action for libel, but, if the defendant justifies, he must further allege and prove that he published the alleged defamatory matter with good motives and for justifiable ends. *Wertz v. Sprecher* (Neb.), 17-758.

The publisher of a newspaper may freely expose false and defamatory matter circulated concerning a candidate for a public office, but, in so doing, he may not libel another party, and can defend against such libel only by showing the truth of the publication. *Sheibley v. Huse* (Neb.), 13-376.

Insanity. — Insanity is a good defense in an action for libel and slander. *Irvine v. Gibson* (Ky.), 4-569.

Previous libel by plaintiff. — In an action for libel, where it appears that the publication complained of was libelous as a matter of law, it is no defense that the plaintiff had previously libeled the defendant; and hence an instruction to the jury, that if the plaintiff had theretofore published articles offensive to the defendant, while the latter had the right to issue circulars fairly refuting the offensive matter, it had no right, by way of counteracting the effect of the offensive articles, to libel the plaintiff, and that if the plaintiff libeled the defendant, the latter's remedy was by an action at law, rather than a libelous retort, is not erroneous. *Sternberg Mfg. Co. v. Miller, etc., Mfg. Co.* (U. S.), 18-69.

Intention to refer merely to imaginary person. — In an action for libel against the publisher of a newspaper who published a defamatory article containing the plaintiff's name, the fact that the writer of the article and the editor of the paper had never heard of the plaintiff and believed the name referred to in the article to be that of an imaginary person, and that neither they nor the publisher of the paper intended to defame the plaintiff, is no defense if the circumstances are such that persons who read the article would reasonably think that the language referred not to an imaginary but to a real person, and that those among them who knew the plaintiff would reasonably suppose the language to refer to him. *E. Hul-ton & Co. v. Jones* (Eng.), 16-166.

Publication by mistake. — The insertion of the plaintiff's portrait in a whiskey advertisement with a testimonial signed with the name of another person, whose occupation was given as a nurse, imports that she is a nurse and has made the statements set forth, and, therefore, the publication is of and concerning the plaintiff, notwithstanding the name of another person is used in the advertisement and is appended to the portrait and testimonial. Nor is it any defense that the portrait was used by mistake, under the supposition that it was the portrait of the person mentioned in the advertisement. *Peck v. Tribune Co.* (U. S.), 16-1075.

e. Pleading.

(1) Complaint or declaration.

In general. — Section 131 of the code of Nebraska has abrogated the common-law rule requiring the complaint in an action for libel to state facts and circumstances connecting the plaintiff with the defamatory publication, and it is now sufficient to allege that the libelous matter was published of and concerning the plaintiff. *Sheibley v. Huse* (Neb.), 13-376.

Complaint held to state a cause of action, and presenting the question of fact whether the words used were intended to and might be understood to charge conduct or characteristics inconsistent with good character or plaintiff's profession. *Cole v. Millsbaugh* (Minn.), 20-717.

A declaration for libel is demurrable where it does not charge the defendant with malice or with the publication of anything defamatory, scandalous, or other than the exact truth. *Henry v. Cherry* (R. I.), 18-1006.

Under Montana code. — While, under the Montana code, "in an action for libel and slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose," it being "sufficient to state generally that the same was published or spoken concerning the plaintiff," in other respects the rules of common-law pleading remain unchanged. Hence, where a cause of action for libel is based upon a publication not libelous *per se*, and the complaint does not employ *colloquim* or *innuendo* to explain the application and meaning of the words published and there is no allegation of special damages, the plaintiff is not entitled to recover. *Paxton v. Woodward* (Mont.), 3-546.

The innuendo, necessity of. — In an action for libel brought by an attorney against the publisher of a legal directory, the alleged libel consisting of the failure of the defendant to give the plaintiff a rating either as to professional qualifications or financial standing, the complaint held insufficient because it failed to allege the meaning and effect of the omission of the defendant to rate the plaintiff properly and the manner in which such omission was understood by the subscribers to the defendant's publication. *Kirby v. Martindale* (S. Dak.), 9-493.

A complaint alleging the publication by a newspaper of an article charging the complainant with taking part in a revolt in a foreign country is insufficient to sustain an action for libel in the absence of an allegation of the statute of such country making such an act a crime. *Crashley v. Press Pub. Co.* (N. Y.), 1-196.

Enlarging meaning of words uttered. — In an action for libel based on words not actionable *per se*, the innuendo can do nothing more than refer back to some facts stated in the inducement, and if the inducement is

wanting the deficiency cannot be supplied by the statement of the facts in the innuendo. *Watson v. Detroit Journal Co.* (Mich.), 8-131.

Where a published article is not susceptible of a construction which will make it libelous, the innuendo cannot enlarge the meaning of the words or attribute to them a meaning which they will not bear. *Nichols v. Daily Reporter Co.* (Utah), 8-841.

Where the petition in an action for slander alleges that the defendant said of the plaintiff, a married man, intending thereby to charge him with the offense of adultery, that "Bashford was undoubtedly down the railroad track with some woman; I believe it; he is guilty, I know he is," it is error to sustain an objection to the introduction of any evidence upon the ground that the words complained of are not susceptible of the meaning attributed to them or that sufficient facts are not pleaded to show that they were used in that sense. *Bashford v. Wells* (Kan.), 16-310.

Effect of innuendo. — Where the innuendo in an action for libel ascribes a certain meaning to the language alleged to be libelous, the plaintiff is bound thereby, and if upon the construction of such language by the court it is ascertained that such language is not susceptible of the meaning ascribed, the action must fail. *Labor Review Pub. Co. v. Galliher* (Ala.), 15-674.

Necessity of pleading special damages. — A complaint in an action for libel which shows no publication actionable *per se* is defective for failure to allege special pecuniary damages. *Crashley v. Press Pub. Co.* (N. Y.), 1-196.

In an action for libel where the publication complained of is libelous *per se* it is not necessary to plead special damages in order to constitute a cause of action. *Sternberg Mfg. Co. v. Miller, etc., Mfg. Co.* (U. S.), 18-69.

Pleading language complained of, in general. — In an action for libel, the exact language of the libelous publication must be set out in the complaint, and it is not sufficient to set out the publication in its "substance and effect." *Kirby v. Martindale* (S. Dak.), 9-493.

Words spoken in foreign language. — In an action for slanderous words spoken in a foreign language, the words should be set out in that language and a translation given in the declaration, and it is necessary to prove that the translation in the declaration is correct. *Romano v. De Vito* (Mass.), 6-731.

Defects cured by answer. — A petition for libel, defective in the matter of charging a publication of the alleged defamatory matter, is cured by an answer which admits such publication. *Sheibley v. Huse* (Neb.), 13-376.

(2) Answer.

Plea of justification. — A plea of justification in an action for libel must justify the precise charge laid in the declaration and

is insufficient, if it attempts to justify a separate and distinct charge, though of the same general nature. *Dowie v. Priddle* (Ill.), 3-526.

Where an alleged libelous charge is specific, the plea of justification need only allege the truth of the charge, but where the charge is general, the plea must state the facts showing the truth. *Dowie v. Priddle* (Ill.), 3-526.

It is not sufficient in a plea of justification in an action for libel to attack the character of the plaintiff generally, or to aver his general misconduct, but the very words set out in the declaration, at least those which are actionable, must be justified. *Dowie v. Priddle* (Ill.), 3-526.

When a person is charged in a publication with the commission of some specific offense, the publisher may, when sued for damages, allege and prove that the offense was committed; but it is not permissible to establish the fact by alleging and proving other acts of wrongdoing. *Lydiard v. Daily News Co.* (Minn.), 19-985.

An allegation in the answer to an action for libel held to present an issue of justification upon which the defendant was entitled to be heard. *Paxton v. Woodward* (Mont.), 3-546.

Under the North Dakota statute the defendant in an action for slander or libel may answer by way of justification and mitigation, either or both, and may plead mitigating circumstances in connection with a general denial. *Wrege v. Jones* (N. Dak.), 3-482.

f. Evidence.

(1) Presumption and burden of proof.

Presumption of malice in unprivileged communication. — Where words are spoken which are slanderous *per se*, malice is conclusively presumed for the purpose of recovering actual damages, and the malice thus presumed to exist is malice in law as distinguished from malice in fact. *Wrege v. Jones* (N. Dak.), 3-482.

Burden of proof of malice in communication qualifiedly privileged. — In an action for libel, when the occasion is shown to have been qualifiedly privileged, the burden of proving malice is cast on the plaintiff. *Denver Public Warehouse Co. v. Holloway* (Colo.), 7-840.

The law presumes that the writer of a defamatory letter was not actuated by malice, where it appears that both the occasion and the subject-matter were privileged. *Denver Public Warehouse Co. v. Holloway* (Colo.), 7-840.

In an action for libel, where it appears that the letter on which the action is based, though libelous *per se*, was written on a privileged occasion, the plaintiff has the burden of proving malice, knowledge of falsity, recklessness, the use of impertinent or unnecessary libelous matter, or other illegal abuse by the defendant of the occasion of privilege, and upon establishing any of these matters the plaintiff is entitled, on account

of the presumption of malice, falsity, and injury arising from matter libelous *per se*, to recover, unless the defendant establishes the truth of the libelous statements. *Chambers v. Leiser* (Wash.), 10-270.

In an action for slander the burden of proving the plea that the communication was privileged is on the defendant. When it is established or conceded that the communication was privileged, the burden is then cast upon the plaintiff to show that the words were uttered from an improper motive, and not for a reason that would otherwise render them privileged. *Abraham v. Baldwin* (Fla.), 10-1148.

Burden of proof of privilege. — As privileged communications constitute an exception to the general rule which implies malice in a libelous publication and infers some damage, it rests with the party claiming the privilege to show that the communication is within the exception. *Logan v. Hodges* (N. Car.), 14-103.

(2) Admissibility of evidence.

Newspaper report of defendant's statement. — In an action for slander it is not competent to introduce in evidence against the defendant newspaper articles purporting to state what the defendant said, but for which he was not responsible. *Carpenter v. Ashley* (Cal.), 7-601.

Sense in which words used. — In an action for slander for charging the plaintiff with being a robber it is proper to exclude evidence to show the sense in which the defendant used the word "robber," and what he meant by the use of the word. *Flaacke v. Stratford* (N. J.), 5-954.

Threats by defendant pending action. — In an action for libel, evidence of threats made by the defendant after the commencement of an action, held admissible to show malice. *Paxton v. Woodward* (Mont.), 3-546.

Malice in privileged communication. — In an action for libel based on a criticism of a book written by the plaintiff, where the defense is that the writing complained of is a fair comment upon a matter of public interest, evidence that the defendant was actuated by actual malice towards the plaintiff is admissible, upon the ground that a comment which is actuated by malice cannot be deemed fair on the part of the person who makes it, and therefore proof of actual malice may take a criticism that is *prima facie* fair outside the limits of a fair comment. *Thomas v. Bradbury, Agnew & Co.* (Eng.), 6-135.

Good faith and lack of malice. — The defendant in an action of libel cannot claim the protection of an absolute or qualified privilege where he fails to plead justification, but having pleaded good faith and a lack of actual malice it is open to him to offer testimony to that effect in mitigation of damages as well as other testimony tending to mitigate the damages. *Logan v. Hodges* (N. Car.), 14-103.

Direct testimony as to malice. — On the trial of an action for libel the de-

fendant may testify directly as to his lack of malice, and that his feelings toward the plaintiff were friendly both before and after the publication of the alleged libel; but he cannot testify as to the plaintiff's feelings toward him, since his testimony on the latter point would be a mere inference or conclusion. *Dorn v. Cooper* (Ia.), 16-744.

Specific offenses by plaintiff to show bad character. — The defendant in a libel action may, as a defense and in mitigation of damages, prove the bad character of the plaintiff; but such proof cannot be established by evidence of the commission of specific offenses not charged in the publication. *Lydiard v. Daily News Co.* (Minn.), 19-985.

The defendant in an action for libel has no right under the general issue to prove the specific acts of the plaintiff's misconduct, but is confined to proof of his general bad character. *Dowie v. Priddle* (Ill.), 3-526.

Newspaper advertisement by physician plaintiff. — The fact that a physician advertises in newspapers that he is skillful and competent in his profession is immaterial in an action by him for libel in charging him with malpractice. In such a case the court cannot apply the rule of medical ethics as to advertising. *Rood v. Dutcher* (S. D.), 20-480.

Opinion as to effect of slander. — A defendant in an action for slander cannot introduce in evidence the opinions or impressions of witnesses to the slander as to its effect upon the reputation of the plaintiff. *Linehan v. Nelson* (N. Y.), 18-831.

Rebutting evidence. — In an action for an alleged libel consisting in the publication of an article charging the plaintiffs, a co-partnership, with entering into a pool to control the price of hogs in a certain locality, where the plaintiffs are permitted to introduce evidence showing the market price of hogs in the locality in question and in other localities, for the purpose of showing actual malice, the defendant is entitled to rebut the evidence on that point by showing the actual market price and his information regarding the same at the time when he made the publication. Such evidence is not admissible in justification, however, where the defendant has not pleaded justification; nor is it admissible in mitigation of damages when not so pleaded. *Dorn v. Cooper* (Ia.), 16-744.

Publication of retraction. — Evidence of the publication by the proprietor of a newspaper, in a conspicuous place therein, of an ample retraction immediately upon learning that a libelous article has appeared therein, is admissible in an action for the libel, as tending to show absence of malice, and since the retraction may be found to have diminished materially the mischief caused by the libel, and thus to have reduced substantially the damages sustained by the person libeled. *Ellis v. Brockton Pub. Co.* (Mass.), 15-83.

Evidence relating to damages. — Where a declaration in an action for libel instituted by a clergyman, who is also the editor of a monthly religious journal and the author of several books, alleges that he has been injured by the publication of the libel

in his calling or profession of clergyman and in his occupation or business of "writing, editing, and publishing religious papers, periodicals, and books," evidence as to the size of the plaintiff's congregation and the extent and circulation of his writings is admissible for the purpose of showing the damages which he sustained. *Russell v. Washington Post Co.* (D. C.), 14-820.

In an action for libel, testimony by the plaintiff that she has no parent living and is dependent upon her own exertions is admissible in evidence, where it is offered not for the purpose of showing poverty, but as bearing on the question of damages for impaired capacity for labor and damages for mental suffering. *Washington Times Co. v. Downey* (D. C.), 6-765.

Defendant's financial standing. — In an action for slander, evidence of the defendant's financial standing is competent as bearing on the damages recoverable. *Flaacke v. Stratford* (N. J.), 5-854.

(3) Sufficiency of evidence.

In general. — Evidence in an action for libel based on a criticism of a book written by the plaintiff, reviewed and held to justify the trial court in refusing to withdraw the case from the jury and to justify the jury in finding a verdict for the plaintiff. *Thomas v. Bradbury, Agnew & Co.* (Eng.), 6-135.

Publication. — The publication of a libel written on a postal card is proved by the testimony of the carrier and of the addressee that he received it through the mail. *Logan v. Hodges* (N. Car.), 14-103.

Malice. — Malice need not be expressly proved; it may be implied. *Pozsa v. Moroney* (La.), 19-1193.

The mere fact that the language in a defamatory writing on a privileged occasion is somewhat strong or intemperate is not, in the absence of evidence of a lack of good faith, such evidence of malice as will show an abuse of the privilege. *Edmondson v. Birch & Co.* (Eng.), 7-192.

Words spoken with reference to plaintiff's business. — In an action based on the utterance of slanderous words concerning the plaintiff in relation to his business, the allegations of the declaration must be sustained by proof that the words were actually spoken of and concerning the plaintiff in relation to his business in order to make the words slanderous *per se*. *Dallavo v. Snider* (Mich.), 8-212.

Damage. — Where it appears, in an action for libel, that a member of a merchants' credit association composed of wholesale dealers reported, by mistake, that a retail merchant was delinquent, and immediately on discovering the mistake corrected it, so that the merchant's credit was restored, and it is not claimed that he suffered from feelings of disgrace or humiliation, or that his credit for honesty as a merchant was in any manner impaired by the act complained of, but on the contrary it appears that he had been on the association's delinquent list before, and did not regard that position as any-

thing more than an inconvenience requiring him to pay cash, no recovery for substantial damages is justified, although the merchant himself testifies that he could not fill orders given on the day he was suspended and that he lost some trade, and possibly some customers, but is unable to give any estimate of the amount of his losses. *Woodhouse v. Powles* (Wash.), 11-54.

Justification. — In a civil action for slander based on words imputing the commission of a crime, a preponderance of the evidence is all that is necessary to sustain a plea of justification, except where the crime imputed is that of perjury. *Flemming v. Wallace* (Tenn.), 7-1156.

Where the plea of justification is interposed in an action for slander for imputing a crime, the party justifying must produce evidence of the acts and intent which are material elements of the crime imputed, sufficiently preponderant to overcome in the minds of the jury the legal presumption of innocence as well as the opposing testimony; but this proof need not go to the extent of convincing the jury beyond a reasonable doubt of the truth of the words imputing the crime. *Abraham v. Baldwin* (Fla.), 10-1148.

The truth of a publication charging the plaintiff, an inspector of concrete work in a city, with jobbery and graft is not conclusively established by proof that in many instances the sidewalks were poorly constructed, that they were not as thick as the contracts called for, that the concrete mixture in some cases was not in the proportion required by the contracts, and that the plaintiff had been discharged for incompetency; and therefore the court may properly refuse to direct a verdict for the defendant in an action for libel based on such publication. *Quinn v. Review Pub. Co.* (Wash.), 19-1077.

(4) Province of court and jury.

Meaning of words used. — In an action for slander, where the complaint alleges that the defendant accused the plaintiff of having committed perjury, and there is some evidence supporting such allegation, but the evidence on behalf of the defendant is to the effect that the defendant did not in express words charge the plaintiff with having committed perjury, but merely said to him, "I wouldn't have done what you did for the whole amount that was involved. swear to a damned lie," the question whether those who heard the words uttered understood them as imputing the crime of perjury to the plaintiff is one of fact for the jury; and, consequently, a charge by the trial court that it was not slander if the defendant said in substance only, "I wouldn't have sworn to a lie or damned lie for all that was involved," or "all in the case," constitutes reversible error. *Linehan v. Nelson* (N. Y.), 18-831.

Unless the meaning of words upon which a charge of slander is based is plain and unambiguous, the meaning intended by the defendant and the understanding of those hearing him should be left for the jury to determine. *Battles v. Tyson* (Neb.), 15-1241.

In an action for slander, evidence showing that while the plaintiff was in the defendant's store the latter in demanding payment on a disputed account called the plaintiff, in the presence of third persons, a thief, a liar, and a beat, and that subsequently in the courthouse, while the action was awaiting trial, the defendant stated in the presence of third persons that he had called the plaintiff a liar and a thief and could prove it, requires the submission of the case to the jury on the theory that the defendant had charged the plaintiff with a crime, it not being shown that the persons who heard the slanderous words did not so understand the language used. *Cain v. Shutt* (Md.), 12-102.

In such an action it is proper for the jury to consider on the question of malice and repetition of the slanderous words after the commencement of the action, or even under circumstances of privilege. *Cain v. Shutt* (Md.), 12-102.

In an action for slander, held to be for the jury to determine whether the words charging the robbery imputed to the plaintiff a crime involving moral turpitude. *Flaacke v. Stratford* (N. J.), 5-854.

Tendency to injure. — Where the plaintiff's portrait was inserted in a whiskey advertisement with a testimonial signed with the name of another person, whose occupation was given as a nurse, the question whether the advertisement is calculated seriously to injure the standing of the plaintiff with a considerable and respectable class in the community is for the jury, and, consequently, it is error for the trial court to exclude the plaintiff's testimony in support of her allegations and direct a verdict for the defendant. *Peck v. Tribune Co.* (U. S.), 16-1075.

Question of privilege. — In an action for slander, where the facts and circumstances under which the words were spoken are undisputed, the question of privilege is one of law for the court to determine. *Carpenter v. Ashley* (Cal.), 7-601.

Whether a writing which is charged to be libelous comes within a qualified privilege is a question for the court and not for the jury. *Byrne v. Funk* (Wash.), 3-647.

Whether slanderous words uttered were a privileged communication depends upon the circumstances under which they were uttered; and whether the facts and circumstances when conceded establish a privilege, is a question of law for the court; but when the facts and circumstances under which the communication was made are not conceded, the court cannot as a matter of law determine whether the communication was privileged, and the jury must determine the facts, under proper instructions from the court. *Abraham v. Baldwin* (Fla.), 10-1148.

In determining whether a communication is privileged, the nature of the subject, the right, duty, or interest of the parties in such subject, the time, place, and circumstances of the occasion, and the manner, character, and extent of the communication, should all be considered. When all these facts and circumstances are conceded, the court may decide.

whether the communication is a privileged one, so as to require the plaintiff to prove express malice. But when all the essential facts and circumstances are not conceded, the existence or nonexistence of a privilege should be determined by the jury from all the facts and circumstances of the case, under proper instructions of the court applicable to the case. *Abraham v. Baldwin* (Fla.), 10-1148.

In an action for libel, where the defense of privilege is set up, it is for the court to determine whether the occasion was privileged, but if there is any dispute as to the occasion upon which the communication was written it is for the jury to find the facts upon which the question of privilege depends. *Denver Public Warehouse Co. v. Holloway* (Colo.), 7-840.

Article as referring to plaintiff. — Where it appears in an action for libel that the libelous article described the plaintiff by his right name and contained a paragraph which referred to events in his life, but that interwoven with these statements were others which those intimately acquainted with the plaintiff's work and residence might have known not to be true of him, the question whether the article was published of and concerning the plaintiff is properly left to the jury to be determined as a question of fact. *Ellis v. Brockton Pub. Co.* (Mass.), 15-83.

Exemplary damages. — Where the character of a libelous article and the evidence relating to the publication thereof indicate that it was prompted by actual malice or that the defendant acted with recklessness or careless indifference to the rights of the person libeled, the plaintiff is entitled to have the question of exemplary damages submitted to the jury. *Russell v. Washington Post Co.* (D. C.), 14-820.

g. Instructions.

Words libelous per se. — In an action for libel, where the words laid in the declaration are clearly defamatory and are unambiguous and incapable of innocent meaning, the court may instruct the jury that the plaintiff is entitled to recover if the jury believes from the evidence that the plaintiff published the libel as charged in the declaration. *Dowie v. Priddle* (Ill.), 3-526.

In an action for slander it is not error for the court to charge the jury that where a person has uttered words of and concerning another, charging criminal conduct, "the law imports liability" therefore, since the quoted words so used mean no more than an accountability to an action in which liability would be determined. *Abraham v. Baldwin* (Fla.), 10-1148.

Falsity of publication. — In an action for libel, based on the publication by the defendant of a charge that the plaintiff, a business rival, had no live, valid patent for the manufacture of a certain article, where the evidence shows that plaintiff has live, valid patents relating to the manufacture of the article in question, it is not error for the trial court to call the attention of the jury to that

fact in its charge, and instruct them that the defendant "was wrong" in making the statement. *Sternberg Mfg. Co. v. Miller, etc., Mfg. Co.* (U. S.), 18-69.

Justification. — In an action for libel, an instruction requested by the defendant which suggests that the libel was justifiable in view of the fact that the plaintiff had previously libeled the defendant, and which ignores the fact that the publication seeks to have that question submitted to the jury, is properly refused. *Sternberg Mfg. Co. v. Miller, etc., Mfg. Co.* (U. S.), 18-69.

In an action for libel, it is erroneous to instruct the jury that a suspicion or belief in the mind of the publisher that the article published was true constitutes no justification of the charge, and that the publisher must not only prove that there was such belief and suspicion, but must prove the truth of the identical charge. *Denver Public Warehouse Co. v. Holloway* (Colo.), 7-840.

Privileged communications. — In an action for slander, where there is the plea of a privileged communication, and the testimony tends to show the interest of both the defendant and of the person to whom the slanderous words were spoken in the subject of the communication, and there is testimony of tending to show the good faith of the defendant in the belief that the communication was true, and also testimony that the slanderous words were uttered on a public street in a high tone of voice in the presence of others not interested in the subject of the communication, one of whom was a hackman who drove the defendant to the place where the slanderous words were spoken, it is error for the court to charge that "there is no testimony in this case to establish the defendant's plea of privileged communication which the jury would be warranted in considering," since the facts and circumstances attending the communication not being conceded, the jury should determine, under proper instructions from the court, whether the communication was privileged. *Abraham v. Baldwin* (Fla.), 10-1148.

Instruction as to other libels. — In an action for libel an instruction as to other libels held error. *Paxton v. Woodward* (Mont.), 3-546.

Requested instruction not based on evidence. — Where, in an action for slander, the slanderous words charged the plaintiff with stealing pulleys and ropes, a prayer that if the jury find that the words had reference to fixtures not the subject of larceny the plaintiff is entitled to recover only nominal damages is properly refused when there is nothing to show that the pulleys and rope were anything else than goods and chattels. *Shockey v. McCauley* (Md.), 4-921.

Duty to instruct as to measure of damages. — In an action for damages for slander the trial court should instruct as to the measure of damages. *Irvine v. Gibson* (Ky.), 4-569.

Damages sustained in employment. — In an action for libel it is not erroneous to instruct the jury that in estimating the damages sustained by the plaintiff they may

include such as she has sustained "in her occupation and calling as a laundress," even though the evidence does not show that the plaintiff has lost her employment or been deprived of her wages, if her evidence shows that she has not been able to work as before the publication of the libel and that she has had to obtain help in her work on account of her weakened condition. *Washington Times Co. v. Downey* (D. C.), 6-765.

Confining damages to such as were sustained in professional capacity. — Where an action for libel is confined by the terms of the complaint to such damages as the plaintiff may have sustained in his professional capacity, an instruction excluding from the jury all consideration of damage to the plaintiff as an individual is proper. *Paxton v. Woodward* (Mont.), 3-546.

Punitive damages. — In an action of slander for words charging the commission of a crime it is proper to instruct the jury that if they find for the plaintiff they are at liberty in their discretion to award punitive as well as compensatory damages. *Shockey v. McCauley* (Md.), 4-921.

Mitigation of damages. — In an action for libel where the article complained of as libelous professes to be based on the defendant's own knowledge, it is error for the court to instruct the jury that if they find that the defendant derived his information from other persons, they may consider that fact in mitigation of damages. *Dorn v. Cooper* (Ia.), 16-744.

In such an action it is also error for the court to instruct the jury that if they find that the defendant was ignorant of the existence of the plaintiff firm at the time when the article complained of was published, they may consider that fact in mitigation of damages. *Dorn v. Cooper* (Ia.), 16-744.

h. Damages.

Mental suffering. — No special damages need be proved. The actual pecuniary damages in an action for libel can rarely be proved and is never the sole rule of assessment. Mental suffering alone can be made the basis for damages. *Jozsa v. Moroney* (La.), 19-1193.

In an action for libel based on words that are actionable *per se* as tending to bring plaintiff into contempt, ridicule, and disgrace, damages may be recovered for the mental suffering endured by the plaintiff as a natural and direct result of the publication. *Washington Times Co. v. Downey* (D. C.), 6-765.

The use of the words "actual injury" in the Massachusetts statute relating to libel and providing that "unless the plaintiff proves actual malice or the want of good faith, or a failure to retract as aforesaid, he shall recover damages only for the actual injury sustained, but in no action of libel shall exemplary or punitive damages be allowed," does not change the rule which prevailed in that state prior to the enactment of the statute that in actions for libel or slander the damages include compensation

for the plaintiff's mental suffering and the injury to his reputation. *Ellis v. Brockton Pub. Co.* (Mass.), 15-83.

Counsel fees. — Counsel fees paid by the plaintiff are not ordinarily recoverable as damages in an action for slander. *Warren v. Ray* (Mich.), 16-514.

Punitive damages. — In an action for libel or slander the right to recover punitive damages depends upon the presence of actual malice or malice in fact; and where such damages are claimed, the presence of actual malice, and its degree, is a vital and material question. In such a case the defendant may, under a sufficient answer, testify directly to his intent or motive, and also as to the facts and circumstances within his knowledge tending to characterize his motive. *Wrege v. Jones* (N. Dak.), 3-482.

In an action for slander, where there is no proof that the defendant entertained any actual malice or ill will towards the plaintiff, but, on the contrary, the evidence tends to show that the words complained of were spoken of the plaintiff by mistake, defendant having confused plaintiff with another person, the allowance of exemplary damages is improper. In such a case, the award by the jury should be confined to compensatory damages. *Greer v. White* (Ark.), 17-270.

Mitigation of damages. — That a libel was copied from another paper is not a defense to an action brought for its publication, but under proper circumstances such fact may be pleaded and shown in mitigation of damages. *Sheibley v. Huse* (Neb.), 13-376.

i. Appeal and error.

Instructions. — Under the Montana constitution providing that in an action for libel the jury shall determine the law and the fact, it is the duty of the court to instruct the jury, and an erroneous statement of law in the instruction prejudicing the plaintiff is reversible error. *Paxton v. Woodward* (Mont.), 3-546.

An incorrect statement of the law in the charge in a libel case is reversible error, notwithstanding the right of the jury to determine the law as well as the facts, if there is nothing to rebut the presumption that the jury accepted the charge as a correct statement of the law. *Rood v. Dutcher* (S. D.), 20-480.

In an action for slander based on the charge of fornication, an instruction is erroneous which tells the jury in effect to find for the plaintiff if the words used by the defendant amounted to charging the plaintiff with fornication, without regard to whether such words were substantially the same as those set out in the complaint; but the error is not prejudicial where there is evidence tending to show that the defendant uttered the words set out in the complaint and there is no evidence to show that he used any other words which could be taken as charging fornication. *Miller v. Neckolls* (Ark.), 7-110.

Examination of witnesses. — In an action for slander it is not erroneous for the

trial court to refuse to permit the defendant to interrupt the direct examination of the plaintiff as a witness to the defendant's financial standing in order to permit cross-examination upon that subject, where the court states that such cross-examination may be made at the conclusion of the direct examination. *Flaacke v. Stratford* (N. J.), 5-854.

Harmless error in ruling on pleadings. — In an action for libel, where special replications are filed to special pleas of justification, and the trial court, after sustaining a demurrer, to the special replications, becomes satisfied that the special pleas are bad, the proper course is to withdraw the case from the jury, set aside the order sustaining the demurrer, carry the demurrer back to the special pleas, enter an order sustaining the demurrer to said pleas, and permit the defendant to stand by his pleas or plead over; but failure to adopt such course is not ground for reversal where it works no harm to the defendant. *Dowie v. Priddle* (Ill.), 3-526.

5. CRIMINAL LIABILITY.

Under Michigan statute. — One who circulates a libel is guilty of an offense under the Michigan statute. *Mark v. Sharp* (Mich.), 5-109.

Place of prosecution. — The act of publication with malicious intent being the gravamen of criminal libel, the editor of a newspaper who thereby starts in motion unlawful means to injure the good name of another person may, in the absence of legislative restriction, be prosecuted therefor in any county within the state wherein his libelous publication is circulated. *State ex rel. Taubman v. Huston* (S. Dak.), 9-381.

6. VALIDITY OF STATUTES.

The Philippine libel law, being one of the laws of the Philippine commission appointed by the President to legislate for the islands in accordance with a resolution of Congress, was a lawful enactment, Congress having power to authorize a temporary government of this character. *Dorr v. United States* (U. S.), 1-697.

LIBERTY.

Deprivation of liberty without due process of law, see CONSTITUTIONAL LAW, 9.
Personal liberty, see PRIVACY, RIGHT OF.

LIBERTY OF CONTRACT.

See CONSTITUTIONAL LAW.
Reasonable restriction of, see CONSTITUTIONAL LAW, 5 b.

LIBERTY OF SPEECH AND PRESS.

See CONSTITUTIONAL LAW, 17.

LICENSE (REAL PROPERTY).

Effect of ticket of admission to place of public amusement, see THEATRES AND PUBLIC RESORTS, 2 a.

Injury to licensee by explosion, see EXPLOSIONS AND EXPLOSIVES, 1 a.

Injuries to licensees generally, see NEGLIGENCE, 3.

Liability of railroad for injuries to licensees, see RAILROADS, 8 e.

Duration of parol license in general.

— If one person without consideration verbally grants the use of his land to another, regardless of whether, when the permission is given, the parties contemplate that the privilege will be permanent, and whether such other enters upon the land and expends money to facilitate the enjoyment of the privilege, the transaction creates only a mere license revocable at the pleasure of the person granting it. *Huber v. Stark* (Wis.), 4-340.

Duration where licensee has expended money under parol license.

— An executed parol license on the faith of which the licensee has expended money or labor, is not revocable at the pleasure of the licensor. *Gyra v. Windler* (Colo.), 13-841.

Where the licensee has entered under a parol license and has expended money or its equivalent in labor in the execution of the license, the license becomes irrevocable, the licensee has a right of entry upon the lands of the licensor for the purpose of maintaining his right under his license, and the license will continue for so long a time as the nature of it calls for. *Stoner v. Zucker* (Cal.), 7-704.

Where the licensee has expended money or its equivalent in labor in the execution of a parol license for the construction of irrigation ditches, drains, and the like, the license becomes in all essentials an easement, continuing for such length of time under the indicated conditions as the use itself may continue. *Stoner v. Zucker* (Cal.), 7-704.

LICENSES.

1. NATURE OF LICENSE FEES, 1066.
2. POWER TO REQUIRE LICENSE OR IMPOSE TAX, 1066.
 - a. Of states, 1066.
 - b. Of municipal corporations, 1066.
3. CONSTITUTIONALITY OF STATUTES AND ORDINANCES, 1066.
4. CONSTRUCTION OF STATUTES AND ORDINANCES, 1068.
5. PARTICULAR OCCUPATIONS, 1068.
6. POWERS OF BOARDS OF COMMISSIONERS, 1068.
7. REVOCATION, 1068.

Compelling issuance of licenses, see MAN-DAMUS, 2 f.

Expression in title of subject of statute for licensing barbers, see STATUTES, 3 b.

Exemption of persons in business at time of enactment of statute, see **PHYSICIANS AND SURGEONS**, 1.

Grant of exclusive privileges, see **MONOPOLIES AND CORPORATE TRUSTS**, 5.

Implied agreement for exclusive license, see **PATENTS**, 2.

Imposition of license tax on foreign corporations, see **CORPORATIONS**, 13 c (2).

License fees, see **CONSTITUTIONAL LAW**, 5.

License tax on bill boards, see **ADVERTISEMENTS**.

Licensing dentists, see **PHYSICIANS AND SURGEONS**, 1 b.

Limitation of action to revoke physician's license, see **LIMITATION OF ACTIONS**, 3.

Marriage licenses, see **MARRIAGE**, 1 b.

Marriage license as evidence in bigamy case, see **BIGAMY**, 4.

Occupation taxes on dealers in articles of food, see **FOOD**, 2.

Particular occupations and things requiring licenses, see **DRUGS AND DRUGGISTS**; **GAMING AND GAMING HOUSES**, 1 e; **HAWKERS AND PEDDLERS**; **INTOXICATING LIQUORS**, 3 d; **MOTOR VEHICLES**, 1 b; **PAWNBROKERS**; **PHYSICIANS AND SURGEONS**.

Power of municipality to impose license or privilege taxes, see **MUNICIPAL CORPORATIONS**, 4 e.

Regulation of dealers in tickets of places of public amusement, see **THEATRES AND PUBLIC RESORTS**, 2 a.

Revocation of license of foreign corporation for removing cause to federal court, see **REMOVAL OF CAUSES**, 1.

Revocation of school teacher's license, see **SCHOOLS**, 7 c.

Taxing electric light company as manufacturer, see **ELECTRICITY**, 1.

Validity of contract by unlicensed real estate agent, see **BROKERS**, 1 b.

1. NATURE OF LICENSE FEES.

License fees not a tax. — A statute requiring the vendors of milk to procure a license from the milk inspector does not impose a tax though license fees are paid into the state treasury, and is therefore not void because the collection of fees is intrusted to another than the county treasurer. *State v. McKinney* (Mont.), 1-579.

Distinction between license fee and tax. — The difference between a license fee and tax stated. *Phœbus v. Manhattan Social Club* (Va.), 8-667.

2. POWER TO REQUIRE LICENSE OR IMPOSE TAX.

a. Of states.

In general. — Under the constitutional provisions of South Dakota the legislature has power to impose taxes on occupations. *In re Watson* (S. Dak.), 2-321.

Occupation tax on person in business on interstate ferryboat. — It is within the power of a state to exact a privilege tax from one selling liquors at retail on a ferryboat engaged in interstate commerce while

at its landing within the jurisdiction of the state. *Harrell v. Speed* (Tenn.); 3-260.

Effect of grant of charter to corporation. — The grant of a charter to a corporation authorizing it to carry on a certain business does not import that it may engage therein without contributing to the support of the government by the payment of an occupation tax. *Mercantile Inc. Co. v. Junkin* (Neb.), 19-269.

b. Of municipal corporations.

Necessity for statutory authority. — The power to impose license fees upon persons in the pursuit of a particular occupation is not inherent in a municipal corporation and will not be held to exist unless conferred on the municipality by the state. *Commissioners v. Cambridge Water Co.* (Md.), 2-311.

Power of legislature to authorize tax by municipality. — In the absence of constitutional restrictions, the legislature may as a general rule impose a license tax intended as a police regulation either directly or through the agency of cities or towns, and may properly authorize such cities or towns to impose a license tax upon any industry or upon the right to transact any business which falls within the scope of police regulations. The power may also be exercised concurrently by both state and municipal governments. *Johnson v. Great Falls* (Mont.), 16-974.

Imposition of tax as police regulation. — The fact that a municipality has no power to prohibit the pursuit of a profession by refusing to license it, does not prevent such municipality from imposing a license tax on such profession when authorized to do so as a police regulation. *Johnson v. Great Falls* (Mont.), 16-974.

Municipal ordinance held ultra vires. — A municipal ordinance exacting a license fee from persons using or maintaining fire plugs held *ultra vires* and not a legitimate exercise of the police power. *Commissioners v. Cambridge Water Co.* (Md.), 2-311.

License tax for sale of intoxicating liquors by social club. — Under a statute providing that "in addition to the state tax on any license, the council of a city or town may, when anything for which a license tax is so required is to be done within the city or town, impose a tax for the privilege of doing the same and require a license to be obtained therefor," a town has the power to impose a license tax for the sale of intoxicating liquors by social clubs. *Phœbus v. Manhattan Social Club* (Va.), 8-667.

3. CONSTITUTIONALITY OF STATUTES AND ORDINANCES.

Deprivation of equal protection of the laws. — An excise tax operating uniformly does not deprive any of the equal protection of the laws. *State ex rel. Taylor v. Guilbert* (Ohio), 1-25.

The constitution contains no express limitation on the power of the legislature to provide for taxes on licenses; but such power should not be so exercised as to deprive any

person of property without due process of law, or so as to deny to any person the equal protection of the laws. *Harper v. Galloway* (Fla.), 19-235.

Imposition of license tax on persons engaged in interstate commerce. — The Idaho statute requiring peddlers or solicitors taking orders for goods to obtain a license and pay a tax is in violation of the interstate commerce clause of the Federal Constitution when applied to persons acting as agents and solicitors for citizens of other states, in the sale of property not at the time within the state. *In re Kinyon* (Idaho), 2-699.

The Massachusetts statute requiring a foreign corporation having a place of business in the commonwealth, or engaged in the commonwealth in a certain kind of work, annually to file a certificate of certain facts and to pay an excise license tax, while inapplicable to corporations maintaining a place of business solely for the purposes of interstate commerce, is applicable to corporations engaged in interstate commerce and at the same time maintaining a place of business for other purposes, and as thus construed is not in violation of the Federal Constitution as a regulation of interstate commerce. *Atty.-Gen. v. Electric Storage Battery Co.* (Mass.), 3-631.

Imposition of license tax on canvasser of goods shipped from another state. — The Washington statute requiring a license tax to be paid by "every person, firm, or corporation who peddles out, or, after shipment to the state, canvasses and sells by sample to users or consumers" certain specified articles, must be construed as requiring a license of a canvasser selling goods shipped from a sister state but not requiring a license of a canvasser selling goods manufactured within the state, and as so construed is void as contravening the Federal Constitution. *Bacon v. Locke* (Wash.), 7-589.

Statute prohibiting peddling without license exempting certain classes. — The Missouri statute prohibiting peddling without a license does not violate the provisions of the state and federal constitutions against class legislation because it exempts from its operation peddlers of "pianos, organs, sewing machines, books, charts, maps, stationery, agricultural and horticultural products, including milk, butter, eggs, and cheese." As such a statute is a police regulation, the legislature has the power to distinguish between peddlers of the exempted articles and peddlers of other articles. *State v. Webber* (Mo.), 15-983.

The provision of the Missouri constitution requiring taxes on all property within the territorial limits of the authority levying such taxes to be equal and uniform, has no application to such a statute. *State v. Webber* (Mo.), 15-983.

Effect of constitutional provision giving legislature authority to impose license tax. — The provision of the Montana constitution giving to the legislature authority to raise revenue by the imposition

of a license tax on persons or corporations doing business in the state has the effect of prohibiting any body other than the legislature from imposing such a revenue tax. Consequently the legislature cannot delegate such authority to a municipality. *Johnson v. Great Falls* (Mont.), 16-974.

Constitutional provision that franchise taxes shall be proportionate to value. — A statute providing that no corporation shall do business in the state "without a state occupation permit" to be granted on the payment of a certain fee (Laws Neb., 1909, c. 25) does not impose a tax on the corporate franchise, and therefore does not violate the constitutional provision (Const. Neb., art. 9, § 1) that a franchise tax shall be in proportion to the value of the franchises taxed. *Mercantile Inc. Co. v. Junkin* (Neb.), 19-269.

Constitutional provision authorizing legislature to empower cities to impose taxes for revenue. — The fact that the constitution expressly authorizes the legislature to empower cities and towns to assess and collect taxes for revenue does not impliedly prohibit the legislature from empowering cities and towns to impose a license tax as a police regulation. *Johnson v. Great Falls* (Mont.), 16-974.

Power of legislature to authorize city to impose license fee on vehicles. — The state legislature has power to authorize a city to pass an ordinance requiring vehicles using its streets to pay license fees, even if the license fees so required are to be only. *Harder's Fire Proof Storage, etc., Co.* considered in the nature of a tax for revenue *v. Chicago* (Ill.), 14-536.

The fact that license fees required by a city ordinance of vehicles using the streets of a city are to be set aside as a special fund for improving and repairing the streets does not render unconstitutional the ordinance or the statute in pursuance of which it is passed. *Harder's Fire Proof Storage, etc., Co. v. Chicago* (Ill.), 14-536.

Effect of exemption of certain class of vehicles in ordinance. — A city ordinance imposing a license fee or tax upon the owner of every vehicle or conveyance used on the city's streets "in carrying persons or property for hire" is not unconstitutional because it exempts from taxation "vehicles kept and used strictly and entirely in ordinary livery business." *Des Moines v. Bolton* (Iowa), 5-906.

Exemption of veterans of civil war. — The South Carolina statute providing that "all soldiers and sailors of the Confederate states who enlisted from this state, and who were honorably discharged from such service, shall hereafter be exempt from any license for the carrying on of any business or profession," is violative of the prohibition of the state and federal constitution against the denial of equal protection of the laws, as it ignores the veterans of other wars than the Civil war, and ignores those soldiers of the Confederacy who enlisted from other states and were honorably discharged. *Laurens v. Anderson* (S. Car.), 9-1003.

4. CONSTRUCTION OF STATUTES AND ORDINANCES.

What constitutes keeping vehicle for hire. — A vehicle used by its owner for the transportation of persons or property for hire, but not let out or rented by him, is "kept for hire" within the meaning of the Iowa statute authorizing cities to regulate and tax "every description of conveyance kept for hire." *Des Moines v. Bolton* (Ia.), 5-906.

Application of statute to villages. — The Illinois statute giving "the city council in cities, and the president and board of trustees in villages," power to "direct, license, and control all wagons and other vehicles, conveying loads within the city," applies to villages as well as to cities. *Harder's Fire Proof Storage, etc., Co. v. Chicago* (Ill.), 14-536.

Collection of tax from persons unlawfully engaging in business. — The statutory tax imposed upon the privilege of selling intoxicating liquors is collectible from persons who unlawfully sell such liquors in prohibited territory, because a business which is prohibited may be taxed. *Foster v. Speed* (Tenn.), 15-1066.

5. PARTICULAR OCCUPATIONS.

Plumbers. — The Washington statute requiring plumbers to be examined as to their qualifications and to take out licenses is not a valid police regulation. *State ex rel. Richey v. Smith* (Wash.), 7-577.

Undertakers and embalmers. — A statutory provision that no one shall be licensed as an undertaker unless he shall have been employed as an assistant to a licensed undertaker continuously for three years is unreasonable in that it makes essential a particular form of acquiring skill and knowledge, and forfeits the right to count the time so engaged in that particular education at each time when there is a break in the continuity of the service. *People v. Ringe* (N. Y.), 18-474.

The embalming of the bodies of the dead is not a necessary part of the business of an undertaker, and therefore the New York statute which forbids any one to engage in the business of undertaking unless he shall have been duly licensed as an embalmer (Public Health Law, § 295) violates the provisions of the Federal Constitution (amendment, XIV.) and the constitution of New York (art. 1, § 6) guaranteeing the rights and privileges of the citizen. *People v. Ringe* (N. Y.), 18-474.

The care of human dead bodies and the disposition of them by burial or otherwise is so related to the health and general welfare of the community that the business of undertaking may properly be regulated by license under the general police power of the state. *People v. Ringe* (N. Y.), 18-474.

Horseshoers. — A statute requiring horse-shoers to secure a license is unconstitutional. *In re Aubrey* (Wash.), 1-927.

6. POWERS OF BOARD OF EXAMINERS.

A statute vesting authority in a board of examiners to prescribe the qualifications of barbers does not give such a board the power to prescribe varying standards of qualifications for different applicants or arbitrarily to grant or refuse a license at will. *State v. Briggs* (Ore.), 2-424.

A statute making it unlawful for a person not a duly registered barber to conduct a barber school without the sanction of a board of examiners does not vest in such board power to grant or withhold such permission at its pleasure. *State v. Briggs* (Ore.), 2-424.

7. REVOCATION.

Power to revoke. — A statute authorizing the granting of a license may provide for its revocation in certain contingencies; and by accepting and acting under the license, the licensee consents to all conditions imposed thereby including provisions for its revocation. *Stone v. Fritts* (Ind.), 14-295.

Grounds for revocation. — Where a statute or ordinance authorizes the revocation of a license for causes enumerated, such license cannot be revoked on any ground other than the causes specified. *Stone v. Fritts* (Ind.), 14-295.

LIENS.

See ATTACHMENT, 5; CHATTEL MORTGAGES, 4; JUDGMENTS, 5 b; MECHANICS' LIENS; MORTGAGES AND DEEDS OF TRUST, 2.

Attorneys' liens, see ATTORNEYS AT LAW, 6. Carrier's lien for charges, see CARRIERS, 4 b. Changing priority as impairing obligation of contract, see CONSTITUTIONAL LAW, 15 a.

Discharge in bankruptcy as divesting lien for rent, see BANKRUPTCY, 9.

Effect of decree for alimony, see ALIMONY AND SUIVIT MONEY, 4 f.

Enforcement of salvage lien in common law courts, see SALVAGE.

Factor's right to lien on principal's goods, see FACTORS, 5.

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Lien of equitable mortgages, see MORTGAGES AND DEEDS OF TRUST, 2.

Partnership creditors' right to lien of firm property, see PARTNERSHIP, 5 b.

Purchaser's lien, see VENDOR AND PURCHASER, 3 h.

Right of bank to lien on money collected, see BANKS AND BANKING, 6.

Right of corporation to lien on shares for debts of stockholders, see CORPORATIONS, 8 f.

Statutory lien for wages, see MASTER AND SERVANT, 2 a.

Subrogation to laborers' liens by advancing money to pay wages, see SUBROGATION, 1 e.

Tax liens, see TAXATION, 7.

Vendor's lien, see **VENDOR AND PURCHASER**, 3 g.
Water rates as lien on premises, see **WATERS AND WATERCOURSES**, 4 b.
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Persons entitled to lien as "farm laborer." — A woman employed in a family living upon a farm, who does ordinary housework and assists in cooking meals for laborers doing the farm work, is not a "farm laborer" within the meaning of section 6277, Rev. Codes 1905 [of North Dakota], giving a lien for the wages of farm laborers. *Lowe v. Abrahamson* (N. Dak.), 20-355.

Thresher's lien. — The North Dakota statute gives to threshers of grain an enforceable lien thereon upon filing a statement therefor within thirty days from the threshing, and such lien exists from the commencement of the threshing. *Mitchell v. Monarch Elevator Co.* (N. Dak.), 11-1001.

A thresher is entitled to a lien on all the grain threshed for threshing any particular kind of grain, when done under the same contract, and such lien is enforceable between the parties. *Mitchell v. Monarch Elevator Co.* (N. Dak.), 11-1001.

Statement for lien. — A statement for a thresher's lien pursuant to the North Dakota statute, which requires the statement to show the amount and quantity of grain threshed, need not state the number of bushels of each kind of grain threshed, when the total amount of the lien appears from the statement. *Mitchell v. Monarch Elevator Co.* (N. Dak.), 11-1001.

A statement for a thresher's lien must contain everything required by the statute to be stated therein, and nothing more. *Mitchell v. Monarch Elevator Co.* (N. Dak.), 11-1001.

Statement for a thresher's lien considered, and held to give a sufficient description of the land on which the grain was grown. *Mitchell v. Monarch Elevator Co.* (N. Dak.), 11-1001.

Rights of lienor. — A lienor who is in actual possession of personal property upon which he has a lien, is the owner of such property against all the world, including the actual owner, until his claim is paid; and if, without payment of his claim, the property is taken from his possession and sold under an execution issued against the actual owner, he may thereafter maintain appropriate proceedings to assert his right of ownership, though he has purchased the property at the execution sale. *Brown v. Peterson* (D. C.), 4-980.

Rights of purchaser of property subject of lien. — A person purchasing grain during thirty days after its threshing in the regular course of business is not an innocent purchaser thereof, although the statement has not been filed when the purchase is made. *Mitchell v. Monarch Elevator Co.* (N. Dak.), 11-1001.

LIFE.

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LIFE ESTATES.

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 - a. Possession of principal fund, 1069.
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 - c. Dividends on corporate stock, 1070.
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Fixtures as between life tenant and remainderman, see **FIXTURES**, 5.

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Validity to appoint life estate under power to appoint fee, see **POWERS**.

1. **RIGHTS OF LIFE TENANT.**

- a. Possession of principal fund.

In absence of testamentary direction.

— In the case of a bequest of money for life, the life tenant is not entitled to possession of the principal sum, unless the will discloses an intention on the part of the testator that he shall have possession, but it is the duty of the executor to hold the principal in trust and to pay the interest only to the life tenant. *Payne v. Robinson* (D. C.), 6-784.

Will construed. — A will construed and held not to disclose an intention on the part of the testator that the legatee shall have possession of the principal of a sum of money bequeathed to him for life. *Payne v. Robinson* (D. C.), 6-784.

Proceeds in partition. — The right of a life tenant is to the use and not to the corpus of the estate, and where his title is to an undivided interest and not to the whole of the land, and a sale is ordered for partition, his right in the proceedings is not a part proportionate to the undivided interest in which he has the life estate, but is to the interest on that part as long as the life estate may continue to exist. *Swayne v. Lone Acre Oil Co.* (Tex.), 8-1117.

- b. Increase in value of trust fund.

Fortunate investments. — Where the income of certain property is to be paid over

to one person for life with remainder to another, the life tenant is not entitled to the increase of the fund by reason of the fortunate investments of the trustee of the fund. *Letcher v. German Nat. Bank* (Ky.), 20-815.

Sale of good will. — Where a testator bequeaths stock in a manufacturing corporation in trust for life with remainder over absolutely, and after the death of the testator the plant and property of the corporation are sold to another corporation at a price largely in excess of its estimated value at the time of the testator's death, the sum received for good will on the sale of the works cannot be deemed income, but must be treated as an appreciation in the value of the *corpus* of the estate. *Matter of Stevens* (N. Y.), 10-511.

c. Dividends on corporate stock.

Cash or stock dividends. — Actual dividends, whether in cash or stock, are a part of the income of the stock of a corporation, and go to the life tenant and not to the remainderman; but so-called stock dividends, representing the natural growth or increase in the value of the physical property, goodwill, or other tangible thing of the corporation, go to the remainderman. *Kalbach v. Clark* (Iowa), 12-647.

Cash dividends are to be regarded as income passing to life tenants, while stock dividends are to be treated as capital inuring to the benefit of remaindermen. *Green v. Bissell* (Conn.), 9-287.

Where a corporation purchases its own stock, not with earnings, but with part of its assets, and distributes a portion of the stock as so-called stock dividends to the estate of a deceased stockholder, such stock becomes part of the *corpus* of the estate and belongs to the remaindermen under such stockholder's will, the corporation being unable, by declaring such stock to be income, to defeat the intention of the stockholder as expressed in his will. *Pabst v. Goodrich* (Wis.), 14-824.

d. Payment of incumbrance.

Right to reimbursement. — As a general rule a life tenant who, in order to preserve the estate, has paid off and discharged an incumbrance upon the fee, is entitled to reimbursement from the reversioners or remaindermen. *Tindall v. Peterson* (Neb.), 8-721.

Ordinarily, a life tenant who pays off an incumbrance upon the fee, will be entitled to be reimbursed by the reversioner or remainderman the amount so paid, less such sum as will equal the present value of the annual instalments of interest he would have paid during his life if the incumbrance had remained so long in existence, with lawful interest on the residue, so ascertained, from the date of payment. *Tindall v. Peterson* (Neb.), 8-721.

Payment by trustees. — Where a testator makes a devise in trust for the bene-

fit of his son, and the trustees, in the valid exercise of the power implied from the power to sell, execute a mortgage on the trust estate, and on the death of the *cestui que trust* the trustees, acting in accordance with the directions of the will, convey the property to a third person for life, with remainder over to his children, a court, for the purpose of protecting the interests of the infant remaindermen and of preventing a sale under the mortgage, may authorize the execution of another mortgage; and the court may also direct that part of the proceeds raised by the latter mortgage shall be used for the redemption of the property from a sale for delinquent taxes, notwithstanding the fact that the law imposes on the life tenant the duty of paying the taxes. *Lueft v. Lueft* (Wis.), 9-639.

2. LIABILITIES OF LIFE TENANT.

a. Premium on investment.

Premium on bonds. — Where the trustee of a fund devised in trust for life with remainder over absolutely, invests the fund in bonds which have a term of years to run and which are purchased at a premium, such a proportionate deduction should be made from the nominal interest collected as will at the maturity of the bonds make good the premium paid, and thus preserve the principal of the fund intact, unless the will contains a clear direction to the contrary; but if the bonds have been received from the estate of the testator, the whole interest collected on them should be treated as income, and the life tenant should not be charged with the premium. *Matter of Stevens* (N. Y.), 10-511.

b. Waste.

Liability in general. — In Texas, the common-law rules as to the incidents of life estates apply to statutory life estates, and therefore a surviving husband or wife holding for life under the statute of descent and distribution is subject to impeachment for waste. *Swayne v. Lone Acre Oil Co.* (Tex.), 8-1117.

Removal of oil. — A life tenant who is punishable for waste has no right to remove minerals from the land, if the land had not been devoted to mining purposes before the creation of his estate; and this rule applies to oil. *Swayne v. Lone Acre Oil Co.* (Tex.), 8-1117.

LIFE INSURANCE.

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1. NATURE, VALIDITY, AND CONSTRUCTION OF STATUTES.

a. Nature.

Purpose of enactment. — Statutes of limitations are enacted for the public well-being, and not solely for individual welfare. *Union Central Life Ins. Co. v. Spinks* (Ky.), 7-913.

b. Validity.

Power to enact in general. — It is within the power of the legislature to fix the period within which actions shall be brought, without making any exceptions whatever. *Lewis v. Pawnee Bill's Wild West Co.* (Del.), 16-903.

Altering time, or enacting statute, applicable to existing causes. — The legislature of a state may prescribe a period of limitations within which a right may be asserted even though no limitation existed when the right accrued, or it may shorten the period of limitation which existed when the right accrued, provided the new limitation is reasonable and affords an ample opportunity for the assertion of existing rights. *Tipton v. Smythe* (Ark.), 8-521.

It is within the power of the legislature to pass a statute of limitations or to change the period of limitation previously fixed and to make such statute or changes applicable to existing causes of action. Such statute, however, is not to be readily construed as having a retroactive effect, but is generally deemed to apply to causes of action arising subsequent to its enactment, and the presumption is against any intent on the part of the legislature to make it retroactive. *Hathaway v. Merchants' Loan, etc., Co.* (Ill.), 4-164.

The Arkansas statute concerning the payment and cancellation of overdue state bonds, and providing that the state treasurer shall call in such bonds by a public notice in the newspapers, etc., does not impose such unreasonable terms, either as to the limitation of time or the adequacy of the notice, that it deprives bondholders of their property without due process of law or impairs the obligations of their contracts. *Tipton v. Smythe* (Ark.), 8-521.

The Arkansas statute prescribing a period

of limitation within which outstanding overdue bonds of the state may be presented for payment and redemption, and providing for the payment in money of bonds presented within the time limited, is not unconstitutional as impairing the obligations of the contracts of the holders of such bonds, even though it deprives them of their statutory right to use their bonds in payment for certain lands, as there can be no higher method of discharging a past-due obligation than by payment in money. *Tipton v. Smythe* (Ark.), 8-521.

The Massachusetts statute requiring actions for tort for injuries to the person against counties, cities, and towns to be commenced within two years next after the cause of action accrues, instead of within six years as allowed by the previous statute, is to be construed as applying to existing causes of action, and is not unconstitutional as unreasonably limiting the time within which an existing claim may be sued on, although such claim may have existed for nearly two years so as to leave only the thirty days between the time of the passage of the act and the time of its taking effect, in which to bring the action. *Mulvey v. Boston* (Mass.), 14-349.

c. Construction.

In general. — The enumeration by the legislature of specific exceptions to the statute of limitations by implication excludes all others. *Atchison, etc., R. Co. v. Atchison Grain Co.* (Kan.), 1-639.

Under the Kansas statute of limitations providing that no action shall be maintained on a cause of action which "has arisen in another state" and is barred by the statute in such state, the word "arisen" as used in the statute means accrued, and refers to the time when the plaintiff has the right to sue the defendant in the courts of the foreign state, and does not refer to the origin of the transaction out of which the cause of action arises. *Bruner v. Martin* (Kan.), 14-39.

Prospective or retrospective. — In construing a statute of limitations, it must, so far as it affects rights of action in existence when the statute is passed, be held, in the absence of a contrary provision, to begin when the cause of action is first subjected to its operation. *In re Mosher* (Okla.), 20-209.

Statutes of limitation relate only to the remedy and the enforcement of rights and, as a general rule, control future procedure in reference to previously existing causes of action, where such statutes contain no language clearly limiting their application to causes of action arising in the future. *Mulvey v. Boston* (Mass.), 14-349.

A provision of a city charter limiting the time within which an action shall be commenced to enjoin the enforcement of an assessment levied by the city has no application to an assessment for work performed prior to the enactment of such charter. *Denver v. Dunning* (Colo.), 3-674.

The Illinois statute changing the time for filing claims against estates held to be pro-

spective, there being nothing in the statute indicating that the legislature intended it to be retroactive, and since to construe it as retroactive would conflict with the general statute providing that no law shall be construed to repeal a former law as to any right accruing under the former or arising before the new law takes effect. *Hathaway v. Merchants' Loan, etc., Co.* (Ill.), 4-164.

Giving new right of action with limitation. — Where a statute gives a right of action which did not exist at common law and fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition upon the right and will control, no matter in what form the action is brought. *Negaubauer v. Great Northern R. Co.* (Minn.), 2-150.

Repeal. — The special limitation provided by the Kentucky statute for actions by married women is not repealed by the Married Women's Act. *Higgins v. Stokes* (Ky.), 3-816.

2. WHAT LAW GOVERNS.

a. Cause of action accruing in foreign state.

In general. — As the statute of limitations affects the remedy and not the cause of action, an action upon a foreign contract is, with respect to such statute, governed by the *lex fori* or the law of the place where the motion is brought. *Union Stockyards Nat. Bank v. Maika* (Wyo.), 14-977.

Foreign judgment. — In an action on a foreign judgment, the statute of limitations of the state of the forum will control. *First National Bank v. Hazie* (R. I.), 8-1123.

Fire insurance policy. — An action to recover upon a fire insurance policy, though transitory, when brought in Ohio upon a cause arising in another state, is by virtue of the Ohio statute limited to the time fixed by the statute of such other state. *Hunter v. Niagara Fire Ins. Co.* (Ohio), 4-146.

Promissory note. — Under the Kansas statute of limitations providing that no action shall be maintained on a cause of action which has arisen in another state and is barred by the statute in such state, an action on a promissory note cannot be maintained where both the plaintiff and the defendant were nonresidents of the state when the cause of action accrued, and the defendant resided in a foreign state until the cause of action was barred by the laws of that state. *Bruner v. Martin* (Kan.), 14-39.

b. Action in federal court.

Enforcement of liability under federal statute. — The statute of limitations of a particular state is applicable to an action to enforce liability under a federal statute, in the absence of any provision in the latter. *McClaine v. Rankin* (U. S.), 3-500.

3. STATUTES APPLICABLE TO PARTICULAR ACTIONS.

Recovery of personal property. — So long as the owner of personal property

in the possession of another has not lost his title by lapse of time, he may sue to recover possession. *Lightfoot v. Davis* (N. Y.), 19-747.

Recovery of consideration for deed. — A recital in a deed that the grantor has conveyed the land to the grantee for a certain consideration is a sufficient written acknowledgment of facts, from which the law imports the obligation to pay, to make the statute of limitations relative to written promises the only one applicable to a proceeding to recover the unpaid consideration. *Fowlkes v. Lea* (Miss.), 2-466.

Injuries to real property. — Under the North Carolina statute, an action against a canal owner for permanently damaging adjoining real property by throwing sand and mud thereon is barred if not brought within three years from the completion of the wrong; and the five-year period of limitation provided by another section of the statute does not apply. *Cherry v. Lake Drummond Canal, etc., Co.* (N. Car.), 6-143.

Injuries to person. — An action by a husband against a city to recover for the loss of services of his wife and for the expenses of her illness resulting from a personal injury received by her through the alleged negligence of the defendant is an action "for injuries to the person" within the meaning of a statute of limitations providing that "actions of tort for injuries to the person, against counties, cities, and towns, shall be commenced only within two years next after the cause of action accrues." *Mulvey v. Boston* (Mass.), 14-349.

Action on foreign judgment. — Under the Yukon statute of limitations, an action on a judgment recovered in a foreign jurisdiction is barred, if not brought within six years after the recovery, though it is brought before the defendant has been within the domestic jurisdiction six years, as the cause of action arose on the day such judgment was recovered. *Rutledge v. U. S. Savings, etc., Co.* (Can.), 5-542.

Removal of cloud from title. — The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitation is not applicable. *Cooper v. Rhea* (Kan.), 20-42.

Setting aside tax deed. — The special statute of limitations provided by the Florida Revised Statutes of 1892 or by the Florida General Statutes of 1906, does not apply to a suit to set aside a tax deed where the calls in the deed are materially different from the lands described on the assessment roll and sold by the collector. *Saddler v. Smith* (Fla.), 14-570.

Specific performance of agreement relating to real property. — Where a mortgagor of land, who has remained in possession, brings suit to enforce specific performance of his agreement to purchase the land from the purchaser at the foreclosure sale, the statute of limitations governing actions to recover land held under a judicial sale has no application for the reason that the suit is not one to recover the land held

under a judicial sale, and for the further reason that the statute does not run against one in possession of land. *Phillips v. Jones* (Ark.), 9-131.

Verbal agreement against discriminations. — An action to recover for the violation of a verbal agreement in which there was a stipulation against discriminations accrues within three years after the agreement has been violated, and an averment that the defendant concealed the fact of discrimination from the plaintiff until less than eighteen months prior to the filing of the petition shows no ground for postponing the operation of the statute of limitations. *Atchison, etc., R. Co. v. Atchison Grain Co.* (Kan.), 1-639.

Railroad aid bonds. — The six-year statute of limitations is the one applicable to county railroad aid bonds. *Berkey v. Board of Comrs.* (Colo.), 20-1109.

Claim against decedent's estate. — A claim for funeral expenses is not a debt of the decedent, but a charge against the estate imposed by law, and therefore is not governed by the statute limiting the time within which an action must be brought to recover a debt. *Hildebrand v. Kinney* (Ind.), 19-788.

A claim against a decedent's estate for services of a physician procured for the decedent in his last illness and paid for by the claimant is an account on which the liability accrued in the decedent's lifetime, within the statute requiring actions on accounts to be commenced within six years. *Hildebrand v. Kinney* (Ind.), 19-788.

Action for penalty. — An action for a penalty under a statute repealed more than two years before the commencement of the action is barred by a statute providing that all actions to recover penalties shall be commenced within two years after the offense shall have been committed. *Western Union Tel. Co. v. State* (Ark.), 12-82.

Action for fraud. — An action on the case for fraud committed in the breach of a written contract is not governed by a statute of limitations providing that actions upon "written contracts" shall be commenced within ten years, but, in the absence of a statute specifically applicable to actions for fraud and deceit, is governed by a five-years' statute applicable to "all civil actions not otherwise provided for." *Bates v. Bates Machine Co.* (Ill.), 12-174.

The statute of limitations applying to actions for relief on the ground of fraud is not applicable to defenses. Hence, in an action on a promissory note where the defendant sets up in defense a discharge in bankruptcy and the plaintiff replies in avoidance of such discharge that the money for which the note was given was procured by fraud, whereupon the defendant rejoins that the fraud complained of is barred by limitation, the rejoinder is bad, as it directs the limitation to the defense and not to the cause of action, it not being necessary for the plaintiff to allege or prove the fraud except to avoid the defense of the discharge in bankruptcy.

Louisville Banking Co. v. Buchanan (Ky.), 4-929.

Where one practices upon another fraud and deceit whereby the latter is induced to accept property in settlement of a debt much greater in amount than the value of the property, an injury is done to property and not to the person, and the statute of limitations in reference to actions for injuries to property applies. *Crawford v. Crawford* (Ga.), 19-932.

Assessment levied on stockholders of national bank. — An action to recover on an assessment levied by the comptroller of the currency on a stockholder of an insolvent national bank is an action to enforce a statutory liability and not an action for breach of contract, and the limitation applicable is that which applies to actions to enforce a statutory liability. *McClaine v. Rankin* (U. S.), 3-500.

Revocation of license to practice medicine. — Under the Washington statute providing that a license to practice medicine may be revoked by the state examining board upon complaint charging unprofessional or dishonorable conduct, and that conviction of any offense involving moral turpitude shall constitute unprofessional or dishonorable conduct, an action by the state medical board to revoke a practitioner's license is not governed by any general statute of limitations and does not have to be brought within two years after the conviction on which the action is based. *State Medical Examining Board v. Stewart* (Wash.), 13-653.

Appointment of administrator. — Under the Idaho statutes, a proceeding for the appointment of an administrator is an "action," and since the time for instituting the same is not particularly prescribed by the statute, it must be commenced within four years after the right to apply for the administration accrues. *Gwinn v. Melvin* (Idaho), 2-770.

4. COMPUTATION OF TIME.

a. When statute begins to run.

(1) In general.

Exclusion of day of accrual of cause. — In determining whether a cause of action is barred by the statute of limitations, the day on which it accrued is excluded. *Nebola v. Minnesota Iron Co.* (Minn.), 12-56.

Accrual of debt or presentment of bill. — The statute of limitations begins to run from the accrual of the debt and not from the presentment of the bill for payment. *Hornblower v. George Washington University* (D. C.), 14-696.

(2) When cause deemed to accrue.

(a) Contracts.

Contract to devise land. — The statute of limitations does not begin to run against an action upon a *quantum meruit* for services rendered under a parol contract to devise land until the contract is broken,

that is, until the promisor dies without having made the devise. *Goodloe v. Goodloe* (Tenn.), 8-112.

Contract upon contingency. — A right of action against the estate of a decedent upon a promise of the deceased to give the plaintiff an interest in his business upon a specified contingency, could not accrue until demand and refusal, and no demand having been made in the lifetime of the deceased the cause of action does not accrue or the statute of limitations begin to run against the plaintiff's claim until after the death of the deceased. *Ott v. Boring* (Wis.), 11-857.

Recovery of principal of mortgage. — Where a mortgage contains an acceleration clause to the effect that in default of the payment of interest the principal sum shall become due and payable forthwith, the right of action to recover the principal accrues at once upon a default in the payment of interest, and the statute of limitations then begins to run against such right. *McFadden v. Brandon* (Ont.), 2-853.

Breach of written contract. — Where persons holding a policy of fire insurance have executed an agreement to the insurance company not to make any claim on or assignment of a policy supposed to be lost and to surrender said policy if the same shall be found, a right of action accrues in favor of the company upon the wrongful assignment of the policy to a third person, and the statute of limitations begins to run against the company for such breach of duty or contract from the time of the assignment of the policy, and not from the subsequent occurrence of actual damages by a recovery on the policy by the person to whom it has been wrongfully assigned. *Aachen, etc., Fire Ins. Co. v. Morton* (U. S.), 13-692.

Demand note. — Prescription on a demand note runs from the date of the note, and not from the date of the demand. *Darby v. Darby* (La.), 14-805.

Municipal or quasi-municipal obligations. — The statute of limitations does not run in favor of a municipal or quasi-municipal corporation upon its outstanding obligations evidenced by warrants until the corporation has provided a fund for their payment. *Barnes v. Turner* (Okla.), 2-391.

The rule of law that the statute of limitations does not begin to run in favor of a municipal organization on its outstanding warrants until it has money in its treasury to redeem them does not apply to its ordinary bonded indebtedness represented by negotiable bonds and interest coupons. *Schoenhoeft v. Board of County Com'rs* (Kan.), 14-100.

Subscription to corporate stock. — Where a portion of a subscription to a corporation is not presently payable, but is to be payable when called for by the corporation, there is no right of action against the subscriber for failure to pay such portion until the call is made, and hence no starting point for the statute of limitations, and it is not necessary that the call be made within the statutory period of six years from the date of the subscription in order to prevent

the bar of the statute of limitations. *Cook v. Carpenter* (Pa.), 4-723.

Compensation for services. — Where compensation for services is not to be made until a certain date or the happening of a certain event, full compensation may be recovered for all services performed prior to such date, as the statute of limitations does not begin to run until the period so fixed. *Cooper v. Colson* (N. J.), 1-997.

Mutual account. — Neither an amount collected by a creditor and credited on the debtor's account without any authority from the debtor, nor an item disconnected from the account, can be considered as creating a mutual account so as to put the statute of limitations in motion from the last item. *Cashmar-King Supply Co. v. Dowd* (N. Car.), 14-211.

Recovery of deposit in bank. — The statute of limitations does not begin to run against an action by a depositor against a bank to recover money deposited subject to check until he demands and is refused payment, as the right of action does not accrue until such time, unless the bank, by some act, has dispensed with the necessity for demand. *Koelzer v. First Nat. Bank* (Wis.), 4-1144.

Though a deposit of money in a bank is an open account current, it does not come within the Wisconsin statute providing that in actions brought to recover the balance due upon an open or mutual account current the cause of action shall be deemed to have accrued at the last item proved in such account, as demand for payment in the banking house during banking hours is essential to put the bank in default. *Koelzer v. First Nat. Bank* (Wis.), 4-1144.

(b) Torts.

Conversion by trustee. — When a trustee of an express trust denies the trust and assumes the ownership of the trust property, and this claim of ownership is brought home to the *cestui que trust*, a cause of action exists in favor of the latter from the time he receives notice of the repudiation of the trust, and the statute of limitations begins to run from that time. *Felkner v. Dooly* (Utah), 3-199.

A sale by a trustee of the trust property for his own benefit is a repudiation of the trust, and the statute of limitations against the *cestui que trust* runs from the time of such sale. *Yeager v. Bank of Kentucky* (Ky.), 16-537.

An executor of a will who agrees with a legatee to whom a sum of money has been bequeathed by the will, to hold the same and pay it to the legatee in monthly instalments, becomes the trustee of an express trust, and the statute of limitations does not run against a claim of the *cestui que trust* to an unpaid portion of the money until there is a clear disavowal of the trust by the trustee and such disavowal is brought to the knowledge of the *cestui que trust*. *Glennon v. Harris* (Ala.), 13-1163.

Conversion by attorney. — With respect to the claim of a client for money collected

by his attorney, the statute of limitations ordinarily begins to run from the expiration of the time within which the attorney should, under the circumstances, have paid the money over. *Goodyear Metallic Rubber Co. v. Baker* (Vt.), 15-1207.

Under the Vermont statute of limitations, if a reasonable time within which to pay over such money has not elapsed thirty days before the attorney's death, the action is not barred if otherwise it would be barred by the expiration of the statutory period. *Goodyear Metallic Rubber Co. v. Baker* (Vt.), 15-1207.

Conversion by life tenant. — Where a life tenant converts not merely the life estate, but the absolute and entire estate in the property, so as to defeat the enjoyment of the estate in remainder, the cause of action for such conversion accrues to the remaindermen as soon as the wrong is committed, and the statute of limitations runs from that time. *Yeager v. Bank of Kentucky* (Ky.), 16-537.

Where the owner of a life estate only in the income from shares of corporate stock wrongfully sells such shares and converts the proceeds to his own use, with the knowledge and assistance of the corporation, the five-years' statute of limitations against an action by the remaindermen for such conversion, as regards both the life tenant and the corporation, begins to run at the time of the sale, and after that period has expired an action cannot be maintained on the theory of a continuing and subsisting trust not subject to the statute of limitations. Whatever trust exists, as regards either the life tenant or the corporation, comes to an end when the property is sold. *Yeager v. Bank of Kentucky* (Ky.), 16-537.

Action for seduction of daughter. — A father's cause of action for the seduction of his daughter arises when the act of seduction is complete and not when he discovers the fact thereof. *Davis v. Boyett* (Ga.), 1-386.

Relief on ground of fraud. — The provision in the code that a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud, has no application to an action founded on contract. *Atchison, etc., R. Co. v. Atchison Grain Co.* (Kan.), 1-639.

Action for injury to subjacent support. — A cause of action accrues to the owner of the upper soil when the failure of support by the underlying strata, through causes put into operation by mining them, interferes with the utility and enjoyment of the superincumbent soil. *West Pratt Coal Co. v. Dorman* (Ala.), 18-750.

(c) Statutory liability.

Liability of bank directors for making unlawful loans. — A bill in equity by the receiver of a national bank against the bank's directors, to hold them liable for making unlawful loans, does not show on its face that the right of action is barred by limitation, though it shows that the statutory

period has elapsed since making the loans, unless it also shows that the statutory period has elapsed since the bank sustained damage or loss by reason of the loans. *Emerson v. Gaither* (Md.), 7-1114.

Enforcing liability of national bank stockholders. — The statute of limitations does not commence to run as to actions to enforce the liability of the stockholders of a national bank under the federal statute until after assessment has been made by the comptroller of the currency. *McClaine v. Rankin* (U. S.), 3-500.

(d) Subjecting real property fraudulently conveyed to payment of judgment.

The statute of limitations does not commence to run against a judgment creditor's right to subject, to the satisfaction of his judgment, real property which has been fraudulently conveyed by the judgment debtor, until the grantee under the conveyance enters into actual adverse possession of the land and so holds against the grantor and all other claimants; and this is so though the conveyance has been placed of record. *Baldwin & Co. v. Williams* (Ark.), 4-1097.

(e) Void decree of divorce.

A decree of divorce being void for want of legal service on the defendant and legal verification of the petition, the statute of limitations runs against a woman in whose favor such decree is rendered, from the death of her husband. *Hinkle v. Lovelace* (Mo.), 11-794.

b. Suspension or interruption of operation of statute.

(1) Absence or departure from jurisdiction.

Nonresident corporation. — A provision in a statute of limitations suspending the running of the statute in favor of nonresidents applies to a nonresident insurance company, and such suspension is not abrogated or affected by a later statute which authorizes service of summons against nonresident insurance companies upon the commissioner of insurance. *Green v. Hartford L. Ins. Co.* (N. Car.), 4-360.

Action for personal injuries. — The Delaware statute of 1897 providing that no action for personal injuries shall be brought after the expiration of one year from the date when the injuries were sustained, being a special or independent statute of limitations, complete in itself, is not subject to the exceptions contained in the general statute of limitations (Code, c. 123), and consequently the absence from the state of the person whose negligence caused the injuries does not extend the time limited for the commencement of such action. *Lewis v. Pawnee Bill's Wild West Co.* (Del.), 16-903.

Computation where debtor temporarily returns. — Under the California statute of limitations, a debtor who leaves the state after a cause of action has accrued

against him, but who, long after the action would be barred but for his absence, repeatedly visits the state openly and without concealment, remaining therein for prolonged periods, may, notwithstanding the fact that his creditor does not learn of his presence in the state before his departure therefrom, have such periods reckoned in his favor in ascertaining whether the entire time of his presence in the state after the accrual of the debt bars an action thereon. *Stewart v. Stewart* (Cal.), 14-940.

(2) Commencement of action.

Nonsuit for failure to give security for costs. — A judgment of dismissal rendered in an action for failure of the plaintiff to give additional security for costs is a nonsuit within the statute of limitations permitting a plaintiff who has suffered a nonsuit to commence a new action within one year, although the original cause of action be barred. *Wetmore v. Crouch* (Mo.), 3-94.

Action voluntarily dismissed without prejudice. — A voluntary dismissal without prejudice to a future action is a failure otherwise than upon the merits within the meaning of the Kansas statute providing that if the action is commenced in time, and the plaintiff fails in it otherwise than upon the merits, he may commence a new action within one year after the failure. Where the first action was prosecuted in a state court, a new action may be maintained in the federal court. The effect of such statute is to make an exception to the general statute of limitations of the state which is justifiable in the federal as well as in the state court. *Harrison v. Remington Paper Co.* (U. S.), 5-314.

Amendment of summons and complaint bringing in new party. — Where the summons and complaint in an action brought before the running of the statute of limitations are so amended after the running of the statute as to show that the defendant is sued individually instead of in a representative capacity, the amendment does not bring in a new party defendant, but merely changes the capacity in which the same defendant is sought to be charged, and therefore the defendant cannot contend that the action is barred by limitation. *Boyd v. United States Mortgage, etc., Co.* (N. Y.), 10-146.

Reassessment of benefits in condemnation proceedings. — A proceeding to reassess benefits in a condemnation proceeding, after a former assessment has failed of confirmation, is not a new action, but a continuation of the old one as regards the application of the statute of limitations. *Columbia Heights Realty Co. v. Rudolph* (U. S.), 19-854.

Proceeding commenced by third person. — The commencement of a proceeding to contest a will before the expiration of the statutory period allowed for contesting wills inures to the benefit of a party who intervenes after the expiration of such period. Consequently the statute of limitations is not available as a defense to the petition of

such intervener. *Maurer v. Miller* (Kan.), 15-663.

(3) Death of owner of real property.

Effect upon infant heirs. — Where the statute of limitations against an action to recover real property has begun to run against the owner during his life, the running of the statute is not interrupted by the death of the owner and descent cast upon infant heirs. *Garner v. Wingrove* (Eng.), 3-837.

When the statute of limitations has begun to run against an action by the owner of land for its recovery, the running of the statute is not interrupted by the death of the owner and his devise of the land in trust for infant devisees. *Garner v. Wingrove* (Eng.), 3-837.

Where the statute of limitations has begun to run against an ancestor, it is not interrupted by his death and the supervening disability of his infant heirs. *Scallion v. Manhattan R. Co.* (N. Y.), 7-168.

Prescription commenced during the lifetime of the ancestor will continue to run after his death against his heir, although the heir is an infant when his right accrues. *Scallion v. Manhattan R. Co.* (N. Y.), 7-168.

The New York statute regulating the running of the statute of limitations against an action concerning real property by a person under the disability of infancy "when his title first descends, or his cause of action or right of entry first accrues," does not change the rule that when the statute commences to run against the ancestor it continues to run after his death against his infant heir. *Scallion v. Manhattan R. Co.* (N. Y.), 7-168.

(4) Injunction against commencement of action.

In absence of statutory provision. — An injunction against the commencement of an action does not save the running of the statute of limitations unless the statute so provides, and no such provision is found in the statute of Ohio or in that of Florida. *Hunter v. Niagara Fire Ins. Co.* (Ohio), 4-146.

(5) Ignorance of existence of cause of action.

In general. — Mere ignorance of the existence of facts constituting a cause of action does not prevent the running of the statute of limitations. *Davis v. Royett* (Ga.), 1-386.

Ignorance due to fraudulent concealment. — An action for the conversion by a thief of the goods stolen by him is barred by the lapse of the statutory period, though the cause of action is fraudulently concealed from the plaintiff. *Lightfoot v. Davis* (N. Y.), 19-747.

Where the original basis of the action is not fraud, the fraudulent concealment of a cause of action from the knowledge of the person entitled thereto which will arrest the running of the statute of limitations must consist of acts or representations of an affirmative character which are designed to

prevent and do prevent the discovery of the cause of action, and mere silence by the person liable to the action is not sufficient. *Fortune v. English* (Ill.), 9-77.

The fraudulent concealment by an attorney of a cause of action against himself in favor of his client which will interrupt the running of the statute of limitations may consist of a misrepresentation of the state of the law or of the legal rules or principles applicable to the facts, if the misrepresentation is knowingly made for the purpose of deceiving the client; but this rule does not require the attorney to volunteer information to his client that the latter has a cause of action against him, and the running of the statute is not interrupted by incorrect information resulting from want of knowledge. *Fortune v. English* (Ill.), 9-77.

(6) Agreement to submit to arbitration.

An agreement to submit a controversy to arbitration does not operate to stop the running of the statute of limitations, unless one party uses the agreement as a means of inducing the other party to refrain from bringing suit until it is barred by the statute. *Hornblower v. George Washington University* (D. C.), 14-696.

(7) Insanity of person having right of action.

Where a personal injury caused by the actionable negligence of another, and resulting insanity, occur on the same day, the two events are legally simultaneous, for the law will not take notice of fractions of a day; and the disability of insanity exists at the time the cause of action accrues, within the meaning of the statute of limitations. *Nebola v. Minnesota Iron Co.* (Minn.), 12-56.

5. REVIVAL OF CAUSE OF ACTION.

a. Acknowledgment or part payment of debt in general.

Payment of interest on mortgage. — The payment of interest on a mortgage debt upon which a cause of action has accrued operates as a new promise to pay the debt and keeps the lien of the mortgage alive for the statutory period of limitation after such payment. *Hughes v. Thomas* (Wis.), 11-673.

Subsequent promise with relation to tort. — A right of action for falsely representing land to be unencumbered and selling it as such, although declared upon in assumpsit, is in tort, and not within the rule that a subsequent promise will remove the bar of the statute of limitations. *Nelson v. Petterson* (Ill.), 11-178.

New promise or part payment with relation to judgment. — A judgment does not come within the rule that a new promise or part payment suspends the operation of the statute of limitations and revives and continues the cause of action. *Olson v. Dahl* (Minn.), 9-252.

The rule that a new promise or part pay-

ment suspends the operation of the statute of limitations and revives and continues the cause of action applies only to contracts, express or implied, for the payment of money, and a judgment is not a contract within the meaning of the rule. *Olson v. Dahl* (Minn.), 9-252.

A cause of action becomes merged in the judgment rendered in an action to recover thereon, and becomes extinct on rendition of the judgment, and therefore a part payment of the judgment after the bar of the statute of limitations has become fixed does not, by implication, revive the original cause of action. *Olson v. Dahl* (Minn.), 9-252.

Time when revival takes place. — When a check in part payment of a debt is given with the understanding that it shall not be presented for payment until a subsequent date, the time at which a promise to pay the balance of the debt can be implied from the circumstances under which the part payment is made is the date on which the check is given and not the date on which it is presented for payment, and therefore the statute of limitations begins to run from the former date. *Marreco v. Richardson* (Eng.), 15-329.

b. Sufficiency of acknowledgment.

In general. — A letter written to a claimant by the president of an educational institution stating that the claim has been referred to an official of the institution for adjustment, does not contain an acknowledgment of indebtedness or a promise of payment sufficient to revive a debt barred by the statute of limitations. *Hornblower v. George Washington University* (D. C.), 14-696.

Written acknowledgment to stranger. — The written acknowledgment of a debt, to stop the running of the statute of limitations, need not be made directly to the creditor, but it is sufficient if it is made to a stranger if the debtor intends and understands that it will reach the creditor and influence him. *Strong v. Andros* (D. C.), 19-101.

There is a sufficient acknowledgment of a debt to take it out of the statute of limitations, where the debtor, in response to a demand from his superior officer (he being a government employee) for an explanation of a complaint against him for not paying the debt, makes an affidavit reciting that he does not owe the whole amount, but that he has borrowed \$100 from the person making the complaint, that he cannot then pay anything but will soon "make an effort to pay small monthly instalments on the \$100 until the debt has been liquidated." *Strong v. Andros* (D. C.), 19-101.

Acknowledgement by joint obligor. — Under the South Dakota statute, a written acknowledgment or promise by a joint maker of a promissory note to the co-maker is not sufficient evidence of a new or continuing contract to take the note out of the statute of limitations, as a promise, to have that effect, must be made in writing to the creditor or his agent and must be direct and un-

qualified. *Dorsey v. Gunkle* (S. Dak.), 5-810.

An acknowledgment in writing by one of several obligors is an acknowledgment by a party liable by virtue of the specialty within the meaning of section 5 of the English Civil Procedure Act of 1833, as interpreted by *Roddam v. Morley*, (1857) 1 De G. & J. 1, so as to take out the operation of section 3 of that act an action founded on the liability of the surviving obligors, and stands on the same footing as payment. *Read v. Price* (Eng.), 17-171.

Acknowledgement of deceased person. — The acknowledgment by a signed writing required by a statute providing that "in actions against the representatives of deceased persons, no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed action against the deceased in his lifetime, and in such case an unequivocal acknowledgment by the party to be charged thereby," is only such as, if made orally or by an unsigned writing, would be sufficient to preserve an acknowledgment of an existing indebtedness is sufficient, and no new promise in express words is required. *Sears v. Howe* (Conn.), 12-809.

Recital in will. — A legacy reciting that it is "in consideration of her care for my invalid mother many years preceding her death, and also her care of my infant son," does not imply a debt but a bounty. It is not an acknowledgment of a legal obligation, and when pleaded in an action barred by the statute of limitations, to recover for such services, does not remove the bar of the statute. *McNeal v. Pierce* (Ohio), 4-71.

Plea of recoupment by defendant. — Although a plea of recoupment alone is equivalent to an admission that the plaintiff has a cause of action, yet a notice of recoupment, coupled with pleas of *non assumpsit* and limitations, does not revive a debt barred by the statute of limitations. *Hornblower v. George Washington University* (D. C.), 14-696.

c. Sufficiency of payment.

In general. — A partial payment does not operate as a new promise to pay the residue of the debt or remove the bar of the statute of limitations unless the payment is made under such circumstances as to warrant the clear inference that the debtor recognizes the debt as then existing and his willingness, or at least his obligation, to pay the balance. *Cashmar-King Supply Co. v. Dowd* (N. Car.), 14-211.

To infer a new promise from the fact of part payment of an obligation already barred by the statute of limitations, the debt or obligation must be definitely pointed out by the debtor and an intention to discharge it in part made manifest. *Anderson v. Nystrom* (Minn.), 14-54.

Involuntary payment. — The application by the payee of promissory notes, pursuant to an order of court in a proceeding to

foreclose a mortgage given as security for the payment of such notes, of the proceeds of sale as a part payment on the notes, is, so far as the makers are concerned, an involuntary payment, which does not arrest the running of the statute of limitations on the notes or revive the liability of the makers for the balance. *Union Stockyards Nat. Bank v. Maika* (Wyo.), 14-977.

Under the Oregon statute providing that whenever any payment of principal or interest is made upon an existing contract, bill of exchange, promissory note, or bond, after the same shall have become due, the limitation shall commence from the time the last payment was made, a payment on a promissory note by a trustee in bankruptcy of one of the joint obligors of the note will keep the debt alive as to the co-obligors. *Sheak v. Wilbur* (Oregon), 11-58.

Payment without direction as to application. — Where a creditor holds several separate claims, and the debtor makes a general payment upon his indebtedness, without directing or authorizing the application thereof upon any one of the claims, all of which are then barred by the statute, the bar of the statute is not removed as to any of them. *Anderson v. Nystrom* (Minn.), 14-54.

An undirected payment made by a debtor who owes two notes to the same creditor, one of which is, and the other is not, barred by the statute of limitations, does not, when applied by the creditor to the note against which the statute has run, raise the bar of the statute as to that note so as to revive the cause of action for the unpaid balance, as such payment does not show any recognition by the debtor of the barred debt. *McBride v. Noble* (Colo.), 13-1202.

Partial payment made in full settlement. — A partial payment made in full settlement and discharge of the liability of the debtor does not remove the bar of the statute of limitations as to the part not paid. *Cashmar-King Supply Co. v. Dowd* (N. Car.), 14-211.

Payment by joint and several obligor. — When one maker of a joint and several negotiable promissory note, after the same has become barred by the statute of limitations, gives his negotiable promissory note to the payee of the barred note in payment of interest on the barred note, it constitutes a new promise on his part to pay the barred note and revives the same as to himself. *Medomak Nat. Bank v. Wyman* (Me.), 4-632.

6. PERSONS BY AND AGAINST WHOM STATUTE MAY BE PLEADED.

a. Who may plead.

(1) State or municipality.

State. — The claim of a private person against a state is the subject of the same statute of limitations that would apply if the claim were against a private person, and the statute applicable to an action of a debt or *assumpsit* may be set up to defeat a mandamus proceeding against a state officer, where the proceeding is in effect an action of

debt or *assumpsit* against the state. *McRae v. Auditor General* (Mich.), 10-594.

County. — Where the payment of county railroad aid bonds is provided for by statute in a special way, and out of a particular fund, with the affirmative duty upon a defendant to provide that fund, as by the levy of a special tax, the county cannot set up limitations without first showing that it has complied with the terms of the statute; and is itself within the law. *Berkey v. Board of Com'rs* (Colo.), 20-1109.

(2) Foreign corporation.

In general. — A foreign corporation cannot avail itself of the statute of limitations, being "out of the state" within the meaning of the exception to such statute. *Williams v. Metropolitan St. R. Co.* (Kan.), 1-6.

Corporation licensed to do business in state. — A foreign corporation which has complied with the laws of this state governing such corporation, and which has been regularly and continuously doing business within the state during the entire period required to bar an action, and which during all that time has had a resident agent, upon whom process could be served, can avail itself of the domestic statute of limitations. *Colonial, etc., Mfg. Co. v. Northwestern Thresher Co.* (N. Dak.), 8-1160.

(3) Successor in interest.

Purchaser from heir. — One who has become the owner of an interest in real estate belonging to the heir at law of the mortgagor may plead the statute of limitations in bar of an action to foreclose the mortgage, although the heir is a party to the action and neglects or refuses to interpose the plea. *Hopkins v. Clyde* (Ohio), 1-1000.

Corporation. — The British Columbia Electric Railway Company, having acquired the property, rights, contracts, privileges, and franchises of the Consolidated Railway and Light Company, under the provisions of "The Consolidated Railway Company's Act, 1896" (59 Vict., c. 55 [B. C.]); is entitled to the benefit of the limitation of actions provided by section 60 of that statute. *British Columbia Electric R. Co. v. Crompton* (Can.), 17-1038.

b. Who may be pleaded against.

(1) State or municipality.

In general. — Unless it is specially named therein, a state is not embraced in the statute of limitations. *Whittemore v. People* (Ill.), 10-44.

Action in name of state for benefit of third person. — The statute of limitations may be set up as a defense to a suit brought in the name of the state, where the state has no real interest in the litigation and its name is used to enforce a right which inures to the benefit of an individual or a corporation. *Eastern State Hospital v. Graves* (Va.), 8-701.

Action in name of third person for benefit of state. — The statute of limita-

tions cannot be set up as a defense to an action by an incorporated state insane hospital to recover for board and medical attention furnished an inmate, where the hospital is owned and controlled by the state, and is a mere governmental agency thereof, and all charges imposed for the care and maintenance of the hospital's inmates are for the benefit of state, and when collected go to the support of the hospital. *Eastern State Hospital v. Graves* (Va.), 8-701.

In passing upon the applicability of the statute of limitations to an action, the court will determine whether the state is the real party in interest by reference not merely to the name in which the action is brought, but to the facts of the case as they appear in the record. *Eastern State Hospital v. Graves* (Va.), 8-701.

The statute of limitations cannot be set up as a defense to a suit which is for the sole benefit of the state, even though the suit is not brought in the state's name. *Eastern State Hospital v. Graves* (Va.), 8-701.

Municipality. — The exemption of a state from the operation of statutes of limitation extends to counties, cities, towns, and minor municipalities in all matters respecting strictly public rights as distinguished from private and local rights, but as to matters involving private rights the municipalities are subject to statutes of limitation to the same extent as individuals. *Brown v. Trustees* (Ill.), 8-96.

An action by a city to recover damages for injuries to a public bridge involves only a private right of the city, and is therefore subject to the statute of limitations. *Chicago v. Dunham Towing, etc., Co.* (Ill.), 20-426.

School district. — In view of the Illinois statutes concerning the public school system, the statute of limitations may be set up in bar of an action of ejectment brought by the trustees of a school district to recover possession of a schoolhouse lot, as the action does not involve a public right within the meaning of the rule exempting municipalities from the operation of the statute of limitations. *Brown v. Trustees* (Ill.), 8-96.

(2) Infant.

Claim against decedent's estate. — The statute of nonclaim prescribing the time within which claims against decedents' estates shall be filed, applies to infants, unless they are expressly excepted from its operation; and a court will not defeat the legislative purpose by reading an exception into the statute. *Boyle v. Boyle* (Iowa), 3-575.

The infancy of a claimant against a decedent's estate is not a "peculiar circumstance entitling him to equitable relief," within the meaning of the exception to the bar of the statute contained in the Iowa statute of nonclaim. *Boyle v. Boyle* (Iowa), 3-575.

(3) Receiver of national bank.

Action against directors for wrongful acts. — A suit by the receiver of a na-

tional bank against the bank's directors to hold them liable for their negligent or wrongful acts, may be barred by limitation, as the directors are merely implied trustees. *Emerson v. Gaither* (Md.), 7-1114.

(4) Successor in interest.

In general. — Where the right of action against a defendant, once existing in favor of the parties to whose rights the plaintiff is subrogated, is barred by the statute of limitations, the right of action upon the part of the plaintiff is also necessarily barred. *American Nat. Bank v. Fidelity, etc., Co. (Ga.)*, 12-666.

7. OPERATION AND EFFECT OF BAR.

Application of statute to interest coupons where main debt not barred.

— Where county railroad aid bonds are not barred by limitations, the interest coupons, being a mere incident to the main debt, are not barred. *Berkey v. Board of Com'rs (Colo.)*, 20-1109.

Expiration of statutory period without acknowledgement of debt. — A promissory note secured by a mortgage is barred by limitation where the statutory period has expired and the maker has paid no interest, either directly or through any authorized agent, within such period. *Iowa Loan, etc., Co. v. Schnose (S. Dak.)*, 9-255.

8. ACTIONS.

a. Waiver and estoppel to plead statute.

Including debt in schedule in bankruptcy. — Where a schedule of debts appended to a voluntary petition in bankruptcy includes debts barred by the statute of limitations and the petitioner knows that they are so barred, such inclusion constitutes, so far as he is concerned, a waiver of the right to invoke such statute. *In re Gibson (Ind. Ter.)*, 4-938.

Procuring injunction against commencement of action. — Only those who are actors in procuring the allowance of an injunction against the commencement of an action can upon that account be equitably estopped from pleading the statute of limitations. *Hunter v. Niagara Fire Ins. Co. (Ohio)*, 4-146.

Action for breach of warranty in deeds. — In an action for damages for the breach of a covenant of warranty in the conveyance of real estate, the grantor held estopped to plead the statute of limitations. *Missouri, etc., R. Co. v. Pratt (Kan.)*, 9-751.

b. Pleading.

(1) Necessity of pleading statute.

In general. — The bar of the statute of limitations must be specially pleaded, unless the facts that raise it appear to be admitted. *Easton Nat. Bank v. American Bank, etc., Co. (N. J.)*, 10-84.

Indulgence will not be granted to a party who fails to invoke in due time and proper

form the protection of the statute of limitations. *Easton Nat. Bank v. American Brick, etc., Co. (N. J.)*, 10-84.

In equity suit. — The statute of limitations, when relied upon as a defense in a suit in equity, must be specially pleaded the same as in an action at law. *Strayhorn v. McCall (Ark.)*, 8-377.

In action for penalty. — In an action to recover a penalty under a statute authorizing its recovery in a civil action, it is necessary, in order to invoke the benefit of the statute of limitations, to plead it. *Western Union Tel. Co. v. State (Ark.)*, 12-82.

In action for death by wrongful act. — The statute of limitations need not be specially pleaded by the defendant in an action for death by wrongful act. *Martin v. Pittsburgh R. Co. (Pa.)*, 19-818.

In action to enforce mechanic's lien. — A bill to enforce a mechanic's lien which does not allege that the suit was brought within the period prescribed by statute is demurrable. *Savings Bank of Richmond v. Powhattan Clay Mfg. Co. (Va.)*, 1-83.

In reply to counterclaim. — In an action on a promissory note secured by a mortgage, where the defendant has set up, as a counterclaim, payments made to the plaintiff under an agreement which is not binding, the plaintiff cannot contend that some of such payments are barred by limitation, if he has failed to plead the statute of limitations to the counterclaim. *Iowa Loan, etc., Co. v. Schnose (S. Dak.)*, 9-255.

Right created solely by statute. — Where a right is created solely by statute which limits the time for the enforcement thereof, time is regarded as of the essence of the right and a bill to enforce the same must show affirmatively that the time for bringing the action has not elapsed. *Savings Bank of Richmond v. Powhattan Clay Mfg. Co. (Va.)*, 1-83.

Raising question by demurrer. — Where in an action on promissory notes it is apparent from the allegations of the petition that the notes are barred by the statute of limitations, unless the application, as a part payment on the notes, of the proceeds of a mortgage given as security therefor arrested the running of the statute, the question of the sufficiency of the petition may be raised by demurrer. *Union Stockyards Nat. Bank v. Maika (Wyo.)*, 14-977.

Where an action is brought to recover damages alleged to have resulted to the plaintiff in consequence of the perpetration of a fraud charged to have been practiced upon him by the defendant, the cause of action, as stated in the declaration, being apparently barred by the statute of limitations, and it is sought to relieve such action of the bar of the statute by alleging that it was brought within the statutory period after the discovery of the fraud, if it does not appear from the petition that the plaintiff used proper diligence to discover the fraud, the petition should be dismissed upon appropriate demurrer thereto. *Crawford v. Crawford (Ga.)*, 19-932.

A replication to a plea of the statute of limitations, which alleges that the statute is

inapplicable because of the defendant's fraudulent concealment of the cause of action against him, must set out facts and circumstances amounting in law to a fraudulent concealment by the defendant of the cause of action, and if it fails to do so it will be held bad on demurrer, notwithstanding the fact that it uses the words "craftily," "fraudulently," "falsely," and "maliciously" to characterize the defendant's conduct. *Fortune v. English* (Ill.), 9-77.

Raising question by motion to dismiss petition. — A defendant may avail himself of the defense of the statute of limitations at the trial term, by a motion to dismiss the plaintiff's petition, when from its allegations the cause of action appears to be barred by the statute. *Davis v. Boyett* (Ga.), 1-386.

Raising question for first time on appeal. — Where the receiver of an insolvent corporation files a petition in chancery against certain of the stockholders to enforce their liability for unpaid subscriptions to the extent required to satisfy the claims of certain creditors, including a debt claimed by a certain person, which debt has been accepted and admitted by the receiver as a claim against the corporation, and the stockholders answer the receiver's petition and thereby question the right of such person to resort to the stockholders' liability, but do not question the validity of his claim as against the corporation or assert that it is barred by the statute of limitations, the delinquent stockholders will not be permitted to claim on appeal that the debt of such person is barred by the statute of limitations. *Easton Nat. Bank v. American Brick, etc., Co.* (N. J.), 10-84.

(2) Sufficiency of pleading.

In general. — A mere statement, in the answer in a suit in equity to foreclose a mortgage, that "no credits were entered on the margin of the mortgage," is not sufficient as a plea of the statute of limitations, as the facts constituting the bar should be set forth. *Strayhorn v. McCall* (Ark.), 8-377.

c. Evidence.

Burden of proof. — The statute of limitations is an affirmative defense, and the burden of proving it is upon the party setting it up. *Schell v. Weaver* (Ill.), 8-339.

Admissibility of parol evidence of written new promise. — Under the Connecticut statute providing that "in actions against the representatives of deceased persons, no acknowledgment or promise shall be sufficient evidence of a new or continuing contract to take the case out of the statute of limitations, unless the same be contained in some writing made or signed by the party to be charged thereby," letters written by a creditor of a deceased person requesting payment and referred to in letters written by the deceased in reply, are, to the extent that they make intelligible the letters of the deceased, a part of such letters and in connection therewith are admissible in evidence; and it is

competent to prove the contents of such letters by secondary evidence where the originals are not procurable. *Sears v. Howe* (Conn.), 12-809.

Parol evidence is admissible to prove the contents of a written acknowledgment of indebtedness which has been lost, for the purpose of taking the case out of the statute of limitations. *Read v. Price* (Eng.), 17-171.

Question for jury. — Whether a reasonable time within which an attorney should have paid over to his client money which he had collected for his client, had elapsed thirty days before the attorney's death is a question for the trial court, where it appears that the question involves but a single fact and not a combination of facts and circumstances. *Goodyear Metallic Rubber So. v. Baker* (Vt.), 15-1207.

But where the facts certified to the appellate court do not show that the trial court found that fact either way, and there is nothing in the record from which such court could have inferred that such reasonable time had elapsed thirty days before the attorney's death, the attorney's personal representatives will be held to have failed to sustain the burden of establishing the statutory bar. *Goodyear Metallic Rubber Co. v. Baker* (Vt.), 15-1207.

9. LIMITATION CREATED BY CONTRACT.

Application to action for repudiation of contract containing limitation. — An action brought for the repudiation of a contract is not subject to a time limitation arising solely out of the terms of the repudiated contract. *O'Neill v. Supreme Council American Legion of Honor* (N. J.), 1-422.

LIMITATION OF LIABILITY.

See CARRIERS.

Contract exempting railroad from liability for fires, see FIRES, 3.

Injuries from fires caused by locomotives, see RAILROADS, 7 c (7).

Master's liability for injuries to servant, see MASTER AND SERVANT, 3 k.

Prohibiting limitation of liability by carriers, see INTERSTATE COMMERCE.

Right of telegraph company to stipulate for exemption from liability, see TELEGRAPHS AND TELEPHONES, 7 b.

LIMITATIONS OVER.

See WILLS.

LIMITS.

Restriction of powers of municipality to incorporate limits, see MUNICIPAL CORPORATIONS, 4 c.

LIQUIDATED CLAIM.

Accepting part due in full satisfaction, see ACCORD AND SATISFACTION.

LIQUIDATED DAMAGES.

See DAMAGES.

Provision for liquidated damages as affecting right to specific performance, see SPECIFIC PERFORMANCE, 3 f (15).

LIQUIDATING PARTNER.

Liabilities, see PARTNERSHIP, 8 c.

LIQUIDATION.

See PARTNERSHIP, 8 c.

LIQUORS.

See INTOXICATING LIQUORS.

LIS PENDENS.

Application of doctrine in general. — The doctrine of *lis pendens* has no application to a bill in chancery to remove an administration into chancery for settlement and distribution, if such bill does not seek to fix any lien, charge, or incumbrance upon land, and the decree rendered is an ordinary money decree. *Morange v. Doe* (Ala.), 5-331.

Notice of *lis pendens*, duly filed, affects subsequent purchasers and incumbrancers only, and does not operate retroactively, and therefore rights acquired prior to such filing are paramount to the adverse claim of parties to the litigation; but such notice advises parties to an uncompleted transaction, concerning the premises described in it, of the pendency of the controversy. *Moulton v. Kolodzik* (Minn.), 7-1090.

Where the purchaser under an unrecorded contract for the sale of land is entitled to possession but has paid only part of the purchase price, the title vested in him is not affected injuriously by the subsequent filing of a notice of *lis pendens*; but when, after the filing of such notice, he comes to pay the balance of the purchase price, he has knowledge of the *lis pendens* and may protect himself against paying the money to the wrong person by any means permitted by the original or any subsequent agreement between the parties to the contract, or by any means provided by law, such as the paying of the money into court. *Moulton v. Kolodzik* (Minn.), 7-1090.

Application to purchaser after judgment. — A person who, after final decree and termination of a suit but before an appeal is obtained, purchases in good faith property which is the subject of the litigation, will be protected in such purchase. *Wingfield v. Neall* (W. Va.), 9-962.

LIST.

Jury list, see JURY, 4 a.

LISTEN.

Duty of pedestrians to listen for street cars, see STREET RAILWAYS, 8 c.

LITERARY CRITICISM.

Effect as libel, see LIBEL AND SLANDER, 2 c.

LITERARY PROPERTY.

See COPYRIGHT.

LITIGANTS.

Exemption of litigants from service of process, see SUMMONS AND PROCESS, 3.

LITIGATION.

Contract encouraging litigation, see CONTRACTS, 4 d.

LITTORAL RIGHTS.

See WATERS AND WATERCOURSES, 3 b.

LIVERY-STABLE KEEPERS.

Lien subject to prior chattel mortgage, see CHATTEL MORTGAGES, 4 a.

Negligence of driver of livery team imputable to passenger, see NEGLIGENCE, 7 e (2).

Sale of stock as within sales in bulk acts, see FRAUDULENT CONVEYANCES, 3 b.

Nature of relation between livery-stable keeper and customer. — The relation between a livery-stable keeper and his customer is that of bailor and bailee for hire, and the former assumes the liability which the contract of bailment imposes. *Conn v. Hunsberger* (Pa.), 16-504.

The relation between a livery stable keeper and one who hires from him a horse and carriage is that of bailor and bailee. *Gibson v. Bessemer, etc., R. Co.* (Pa.), 18-535.

A livery stable keeper who does not hold himself out to the public as a general conveyor of passengers from place to place for hire, but whose business it is to care for the horses and carriages of others, and to let his own horses and carriages either with or without drivers, is not a public carrier of passengers, but at most a private carrier for hire, and as such is bound to exercise only the usual skill, care, and prudence ordinarily exercised by those engaged in the same pursuit. *Stanley v. Steele* (Conn.), 2-342.

Duty of livery-stable keeper to customer. — It is the duty of a livery-stable keeper to inform himself of the habits and disposition of the horses which he keeps in his stable for hire, and if he knows that they are dangerous and unsuitable, or, by the exer-

cise of reasonable care, could ascertain the fact, he is liable for any injuries to his customers resulting from their vicious propensities. *Conn v. Hunsberger* (Pa.), 16-504.

Although a liveryman is not an insurer of the suitability of a horse let to a customer, he is bound to exercise the care of a reasonably prudent man to furnish a horse that is fit and suitable for the purpose contemplated in the hiring. When he lets a horse for hire, he impliedly warrants that the animal is not unruly or vicious, but is safe, manageable, and suitable for the use for which the customer has hired it. *Conn v. Hunsberger* (Pa.), 16-504.

Evidence. — In an action against a livery-stable keeper, by a customer, to recover damages for injuries caused by the vicious acts of a horse, the burden of proving that the horse was vicious and unsuitable for the purpose for which it was hired, and that the defendant knew or by the exercise of reasonable care should have known the fact, is upon the plaintiff; but after the latter has introduced evidence sufficient to make out a *prima facie* case, it becomes incumbent upon the defendant to prove that the animal was not vicious or unruly, or that he was ignorant of its vicious character, after exercising proper care to inform himself of its habits. *Conn v. Hunsberger* (Pa.), 16-504.

In such an action, where the complaint sufficiently shows the contract of hiring out of which an implied warranty arises, the fact that it also sets forth a special warranty does not preclude a recovery by the plaintiff upon the implied warranty, if the evidence is sufficient. *Conn v. Hunsberger* (Pa.), 16-504.

In such an action, evidence examined and held sufficient to require the submission of the case to the jury, and to render the direction of a verdict for the defendant improper. *Conn v. Hunsberger* (Pa.), 16-504.

LIVE STOCK.

Carriers of live stock, see **CARRIERS**, 5.

LOANS.

Action to recover money loaned, see **MONEY LOANED, PAID, OR RECEIVED**.

By building associations, see **BUILDING AND LOAN ASSOCIATIONS**, 3.

Gift distinguished from loan, see **GIFTS**, 1 a.

Lending servant, see **MASTER AND SERVANT**, 1 a.

Loaning money as doing business within prohibition of Sunday laws, see **SUNDAYS AND HOLIDAYS**, 2.

Recovery of money lent for gambling, see **GAMING AND GAMING HOUSES**, 3 c.

Subrogation of laborer's lien of lender of money to pay wages, see **SUBROGATION**, 1 e.

LOBBYING CONTRACTS.

See **CONTRACTS**, 4 c.

LOCAL ACTIONS.

See **VENUE**.

LOCAL ASSESSMENTS.

See **SPECIAL OR LOCAL ASSESSMENTS**.

LOCAL INFLUENCE.

Ground for removing cause to federal court, see **REMOVAL OF CAUSES**, 3 c.

LOCAL JURISDICTION.

See **VENUE**.

LOCAL LAWS.

Notice of introduction in legislature, see **STATUTES**, 1 a.

LOCAL OPTION.

See **INTOXICATING LIQUORS**, 3 d, 7.

LOCATION.

Division fences, see **FENCES**, 2.

Locating right of way reserved in deed, see **EASEMENTS**, 1 a.

Mining claims, see **MINES AND MINERALS**, 7.

Right of way of railroads, see **RAILROADS**, 2 a.

LOCI CONTRACTUS.

See **CONFLICT OF LAWS**.

LOCI REI SITAE.

See **CONFLICT OF LAWS**.

LOCK-UP.

Liability of municipality for defective condition of lock-up, see **MUNICIPAL CORPORATIONS**, 9 a.

LOCOMOTIVES.

See **RAILROADS**.

Liability for fires caused by locomotives, see **FIRES**.

LOCO PARENTIS.

See **PARENT AND CHILD**.

LOGS AND LUMBER.

See **WOODS AND FORESTS.**

Construction of logging contract, see **CONTRACTS**, 3 c.

Injury to riparian owner by driving logs, see **WATERS AND WATERCOURSES**, 3 b (1).

Navigability of stream for floating logs, see **WATERS AND WATERCOURSES**, 3 a.

Obstructing flow of stream by boom company, see **WATERS AND WATERCOURSES**, 3 b (4).

Rights of purchaser of standing timber. — Where the owner of timber lands sells to another the timber thereon with the right to remove the same within ten years, and nearly ten years later, the removal of the timber within the time limit not being practicable, a new agreement is entered into by the parties whereby all the timber on the lands is conveyed to the purchaser, his heirs and assigns forever, with a right "at all reasonable times hereafter during the term of 999 years" to remove the same, the new agreement does not convey the fee simple in the standing timber, but confers only the right to cut down and remove it within a reasonable time, and the owner of the land is entitled to recover damages for timber cut by the authority of the purchaser's executor about twenty-two years subsequent to the making of the new agreement. *Beatty v. Mathewson* (Can.), 12-913.

Under a contract selling and conveying all the timber on described land with the right of egress and regress over the land for the purpose of cutting, manufacturing, and removing the timber, and providing that the "privilege of five years' time is hereby granted for the completion of said operation," the buyer, having paid the consideration in full and having cut down and manufactured the timber into cross-ties, telephone poles, and sawlogs within the five years, is the owner of such product as personal property, and has the right to remove the same from the land after the expiration of the five years. *Mahan v. Clark* (Pa.), 12-729.

A contract for the sale of standing timber construed, and the vendee held to have no right to cut or remove the timber after the expiration of a stipulated time. *Mengal Box Co. v. Moore* (Tenn.), 4-1047.

Rights of grantor reserving timber. — Where a deed of land contains a clause providing that the grantor "reserves and still owns all timber" standing on the land and requiring him to remove it within a specified time, the grantor does not hold an absolute and unconditional title to the timber so reserved, but so much as remains unsevered at the expiration of the time limited becomes the property of the owner of the land at that time. *Adkins v. Huff* (W. Va.), 6-246.

Rights of grantee of lands subject to timber contract. — Where an owner of land who has sold certain timber thereon upon the condition that it be cut and removed within a certain time, conveys the land with

a covenant of seizin and right to convey against incumbrances, except by the timber contract, the grantee is substituted to all the rights of the grantor to timber upon the land whether cut or standing, subject to the contract with the vendee of the timber. *Mengal Box Co. v. Moore* (Tenn.), 4-1047.

LOOK-OUT.

Duty of pedestrian to look out for street cars, see **STREET RAILWAYS**, 8 c.

Duty to maintain look-out on street cars, see **STREET RAILWAYS**, 8 a (4).

Loss of right to salvage, see **SALVAGE**.

Loss of time as damages for injuries to property, see **DAMAGES**, 9 b.

LOSS.

Loss under fire insurance policy, see **INSURANCE**, 5 l.

Rights, remedies and liabilities as to losses under insurance policies, see **INSURANCE**.

Termination of voyage by loss of vessel, see **SEAMAN**, 2.

LOST PAPERS AND RECORDS.

Liability of drawer of lost check, see **CHECKS**, 7.

Loss or destruction of record as ground for new trial, see **NEW TRIAL**, 2 b (3).

Proof required to establish lost instrument. — Under the provisions of the Montana code of civil procedure, it is necessary, in order to establish the former existence of a lost written instrument, to prove its execution and contents; and proof of the contents requires a practical reproduction of the instrument in all of its substantial parts. *Capell v. Fagan* (Mont.), 2-37.

While, under the statutes, the consideration need not be mentioned in a deed, yet if it is mentioned and set forth therein, it becomes a part of the contents of the deed, and, in the case of a lost deed, must be proven like any other of the contents. *Capell v. Fagan* (Mont.), 2-37.

Sufficiency of parol evidence. — Parol evidence to establish the contents of a lost instrument should be clear and certain. The vague and uncertain recollections of witnesses are insufficient. *Capell v. Fagan* (Mont.), 2-37.

Admissibility of parol evidence of contents of instrument. — In an action to recover on a promissory note, a copy of which is set forth in the petition, proof of loss of the note and of its execution and contents may be received, although no mention of the loss is made in the petition. *Bare v. Ford* (Kan.), 11-251.

Admissibility of evidence of extraneous facts and circumstances. — Proof

of the negotiations, conversations, and acts of the parties before, at the time of, and after, the execution of a lost written instrument are not competent to prove its contents. *Capell v. Fagan* (Mont.), 2-37.

LOST PROPERTY.

Appropriation of lost goods as larceny, see **LARCENY**, 1 b.
Defining lost treasure, see **TREASURE TROVE**.
Things found embedded in the earth, see **PROPERTY**.

What constitutes lost property. — Money or property is not lost in the sense that a finder may, by his discovery and possession thereof, obtain absolute title thereto, unless it has been voluntarily abandoned or cast away by the owner. Property is usually considered lost in a legal sense when the possession has been casually and involuntarily parted with, as in the case of an article accidentally dropped by the owner. *Kuykendall v. Fisher* (W. Va.), 11-700.

Rights of finder — The finder of lost property or treasure trove acquires, by the act of finding, no right of property therein as against the owner; but, as against all other persons, he is entitled to the possession thereof as a *quasi-depositary* holding for the owner. *Kuykendall v. Fisher* (W. Va.), 11-700.

LOTTERIES.

What constitutes a lottery in general. — Any scheme whereby prizes in money or property are distributed by chance to the purchasers of tickets or chances is a lottery. It makes no difference by what name the scheme may be called; nor does it make any difference that every ticket sold entitles the holder to a certain sum, provided there is also an additional sum, the distribution of which depends upon chance. *Grant v. State* (Tex.), 16-844.

A scheme for a common fund to be produced by contributions of various parties and afterwards distributed among them, the preference in the distribution to depend upon chance, is a lottery. *State ex rel. Prout v. Nebraska Home Co.* (Neb.), 1-88.

To constitute lottery a valuable prize must be offered and something of value given for a chance to obtain the same. *State ex rel. Prout v. Nebraska Home Co.* (Neb.), 1-88.

"Suit club" as lottery. — A scheme whereby persons engaged in the custom tailoring business form a so-called suit club consisting of fifty-two members, and collect dues of one dollar per week from each member for a period of twenty-six weeks, and hold twenty-six weekly drawings, at each of which one member of the club, whose number is drawn from a bag by chance, receives a suit of clothes valued at twenty-six dollars, constitutes a lottery within the meaning of the Texas statute. Such scheme is none the less

a lottery because there are no blanks in the drawings, or because the drawings are not determined by means of dice or a wheel, or because a member who has paid in twenty-six dollars is entitled to a suit of clothes whether successful at a drawing or not, or because members who withdraw from the club at any time are given credit for the amounts which they have paid in on purchase of merchandise from the managers of the scheme. *Grant v. State* (Tex.), 16-844.

A "suit club" conducted by a tailor held to be a lottery within the meaning of the Michigan statute. *People v. McPhee* (Mich.), 5-835.

Distribution of parcels of lands to purchasers by chance as lottery. — It is a lottery to sell at a uniform price parcels of land of unequal value, where the contracts of sale do not specify the parcel which each purchaser is to have, but provide for the execution of deeds and the payment of the purchase money after the parcels are selected, and afterwards the parcels are distributed to the respective purchasers by chance, though the plan of distribution is not proposed by the vendor, but is proposed and carried out by a committee representing the purchasers. *Burks v. Harriss* (Ark.), 18-566.

"Guessing contest" as lottery. — A scheme for the distribution of prizes to those holders of cigar bands making the nearest estimate of the number of cigars on which the government would collect taxes in a certain month, is a lottery, and the advertising thereof is a misdemeanor. *People ex rel. Ellison v. Lewin* (N. Y.), 1-165.

A "guessing contest" inaugurated by a publishing association prior to an election, offering certain rewards or prizes to those persons who, prior to such election, shall submit to the association the nearest correct estimates of the total popular vote to be cast at the election for the office of president of the United States and at the same time pay a certain sum as the subscription to a named periodical, is a contest of chance and a lottery on which no action can be maintained for the prizes offered by the successful contestants, and is also a violation of the laws of the United States and the laws of the state of Michigan. *Waite v. Press Publishing Assoc.* (U. S.), 12-319.

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not actuated by actual ill will towards the owner of the property or any other person. *State v. Boies* (Kan.), 1-491.

MALICIOUS PROSECUTION.

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1. NATURE AND GROUNDS OF LIABILITY.

a. In general.

Definition of "malicious prosecution." — A malicious prosecution is one begun in malice, without probable cause, to believe it can succeed, and which finally ends in failure. *Burt v. Smith* (N. Y.), 2-576.

What must be proved in general.

In order to recover in an action for malicious prosecution, the plaintiff must allege and prove that there was a prosecution; that it terminated in his favor; that the defendants were the prosecutors; that the defendants were actuated by malice; that there was a want of probable cause; and the amount of damage that the plaintiff has sustained. *Russell v. Chamberlain* (Idaho), 9-1173.

In order to maintain an action for malicious prosecution, the plaintiff must show a want of probable cause, malice upon the part of the defendant, and that a criminal proceeding has been determined in the plaintiff's favor or abandoned. *Ton v. Stetson* (Wash.), 10-369.

In an action for damages for malicious prosecution it is necessary to allege and prove malice, want of probable cause, and that the prosecution has terminated. *Pittsburg, etc., R. Co. v. Wakefield Hardware Co.* (N. Car.), 3-720.

Procuring issuance of search warrant. — An action for malicious prosecution will lie for maliciously and without probable cause procuring the issuance and execution of a search warrant, and the prerequisite that the prosecution must have terminated

favorably to the plaintiff is satisfied by the failure to find the stolen goods upon the execution of the warrant. *Spangler v. Booze* (Va.), 1-995.

b. Institution of prosecution.

Issuance of warrant not executed. —

The issuance of a criminal warrant never executed by service on the defendant cannot be made the basis of an action for malicious prosecution, especially where the charge is not actionable *per se*, and there is no allegation of special damage accruing before service. *Mitchell v. Donanski* (R. I.), 12-1019.

The mere application for and issuance to the proper officer for execution of a warrant of arrest on a criminal charge is such an institution of a prosecution as may be made the basis of a subsequent civil action for malicious prosecution by the party claimed to have been injured; and, therefore, a complaint in an action for malicious prosecution which alleges the issuance of a warrant for the arrest of the plaintiff on a criminal charge cannot be held defective for failure to allege the execution of the warrant. *Halberstadt v. New York Life Ins. Co.* (N. Y.), 16-1102.

c. Absence of probable cause.

What constitutes probable cause. —

Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in believing that he has lawful grounds for prosecuting the defendant in the manner complained of. *Burt v. Smith* (N. Y.), 2-576.

Continuation of prosecution after discovery of absence of probable cause.

— Notwithstanding the fact that a person who instigates a criminal prosecution may have had probable cause for the commencement thereof, yet if such person afterwards acquires means of ascertaining that the charge is not well founded, his failure to intervene and have the prosecution discontinued or to do what he can to sever his connection therewith is some evidence of the want of reasonable and probable cause for continuing such prosecution, and he may be liable for the damages resulting from the continuance thereof. *Fancourt v. Heaven* (Can.), 15-153.

d. Termination of prosecution.

In general. — A prosecution may be regarded as terminated, for the purpose of authorizing an action for malicious prosecution, when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute proceedings *de novo*. *Graves v. Scott* (Va.), 7-480.

Where a criminal proceeding has been terminated in favor of the accused by judicial action of the proper court or official in any way involving the merits or propriety of the proceeding, or by a dismissal or discontinuance based on some act chargeable to the

complainant, such as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect is laid for an action of malicious prosecution; but the rule is otherwise where the proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties or solely by the procurement of the accused as a matter of favor, or as the result of some act, trick, or device preventing action and consideration by the court. *Halberstadt v. New York Life Ins. Co.* (N. Y.), 16-1102.

A criminal action cannot be considered to have ended favorably to the defendant so as to permit him to maintain an action for malicious prosecution where it does not appear that the warrant of arrest issued in such criminal action was ever recalled by the court or that the accused was ever discharged. *Mitchell v. Donanski* (R. L.), 12-1619.

Dismissal by magistrate. — Where a criminal prosecution before a justice of the peace is dismissed by the justice upon the failure of the prosecuting witnesses to be sworn and give evidence, there is such a legal termination of the proceeding as will entitle the accused to maintain an action for malicious prosecution. *Graves v. Scott* (Va.), 7-480.

Dismissal in consequence of compromise. — The dismissal or abandonment of a criminal prosecution in consequence of a settlement or compromise between the accused and the prosecuting witness is not such a termination in favor of the accused as will entitle him to maintain an action for malicious prosecution. *Baxter v. Gordon Ironsides, etc., Co.* (Ont.), 7-452.

Discharge by grand jury. — The discharge by a grand jury of a person bound over by the committing magistrate is a sufficient termination of the prosecution to support an action for malicious prosecution. *Wells v. Parker* (Ark.), 6-259.

Withdrawal of charge. — The withdrawal of the charge in open court by the prosecuting attorney is a sufficient termination of the prosecution to support an action for malicious prosecution. *Fancourt v. Heaven* (Can.), 15-153.

2. ACTIONS.

a. Persons entitled to sue.

Defendant in replevin having no interest in property. — A defendant in a replevin suit who has no property in the goods taken under the writ, cannot maintain an action of malicious prosecution against the unsuccessful plaintiff in the replevin suit. *Powers v. Houghton* (Mich.), 18-811.

b. Persons liable.

Persons voluntarily participating in prosecution. — In an action for malicious prosecution it is not necessary to allege that all of the defendants combined in instituting

the proceedings complained of. If, after the proceedings were commenced, they, without probable cause and with malice, participated voluntarily in the prosecution, they may be joined in the action as defendants with the person or persons who instituted the action. *Russell v. Chamberlain* (Idaho), 9-1173.

Liability of prosecution for wrongful arrest by officers. — A person who has caused a search warrant to be issued and who has made the affidavit for its issuance cannot be held liable as for malicious prosecution, where the evidence shows that the officers, instead of executing the warrant, wrongfully arrested the person whose premises they were directed to search, without entering the premises or attempting to make any search, and there is no evidence connecting in any way the person who caused the warrant to be issued with the unauthorized act of the arresting officers. *Ton v. Stetson* (Wash.), 10-369.

c. Defenses.

In general. — In an action for malicious prosecution, based on the issuance of a warrant in a foreign country for the plaintiff's arrest on a criminal charge, an answer alleging that the plaintiff fled from such foreign country before the warrant could be served on him, for the purpose of evading service, and remained out of the country and beyond the jurisdiction of the court for such a length of time that the proceeding against him was finally dismissed on account solely of the lapse of time, sets up a good defense, and is not demurrable. *Halberstadt v. New York Life Ins. Co.* (N. Y.), 16-1102.

Actual guilt of plaintiff. — In an action for malicious prosecution the actual guilt of the plaintiff may be shown as a defense, though he was acquitted. *Mack v. Sharp* (Mich.), 5-109.

In an action for malicious prosecution, proof of the plaintiff's actual guilt of the offense charged is a complete defense. *Whipple v. Gorsuch* (Ark.), 12-38.

Probable cause in general. — The defendant in an action for malicious prosecution is relieved of liability if the prosecution was instituted with probable cause, which is such a state of facts known to the prosecutor, or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe that the accused is guilty of the crime alleged. *Whipple v. Gorsuch* (Ark.), 12-38.

Advice of counsel. — Advice of counsel is a defense to an action for malicious prosecution where given in good faith. *Shea v. Cloquet Lumber Co.* (Minn.), 1-930.

Advice of counsel is not a complete defense to an action for malicious prosecution, unless the advice was sought and acted upon in good faith, and unless the defendant made full disclosure of all material facts to the counsel. *Davis v. McMillan* (Mich.), 7-854.

Where a party lays all the facts of the case fairly before counsel of competency and

integrity before beginning proceedings, and acts *bona fide* upon the opinion given by that counsel, however erroneous that opinion may be, whether the party thus becoming the prosecuting witness would be liable in an action for malicious prosecution *quære*. *Catzen v. Belcher* (W. Va.), 16-715.

Advice of magistrate. — In an action for malicious prosecution the fact that the defendant, at the time he applied to the justice for the warrant of arrest and made the complaint on oath, fully stated all the facts to the justice, who advised him that he had a reasonable and probable cause to prosecute, is not a sufficient defense to the action. *Catzen v. Belcher* (W. Va.), 16-715.

d. Pleading.

Sufficiency of complaint. — Allegations of a complaint considered, in an action for malicious prosecution, and held to show that they state a cause of action. *Russell v. Chamberlain* (Idaho), 9-1173.

When the facts set forth in a complaint are such that if true the law will infer both malice and want of probable cause from them, they are tantamount to specific allegations of malice and want of probable cause. *Pittsburg, etc., R. Co. v. Wakefield Hardware Co.* (N. Car.), 3-720.

e. Evidence.

(1) Presumptions and burden of proof.

Burden of proof of want of probable cause. — In an action for malicious prosecution, the burden of proving want of probable cause is upon the plaintiff. *Davis v. McMillan* (Mich.), 7-854.

In an action for malicious prosecution, testimony by the defendant that he commenced a criminal proceeding for the purpose of enforcing the payment of a debt is *prima facie* evidence of the want of probable cause and of malice, and imposes on the defendant the burden of showing that he had probable cause and was not actuated by malice. *MacDonald v. Schroeder* (Pa.), 6-506.

Presumption of want of probable cause from discharge by magistrate. — In an action for malicious prosecution, proof of the fact that a United States commissioner acting as an examining magistrate, after a hearing, had discharged the accused is *prima facie* evidence of the want of probable cause for instituting the prosecution. *Lindsey v. Couch* (Okla.), 18-60.

A discharge by a magistrate in a criminal proceeding is *prima facie* evidence of want of probable cause in instituting the proceedings where the magistrate had power in the premises merely to examine and commit, but not where the magistrate had power to try and determine. *Fox v. Smith* (R. I.), 3-110.

Where a justice has jurisdiction to try, with or without a jury, and to punish the accused on conviction for the offense charged, his judgment of acquittal will not be taken as *prima facie* evidence of want of probable

cause, or of malice, in a subsequent action for malicious prosecution. *Catzen v. Belcher* (W. Va.), 16-715.

The fact that a magistrate discharges the defendant in a criminal proceeding upon the request of the prosecuting attorney has not in itself any tendency to prove want of probable cause. *Davis v. McMillan* (Mich.), 7-854.

Presumption of want of probable cause from acquittal. — In an action for malicious prosecution, proof of the acquittal of the accused by a jury on trial, on indictment, does not tend to show want of probable cause. *Lindsey v. Couch* (Okla.), 18-60.

Presumption of probable cause from indictment subsequent to discharge by magistrate. — Standing alone, in an action for malicious prosecution, proof of the fact, that after the discharge of the accused by a United States commissioner, acting as an examining magistrate, the grand jury indicted the accused for the same offense, is *prima facie* evidence of probable cause for instituting the prosecution. *Lindsey v. Couch* (Okla.), 18-60.

Where a United States commissioner, acting as an examining magistrate, after a hearing discharges the accused, and the grand jury then returns an indictment charging him with the same offense, these two facts, in a suit for malicious prosecution, neutralize each other, and the plaintiff, to sustain his case, must go further and produce other evidence of want of probable cause for instituting the prosecution. *Lindsey v. Couch* (Okla.), 18-60.

Presumption of probable cause from conviction. — A verdict of guilty in a criminal prosecution is not conclusive evidence of probable cause, barring an action for malicious prosecution, where the trial court sets it aside and grants a new trial and on the second trial a verdict of not guilty is returned. *MacDonald v. Schroeder* (Pa.), 6-506.

Where in an action for malicious prosecution it is averred in the complaint that the plaintiff was convicted, but that such conviction was procured by fraud, perjury, or subornation of perjury, or other unfair means, the presumption of probable cause arising from the conviction is effectually rebutted. *Carpenter v. Sibley* (Cal.), 15-484.

Presumption of probable cause from magistrate's holding for grand jury. — In an action for malicious prosecution, the fact that the plaintiff was bound over by the committing magistrate to await the action of the grand jury is *prima facie*, but not conclusive, evidence of probable cause. *Wells v. Parker* (Ark.), 6-259.

Presumption of probable cause from granting of temporary injunction. — In an action for malicious prosecution, the fact that an order for a temporary injunction was granted to the plaintiff in the prosecution complained of as malicious is not conclusive, but merely *prima facie* evidence of

probable cause. *Burt v. Smith* (N. Y.), 2-576.

Presumption of malice from want of probable cause. — In an action for malicious prosecution, the plaintiff must prove malice as well as want of probable cause; but malice may be deduced from the facts and circumstances surrounding the transaction and may be inferred from want of probable cause. *Davis v. McMillan* (Mich.), 7-854.

While it is true that in some cases where the evidence in an action for malicious prosecution is sufficient to show want of probable cause, malice may be inferred, it is not the invariable rule that it must necessarily be inferred. *Ton v. Stetson* (Wash.), 10-369.

(2) Admissibility.

In general. — In an action for malicious prosecution in instituting proceedings to have the plaintiff bound over to keep the peace, such proceedings having grown out of the refusal of the plaintiff to move buildings from land which he claimed to own, and the title to which was disputed by the defendant, and a threat by the plaintiff to stop the defendant from going on the land with "cold lead," it is error to admit evidence that the defendant did not need the land upon which plaintiff's buildings stood, for the purpose of showing malice, as plaintiff had no right to occupy the land, and defendant's right to evict him was not dependent upon the necessity for its immediate use. *Thurkettle v. Frost* (Mich.), 4-836.

In such a case the defendant may, for the purpose of contravening plaintiff's claim that the proceedings to have him bound over to keep the peace were a malicious and unwarranted prosecution and persecution intended to harass him and make his occupancy of the land uncomfortable and thus drive him into yielding his rights, show that the plaintiff knew that the land in question belonged to the defendant, and that the former never claimed to own the land but purchased the buildings thereon with knowledge that they had always been treated as personal property; and to support such defense the defendant may introduce in evidence the bill of sale of the buildings to plaintiff's vendor and the chattel mortgage given back by such vendor to his vendor. *Thurkettle v. Frost* (Mich.), 4-836.

Reputation of plaintiff. — In a suit for malicious prosecution, evidence is admissible of the plaintiff's previous good reputation, as it has a bearing upon the question of probable cause. *Thurkettle v. Frost* (Mich.), 4-836.

(3) Sufficiency.

Malice. — Evidence reviewed, in an action for malicious prosecution, and held to show that the plaintiff's *prima facie* showing of a want of probable cause, when taken in connection with the surrounding facts and circumstances, would not warrant the jury in

finding or inferring malice on the part of the defendant. *Ton v. Stetson* (Wash.), 10-369.

Probable cause. — Probable cause for a criminal prosecution is shown as a matter of law, by findings that the prosecutor made a full and fair statement to reputable counsel of all the facts and information within his knowledge and was advised by the counsel to proceed. The term "full and fair statement of the facts" does not mean all the facts discoverable but all the facts within the knowledge of the person making the statement. *King v. Apple River Power Co.* (Wis.), 11-951.

The tearing down by a tenant of a "for rent" notice placed by the landlord in a window of the demised premises after the tenant had given notice of intention to move is not a violation of the Arkansas statute against trespass by the severance from the freehold of any produce thereof "or anything attached thereto," but the statute is of such doubtful construction that the tearing down of such notice is sufficient to constitute probable cause for prosecution of the tenant by the landlord under the statute, if he is induced to believe that the statute is thereby violated; and in an action for malicious prosecution on account of such prosecution the jury should be told as a matter of law that if the defendant honestly believed that the plaintiff had violated the statute by tearing down the notice they should find for the defendant. *Whipple v. Gorsuch* (Ark.), 12-38.

Connecting third person with prosecution. — In an action against two defendants for malicious prosecution evidence that one defendant urged the other to cause the plaintiff's arrest is sufficient to justify the jury in connecting the former defendant with the transaction, though such advice was given after the complaint was made but before the arrest and subsequent proceedings. *Davis v. McMillan* (Mich.), 7-854.

(4) Function of court and jury.

Probable cause. — The question whether there was probable cause in an action for malicious prosecution is solely a question of law for the court where the facts are undisputed. *King v. Apple River Power Co.* (Wis.), 11-951.

In an action for malicious prosecution, the question of probable cause held to be for the jury and the facts and circumstances proper for the jury to consider stated. *Thurkettle v. Frost* (Mich.), 4-836.

In an action for malicious prosecution it is for the jury to determine whether the defendant acted under advice of counsel and whether he fully disclosed to his counsel all the facts known to him. *Wells v. Parker* (Ark.), 6-259.

Evidence reviewed in an action for malicious prosecution and held to show that it was proper for the trial court to submit the question of probable cause to the jury. *Davis v. McMillan* (Mich.), 7-854.

Malice. — In an action for malicious prosecution in instituting proceedings to have the plaintiff bound over to keep the peace, such proceedings having grown out of the refusal of the plaintiff to move buildings from land which he claimed to own, and the title to which was disputed by the defendant, and a threat by the plaintiff to stop the defendant from going on the land with "cold lead," where it appears from the defendant's testimony that he stated to his counsel and to the justice before whom the complaint was made, exactly what occurred at the time of the alleged threat, it is not error for the court to refuse to direct a verdict for the defendant, as it is for the jury to determine whether the defendant was actually in fear that the plaintiff would execute his threat, for if he was not, and the proceedings were instituted for purposes other than a *bona fide* attempt to prevent a breach of the peace, the swearing out of the complaint was malicious. *Thurkettle v. Frost* (Mich.), 4-836.

f. Instructions.

In general. — Upon a count for malicious prosecution by a street railway company, there is no error in refusing a requested ruling for the defendant that there is no evidence to sustain the count and that the verdict must be for the defendant on that count, where there is evidence from which the jury has a right to find that the prosecution was instituted by the defendant's conductor and police officer, maliciously and without probable cause and while acting within the scope of their authority from the defendant, and that the defendant's manager or superintendent assented to the prosecution by intimating a readiness on his part either to settle it or to allow it to go on. *Conklin v. Consolidated R. Co.* (Mass.), 13-857.

In an action for malicious prosecution in instituting proceedings to have the plaintiff bound over to keep the peace, such proceedings having grown out of the refusal of the plaintiff to move buildings from land which he claimed to own, and the title to which was disputed by the defendant, and a threat by the plaintiff to stop the defendant from going on the land with "cold lead," it is proper for the court to charge the jury that in determining the question of probable cause they may consider all the facts and circumstances as shown by the evidence, so far as they throw any light upon that question, the dispute between the parties as to the right to the use of certain land, the circumstances under which the threat was made, the language used by the plaintiff in making the threat, whether the defendant fully and fairly stated all the facts, and what he said to his attorneys, and whether he acted in good faith on the advice given, and whether he wilfully withheld any material fact from the justice in making the complaint. *Thurkettle v. Frost* (Mich.), 4-836.

Malice and want of probable cause. — In an action for damages brought against

an attorney for prosecuting a suit against the plaintiff under an agreement for a contingent fee, it is proper for the court to instruct the jury that the plaintiff must show malice and want of probable cause, as, the contract for compensation not being champertous, the only remaining issue is one of malicious prosecution. *Smits v. Hogan* (Wash.), 1-297.

Advice of counsel. — In an action for malicious prosecution, an instruction as to advice of counsel held not open to objection. *Dorr Cattle Co. v. Des Moines Nat. Bank* (Ia.), 4-519.

g. Verdict.

Excessive damages. — Verdict for the plaintiff considered in an action for malicious prosecution, and held to be so excessive as to shock the judicial conscience. *Davis v. McMillan* (Mich.), 7-854.

MALPRACTICE.

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MANDAMUS.

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1. NATURE AND GROUNDS OF RELIEF.

Clear right and absence of adequate remedy. — The writ of mandamus does not supersede legal remedies, but rather supplies the want of a legal remedy, therefore two prerequisites must exist to warrant a court in granting this extraordinary remedy: first, it must appear that the relator has a clear, legal right to the performance of the particular duty by the respondent; and second, that the law affords no other adequate or specific remedy to secure the performance of the duty which it is sought to coerce. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

The remedy by mandamus is a strictly legal one, and the relator must establish a specific legal right as well as the want of a specific remedy in order to sustain a proceeding. *Stegmaier v. Goeringer (Pa.)*, 11-973.

The proceedings by mandamus can only be resorted to when there is no other legal remedy to accomplish the purpose sought thereby. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

Concurrent remedy with injunction. — Mandamus is not made a concurrent remedy with injunction by the Tennessee statute (Acts 1877, c. 97) which gives the chancery court jurisdiction of all cases at law except actions for unliquidated damages, and authorizes that court to use any remedy under its control proper to effectuate the purpose in view. *Brown v. Crystal Ice Co. (Tenn.)*, 19-308.

Discretion of court. — The writ of mandamus is an extraordinary writ and, while not discretionary, will only be issued by the court in the exercise of its sound legal discretion. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co. (Ind.)*, 6-880.

2. NATURE OF ACTS COMPELLABLE.

a. In general.

Upon whom rests duty to perform public functions. — Mandamus is not the proper proceeding to determine upon which of several public officers rests the duty of performing certain public functions. *Fowler v. Brooks (Mass.)*, 3-173.

Review of decision of pension board. — Mandamus will not lie to review or reverse the decision of a pension board on an application for a pension under the Louisiana statute providing that the decision of the board shall be final and conclusive. *State ex rel. Lynch v. Board of Trustees (La.)*, 8-945.

Determination of contract rights. — A controversy between the parties to a contract as to their respective rights thereunder cannot be determined in mandamus proceedings. *Mt. Vernon v. State ex rel. Berry (Ohio)*, 2-399.

Compelling issuance of state stock for state bond. — Mandamus will lie against the state treasurer to compel him to issue stock in exchange for a state bond in pursuance of a ministerial duty imposed upon him by statute. *Ehrlich v. Jennings (S. Car.)*, 13-1166.

Compelling repair of streets. — Mandamus does not lie to compel a municipal corporation to repair a part of one of its streets, more particularly if it appears that repairs to the street have been begun, if no wrong is shown calling for immediate redress, and if other and adequate remedies exist to cure such wrong as is complained of. *Farly v. Montreal (Can.)*, 20-847.

b. Exercise of discretionary powers.

Official boards. — The court may control by mandamus the action of officers or official boards vested with discretionary power when they refuse to act in consequence of an arbitrary conclusion, though the court should interfere only when it clearly appears that such officers or boards refuse to perform their official duties or so misconceive their official powers or duties that the purpose of the law will be defeated. *State v. Matthews (S. Car.)*, 16-182.

Public officers. — A writ of mandamus does not lie to compel a public officer to perform a duty which requires the exercise of discretion. The question whether the duty is of such a nature is one of law which may be considered by the court though the defendant has demurred to the complaint. *State ex rel. Hawes v. Brewer (Wash.)*, 4-197.

c. Compelling general course of official conduct.

Compelling justice to apportion process for service. — While mandamus will lie to compel performance of specific acts, where the duty to discharge them is clear, it is not an appropriate remedy to compel a general course of official conduct for a long

series of continuous acts to be performed under varying conditions. Therefore the writ of mandamus will not issue at the suit of one of the duly elected bailiffs of a militia district to compel the justice of the peace elected in such district to make an apportionment of the papers, writs, and other processes issuing from the justice's court or returnable thereto, and to turn over any particular part of them to the constable. *Jackson v. Cochran* (Ga.), 20-219.

Compelling police officers to enforce law. — The rule that mandamus does not lie to compel a general or continuing course of official conduct precludes the granting of a writ commanding police officers to enforce the laws generally and to perform every duty required by law, but not pointing out any specific act to be done. *State ex rel. Hawes v. Brewer* (Wash.), 4-197.

d. Acts of judicial officers.

Compelling action on motion for new trial. — Where the District Court refuses, on proper application, to grant a defeated party in a civil action a stay of proceedings under chapter 322 of the Kansas Laws of 1905, and after the Supreme Court has granted a stay of proceedings on the judgment, refuses to act upon a motion for a new trial pending in the action, mandamus will lie to compel the judge of such court to act upon the motion. *Bleakley v. Smart* (Kan.), 11-125.

Compelling magistrate to act upon application for warrant. — A court cannot, in a mandamus proceeding, determine the question whether a criminal warrant should issue, nor can it control the judgment or discretion of the magistrate to whom an application for warrant has been made, but it can and will issue a writ commanding the magistrate to hear and determine the application on the merits instead of casting the burden of investigation on the prosecuting attorney. *State v. Yahey* (Wash.), 9-1071.

Compelling court to proceed with trial. — A writ of mandamus lies to compel a trial court to proceed with the trial of a cause in which it has granted a change of venue without authority. *State ex rel. Wyman v. Superior Court* (Wash.), 5-775.

e. Acts of private corporation.

Issuance of corporate stock. — The only cases in which mandamus lies to compel the issue and delivery of stock of a corporation are where the stock in question has some pecuniary or special value peculiar in itself and different from the value of other stock in the corporation, or where shares of stock are detained, and the control of the corporation is at issue, and by securing the shares the party applying for the writ would obtain control; and in such cases it must affirmatively appear from the petition that the relator has a clear legal right to the possession of the stock, and that he has no

plain, speedy, and adequate remedy at law. *State ex rel. Gleason v. Jumbo Extension Min. Co.* (Nev.), 16-896.

Installation of telephone. — Mandamus will not lie to compel a telephone company to install a telephone at a bawdy house. *Godwin v. Telephone Co.* (N. Car.), 1-203.

Compliance with ordinance. — Mandamus will lie to compel a corporation to perform acts required by a municipal ordinance which the corporation accepts as a condition to a grant made to the corporation by the city, where the acts required by the ordinance are in the nature of duties or services to the public as distinguished from duties or services to the municipal entity. *Chicago v. Chicago Tel. Co.* (Ill.), 12-109.

A municipal ordinance accepted by a telegraph company, requiring it to file a statement of its gross receipts and pay a certain per cent. thereof into the city treasury, constitutes merely a contract between the company and the city, and creates no duty to the public such as is enforceable by mandamus. *Chicago v. Chicago Tel. Co.* (Ill.), 12-109.

f. Issuance of license.

Under void ordinance. — Mandamus will not lie to compel the granting of a plumber's license by a city where the ordinance relating to the licensing of plumbers is void and there is no valid provision requiring a license for any one to engage in or work at the business of plumbing in the city. *Henry v. Campbell* (Ga.), 18-178.

Pharmacist's license. — Under a statute providing that a regular graduate in pharmacy from any reputable college shall be entitled to a license, a graduate of a college of the character of which persons having a general acquaintance with the subject entertain a good opinion cannot be refused a license by the board of pharmaceutical examiners on the ground that such college does not require four years' practical experience in its laboratories or under a pharmacist, and the board may be compelled by mandamus to issue a license to such graduate. *State v. Matthews* (S. Car.), 16-182.

When a board of pharmaceutical examiners so misconceives its powers and duties that its exactions amount to the imposition on an applicant of terms and conditions not contemplated by the statute, the board may be compelled by mandamus to issue a license to the applicant. *State v. Matthews* (S. Car.), 16-182.

g. Levy of tax.

Duty imposed by statute. — Mandamus is the proper remedy against a county to enforce the payment of railroad aid bonds and the levy of a tax therefor, the bonds having been authorized by a statute making it the affirmative duty of the county commissioner to levy and assess a special tax annually in amount sufficient to pay accruing interest, and eventually the principal. *Berkey v. Board of Com'rs* (Colo.), 20-1109.

Even if county commissioners cannot levy a tax for the payment of railroad aid bonds at the time of demand therefor, a court may grant mandamus requiring a future levy at the time fixed by law, if the petitioner has a cause of action, and if the conduct of the defendant justifies the belief that it has no purpose to act at any time. *Berkey v. Board of Com'rs (Colo.)*, 20-1109.

h. Relinquishment of office to claimant.

Restoration to rightful claimant. — Mandamus is the proper remedy to restore a person to the possession of an office from which he has been illegally removed. *State ex rel. Moyer v. Baldwin (Ohio)*, 12-10.

Relinquishment to successful claimant in quo warranto. — If after the relator has succeeded in ousting, in quo warranto proceedings, the wrongful incumbent of an office, the relator is not voluntarily admitted to the office, he must resort to mandamus to secure possession, and in the mandamus proceedings the respondent may properly be ordered to deliver up the records and other equipment of the office. *Albright v. Territory (N. Mex.)*, 11-1165.

3. PROCEEDINGS TO OBTAIN WRIT.

a. Jurisdiction.

Original jurisdiction of Supreme Court. — The Supreme Court of Oklahoma has no original jurisdiction of an action originally instituted in that court by an insurance company against the state insurance commissioner, seeking a peremptory writ of mandamus against the commissioner for the issuance of a permit to the insurance company to do business in the state. *The Homesteaders v. McCombs (Okla.)*, 20-181.

The Supreme Court of Arkansas has supervisory jurisdiction to issue mandamus to compel a circuit judge to hold a term of court at a time and in a county required by statute. *Powell v. Hays (Ark.)*, 13-220.

Where a case has been brought to the Supreme Court of Georgia by a bill of exceptions complaining of a refusal to grant a new trial to a person convicted of felony, if the presiding judge grants a supersedeas but declines to admit the accused to bail, whether the Supreme Court has jurisdiction to issue a writ of mandamus to compel him to do so, *quære*. *Vanderford v. Brand (Ga.)*, 9-617.

Issuance of writ to judge of court of co-ordinate jurisdiction. — A judge of the Supreme Court of Georgia has no power to issue a mandamus to compel the performance of an official duty by another judge of the Superior Court. *Shreve v. Pendleton (Ga.)*, 12-563.

When duties are imposed on a judge of a Superior Court as an officer, another judge of the Superior Court has no power to issue a mandamus to compel the performance of such duties. *Elliott v. Hipp (Ga.)*, 20-423.

Where the judge of another circuit to whom such application was presented refused a mandamus *nisi* against the judge named in

the petition, and granted a restraining order and mandamus *nisi* against the registrars, it was proper for the judge granting the order and mandamus *nisi* to subsequently revoke the same and refuse to take further action on such application, for the reason that the same should be presented to the judge referred to in the application, who had jurisdiction to act thereon and who was not disqualified from so doing. *Elliott v. Hipp (Ga.)*, 20-423.

On error in the Supreme Court of Georgia from the refusal of a judge of the Superior Court to grant a mandamus absolute to compel another judge of the Superior Court to discharge an official function, the Supreme Court will not inquire into the merits of the case, but will affirm the judgment on the ground that one judge of the Superior Court has no power to issue mandamus against the other. *Shreve v. Pendleton (Ga.)*, 12-563.

b. Who may obtain writ.

Member of public at large. — One or more individuals may maintain mandamus to compel the doing of an act in which the public at large have a common interest. *Payne v. Staunton (W. Va.)*, 2-74.

Necessity of pecuniary interest. — A pecuniary interest in an individual in the act sought to be compelled by mandamus must exist to maintain it. *Payne v. Staunton (W. Va.)*, 2-74.

Private prosecutor. — Under the Washington statute permitting any person to make complaint that a criminal offense has been committed, if the magistrate to whom the complaint is made wrongfully refuses to act in the matter, the person applying for the warrant has sufficient interest in the performance of a public duty to compel its performance by mandamus, especially if the prosecuting attorney is resisting the application for the warrant. *State v. Yakey (Wash.)*, 9-1071.

c. Against whom writ lies.

In general. — Where application for a criminal warrant has been made to a visiting judge of the Superior Court and has been refused by him, and he has returned to his own county and ceased to be a visiting judge, a writ of mandamus will not issue to compel him to leave his duties in his county and go to the county where the application was made, for the sole purpose of hearing the application, so long as there are in the latter county numerous officers charged with the duty of hearing such applications. *State v. Yakey (Wash.)*, 9-1071.

Person sought to be removed from office as necessary party. — A person whose removal from a public office is sought to be accomplished by mandamus proceedings is a necessary party thereto and the court cannot adjudicate the cause without making him a respondent if he is within the jurisdiction of the court. *Powell v. People ex rel. Hedrick (Ill.)*, 2-551.

Against court or judge. — The Wash-

ington constitution recognizes a distinction between the powers of the Superior Court and the powers of the judges thereof, and therefore, in a petition for a mandamus to compel action on an application for a warrant made to a judge, the writ, if it issues, must issue against the respondent as judge and not against the Superior Court. *State v. Yahey* (Wash.), 9-1071.

State officer. — An action for mandamus to compel the state treasurer to redeem a state bond, as he is required to do in the performance of his official duty, is in no sense a suit against the state. *Ehrlich v. Jennings* (S. Car.), 13-1166.

Unincorporated association. — In the absence of statute, mandamus does not lie against an unincorporated association, or against individuals in their capacity as a board of directors of such an association. *Doyle v. Burke* (R. I.), 16-1245.

Abatement on expiration of term of office of party. — Mandamus does not lie against a mayor and city councilmen whose terms have expired to compel them to reconvene as a canvassing board and recanvass an election for city recorder. *Holdermann v. Schane* (W. Va.), 3-170.

Upon a petition for mandamus, the court will take judicial notice that the action has abated by the expiration of the term of office of the respondents, and will dismiss the suit, though the point as to abatement is not raised by counsel on either side. *State ex rel. Stranahan v. Board of State Canvassers* (Mont.), 4-73.

A petition for mandamus to compel a state board of canvassers to reconvene and recanvass election returns must abate and be dismissed where it appears that a majority of those originally constituting the board are not officers of the state at the time of the hearing, their successors having been elected and taken office and not having been served with notice of an action pending against them. *State ex rel. Stranahan v. Board of State Canvassers* (Mont.), 4-73.

Substitution of successor in office. — A mandamus *nisi* awarded against certain persons by name who when in office canvassed the ballots of a city election, but whose terms had expired when the mandamus was awarded, to compel them to reconvene and recanvass ballots, cannot be used for such relief against their successors in office. *Holdermann v. Schane* (W. Va.), 3-170.

Where a dismissed city employee brings a mandamus proceeding against an officer of the city to compel his reinstatement, and it appears that the relator was suspended from his office without pay upon the ground that his services were no longer necessary to the city, but the relator contends that this is not true, and that his services are still needed by the city, the proceeding does not abate upon the resignation of the defendant from the office, as, if the relator's contention is correct, his right to hold the position under the city is existing and continuous, and he may enforce this right by continuing

the proceeding against the defendant's successor. *People ex rel. La Chicotte v. Best* (N. Y.), 10-58.

Where a mandamus proceeding is against an officer of a municipality for the enforcement of the right of the relator against the municipality, the proceeding does not abate upon the resignation, removal, or expiration of the term of the officer, but it may be maintained against the officer's successor or successors. *People ex rel. La Chicotte v. Best* (N. Y.), 10-58.

In a mandamus proceeding against a municipal officer to enforce a continuing right of the relator against the municipality, where the defendant resigns his office after the application for a peremptory writ has been made and argued, but before written briefs have been submitted and before a decision has been rendered, the substitution of the defendant's successor in office as the defendant is necessary. *People ex rel. La Chicotte v. Best* (N. Y.), 10-58.

d. Limitation and laches.

Statute relating to civil actions as applicable to mandamus. — The Oklahoma statute limiting the time within which civil actions may be brought has no application to mandamus proceedings, as a mandamus proceeding is not a civil action. *Duke v. Turner* (U. S.), 9-842.

Limitation applicable to enforcement of county railroad aid bonds. — Mandamus, being the only remedy to enforce the payment of county railroad aid bonds, is barred only by the six-year statute of limitations, applicable to ordinary actions on the bonds and interest coupons, and not by the three-year limitation. *Berkey v. Board of Com'rs* (Colo.), 20-1109.

Application of doctrine of laches. — Where to all intents and purposes a mandamus proceeding against a state officer is made to play the part of an action against the state to enforce a claim, and the claim is a stale one, the equitable doctrine of laches should be applied. *McRae v. Auditor General* (Mich.), 10-594.

e. Pleading and practice.

Title of cause. — A bill for mandamus ought to be presented in the name of the state, but this has not generally been observed in practice, and if objection should be made to the omission the court would readily allow an amendment. *Brown v. Crystal Ice Co.* (Tenn.), 19-308.

Sufficiency of petition to compel issuance of corporate stock. — A petition for a writ of mandamus to compel the issue of shares of corporate stock, which alleges that the relator has paid a certain amount to the defendant corporation for a certain number of shares of its treasury stock, and has demanded a certificate for such shares from the corporation, and that the corporation has declined and refused to issue such certificate, but which fails to show that the particular shares in question have any pe-

culiar or greater value in themselves than any other like number of shares of stock in the corporation, or that the corporation is insolvent or unable to respond in damages for the conversion of the stock, or that its board of directors has authorized the secretary to sell the stock or to enter into any agreement with the relator to sell the same for the amount alleged to have been paid, does not disclose a state of facts warranting the issuance of a writ, and should therefore be dismissed. *State ex rel. Gleeson v. Jumbo Extension Min. Co.* (Nev.), 16-896.

In such a case, where the petition makes the corporation and also the individual members of its board of directors parties defendant, and each of the defendants interposes a separate demurrer, entitled in the same manner as the petition, an objection by the relator that the court cannot consider such demurrers because there is no appearance on behalf of the board of directors is without merit. *State ex rel. Gleeson v. Jumbo Extension Min. Co.* (Nev.), 16-896.

Specific averments as controlling general averments. — In an action of mandamus to compel the mayor of a city to recognize the relator as a member of the common council of the city, allegations in the petition that the votes in the city election were canvassed and that another than the relator was declared elected to the office of councilman and received the certificate of election and qualified by taking the official oath, sufficiently shows that such other person is a claimant to the office adverse to the relator, notwithstanding general averments that such person never accepted said office or made any claim thereto, the rule being that specific averments of fact will control general averments in a pleading. *Hoy v. State ex rel. Buchanan* (Ind.), 11-944.

Manner of raising objection to complaint or petition. — In a jurisdiction where the code system of pleading obtains, the defendant in mandamus proceedings may demur to the complaint, as the demurrer performs the office of a motion to quash the writ. *State ex rel. Hawes v. Brewer* (Wash.), 4-197.

Objections to a petition for mandamus should be raised by demurrer or answer, rather than by motion to quash the citation for the writ. *State ex rel. Gleeson v. Jumbo Extension Min. Co.* (Nev.), 16-896.

Amendment of alternate writ. — An alternative writ of mandamus may be amended. *State ex rel. Ellis v. Atlantic Coast Line R. Co.* (Fla.), 12-359.

Issuance of peremptory writ. — The mandatory part of a writ of mandamus should conform to the allegations of the writ, and it should not in general require more to be done than is justified by the allegations of the writ. Where the mandatory part of the writ, taken with its allegations, is not so definite and specific that its performance can be readily enforced by the court, a peremptory writ will not be issued. *State ex rel. Ellis v. Atlantic Coast Line R. Co.* (Fla.), 12-359.

When the court will not enforce the man-

date of an alternative writ as it is framed, a peremptory writ will not issue thereon, since the writ must be enforced as a whole if at all. *State ex rel. Ellis v. Atlantic Coast Line R. Co.* (Fla.), 12-359.

f. Evidence.

Burden of proof. — Where a private relator seeks to compel by mandamus a public official to perform an alleged duty, the burden is on him to show that he has performed every prerequisite condition necessary to compel such action, and that it has been refused by the public official, and such showing must be made, whether the duty to be performed is ministerial or discretionary. *Stegmaier v. Goeringer* (Pa.), 11-973.

If the relator in an action for a writ of mandamus refuses to produce evidence in support of the allegations of his petition on the case being called for trial, the case should, on motion of the respondent be dismissed; but the respondent, by assuming the burden and introducing evidence in support of his defense, waives the error, and the case must then be determined on the evidence. *Vermillion v. State ex rel. Englehardt* (Neb.), 15-401.

Sufficiency of evidence of laches. — Evidence reviewed, in a mandamus proceeding, and held insufficient to show that the relator had been guilty of such laches as to bar his right to the writ, and insufficient to show that the relator's delay had caused prejudice to the defendant or to the rights of other interested persons. *Duke v. Turner* (U. S.), 9-842.

g. Appeal and error.

Reversal for want of proper parties. — An appellate court will, upon its own motion, reverse a judgment granting a writ of mandamus where it appears from the record that the person whose rights were adjudicated by such judgment was not made a party respondent to the proceeding in the trial court. *Powell v. People ex rel. Hedrick* (Ill.), 2-551.

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Disobedience of mandate as contempt of court, see CONTEMPT, 1 e.

MANDATORY INJUNCTIONS.

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- Disparaging quality of manufactures, see **LIBEL AND SLANDER**, 2 j.
- Measure of damages for breach of contract in respect to goods to be manufactured, see **SALES**, 5 d (3).
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- Admissibility of maps in evidence, see **EVIDENCE**, 9 b (1).
- Filing map as dedication of land, see **LEVEES**.
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MARINE INSURANCE.

- See **INSURANCE**, 6.

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- See **ADMIRALTY**; **COLLISIONS**; **SHIPS AND SHIPPING**.

MARK.

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- Abandonment of, see **ABANDONMENT**.
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- Fish market as nuisance, see **NUISANCES**, 1 b.

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- See **SIGNATURE**.

MARRIAGE.

1. **NATURE AND VALIDITY OF MARRIAGE CONTRACT**, 1099.
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- See **BIGAMY**; **HUSBAND AND WIFE**; **MISCEGENATION**.
- Alimony in suit for annulment, see **ALIMONY AND SUIT MONEY**, 3 b; 4 c.
- Breach of promise, see **BREACH OF PROMISE OF MARRIAGE**.
- Contracts in restraint of marriage, see **BILLS AND NOTES**, 2; **CONTRACTS**, 4 a.
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- Devise in restraint of marriage, see **WILLS**, 9 b.
- Discontinuance of bastardy proceeding as consideration for promise to marry, see **BASTARDY**.
- Effect of marriage as emancipation of child, see **PARENT AND CHILD**, 7.
- Enforcement of antenuptial contracts, see **SPECIFIC PERFORMANCE**, 3 a.
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Prerequisite to allowance of alimony, see **ALIMONY AND SUIT MONEY**, 3 d.

Proof of marriage in divorce actions, see **DIVORCE**.

Proof of marriage in prosecution for statutory rape, see **RAPE**, 2 d (3).

Revocation of will by marriage, see **WILLS**, 6 b (7).

Subsequent marriage of parties as defense to rape, see **RAPE**, 2 b.

What law governs as to capacity of parties, see **CONFLICT OF LAWS**, 3 d (4).

1. NATURE AND VALIDITY OF MARRIAGE CONTRACT.

a. Nature.

In general. — Marriage, though defined by the law as a civil contract, differs from all other contracts in its consequences to the body politic, and for that reason in dealing with such contract or with the status resulting therefrom, the state is always a party whose interest must be taken into account. *Willits v. Willits* (Neb.), 14-883.

b. Validity.

Common-law marriage. — In the absence of a legal impediment, the only essential of a valid marriage in Nebraska is the free consent of the parties to live together in the marriage relation. *Eaton v. Eaton* (Neb.), 1-199.

Where a marriage contracted in good faith is void because of a legal impediment, the parties may, after the impediment has been removed, become lawfully united by continuous cohabitation. *Eaton v. Eaton* (Neb.), 1-199.

Sufficiency of religious ceremony. — A man and a woman competent to marry went through the marriage ceremony before a Catholic priest and three witnesses, intending to marry; and the priest made on the marriage record of his church an entry reciting that in view of a license issued by the clerk of court he had in the presence of the witnesses required by law received the free and mutual consent of marriage between the parties, and had given them the nuptial benediction, and caused them and the witnesses to sign "the present act of marriage." The parties had already married before a justice of the peace, or rather gone through the forms of a marriage, since the woman's first husband was then still living; and the priest was under the impression that said marriage, although no marriage in the eye of the Catholic church, yet was valid in the eye of the civil law, and that therefore the ceremony before him was intended to be merely a religious marriage; hence he acted under the same license which had done service for the other marriage, and did not send to the clerk of court a certificate of marriage signed by three witnesses, as required by law; and he caused his own record to be signed by only two of the witnesses, no greater number be-

ing required for a church record. In a suit contesting the will of the husband in favor of his wife as made in favor of a mere concubine, held, that the ceremony before the priest was a marriage, and not a mere blessing of the null and void marriage before the justice of the peace. *Landry v. Bellanger* (La.), 14-952.

Marriage by person under age of consent. — Where one of the parties to a marriage is under the age of consent but is at common law competent to contract a marriage, the marriage is not void but merely voidable, and until annulled by a judicial decree is valid for all civil purposes. *Willits v. Willits* (Neb.), 14-883.

Marriage by minor without consent of parent. — A marriage entered into by a female of the age of fourteen years is not invalidated by the fact that neither of her parents have consented thereto, either in writing or otherwise, and that the written consent purporting to be signed by her mother, upon which the license was issued, was in fact drawn up and signed by the minor herself without the mother's knowledge or consent. A party who obtains the issuance of a marriage license by fraud or forgery is liable to punishment, but the marriage is not invalidated thereby, unless the statute expressly so declares. *Matter of Hollopeter* (Wash.), 17-91.

Marriage without license required by statute. — A marriage which is celebrated publicly by a minister of the gospel and is consummated by subsequent cohabitation lasting for a period of several months is valid as a common-law marriage, and is not invalidated by the failure of the contracting parties to procure a license, where the statute requiring a license does not positively declare that a marriage without a license shall be void, but merely provides a penalty for its violation. *Snuffer v. Karr* (Mo.), 7-780.

Marriage by divorced person. — The statute which incapacitates a divorced person from contracting a valid marriage while the judgment divorcing him is subject to possible reversal is preventive and not merely repressive. *Eaton v. Eaton* (Neb.), 1-199.

One who has been released from wedlock by a judicial decision is not permitted to hope that if he marry again in violation of the statute, the marriage will be valid unless the decision is reversed. *Eaton v. Eaton* (Neb.), 1-199.

Marriage by divorced person with accomplice in adultery. — A marriage between one who has been divorced for adultery and the accomplice in such adultery is absolutely and incurably null, and produces no civil effects, if the accomplice was aware of the status of the other party when the adultery was committed. *Succession of Gabisso* (La.), 12-574.

Where the petition for divorce specifically charges adultery and concubinage between the defendant and a named accomplice, as the sole ground upon which the judgment prayed for could be rendered, and the judgment of

final divorce recites that it was rendered after due proof, though the evidence be not preserved, the identification of the accomplice is complete, for all the purposes of the Louisiana Civil Code, art. 161, prohibiting and declaring null marriages between persons who are divorced for adultery and their accomplices in such adultery. Succession of Gabisso (La.), 12-574.

Foreign marriage. — The rule that marriages, valid where made, are valid everywhere, is subject to exceptions, one of which is that, where a resident and citizen of one state goes into another, and there contracts marriage prohibited, from considerations of public policy and good morals, by the law of his domicile, such law cannot successfully be invoked in support of the marriage so contracted, or of claims predicted upon the validity thereof. Succession of Gabisso (La.), 12-574.

Aider of void marriage by prescription. — Prescription cannot be successfully invoked in aid of a marriage void *ab initio*, and at all times, as in contravention of public policy and good morals. Succession of Gabisso (La.), 12-574.

2. EVIDENCE OF MARRIAGE.

a. In general.

In a wife's action for divorce, where the defendant sets up the defense that he is not the complainant's husband, actual marriage is established by evidence that the parties were formally married under the belief that the wife's first husband was dead; that shortly thereafter the wife procured a divorce from the first husband; and that after such divorce the wife and the second husband continued to live together for many years with the intention of living as man and wife and under the common belief that they were lawfully such, and that the first husband was dead, though the first husband was in fact alive at the time of the second marriage. Chamberlain v. Chamberlain (N. J.), 6-483.

b. Presumptions and burden of proof.

Presumption of validity. — A marriage, when shown to have been entered into in due form of law, is clothed with every presumption of validity. If its validity is attacked, the burden of proving the invalidity is upon the party attacking it, and if, in assuming this burden, it becomes necessary for such party to prove a negative he must do so. Maier v. Brock (Mo.), 17-673.

The above rule applies in favor of the validity of a second or other subsequent marriage as against a prior marriage, and, consequently, where the wife by the first marriage attacks a subsequent marriage by the husband, the burden of proving that such first marriage has not been dissolved by law rests upon her, provided the subsequent marriage is shown to have been entered into in due form of law. Maier v. Brock (Mo.), 17-673.

c. Sufficiency.

Rebuttal of presumption of validity.

— In an action for dower, brought by the first wife of a decedent, evidence examined and held insufficient to overcome the presumption arising from a subsequent marriage of the decedent, that the first marriage had been legally dissolved. Maier v. Brock (Mo.), 17-673.

Under Nebraska statute. — Evidence reviewed in an action to construe a will, and held insufficient to establish the existence of a marriage within the meaning of the Nebraska statute providing that "marriage is considered a civil contract." Brisbin v. Huntington (Ia.), 5-931.

3. ANNULMENT OF MARRIAGE.

a. Grounds for annulment.

In general. — Under the code provisions of West Virginia all unlawful marriages are made voidable by the decree of a court of chancery. Martin v. Martin (W. Va.), 1-612.

Whether an equitable suit to annul a marriage is maintainable for causes recognized by the statute as grounds for an absolute divorce, *quære*. Griffin v. Griffin (Ga.), 14-866.

Incestuous marriage. — An incestuous marriage will be annulled by a court of chancery at the instance of either party, though the applicant may have wilfully entered into the same, as the continuance of such a marriage is contrary to good morals and public policy. Martin v. Martin (W. Va.), 1-612.

Duress. — Marriage, as a civil contract, is not valid where the parties have not freely consented, and consent is not free where it is extorted by violence or threats. A marriage is properly annulled where the consent of the complainant was procured by violence or threats of such a nature as to inspire a just fear of great bodily harm in a mind of ordinary firmness. Whether the violence or threats employed in a particular case was or were of such a nature is a question of fact left to the appreciation of the judge or jury. Quealy v. Waldron (La.), 20-1374.

A man who elects to stop a prosecution for seduction by marrying the woman alleged to have been seduced, and giving bond for her support, pursuant to the Georgia Penal Code, cannot have the marriage declared void as procured by duress. Griffin v. Griffin (Ga.), 14-866.

A man who contracts a marriage in order to escape a threatened prosecution for bastardy, and not because of fear of bodily injury from the woman's relatives, cannot have the marriage annulled for duress. Willits v. Willits (Neb.), 14-883.

Fraud. — In an action for the annulment of a marriage alleged fraud on the part of the defendant in falsely representing to the plaintiff prior to the marriage that she, the defendant, was entirely cured of epilepsy and had had no attack of it in eight years, does

not constitute ground for an annulment. *Lyon v. Lyon* (Ill.), 12-25.

b. Parties.

Right of parent to maintain suit. — Considering the policy of the law which is to sustain, rather than abrogate, the marriage relation, and in view of the fact that there is no statute permitting a parent to maintain an action to annul the marriage of a child, it must be held that a parent cannot maintain such an action. *Matter of Hollopeter* (Wash.), 17-91.

c. Pleading.

Annulment of foreign marriage. — In an action for annulment of marriage, where the bill does not charge conduct which the court of the forum would hold fraudulent and ground for an annulment, that court will not assume that the court of another state where the marriage was contracted would hold such conduct fraudulent and sufficient ground for annulment. *Lyon v. Lyon* (Ill.), 12-25.

MARRIAGE SETTLEMENTS.

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MARRIED WOMEN.

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MARSHALING ASSETS.

Application of doctrine to defeat prior equity. — The doctrine of the marshaling of assets for the protection of the common debtor as well as of the creditors, is of equitable origin and growth. It will be extended so far as may be necessary to protect the right of all, but an extension of it will be withheld when the manifest result would be to promote a subsequent equity into a position of superiority over a prior equity, to the injury of the holder of the earlier. The rule, like all equitable rules, will not be enlarged, or, if enlarged, will not be enforced, to the displacement of a countervailing equity, or where, for any special reasons it would be inequitable to enforce it. *Nolan v. Nolan* (Cal.), 17-1056.

Application of doctrine to protect homestead. — A debtor who has mortgaged an existing homestead will be heard, upon a marshaling of securities, to insist that recourse shall be had last to the homestead property; and a lien holder, whose security affects the homestead with other land will, at the instance of the debtor, be compelled to resort first to the other lands, even though

by so doing the security of still other creditors upon such other lands is impaired or destroyed. This principle, however, applies only where the homestead is in existence at the time when the liens of the creditors attach, and, consequently, where one creditor has a mortgage lien on two parcels of land and another creditor has a vendor's lien on one of those parcels, the common debtor cannot, by virtue of an after-declared homestead upon the parcel free from the vendor's lien, compel the creditor holding the mortgage lien, in marshaling securities, first to exhaust the security upon the parcel subject to the vendor's lien, when the result will be the impairment, if not the destruction, of the creditor holding the vendor's lien. *Nolan v. Nolan* (Cal.), 17-1056.

In such a case as that above considered, it is immaterial that the homestead is declared by the debtor's wife instead of the debtor himself. A declaration made upon the separate property of the debtor by his wife, after the liens of creditors have attached, can have no higher place in equitable regard than if it had been placed upon the property by the debtor himself. *Nolan v. Nolan* (Cal.), 17-1056.

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MASTER AND SERVANT.

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1. CONTRACT OF HIRING.

a. Creation of relation.

Relation between convict laborer and contractor. — Under the Arkansas statute providing that the management and discipline of convicts hired out by the state shall remain in the state, the relation of master and servant does not exist between a convict and a railroad company to which his labor is sold, and the railroad is not liable for the tortious act of the convict resulting in injury to another employee, even though such act is committed on Sunday when the convicts are allowed pay for the work done. *St. Louis, etc., R. Co. v. Boyle* (Ark.), 13-167.

Person borrowing another's servant. — One who borrows another's servant for an occasional service assumes the duties and liabilities of a master to the servant during the time of such service. *Wyman v. Berry* (Me.), 20-439.

b. Duration.

Where time not specified. — Where a contract of employment stipulates that the servant shall be paid at a certain rate per day, but does not specify any time for the duration of the employment, the law presumes that the hiring is for a year. *Gould v. McCrae* (Ont.), 8-279.

Mutuality of obligation as to duration. — A contract by which one party agrees to employ the other so long as his services are satisfactory, but without any stipulation by the employee to serve for any particular length of time, lacks mutuality as to the duration of the employment, and the employer may therefore terminate it at any time. *Price v. Western Loan, etc., Co.* (Utah), 19-589.

c. Termination.

(1) Pursuant to contract.

Contract making satisfaction test. — Where an employee enters into a written contract with his employer to continue at least a specified number of years if he proves himself "competent and satisfactory," and agrees to perform all the duties of a first-class gardener and manager of his employer's place to "the satisfaction" of the latter, he is subject to be discharged if the employer is dissatisfied; and this is not dependent on whether there are reasonable and sufficient grounds for such dissatisfaction. *Mackenzie v. Minis* (Ga.), 16-723.

Under a contract of employment for a definite term provided the duties of the employment are satisfactorily performed, the

employer has the absolute right to discharge the employee whenever he becomes genuinely dissatisfied with his services although no valid grounds for discharge exist. *Corgan v. George F. Lee Coal Co.* (Pa.), 11-838.

A person whose satisfaction is made the test of the sufficiency of services performed by another must act honestly and in good faith in declaring a breach of the contract. His dissatisfaction must be real, and not merely pretended. *Mackenzie v. Minis* (Ga.), 16-723.

If a reasonable ground for discharge was required in such a case, it would be sufficient that the servant has borrowed tools belonging to the master without the latter's consent and has sold, or pretended to sell, to himself certain articles belonging to the master. Even though authorized to sell the articles, his authority in that regard would not extend to a sale to himself. *Mackenzie v. Minis* (Ga.), 16-723.

Rule requiring notice of termination.

— A manufacturing company or companies may, as a reasonable rule, require the employees to give notice before leaving, and such a rule is binding upon an employee who enters the service with knowledge thereof. *Willis v. Muscogee Mfg. Co.* (Ga.), 1-472.

(2) Death of servant.

Implied condition. — Every contract for personal services is subject to the implied condition that the party agreeing to perform the services shall be alive at the time set for performance, and, consequently, if such party dies before the services have been fully performed, his estate is not ordinarily liable in damages because of the untimely termination of the contract. If, however, the services have been paid for in advance, the estate of the deceased is liable to refund the unearned portion of the consideration. *Mendenhall v. Davis* (Wash.), 17-179.

Recovery of damages. — In such a case, if the defendant is able to show that his contract with the plaintiff's intestate was more favorable than he could have made with another person equally skilled and competent, the difference is the measure of his damages, and he is entitled to counterclaim the same against the plaintiff's demand. *Mendenhall v. Davis* (Wash.), 17-179.

In an action by the administrator of a decedent, on a promissory note, it is a good defense that a part of the consideration for the note consisted of the agreement of the plaintiff's intestate to render personal services to the defendant, and that the plaintiff's intestate died before the services had been fully performed. *Mendenhall v. Davis* (Wash.), 17-179.

(3) Discharge of servant.

Immoral conduct. — In an action brought by a servant against his master to recover for an alleged wrongful discharge, where the evidence shows that the plaintiff was employed by the defendant to assist him in his

business of sheep raising, and lived in a house owned by the defendant, near the latter's dwelling house; that during the defendant's frequent absences from home the plaintiff was left in charge of the business, and at such times was often in the defendant's house, of which the defendant's wife and daughter and other children and a maid servant were inmates; that about a month prior to his discharge the plaintiff boasted to defendant of indecent and immoral conduct on his (plaintiff's) part, occurring some years before; that he had previously made the same statement to a neighbor of the defendant, who communicated them to the latter; and that the making of these statements was the cause of the plaintiff's discharge, the defendant is entitled to a dismissal of the action, the plaintiff's discharge, under such circumstances, being justified. In such a case it is no exculpation of the servant that the indecent conduct was an isolated act, occurring several years before, the master's knowledge being recent. *Denham v. Patrick* (Can.), 17-358.

It seems that in the case of a household servant, or one who has access freely to the household, any moral misconduct (not of trivial character) will justify his discharge. (*Per Boyd, C.*) *Denham v. Patrick* (Can.), 17-358.

Waiver of right to discharge. — It is a question of fact whether an employer waives his right to discharge an employee by retaining him in service after knowledge of such acts of disobedience and misconduct as would justify his discharge. *Batchelder v. Standard Plunger Elevator Co.* (Pa.), 19-875.

d. Compensation.

As dependent on estimate of cost. — An architect employed to prepare plans and specifications for a building to cost an estimated sum may be entitled to compensation if the cost of erecting such building in accordance with such plans and specifications is reasonably near or reasonably approximates such sum. *Williar v. Nagle* (Md.), 16-982.

In such a case the question of reasonableness should ordinarily be submitted to the jury. But where it appears that the estimated cost of the building was ninety thousand dollars and that the lowest bid under the plans and specifications was one hundred and twenty-five thousand dollars, the court may properly declare that as a matter of law the cost does not reasonably approximate the estimated amount, and that the architect cannot recover. *Williar v. Nagle* (Md.), 16-982.

In an action by an architect to recover compensation for preparing plans and specifications for a building to cost an estimated sum, it is error to instruct the jury to the effect that the plaintiff is entitled to recover unless there was an express agreement that there should be no compensation if the cost of erecting the building in accordance with such plans and specifications should exceed

the estimated sum. *Williar v. Nagle* (Md.), 16-982.

Such instruction is not modified by a correct instruction granted on behalf of the defendant to the effect that there is an implied condition in such a contract of employment that there shall be no compensation if the cost of erecting the building in accordance with the plans and specifications shall greatly exceed the estimated cost. The two instructions are conflicting and are calculated to mislead the jury. *Williar v. Nagle* (Md.), 16-982.

In such an action there is no reversible error in rejecting a prayer that the jury shall find for the defendant if they find that there was an agreement or understanding between the parties that the services should not be paid for unless the building could be erected according to such plans and specifications for a sum not exceeding the estimated amount, where such prayer does not submit to the jury the question whether such building could be erected for such amount, there being no admission by the plaintiff that the lowest bid was greatly in excess of such amount. *Williar v. Nagle* (Md.), 16-982.

Rendition of extra services. — All services rendered by an employee during the period of employment which are similar in nature to the regular duties are presumed to be covered by the regular salary, except upon proof of an agreement for extra compensation. *Jerome v. Wood* (Colo.), 12-662.

An express contract for additional compensation for alleged extra services rendered by an employee working for monthly wages, is not proven by testimony of the employee that at the time her services were increased she complained to the employer and was told by him that if she would remain he would "make it all right" or "do well" by her, when it appears that the employee's wages were somewhat increased about this time, and that at the final settlement with her employer, six months later, she made no demand for extra compensation, nor made such demand for a year thereafter. *Jerome v. Wood* (Colo.), 12-662.

Where a person is employed as a domestic servant and as an attendant upon the invalid wife of the employer, increased services to the invalid due to a change in the treatment of the invalid are presumed to be compensated by the employee's regular wages, especially where such wages are increased at or about the time that the alleged additional services are required and the employee remains in the employment for about six months thereafter and then receives wages agreed upon without making any demand for additional compensation. *Jerome v. Wood* (Colo.), 12-662.

Statutory regulation of mode of payment. — Under the Indiana statute regulating the time and mode of payment of wages, the requirement to pay semi-monthly becomes mandatory upon an employer only, when an employee to whom wages are due and owing demands such payment; and the

right of the employee to demand the semi-monthly amount of wages then due is a right which he may exercise or not as he chooses. *Seelyville, Coal, etc., Co. v. McGlosson (Ind.)*, 9-234.

Under a statute prohibiting the payment of wages for labor by order or check not redeemable in cash, a money judgment cannot be recovered against a corporation at the suit of a holder of checks issued by it and redeemable on their face only in merchandise, where it does not appear that such checks were issued in payment for labor, and where the corporation stands ready to redeem in merchandise. *Johnson, Lytle & Co. v. Spartan Mills (S. Car.)*, 1-409.

e. Performance and breach.

In general. — Evidence reviewed, in an action by a servant to recover damages for breach of his contract of employment, which was indefinite as to its duration, and held to be insufficient to rebut the presumption that the hiring was for a year. *Gould v. McCrae (Ont.)*, 8-279.

Assignment of inventions. — A contract binding an employee to assign to his employer all inventions made by him during the term of his employment, which recites that it is in consideration of the employment, and which is executed and delivered before the actual commencement of the employment, is supported by a sufficient consideration though it is executed several days after the execution of the contract of employment. *Mississippi Glass Co. v. Franzen (U. S.)*, 6-707.

In a suit for specific performance of a contract binding an employee to assign to his employer all inventions made by him during the term of his employment, where such suit is brought by the employer after the employee has enjoyed the benefits of the contract for a period and has voluntarily quit the employment, the defense of lack of mutuality cannot be set up, as the contract shows reciprocity of obligation, and is, moreover, an executed contract. *Mississippi Glass Co. v. Franzen (U. S.)*, 6-707.

Evidence reviewed in a suit to compel an assignment of letters patent under a contract binding the defendant to assign to the complainant his entire interest in all inventions and discoveries made by him while in the complainant's employ, and held to show that the inventions in controversy were made by the defendant during the term of his employment with the complainant. *Mississippi Glass Co. v. Franzen (U. S.)*, 6-707.

Disclosure of trade secrets of master. — The relation between a corporation engaged in the business of prescribing, manufacturing, and selling eyeglasses, and an optician in the employ of such corporation who examines the eyes of patrons, prescribes glasses, and makes records of the cases examined and treated, is confidential; and where such employee surreptitiously copies the names and addresses of a great number of the company's patrons from its records,

and, after leaving its employment, sends circular letters to persons whose names and addresses he has thus acquired, soliciting their patronage, the company is entitled to an injunction restraining him from so using the names and addresses in question, and from disclosing the same to any one else. *Stevens & Co. v. Stiles (R. I.)*, 17-140.

A court of equity will restrain a person from disclosing trade secrets which have come to his knowledge while in the confidential employment of another person; and it is not necessary that there should be an express contract by the employee not to disclose such secrets, if such agreement may fairly be implied from the circumstances of the case and the relation of the parties. *Stevens & Co. v. Stiles (R. I.)*, 17-140.

Where the injunction granted in such a case does not restrain the defendant generally from entering into competition with the plaintiff, the defendant cannot complain that such injunction is unwarranted on the ground that there was no agreement that he would not enter into competition with the plaintiff in case he left its employ. *Stevens & Co. v. Stiles (R. I.)*, 17-140.

In such a case it is no defense to the employer's action for an injunction, that the only names copied and used by the defendant were those of customers whom the defendant had personally examined. What is done by a servant in the course of his employment is, in the legal sense, done by the master himself, and the servant has no more right to copy records made by himself than to copy any other records of the master to which he has access. *Stevens & Co. v. Stiles (R. I.)*, 17-140.

Change of position of servant. — A contract employing one as manager of a sales department is violated by the master in reducing a servant to a sales clerk. *Cooper v. Stronge and Warner Co. (Minn.)*, 20-663.

Waiver of breach. — Where a traveling salesman agrees with his employers that they are to keep part of his salary as a guaranty for the faithful performance of his contract of employment, and upon his buying a similar business during the life of the contract his employers discharge him, retaining a portion of his wages, in an action by the salesman for commissions and also the wages so retained, the question as to whether the defendants have waived any claim on account of the plaintiff's conduct being involved, the right of the plaintiff to recover the wages withheld should be submitted to the jury. *Schultz v. Fort (Ia.)*, 12-428.

Successive actions for breach. — Successive actions against the master for wages accruing after a wrongful discharge of a servant cannot be maintained, and a recovery in one such action is a bar to any further recovery for a breach of the contract of employment. *Carmean v. North American Transportation, etc., Co. (Wash.)*, 13-110.

Duty to minimize damages. — An employee who has been wrongfully reduced in his position by his employer in violation of

his contract is required to be reasonably diligent in seeking employment of a similar character to that contracted for. *Cooper v. Stronge & Warner Co.* (Minn.), 20-663.

By "other employment" as used in the rule making it the duty of a servant discharged in violation of a contract of hiring to seek "other employment," is meant employment of a character such as that in which he was employed, or not of a more menial kind. *Cooper v. Stronge & Warner Co.* (Minn.), 20-663.

Measure of damages. — Where a contract of employment between a manufacturer and a workman provides that the servant shall be paid by piece work and that he shall not quit or be discharged without giving or receiving notice, there is an implied undertaking that when the master terminates the employment because of his inability to run the works at a profit, he shall provide the servant with a reasonable amount of work up to the expiration of the time specified in the notice to quit, notwithstanding the existence of an alleged custom to the contrary; and the measure of damages for the breach of such implied agreement is the average amount of the servant's earnings prior to the stoppage of the works. *Devonald v. Rosser* (Eng.), 6-230.

A manager of his employer's business, who is to receive a fixed salary as well as commissions on the business done by him, may, in an action for being wrongfully dismissed before the expiration of his contract of employment, recover, in addition to his salary for such unexpired period, such commissions as in the opinion of the jury he would have earned had he been allowed to manage the business during such period. *Addis v. Gramophone Co.* (Eng.), 16-98.

In such action the jury cannot consider, in aggravation of the plaintiff's damages, the manner of his dismissal, the injury to his feelings, or the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain other employment. *Addis v. Gramophone Co.* (Eng.), 16-98.

2. VALIDITY OF STATUTORY REGULATION

a. Relating to payment of wages.

Time and medium of payment. — The Indiana statute requiring employers engaged in certain specified classes of business to pay their employees at least semi-monthly if such payment is remanded, and further requiring that such payment shall be "in lawful money of the United States," is a valid exercise of the legislature's power to regulate the reasonable payment of wages. *Seelyville Coal, etc., Co. v. McGlosson* (Ind.), 9-234.

The provision of the Indiana statute regulating the time and mode of payment of wages that an employer who shall fail, for ten days after demand for semi-monthly payment has been made by an employee, to pay the wages due such employee, shall be liable

for a reasonable attorney's fee, as a part of the damages in an action instituted by the employee to recover the wages due him, is constitutional. *Seelyville Coal, etc., Co. v. McGlosson* (Ind.), 9-234.

The provision of the Indiana statute regulating the time and mode of payment of wages that an employer who shall fail, for ten days after demand for semi-monthly payment has been made by an employee, to pay the wages due such employee, shall be liable to "a penalty of one dollar for each succeeding day, not exceeding double the amount of wages due," is constitutional. *Seelyville Coal, etc., Co. v. McGlosson* (Ind.), 9-234.

A statute providing that certain corporations shall pay the wages of their employees within a certain time in lawful money does not deprive a railroad corporation or the persons who compose it of liberty or property without due process of law, or deny to them the equal protection of the laws or infringe any for their property rights guaranteed by the constitution of the state of Vermont. *Lawrence v. Rutland R. Co.* (Vt.), 13-475.

Creating lien for wages. — No constitutional provision is infringed by a statute giving the employees of manufacturing establishments a lien, superior to prior mortgage liens created after the enactment of the statute, for wages payable within six months before the distribution of the property or effects of such establishments among their creditors. *Graham v. Magann Fawke Lumber Co.* (Ky.), 4-1026.

b. Relating to discharge of servant.

Requiring master to give written reason for discharge. — The Kansas statute (Laws 1897, c. 144) requiring an employer of labor, upon the request of a discharged employee, to furnish in writing the true cause or reason for such discharge, is repugnant to section 11 of the bill of rights of the state guaranteeing freedom of speech, and is invalid. *Atchison, etc., R. Co. v. Brown* (Kan.), 18-346.

The duty imposed upon employers by the Kansas statute (Laws 1897, c. 144) requiring an employer of labor, upon the request of a discharged employee, to furnish in writing the true cause or reason for such discharge is not a police regulation, and is an interference with the personal liberty guaranteed to every citizen by the state and federal constitutions. *Atchison, etc., R. Co. v. Brown* (Kan.), 18-346.

c. Relating to breach of contract.

Imprisonment for leaving employment after receiving advance wages. — The Alabama statute providing for the imprisonment of any person who, with the intent to injure or defraud his employer, obtains money or other personal property under a written contract for the performance of work, and without making restitution and without just cause refuses or fails to perform such work, does not violate the Ala-

bama Bill of Rights prohibiting imprisonment for debt. *State v. Vann* (Ala.), 14-1058.

The Alabama statute making a breach of contract by an employee or tenant a misdemeanor and punishable by fine or imprisonment or both, violates the guaranties of life, liberty, and property contained in the United States and Alabama constitutions. *Toney v. State* (Ala.), 3-319.

The South Carolina statute providing for the imprisonment of any farm laborer working for a consideration under a contract who "shall receive advances in money or supplies and thereafter wilfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract," violates the provision of the South Carolina constitution prohibiting imprisonment for debt except in cases of fraud. *Ex p. Hollman* (S. Car.), 14-1105.

Such statute is also contrary to the Thirteenth Amendment to the Federal Constitution and the Act of Congress passed in pursuance thereof, prohibiting involuntary servitude or peonage. *Ex p. Hollman* (S. Car.), 14-1105.

Such statute also denies the equal protection of the laws to the farm laborers coming within its provisions. *Ex p. Hollman* (S. Car.), 14-1105.

No one has a right to money obtained in bad faith and through wilful and wanton methods. The fact of one who imposes upon another, and obtains an amount on the representation that he will stay and work, and immediately thereafter leaves, falls within the terms of the Louisiana statute imposing a penalty for violation of a labor contract, and he cannot be heard to complain of involuntary servitude. *State v. Murray* (La.), 7-957.

d. Abrogating fellow-servant rule.

Power to abrogate. — For the purpose of providing for the safety and protection of the employees in the service of a common employer, the legislature has the undoubted authority to abrogate an exception to the general rule of *respondeat superior* in favor of the employer, and make him liable to one of his employees for damages caused by the negligence of another employee, while acting within the scope of his employment, regardless of the fact that such employees are fellow servants. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

Due process of law. — The Colorado Coemployee Act rendering an employer liable for damages resulting from injuries to, or the death of, an employee caused by the negligence of the coemployee in the same manner, and to the same extent as if the negligence causing the injury or death was that of the employer is not unconstitutional as depriving the employer of his property without due process of law, as the act does not deprive the employer of any defense to the liability thereby imposed which under the established rules of law could be regarded

as sufficient, save and except his own lack of negligence, and such defense is not a constitutional right. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

Equal protection of law. — Section 3150 [Florida] General Statutes of 1906, that imposes liability upon railroad companies for injury to their employees, who are free from fault, through the negligence of coemployees, does not deny to such companies due process of law or the equal protection of the law, and is not violative of the Fourteenth Amendment to the Federal Constitution. *Florida East Coast R. Co. v. Lassiter* (Fla.), 19-192.

3. LIABILITY OF MASTER FOR INJURY TO SERVANT.

a. In general.

Duties of master to servant in general. — The duties which a master owes to his servants are to furnish suitable machinery and appliances with which the service is to be performed, to keep them in order and repair, to exercise ordinary care in the selection and retention of sufficient and competent servants, and generally to make such provision for the safety of employees as will reasonably protect them against the danger incident to their employment. *Quinn v. Electric Laundry Co.* (Cal.), 17-1100.

It is the duty of the master to employ none but competent servants, to use due care in providing his servants with safe machines and appliances to work with, and to exercise reasonable care in keeping them in good repair by inspection at reasonably frequent intervals; and the master cannot, by delegating such duties to others, relieve himself from responsibility for their imperfect performance. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

The standard of conduct followed by the ideal prudent man is the one adopted in all cases involving the question of negligence by which to measure the conduct of employer and employee. *Marks v. Harriet Cotton Mills* (N. Car.), 3-812.

Test of liability. — The test of the liability of a master for an injury to his servant is not the condition of the place or the machinery at the instant of the injury, but the character of the duty, the negligent performance of which causes the injury, and whether such duty is a duty of construction, preparation, or repair, or whether it is a duty of operation. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

Extra hazardous employment. — The operation of an ordinary band saw, for the purpose of cutting wood according to various designs for the manufacture of furniture, cannot be considered an extra hazardous occupation, so as to impose upon the master any extraordinary degree of care with regard to the safety of his servants engaged therein. *Coin v. John M. Tatge Lounge Co.* (Mo.), 17-888.

Liability for injuries sustained in consequence of overwork. — A master

who keeps his servant continuously at work for an undue number of hours is liable in damages for an injury which the servant sustains, in the ordinary discharge of his duty, in consequence of his inability, from fatigue and exhaustion, to use the requisite skill and care. *Great Northern R. Co. v. Couture (Que.)*, 7-190.

Exposure to infectious disease. — A master is under a primary and unassignable duty to adopt all reasonable means and precautions to secure the safety of his servant, and is negligent in exposing the servant to an infectious disease which reasonable care on the master's part would discover. *O'Connor v. Armour Packing Co. (U. S.)*, 14-66.

Promulgation and enforcement of rules. — While it is the duty of a railroad company not only to promulgate a code of rules for the government of its employees, but also to enforce their obedience, the company is not required to adopt and promulgate a code of rules for inducting learners or beginners into its service. *Louisville, etc., R. Co. v. Vincent (Tenn.)*, 8-66.

A rule of a railway company requiring trainmen to know that the cars in their train are safe does not impose upon the trainmen a duty coextensive with the common-law duty of the company to furnish safe cars, as the inspection required of the trainmen does not extend to defects not obvious to them, while the inspection required of the company's car inspector does extend to such defects where they can be made obvious by careful inspection. *Martin v. Wabash R. Co. (U. S.)*, 6-582.

The violation of a rule of the railroad company, requiring a block to be kept clear, whereby an injury results to a locomotive engineer, constitutes negligence in law. *Jennings v. Philadelphia, etc., R. Co. (D. C.)*, 10-761.

Liability of railroad operating on leased tracks. — A railway company running its trains over the leased tracks of another company is not relieved of the duty it owes to its employees to use reasonable care to provide for the safe operation of its trains while upon such leased tracks. *Floody v. Chicago, etc., R. Co. (Minn.)*, 18-274.

Liability of master to substitute for servant. — Where a man employed as outfit manager on outfit cars used for the employees of a railroad company is required by his contract of employment either to do the cooking or to get some one to do it for him, and his wife goes upon the cars and cooks for the railroad employees, washes the dishes, and takes care of the commissary and dining car, with the knowledge and approval of the company which receives the benefit of her labor, she is not a trespasser or licensee, and the company owes her the same duty to exercise care for her safety as it owes to its employees, although she is not on the payroll of the company or entitled to pay for her services. *Pugmire v. Oregon Short Line R. Co. (Utah)*, 14-384.

A person employed and paid by a servant

as a temporary substitute, with the knowledge and acquiescence of the master, is entitled to the same measure of protection against injury while engaged in the master's work as the regular servant for whom he is acting as substitute, though he may not be entitled to recover wages from the master. *Agar v. Harbach (Ia.)*, 4-441.

b. Duty to furnish safe place to work.

Existence of duty. — It is the duty of the master to furnish the servant a place to work which is safe from latent as well as from patent danger, and which is safe from extraneous forces menacing its safety that could be ascertained upon reasonable inquiry. *Williams v. Sleepy Hollow Mining Company (Colo.)*, 11-111.

Required to exercise in providing a reasonably safe place for employees to work is of a much higher degree where the employees are far underground with but scant means of escape in case of danger. *Williams v. Sleepy Hollow Mining Company (Colo.)*, 11-111.

Duty to make provision against unforeseen accidents. — It is not to be reasonably anticipated that the driver of a car in a coal mine will be kicked from his seat on the car by the animal drawing it, or that he will otherwise be caused to fall; and therefore, on the happening of such an accident, in consequence of which the driver is crushed between the side of the car and the wall of the passage way through which the car is running, the mine owner is not chargeable with negligence in failing to provide the driver with a safe place to work, in that the passage is too narrow to admit the body of a man between the car and the wall. *Arkansas Smokeless Coal Co. v. Pippins (Ark.)*, 19-861.

Safe means of ingress and egress from master's premises. — When an employee is going to and from his work, the relation of master and servant exists so long as the employee is upon premises owned and controlled by the employer, and the employer owes to the employees the duty of providing a safe way to pass and repass. *Virginia Bridge, etc., Co. v. Jordan (Ala.)*, 5-709.

Erection of scaffold. — An employer who erects a scaffolding for his employees to work on, as distinguished from merely furnishing the materials with which the employees may build a scaffolding for themselves, is bound to see that a safe method of construction is used, and where the testimony as to the safety of the method is conflicting, in an action by an employee who was injured by the fall of the scaffolding, the case must be submitted to the jury. *Studebaker v. Shelby Steel Tube Co. (Pa.)*, 18-611.

Duty of express company as to cars and tracks not under its control. — The doctrine that it is the employer's duty to furnish the employee a safe place in which to do his work does not apply to an express company as regards cars and tracks not un-

der its control. *Robinson v. St. Johnsbury, etc., R. Co. (Vt.), 12-1060.*

Erection of mail cranes near tracks.

—The use of mail cranes near railroad tracks necessarily increases, to some extent, the danger of railroading, and it is the duty of a railroad company using such appliances to exercise every reasonable care to render the use of the appliances as reasonably safe as is practicable without impairing their efficient operation. *Denver, etc., R. Co. v. Burchard (Colo.), 9-994.*

It cannot be said that the location of a mail crane so near to the railroad track as to bring the end of the arm of the crane within ten inches of the cab of a passing locomotive is negligence *per se*. *Denver, etc., R. Co. v. Burchard (Colo.), 9-994.*

Employees entitled to benefit of rule in general. — A foreman in a sawmill is entitled to the benefit of the rule that the master is bound to use reasonable care to provide his servants a safe place in which to work. *Viou v. Brooks-Scanlon Lumber Co. (Minn.), 9-318.*

Duty to inspect as to employee upon whom duty rests. — In a suit for a personal injury by a servant against the master, where the right of recovery is dependent upon the negligence of the master in failing to inspect the premises, and where the duty of inspection was upon the injured servant, the servant cannot recover for an injury sustained because of his failure to inspect. *Stewart v. Savannah Electric Co. (Ga.), 17-1085.*

The right of a servant to recover for injuries caused by the unsafe condition of his place of work cannot be defeated on the ground that it was his duty to repair the defect, where he offered to do so, but was ordered by the foreman not to do it. *Miller v. White Bronze Monument Co. (Ia.), 18-957.*

Question of law or fact. — The question as to what is a safe place to work is in some instances for the court, and in other instances for the jury. *Welch v. Carlucci Stone Co. (Pa.), 7-299.*

Under the well-established doctrine that a master must exercise ordinary care to furnish his servant a safe place in which to work and to protect his servant from danger, it is for the jury to say whether this duty was performed when a train of cars was pushed on the track where laborers were at work, without having a flagman on the front end of the train to keep a lookout and give signals of danger. *St. Louis, etc., R. Co. v. Jackson (Ark.), 8-328.*

In an action against a railroad company to recover damages for the death of a fireman, caused by coming in contact with a mail crane, where evidence at the close of the plaintiff's case in chief tends to show that the crane was located nearer the track than was necessary to its efficient operation, the question of the defendant's negligence is one for the determination of the jury, and therefore it is proper to refuse the defendant's

motion for a directed verdict. *Denver, etc., R. Co. v. Burchard (Colo.), 9-994.*

In an action by a servant to recover damages for personal injuries sustained by him, the jury cannot be permitted to guess at or conjecture about what constitutes a safe place to work, or of the cause of the accident, without proof of facts to support the theories relied on or of facts from which an inference of the alleged negligence can fairly be drawn. *Welch v. Carlucci Stone Co. (Pa.), 7-299.*

A mining company which knows of the existence of water in a neighboring mine in such quantities that it may become dangerous to the company's employees, by breaking through and flooding the company's mine, is bound to make such an investigation of the matter as ordinary care and prudence would suggest, and if, upon making such investigation, it learns that danger exists, it then becomes its duty to make such provision for the safety of its employees as would occur to a person of ordinary prudence, or to inform its employees of the impending danger so that they may assume the risk; and the question as to what is ordinary care under such circumstances cannot be determined as a matter of law by directing a verdict, but must be left to the jury. *Williams v. Sleepy Hollow Mining Co. (Colo.), 11-111.*

c. Duty to furnish safe machinery and appliances.

(1) In general.

Nature of duty. — A master is bound to use reasonable care and precaution to furnish his servant safe appliances with which to do his work, and to keep such appliances in good order and condition. He is not bound, however, to use the newest and best appliances, but performs his duty when he furnishes those of ordinary character and of reasonable safety. In this connection the term "reasonably safe" means safe according to the usages and habits and ordinary risks of the business. *Coin v. John M. Talge Lounge Co. (Mo.), 17-888.*

Error of judgment. — An employer is not liable in damages for mere error of judgment in furnishing appliances for the use of a servant, unless such error is a result of negligence or ignorance. *O'Neill v. Chicago, etc., R. Co. (Neb.), 1-337.*

Failure to guard machinery. — Where it is the duty of a master to keep a guard attached to a machine in position, and a servant is injured by the master's failure to perform that duty, the master is liable. In such a case the master is not relieved from liability by the fact that the guard was merely intended to lessen the danger of operating the machine, and not to obviate such danger altogether. *Quinn v. Electric Laundry Co. (Cal.), 17-1100.*

Blocking frog of switch. — In an action by a brakeman against a railroad company to recover damages for personal injuries, where the sole act of negligence

charged against the defendant is its failure to block the frog or guard rail of a switch, and the undisputed proof shows that on some railroad systems it is the custom to leave the frogs unblocked, and on others it is the custom to block them, and that the frogs on some parts of the defendant's road were blocked and on other parts were not blocked, and that the particular frog in which the plaintiff's foot was caught had never been blocked, and the evidence also shows that there is a difference of opinion among practical railroad men as to which is the safer practice, the court should direct a verdict for the defendant, as when such a diversity of theory and practice in the construction and maintenance of railroads reasonably exists, it is not negligence for a railroad company to adopt the course which, in the judgment of its officers, is least productive of danger to all whose safety is to be considered. *Wabash R. Co. v. Kithcart* (U. S.), 9-497.

Car couplers. — In an action by an employee to recover for injuries alleged to have resulted from defective car couplers, it is essential to a recovery by the plaintiff that he show either that the defendant did not exercise due care in procuring safe appliances, or that there was some defect in them which could have been discovered by the employer by a proper inspection, and that such defect was the cause of the injury. *Buttner v. South Baltimore Steel Car, etc., Co.* (Md.), 4-761.

Derricks. — A derrick is an appliance which an employer must furnish completely set up and ready for use in a safe condition, thus differing from a scaffold, which employees are required to construct for themselves with materials furnished by their employer; and therefore it is the duty of the employer to exercise ordinary care to see that the derrick is properly equipped and that it is kept in a reasonably safe condition, though the employees who use it are required to set it up and move it from place to place as the work progresses. *Hamlin v. Lanquist, etc., Co.* (Minn.), 20-893.

Air pump being unloaded. — An air pump while being unloaded from a railroad car, and which is to be set up for use in a plant to be erected for the purpose of preparing material for street paving is not an appliance within the meaning of the rule which requires the master to exercise reasonable care in furnishing his servants with reasonably safe appliances with which to carry on the master's business. *Westlake v. Murphy* (Neb.), 19-149.

Vicious animal. — An employer is not liable to his employee for injuries inflicted by a vicious mule which the employee is required to drive, unless the viciousness of the mule is known to the employer. *Arkansas Smokeless Coal Co. v. Pippins* (Ark.), 19-861.

(2) Inspection of machinery and appliances.

Cars. — A railroad company which receives a foreign car to be transported over its lines

or handled by its employees in its general switch yards, must exercise such reasonable care as the time, place, and exigencies of the business permit to ascertain if the car is in a reasonably safe condition, and if such car is found to be out of repair, unsafe, or unfit for the business in which it is to be employed, the company must place such car in a reasonably safe condition, or notify those of its employees who may be required to handle the car of the danger or defect. *New York, etc., R. Co. v. Hamlin* (Ind.), 15-988.

Where there is evidence from which a jury is authorized to find that a round in a ladder on a box car was so rotten or defective as to break and cause the fall of an employee of the railroad company, it cannot be said, as a matter of law, that an inspection of the car by a person employed for that purpose, made by walking along the train and looking at the running gear, ladders, and other things, was not negligent; nor is the railroad company protected from liability on the ground that the car was a foreign car, and that a competent inspector was employed to inspect it. *Kiley v. Rutland R. Co.* (Vt.), 13-269.

Railroad torpedo. — A railroad company is not chargeable with negligence in not inspecting torpedoes so as to make it liable for injury to a brakeman caused by a collision resulting from the failure of torpedoes to explode, where it appears that they were purchased from reputable manufacturers, that in years of experience no other torpedoes had failed to explode by a train passing over them, and that there was no method of inspection except by use, in which event they were consumed. *Siegel v. Detroit, etc., R. Co.* (Mich.), 19-1095.

Common or simple tool. — In case of a common or simple tool, no liability rests on a master for the ordinary perils resulting from its use, or for those latent and usual defects or weaknesses which, by reason of the common and usual character of the tool, are presumed to be known to all men alike. *Stork v. Charles Stolper Cooperage Co.* (Wis.), 7-339.

The rule requiring a master to inspect the tools furnished his servants does not require him to inspect the common or simple tools to ascertain the development of defects or disrepair in the course of their use. *Stork v. Charles Stolper Cooperage Co.* (Wis.), 7-339.

A master is liable for an injury sustained by a servant in consequence of a defect in even a common or simple tool where, though the defect was not known to the servant, and was not obvious to that observation which might be expected to accompany the use of the tool, the master had actual knowledge of the defect prior to the injury and should, as a reasonable man, have known that it was likely to result in injury to one using the tool. *Stork v. Charles Stolper Cooperage Co.* (Wis.), 7-339.

Sufficiency of inspection by public officer. — The duty of the master to inspect or have inspected with reasonable care and diligence the machinery, appliances, or ma-

terial with which the servant has to work, and which may be dangerous to life or health, is not discharged by the fact that an inspection is made by government officials, where a servant is injured in consequence of a danger which would have been discovered by competent inspectors making a reasonably careful and skilful inspection. *O'Connor v. Armour Packing Co.* (U. S.), 14-66.

(3) Question of law or fact.

In an action by a servant to recover damages for a personal injury sustained by a defect in a simple tool furnished by the master with knowledge of the defect, the question whether the defect was a proximate cause of the injury held to be a question for the jury. *Stork v. Charles Stolper Cooperage Co.* (Wis.), 7-339.

d. Duty to warn and instruct.

(1) In general.

Dangerous employment. — On setting an inexperienced employee to work at a dangerous employment it is the duty of the foreman in charge to instruct the employee as to the work and give warning of the dangers likely to arise, and a failure to do so is negligence. *Cribb v. Kynoch* (Eng.), 11-100.

Where one who is known to be an inexperienced person is put to work upon machinery which is dangerous to operate unless with care, and by one familiar with its structure, such as a steam mangle in a laundry, the master is bound to give him such instructions as will cause him fully to understand and appreciate the danger attending the employment, and the necessity for care. *Quinn v. Electric Laundry Co.* (Cal.), 17-1100.

Dangers ordinarily incident to service. — It is the duty of a master to warn an inexperienced servant of dangers ordinarily incident to the service, and if he fails to do so, and the servant has no opportunity to learn of them, the servant will not be held to assume risks not obvious to one of his age, experience, and judgment. But this rule applies only where there is danger known, or which ought to be known, to the master, of which the servant, on account of his youth or inexperience, is ignorant, and which he cannot reasonably be expected to discover by the exercise of ordinary care. *Low Moor Iron Co. v. La Bianca* (Va.), 9-1177.

Obvious danger. — When a servant is engaged with others in pulling down, by means of a rope attached thereto, a tree being felled in an open space, the danger of his being injured by the fall thereof is an obvious one, and known or should be known to the servant; and in the absence of an express contract on the part of the master to give warning when the tree begins to fall and in what direction it will fall, there is no duty on him to do so. *Hagins v. Southern Bell Tel. Co.* (Ga.), 20-248.

Concealed or unknown danger. — A master is not bound to warn a servant of all possible concealed or unknown dangers incident to the use of the machine at which he is put to work, but only of such as may expose him to injury in the course of his employment. *Wyman v. Berry* (Me.), 20-439.

Scientific facts. — It is the duty of an employer who uses in his business processes or substances which are dangerous to persons who have no scientific knowledge of them to impart such knowledge to his employees as will enable them to avoid the danger. *Adams v. Grand Rapids Refrigerator Co.* (Mich.), 19-1152.

A person employed as a workman about a smelting furnace, one of whose duties is to draw molten matter from the furnace into tanks of water, is not supposed to have the same knowledge as his employer of the danger of an explosion from pouring molten matter into an insufficient quantity of water. *Adams v. Grand Rapids Refrigerator Co.* (Mich.), 19-1152.

Location of mail crane near tracks. — Where a railroad company has exercised reasonable care in the location and maintenance of a mail crane near its tracks, it has discharged its duty to the servants employed on its trains, and is under no obligation to notify such servants of the proximity of the crane to the track. *Denver, etc., R. Co. v. Burchard* (Colo.), 9-994.

Danger in operating switch. — Where the location by a railroad company of a switch stand between tracks is an engineering problem, and the switch is so close to one track that a person throwing the switch is liable to be injured by passing trains, it is the duty of the company to give notice of the danger to a servant employed to operate the switch, and failure to give such notice is negligence which will render the company liable for an injury inflicted on the servant by a passing train, unless the servant is guilty of contributory negligence, or unless the danger is so patent and obvious as to charge the servant with knowledge thereof. *Chicago, etc., R. Co. v. Riley* (U. S.), 7-327.

Delegation of duty. — The duty of a mine owner to give employees working in the mine warning of the discharge of explosives in the prosecution of the work is one that belongs to the master and cannot be delegated to a servant so as to relieve the master of liability to a servant injured by a blast set off without warning. *Hendrickson v. United States Gypsum Co.* (Ia.), 12-246.

The duty of a master to warn and instruct an inexperienced employee as to the dangerous employment may be delegated to a foreman whom the master has good reason to believe competent, so as to relieve the master of any liability for the negligence of the foreman in failing properly to instruct an employee as to the dangers of the employment. *Cribb v. Kynoch* (Eng.), 11-100.

(2) Infants.

Duty in general. — It is the duty of the master to give to his servant, a minor of

immature years, such instructions and warning of the dangers incidental to the employment as may reasonably enable him to understand its perils and to avoid them. *Rossey v. Lawrence* (La.), 17-484.

The employment of young children either upon or in buildings where dangerous machinery is operated imposes the duty of carefully explaining to them the danger, and the duty of constant warning and watchfulness for their protection. *Rolin v. R. J. Reynolds Tobacco Co.* (N. Car.), 8-638.

Extent of duty. — While the general rule is that it is the duty of the master to give such warning, advice, and instruction to a youthful and inexperienced servant as will enable the latter by the exercise of reasonable care to perform the duties of his employment with safety to himself, this rule does not require the railroad company to adopt and promulgate rules and regulations for inducting learners or beginners into its service. *Louisville, etc., R. Co. v. Vincent* (Tenn.), 8-66.

Location of shaft. — It is the duty of an employer to warn a girl employee fourteen years old of the danger of coming in contact with a shaft under a table at which the girl is required to work, where it is a part of her duty to reach under the table for any articles that may fall there from the table. *Kirwan v. American Lithographic Co.* (N. Y.), 18-650.

(3) Question of law or fact.

Duty to warn. — In an action against a master to recover damages for personal injuries sustained by a minor servant, where the evidence shows that the servant was not quite thirteen years of age when the injury was received, and had not been instructed or warned of the dangers incident to his employment, but was ignorant of them, and that in attempting to enter a narrow and dangerous passageway on the master's premises he slipped and fell on a wet floor, and, in falling, caught and crushed his hand in an exposed cogwheel located on one side of the passageway, the question as to the master's negligence is for the jury. *Rossey v. Lawrence* (La.), 17-484.

It is a question for the jury whether the danger of an explosion from pouring molten matter into water as dependent on the proportion of water to the molten matter involves the application of a natural law which should have been understood by an employer and communicated to his employees who were required to pour molten porcelain into tanks of water. *Adams v. Grand Rapids Refrigerator Co.* (Mich.), 19-1152.

Knowledge and appreciation of risk. — It is ordinarily a question for the jury to determine, upon competent evidence, whether a servant was given full and careful instruction in regard to the danger incident to his employment, and whether he was capable of understanding the danger after receiving proper instruction. *Rolin v. R. J. Reynolds Tobacco Co.* (N. Car.), 8-638.

In an action by a servant against his master for personal injuries received while operating a steam mangle in a laundry, where the evidence shows that the plaintiff was young and inexperienced in the operation of the mangle, the question whether he had knowledge and appreciation of the dangers incident to its operation is for the jury; and even if it is conceded that the plaintiff had knowledge of the dangers attending the operation of the machine, it is still for the jury to determine whether, considering his youth and inexperience, he was possessed of sufficient judgment to appreciate them. *Quinn v. Electric Laundry Co.* (Cal.), 17-1100.

Giving and sufficiency of instruction.

— It is the duty of the master to instruct an inexperienced minor servant employed in operating dangerous machinery as to the method in which such machinery is to be operated; and where it appears in an action for injuries to the plaintiff, a boy sixteen years old, that he was injured while attempting to operate a dangerous machine with which he was not familiar, the attempt being made in obedience to the command of the defendant's superintendent, it is for the jury to determine whether such instruction was given to the plaintiff, and if given whether it was sufficient and proper under the circumstances. *Noden v. Verlanden Bros.* (Pa.), 3-367.

e. Violation of statute.

(1) In general.

Failure to keep lookout for persons on tracks. — The Arkansas statute requiring a railroad company to keep a constant lookout for persons upon its tracks operates for the benefit of the employees of the company, as it makes no exception of the employees. *Kansas City R. Co. v. Morris* (Ark.), 10-618.

The Nova Scotia statute providing that when a train is moving reversely in a city, town, or village, the railway company shall station a person on the last car to warn persons standing on or crossing the track of the approach of the train, is for the protection of the servants of the company standing on or crossing the track, as well as for the protection of other persons. *McMullin v. Nova Scotia Steel, etc., Co.* (Can.), 10-39.

Application of statute. — Switch targets are not "signals" nor is a single switch attached to a siding a "switch yard" within the meaning of the Indiana statute relating to the liability of railroad companies for the negligence of an employee "having charge of any signal . . . switch yards," etc. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

Right of defendant to set up fellow-servant rule. — In an action against a railway company to recover for the death of a servant caused by the defendant's failure to comply with a statute requiring it to station a person on the last car of a backing train to give warning of the train's approach, the

defense under the doctrine of common employment is not open to the defendant, as the duty imposed by the statute is an absolute one, and if the company fails to discharge the duty it is liable for the consequences resulting from such failure. *McMullin v. Nova Scotia Steel, etc., Co.* (Can.), 10-39.

(2) Safety appliances.

Automatic car couplers. — A railroad of a standard gauge, from twelve to fourteen miles long, operated as part of the enterprise of a corporation engaged in the manufacture of leather, for hauling the material used in its works, having its own crew, engines, and cars, and shifting the cars of other railroads, but using cars smaller than regular railroad cars, is a railroad within the statute requiring railroads to provide cars with automatic safety couplers, and is also within the statute making railroads liable for injuries to their servants caused by the negligence of fellow servants. *Hairston v. United States Leather Co.* (N. Car.), 10-698.

The Federal Safety Appliance Act of March 2, 1893, requiring common carriers engaged in interstate commerce to equip their cars with automatic couplers, requires the carriers to exercise a high degree of care to keep the automatic couplers in proper condition, but does not impose on them the absolute duty to have the couplers in good order at all times, and under all circumstances. *St. Louis, etc., R. Co. v. Delk* (U. S.), 14-233.

The failure of a railroad to furnish its cars with automatic couplers amounts to a continuing negligence on the part of the company, which cuts off the defense of contributory negligence and the assumption of risk in an action for injuries inflicted on an employee by reason of lack of improved coupling devices. *Hairston v. United States Leather Co.* (N. Car.), 10-698.

Guarding machinery. — A shaft is not "properly guarded" within the New York statute (Laws 1897, c. 415, § 81, as amended by Laws 1906, c. 36) when it is placed under and about four inches from the top of a table, though the space under the table is partly closed by boards fastened to the legs at top and bottom, where there still remains a clear open space of about fourteen inches, and employees working at the table must sometimes reach under it to pick up articles falling there. *Kirwan v. American Lithographic Co.* (N. Y.), 18-650.

Under section 2248, General Statutes Minnesota 1894, providing that dangerous machinery used in the operation of any factory, mill, or workshop shall be, as far as practicable, properly guarded, fenced, or otherwise protected, an employer is liable for damages resulting to a workman from a neglect on the part of the former to comply with the statute, where such workman is not informed that the machinery is unguarded or does not appreciate the risks of injury incident thereto. *McGinty v. Waterman* (Minn.), 3-39.

Right of defendant to set up assumption of risk. — In an action by an employee for injuries resulting from coming in contact with unguarded shafting, the defense of assumption of risk is not available to an employer who has not complied with a statute requiring all operators of mills and workshops to place safeguards over all such machinery and proof that the employee knew that the shafting was unguarded does not make him guilty of contributory negligence as a matter of law, but it must be shown that he did not use care reasonably commensurate with the risk to avoid injurious consequences. *Hall v. West and Slade Mill Co.* (Wash.), 4-587.

The Colorado statute imposing upon railroad companies the duty of safeguarding frogs and switches does not deprive a railroad company of its common-law right to set up the defense of assumption of risk in an action for personal injuries brought against it by one of its servants. *Denver, etc., R. Co. v. Norgate* (U. S.), 5-448.

(3) Employment of minor.

As negligence per se. — The employment of a minor in violation of statute is negligence *per se*, not merely evidence of negligence. *Starnes v. Albion Mfg. Co.* (N. Car.), 15-470.

Under the Pennsylvania statute providing that no child under fourteen years of age shall be employed in certain establishments, and that no minor under sixteen years of age shall be permitted to clean or oil machinery while in motion, the employment of a boy under fourteen years of age to do any kind of work in an establishment of the kind designated by the statute, and his having been occupied in cleaning and oiling machinery while in motion, in violation of the statute, are facts constituting evidence of negligence on the part of the employer which, if found to have been the cause of an injury to such minor, authorize a recovery against the employer. *Stehle v. Jaeger Automatic Machine Co.* (Pa.), 14-122.

What constitutes violation. — A statute prohibiting masters from permitting or directing any female employee under the age of eighteen "to clean machinery while in motion" is violated by permitting a female under eighteen to place around the rollers of an ironing machine while in motion clean cloth in place of cloth which has become soiled and burned by use. *Bromberg v. Evans Laundry Co.* (Ia.), 13-33.

A petition, in an action for injuries sustained by a girl while placing clean cloth upon the rollers of an ironing machine, although making no specific reference to such statute, shows a case of negligence *per se* under the statute, where it alleges in substance that the plaintiff was under eighteen years of age and that the defendant was negligent in allowing her to do such work. *Bromberg v. Evans Laundry Co.* (Ia.), 13-33.

Extent of liability. — The liability of one who knowingly and wilfully employs a

minor in violation of statute is not limited to injuries sustained by the minor while performing the work to which he is assigned, but extends to all injuries which are the natural result of the employment. Consequently a minor under the statutory age who is employed to sweep the spinning room and to make bands in a cotton factory is entitled to recover for injuries sustained while tampering with dangerous machinery on another floor of the factory. *Starnes v. Albion Mfg. Co.* (N. Car.), 15-470.

Effect of ignorance of minority. — In an action by an employee to recover damages for personal injuries, where the complaint alleges that the defendant was guilty of negligence in employing the plaintiff, an infant under fourteen years, of age, to operate dangerous machinery, in violation of the New York Labor Law, and there is evidence tending to show that plaintiff was in fact under fourteen years of age at the time of his employment, although he represented himself to be over sixteen, and where the court, at the request of the plaintiff, has fully instructed the jury as to the circumstances under which defendant would be liable despite any statements by the plaintiff as to his age, it is error to refuse a charge, requested by the defendant, that "if the plaintiff falsely stated his age to the officers of the defendant, and led them to believe that he was actually over fourteen years of age at the time he was hired, and if they were justified in that belief, then they are not guilty of negligence in hiring him, and the jury must dismiss that provision of the Labor Law from further consideration." *Koester v. Rochester Candy Works* (N. Y.), 16-589.

Right of defendant to set up assumption of risk or contributory negligence. — Under a statute fixing an age limit below which children shall not be employed in certain dangerous kinds of work, one employing a child under the statutory age in a prohibited occupation does so at his own risk, and in an action against the master for personal injuries sustained by a child in such employment, the defendant cannot set up as a defense either assumption of risk or contributory negligence. *Stehle v. Jaeger Automatic Machine Co.* (Pa.), 14-122.

The defense of contributory negligence is open to a master who is sued for personal injuries sustained by an infant while employed in the master's factory, although the employment of the injured infant was in contravention of a statute prohibiting the employment in factories of children under a specified age. *Rolin v. R. J. Reynolds Tobacco Co.* (N. Car.), 8-638.

Right of defendant to set up fellow-servant rule. — If the owner of a factory is negligent in employing a child contrary to the prohibition of the statute prohibiting the employment in factories of children under a prescribed age, he cannot escape liability for injuries sustained by a child so employed because the accident was caused by the negli-

gent act of a fellow servant. *Rolin v. R. J. Reynolds Tobacco Co.* (N. Car.), 8-638.

Application of penal statute to civil suit. — The fact that a statute forbidding the employment of children below a certain age in dangerous occupations is penal, and makes provision for the punishment of its violation by fine and imprisonment, does not supersede a right of action for damages in a civil proceeding. *Stehle v. Jaeger Automatic machine Co.* (Pa.), 14-122.

f. Acts of vice-principals and fellow servants.

(1) Vice-principals.

(a) Who are.

In general. — A servant to whom is committed the duty of instructing another servant is a vice-principal in respect to that duty, though both servants are of the same grade. *Wyman v. Berry* (Me.), 20-439.

The duty of exercising ordinary care in the selection of his employees is a personal duty which cannot be delegated by the master, and, where the selection of employees is confided to another employee, the latter becomes the representative of the employer in that regard, and is not a fellow servant. *Cragg v. Los Angeles Trust Co.* (Cal.), 16-1061.

Superintendent or general manager of business. — A superintendent or general manager who has charge of the master's entire business is a vice-principal, and where, upon his arrival at the place where the work for the master is being done, he assumes charge thereof and directs the manner in which it shall be completed, the master becomes liable for his subsequent negligence to the same extent as if he had laid out the plan for doing the work at the outset. *Hamann v. Milwaukee Bridge Co.* (Wis.), 7-458.

Foreman of bridge gang. — The foreman of a bridge gang who has charge of work for a railroad company stands in the company's place as its representative, and if he, while acting as foreman, negligently causes an injury to a servant of the company, the company is liable therefor unless the servant is guilty of contributory negligence or unless the injury results from a risk assumed by the servant. *Choctaw, etc., R. Co. v. Jones* (Ark.), 7-430.

Conductor of railway train. — A conductor in charge of a freight train stands in the relation of vice-principal to the other members of the crew of the train. *Louisville, etc., R. Co. v. Vincent* (Tenn.), 8-66.

The conductor of a railroad train is, in the management and operation of the train, a vice-principal of the company with regard to the train crew, and the company is liable for injuries to the crew caused by the negligence of the conductor when acting in his official capacity. *Alabama Great Southern R. Co. v. Baldwin* (Tenn.), 3-916.

Car inspectors. — Car inspectors employed by a railroad company, both when inspecting the company's own cars, and when

inspecting cars of other companies as they come to the employer's roads, act as the representatives of the employer and not as the fellow servants of the employer's trainmen, and for the negligence of such inspectors causing injury to a trainman, the employer is liable without protection from the fellow-servant doctrine. *Kiley v. Rutland R. Co.* (Vt.), 13-269.

(b) Nature of liability.

Negligence of Union Depot Company.

— A depot company, operating a union depot under the control and for the convenience of several railway companies, is the servant of the one for which it performs a particular act; and, if the act is negligently performed, the railway company is liable to its employee injured thereby. *Floody v. Chicago, etc., R. Co.* (Minn.), 18-274.

The act of a switchman employed by a depot company in throwing a switch for the passage of a railway company's train is the act of the depot company, and may render the railway company liable to its injured employee. *Floody v. Chicago, etc., R. Co.* (Minn.), 18-274.

Negligence of conductor. — As it is within the sphere of a conductor's duty to control and direct the coupling of the cars to a train, his act in giving signals to the engineer with regard thereto will be presumed to be the act of a vice-principal with respect to a brakeman of the crew, even though the signal would have been obeyed if given by the brakeman. *Alabama Great Southern R. Co. v. Baldwin* (Tenn.), 3-916.

Evidence that while the plaintiff, a brakeman, was between the cars of a train, endeavoring to adjust the coupling and acting with proper care, the conductor, who knew of the situation, or could have known of it by the exercise of ordinary care, caused the cars to be brought together, thereby injuring the plaintiff, is sufficient evidence of negligence to sustain a verdict against the railroad company. *Alabama Great Southern R. Co. v. Baldwin* (Tenn.), 3-916.

Negligence of certificated foreman. —

Under the Tennessee statute providing that no coal mine shall be operated without the foreman holding a certain certificate of competency, and that the certificate shall be sufficient evidence of the competency of the holder, and prescribing the duties of the foreman, and providing that "said foreman shall not be subject to the control of the operator or owner in the discharge of the duties required of said mine foreman by this act" and shall be subject to a fine and imprisonment for a failure to discharge the duties prescribed by the act, the mine operator or owner is not liable for the negligence of his certificated foreman. *Sale Creek Coal, etc., Co. v. Priddy* (Tenn.), 10-745.

Failure to warn servant of danger. —

Where a vice-principal, who is directing certain work for his master, sees or ought to see that the manner in which the work is being done is dangerous, it is his duty either

to notify the servants of the danger or to stop the work until the proper remedy is applied. *Hamann v. Milwaukee Bridge Co.* (Wis.), 7-458.

Assault by vice-principal. — A master is not liable for an assault committed on one of his servants by a superior servant while the latter was not acting within the scope of his employment or in the prosecution and furtherance of the business intrusted to him. *Roberts v. Southern R. Co.* (N. Car.), 10-375.

Question for jury. — It is for the jury to determine whether a vice-principal was guilty of negligence in directing or permitting work to be done in a certain manner. *Hamann v. Milwaukee Bridge Co.* (Wis.), 7-458.

(2) Fellow servants.

(a) Who are.

In general. — All who enter the same employment are presumably fellow servants, and the burden of showing the contrary is on one who asserts it. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

The operation of machinery is a duty owing by the servant to the master, and when any duty connected with the operation of any part of a machine is delegated to another by the master, the servant performing such duty is a fellow servant of all others engaged in carrying on the common enterprise. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

Where in an action against a city by an employee thereof who, while on a municipal bridge, where he had been ordered to make certain measurements, was injured by the negligence of the bridge tenders, it appears that the plaintiff and such bridge tenders were in different departments of the city government, under the control of different superior officers, and were not co-operating in making the measurements or in operating the bridge, and that the lines of their respective employments did not necessarily bring them into habitual association, the question whether they were fellow servants is properly submitted to the jury as one of fact. *Gathman v. Chicago* (Ill.), 15-830.

Separate trains do not constitute separate and distinct departments of railway service within the meaning of a rule under which the fellow-servant doctrine is not applied, where a servant is employed in a department of the general service which is separate and distinct from that of the servant or servants whose negligence caused the injury. *Louisville, etc., R. Co. v. Dillard* (Tenn.), 4-1028.

A miner who loads coal on a car in which it is hauled from a room in a mine to the bottom of the shaft may be a fellow servant of the driver of the car; but in an action by the driver to recover for personal injuries sustained in an accident caused by the fact that the top of the coal in the car caught on the timbers of the roof, with the result that the car tilted upward in front and caught the plaintiff between the end of the car and the roof, where the evidence shows that

the driver, and not the miner, determined when the car was properly loaded, and there is no evidence to show that the car was improperly loaded, the fellow-servant doctrine has no application. *Jones, etc., Co. v. George* (Ill.), 10-285.

Passenger conductor and freight brakeman. — A railroad company which has exercised due care in the selection of its servants is not liable to a brakeman on one of its freight trains for personal injuries resulting from the negligence of the conductor of one of its passenger trains, as the two employees are fellow servants. *Louisville, etc., R. Co. v. Dillard* (Tenn.), 4-1028.

Conductor of freight train and Pullman employee. — The conductor of the freight train of a railroad company and the servant of a sleeping-car company which uses the facilities of the railroad by contract between the two companies, are fellow servants, and the railroad company is not liable for an injury to the sleeping-car servant caused by the negligence of the conductor. *Lewis v. Pennsylvania R. Co.* (Pa.), 13-1142.

Section hands and train crew. — Section or repair men are fellow servants of those operating trains. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

A laborer employed by a railroad construction company in removing dirt which falls between the cars of a train used in the work of construction is a fellow servant of the engineer of the train. *Bradford Construction Co. v. Heflin* (Miss.), 8-1077.

"Cub" brakeman and train crew. — A person acting as a "student brakeman" on a railroad freight train, who, at his own request and by permission of the railroad company, is performing services for the company for the purpose of gaining such experience and such knowledge of the work as will render him competent to act as a regular brakeman and to receive a regular brakeman's pay, is a servant of the company, and therefore is a fellow servant of regular paid servants employed in the operation of the train upon which he is engaged. *Weisser v. Southern Pacific R. Co.* (Cal.), 7-636.

A "cub" brakeman on a railroad train, who is learning the business, is a fellow servant of the regular brakeman employed on the same train. *Louisville, etc., R. Co. v. Vincent* (Tenn.), 8-66.

Train dispatcher and locomotive fireman. — A train dispatcher of a railroad company operating a single-track railroad, whose duty it is to issue telegraphic orders in the superintendent's name for movement of trains and to see that the orders are transmitted, is not a fellow servant of a fireman upon one of the locomotives of the company. *Ricker v. Central R. Co.* (N. J.), 9-785.

Section foremen of different sections of railway. — A section foreman of a railroad is the fellow servant of foremen of other sections and various railroad employees who together with him are engaged in removing the debris of a landslide from the track, and the fact that such foreman makes no proper inspection of the premises, or states in the

presence of the others that the premises are safe, does not render the railroad company liable for an accident occasioned by falling rock and dirt. *Maloney v. Florence, etc., R. Co.* (Cois.), 12-621.

Employees of railway companies using same tracks. — An arrangement whereby one railroad company permits another to operate its trains over the tracks of the former does not make the employees of the two companies fellow servants. *Jennings v. Philadelphia, etc., R. Co.* (D. C.), 10-761.

Switchman of Union Depot Company and switchman of railway company. — A switchman in the employ of a union depot company is not a fellow servant of a switchman in the employ of a railroad company running trains to the depot, as the term "fellow servant" is used when the common-law rule is invoked that a master is not liable for injuries received through the negligence of a coemployee. Nevertheless the railway company may be liable to its servant for personal injuries received because of the negligence of the depot employee. *Floody v. Chicago, etc., R. Co.* (Minn.), 18-274.

Overseer and workmen unloading car. — Workmen engaged in the ordinary occupation of unloading a railroad car under the direction of a common overseer, are fellow servants within the rule announced in *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127; and the master is not liable for an injury to one engaged in such occupation caused by the negligence of a competent fellow servant. *Westlake v. Murphy* (Neb.), 19-149.

Foreman and member of crew. — A mere foreman, who is engaged with a crew of assistants, which is supplied with suitable materials and appliances, in performing a mere detail of the master's business, is a fellow servant of a member of the crew. *Hamann v. Milwaukee Bridge Co.* (Wis.), 7-458.

Plumber and helper. — A person employed as a plumber, who has no power to hire or discharge his helper, is a fellow servant of the helper, and is not a superintendent within the meaning of the provision of the New York Employers' Liability Act making an employer liable for the negligence of any person in his service "whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer," notwithstanding the fact that it is the helper's duty to obey the plumber's directions with reference to certain matters connected with the work. *McConnell v. Morse Iron Works, etc., Co.* (N. Y.), 10-205.

Mine boss and miner. — A mine boss and a fire boss employed in a coal mine, pursuant to the West Virginia statute (Code 1906, §§ 409, 410), in the performance of the duties thereby imposed upon them, including the duty of the mine boss to see that as the working places advance break-throughs for air are made, or that brattice shall be used, are fellow servants of the miner employed

therein, and the master is not liable for injuries sustained by such miner on account of the negligent performance of those duties. *Bralley v. Tidewater Coal Co.* (W. Va.), 19-510.

(b) Nature of liability.

In general. — In determining whether the fellow-servant rule is applicable in a given case of injury to a person while riding to or from his work upon his employer's conveyance, a fair test is whether the employer in furnishing the transportation, and the employee in using it, were engaged in performing one of the express or implied duties of the employment, and this question must depend largely upon the peculiar circumstances of each case. *Pigeon v. Lane* (Conn.), 11-371.

In an action by a telephone lineman for personal injuries the fact that an uninsulated wire which the plaintiff was stringing fell upon a trolley wire through the negligence of a fellow servant does not warrant the direction of a verdict for the defendant, since an employee may recover for the negligence of his employer notwithstanding the fact that the negligence of a fellow servant has contributed to the injury. *De Kallands v. Washtenaw Home Tel. Co.* (Mich.), 15-593.

Under the common law of Connecticut, a master is not liable for injuries to his servant resulting from the negligence of a fellow servant. *Hoxie v. New York, etc., R. Co.* (Conn.), 17-324.

After a master has exercised due care in the selection of his servants, the danger arising from the negligence of a fellow servant is one which a person going into the service voluntarily assumes, and it is a risk for which it is presumed he is satisfactorily compensated by the larger wages he can earn in the service than in other employments. *Louisville, etc., R. Co. v. Dillard* (Tenn.), 4-1028.

In the absence of precedent want of care in employing a servant, the master is not liable for an injury negligently inflicted by the servant upon a fellow servant. *Hamann v. Milwaukee Bridge Co.* (Wis.), 7-458.

Evidence reviewed, in an action against a railroad company and a conductor in its employ to recover damages for the negligent killing of a "cub" brakeman in the employ of the company, and held to show that the injury, which was caused by the premature starting of the train while the deceased was making a coupling, was due to the negligence of a fellow servant, a brakeman, in giving a premature signal to the conductor to start the train, and to show further that the conductor was not negligent in acting upon such signal and signaling the engineer to start the train. *Louisville, etc., R. Co. v. Vincent* (Tenn.), 8-86.

Selection of defective tools by fellow servant. — Where a master has upon hand at a place where the work is being performed sufficient suitable materials or appliances for the doing of the work, he is not liable for injuries resulting to a servant by reason of error in the judgment of a fellow

servant in selecting a defective material or appliance. *McConnell v. Morse Iron Works, etc., Co.* (N. Y.), 10-205.

A master held not liable for an injury to a servant caused by the negligent act of a fellow servant in selecting an unsafe appliance from the supply of safe appliances furnished by the master. *Towne v. United Electric Gas, etc., Co.* (Cal.), 2-905.

Failure of fellow servant to give warning of danger. — The failure of foremen in charge of the details of felling a tree (who at the time of the injury, because of the absence of other employees, are engaged with the servant who is injured in pulling on a rope to guide the direction of the fall of the tree) to warn the servant when it begins to fall and in what direction it will fall, or to station themselves or others elsewhere to give such warning, cannot be charged against the master as negligence entitling the servant to recover damages for injuries received by reason of the tree falling on him. There being no nondelegable duty resting on the master to thus warn the servant, the negligence of the foreman, if any, is that of a fellow servant. *Hagins v. Southern Bell Tel. Co.* (Ga.), 20-248.

Turning on of electric current by fellow servant. — In an action against an electric light company to recover damages for personal injuries, where the evidence shows that the plaintiff, a lineman in the employ of the defendant, was injured by receiving an electric shock while repairing one of the company's lines, and that the injury was caused by the act either of the company's chief engineer or of its electrician, in turning on the current while the plaintiff was working on the line, in violation of the plaintiff's directions to keep the current turned off, and where there is no evidence that either the chief engineer or the electrician had charge of the line or the switch board, or of any distinct branch of the company's business, so as to make them vice-principals in the eyes of the law, or that either of them was incompetent, the plaintiff is properly nonsuited, on the ground that the injury resulted from the negligence of a fellow servant for which the employer is not liable. *Shank v. Edison Electric Illuminating Co.* (Pa. St.), 17-465.

The duty of repairing its lines and of caring for the circuit while such repairs are being made, is a duty which an electric light company may properly delegate to its employees, and its duty to its servants in that regard extends no further than to employ suitable and competent fellow servants, and to supply them with everything needed for the work. There is no rule of law which requires such a company to keep constant watch over its switch board, in order to prevent the current from being turned on, whenever one of its servants is engaged in repairing the line. *Shank v. Edison Electric Illuminating Co.* (Pa. St.), 17-465.

Negligence of fellow servant in carrying to or from work. — A coal miner who, after his day's work, avails himself of the option to ride on a train provided by the

mine owner for the purpose of carrying his workmen from the mine to their homes, there being no actual contract that such miner shall be carried on the train, assumes the risk of negligence of the engineer of the train and of a mason employed by the mine owner to repair a bridge over the railway, the fellow-servant doctrine being applicable to such a case. *Coldrick v. Partridge, Jones & Co. (Eng.)*, 16-283.

In an action against an employer by an employee for an injury suffered by the plaintiff while being driven in a vehicle of the defendant in charge of another employee of the defendant, where the jury might find from the evidence that the defendant by no contract ever agreed to carry the plaintiff on the trip on which he was injured; that the plaintiff was allowed to ride upon the vehicle merely as a matter of favor; that the defendant had the right to refuse to carry the plaintiff and to compel him to leave the vehicle at any point on the journey; that the plaintiff was at liberty to leave whenever he chose; that the plaintiff rendered no service while on the vehicle, and was injured before reaching his place of work and before the hour for beginning work, a finding of such facts by the jury would make the relation of the plaintiff and defendant that of licensor and licensee, and the fellow-servant law would not be available as a defense to the action. *Pigeon v. Lane (Conn.)*, 11-371.

Act of incompetent fellow servant. — In an action by a servant against his master to recover damages for personal injuries alleged to have been caused by the negligence of a fellow servant in the operation of a passenger elevator, evidence that such fellow servant was hired in violation of an ordinance prohibiting the employment of unlicensed persons to operate passenger elevators is conclusive upon the question of the master's negligence in hiring him. *Cragg v. Los Angeles Trust Co. (Cal.)*, 16-1061.

The rule as to the liability of a master on the ground of want of care in the selection of competent servants is a part of the fellow-servant rule, and is applicable only in actions by servants against their master for injuries caused by the negligence of fellow servants. *Minot v. Snavely (U. S.)*, 19-996.

Evidence reviewed, in an action to recover damages for the death of a servant resulting from the negligence of a fellow servant, and held sufficient to show that the fellow servant was incompetent or that the master was negligent in selecting him to do the work which resulted in the injury. *Hamann v. Milwaukee Bridge Co. (Wis.)*, 7-458.

Performance of nondelegable duty. — Where an act is one which it is the duty of a master to perform, and he delegates its performance to a servant, and the latter performs it negligently to the injury of another servant in the same common employment, the master is liable. *Quinn v. Electric Laundry Co. (Cal.)*, 17-1100.

(c) Effect of statutes.

To what masters applicable. — A corporation organized under a charter conferring the power of eminent domain, with authority to construct railways for the transportation of passengers and freight, is a railroad company and as such is subject to the provisions of the fellow-servant act, though its chief purpose is to exploit certain timber lands and to market the timber growing thereon. *Wright v. Caney River R. Co. (N. C.)*, 19-384.

The provision of the Mississippi constitution abolishing the fellow-servant doctrine in the case of employees of a railroad corporation applies only to railroad corporations proper, which are engaged as common carriers in the business of transporting freight and passengers, and does not apply to corporations which are authorized to construct but not to operate railroads, even though such corporations actually operate trains in the performance of their construction work; nor does it apply to logging railroads, lumber railroads, or other railroads owned or operated by individuals, corporations, or partnerships as adjuncts to their main business. *Bradford Construction Co. v. Heflin (Miss.)*, 8-1077.

To what servants applicable. — The engineer of a train is a fellow servant of the brakeman and is not a superior officer or agent, or a person having the right to direct or control the services of the brakeman within a constitutional provision giving employees of railroads the same right of recovery as a person not an employee "where the injury results from the negligence of a superior officer or agent" and "where it results from the negligence of a person having the right to control or direct the services of the party injured." *Pagan v. Southern Railway (S. Car.)*, 13-1105.

The North Dakota statute making railroad companies liable to an employee for injuries caused by the negligence of a coemployee applies only to those employees engaged in operating the railroads, and exposed to the peculiar injuries attending that business, and does not apply to an employee of a railroad company engaged in cutting and removing ice from a river for use by the company. *Beal v. Northern Pacific R. Co. (N. Dak.)*, 11-921.

In an action under the Iowa statute providing that a railway company shall be liable to an employee for an injury resulting from the negligence of a coemployee, when the negligence is in any manner connected with the use and operation of the railway, it is for the court to determine as a question of law whether the negligence of the coemployee was in any manner connected with the use and operation of the railway; where there is no question as to what the employment was or as to what the employees were doing at the time the injury was inflicted. *Dunn v. Chicago, etc., R. Co. (Ia.)*, 8-226.

The Iowa statute providing that a railway company shall be liable to an employee for

an injury resulting from the negligence of a coemployee, when the negligence is in any manner connected with the use and operation of the railway, does not render the company liable to a section hand for an injury resulting from the negligence of a coemployee who is engaged in the ordinary work of a section gang, disconnected from any control of the train. *Dunn v. Chicago, etc., R. Co. (Ia.)*, 8-226.

A section hand employed by a railroad company, who has been appointed by the section master, or selected by his fellow employees, as "caller" for a squad of section hands engaged in moving rails, and whose duty it is to direct the other members of the squad when to pick up a rail and when to drop the same, is a person having a right to control or direct the services of the other members of the squad, within the meaning of the provision of the South Carolina Constitution, abrogating the fellow-servant doctrine in some respects, and if another member of the squad is injured by his negligence the railroad company is liable. *Hallums v. Southern R. Co. (S. Car.)*, 17-511.

A section hand employed by a railroad company and engaged in the work of removing rails from one side of a railroad track to the other, is an employee of a railroad corporation within the meaning of section 15 of article IX. of the Constitution of South Carolina, which nullifies in some particulars the doctrine of assumption of risk as applied to such employees, by giving them the same rights and remedies against the railroad company for injuries suffered by them as are allowed by law to persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, or, in certain cases, from the negligence of a fellow servant. *Hallums v. Southern R. Co. (S. Car.)*, 17-511.

Application to common-law right of action. — The Colorado "Employers' Liability Act" does not apply to an action by a servant against the master to enforce a right existing at common law. *Denver, etc., R. Co. v. Norgate (U. S.)*, 5-448.

Act of incompetent fellow servant. — Under the California statute an employer is liable to an employee for injuries resulting to the latter from the negligence of a fellow servant, where he has failed to use ordinary care in the selection of such fellow servant. *Cragg v. Los Angeles Trust Co. (Cal.)*, 16-1061.

(d) Who may invoke doctrine.

Person other than master. — Where a servant is injured by reason of the joint negligence of a fellow servant and of a third person who is a stranger to the contract of master and servant, the fellow-servant rule does not exonerate the third person from liability for his negligence. *Kentucky, etc., R. Co. v. Sydnor (Ky.)*, 7-1177.

Where a bridge and transfer company

maintains a switch yard and permits railway companies to repair their cars at any point in the yard, the plan of protecting the repairers being the placing of a signal near the car being repaired, it is the duty of the bridge company's employees in charge of moving cars and engines to keep a lookout for repairers and their signals; and the bridge company is liable for an injury to a repairer resulting from the operation of one of its trains, though the repairer was negligent in his manner of displaying the signal, if the servants in charge of the train could by the exercise of ordinary care have discovered the signal in time to avert the injury. *Kentucky, etc., R. Co. v. Sydnor (Ky.)*, 7-1177.

(3) Dual capacity.

Nature of liability. — By the dual-capacity doctrine one may act both as a vice-principal and as a fellow servant, and a master is liable for his negligent acts in the former capacity but not in the latter. *Fogarty v. St. Louis Transfer Co. (Tenn.)*, 3-916.

While a vice-principal may lay aside his official capacity and engage in the common service as a fellow servant with other servants of the master, he cannot occupy both relations at the same time, and if the act is one which he could do in either capacity, it will be held to have been done in the capacity in which it was his special duty to act. *Alabama Great Southern R. Co. v. Baldwin (Tenn.)*, 3-916.

Fellow servant performing nondelegable duty. — Ordinarily the foreman or boss of a gang of hands employed in executing a master's orders is a mere fellow servant of the other members of the gang, but when he is discharging a nonassignable duty of the master, such as furnishing the members of the gang a reasonably safe place in which to work, he is to that extent a vice-principal. *Low Moor Iron Co. v. La Bianca (Va.)*, 9-1177.

Question of law or fact. — In Illinois the question whether the representative of a master is at the time of his negligence acting as vice-principal or as a fellow servant is one for the jury, except where the facts are conceded and but one inference can be drawn therefrom. *Fogarty v. St. Louis Transfer Co. (Mo.)*, 1-136.

g. Assumption of risk.

(1) Nature of doctrine.

In general. — The doctrine of assumption of risk is not a term of the contract of employment between master and servant, but is a principle of the common law governing that relation and exists independent of the will of either party to the contract. *Denver, etc., R. Co. v. Norgate (U. S.)*, 5-448.

The doctrine of assumption of risks incident to the occupation in which a person has engaged does not apply otherwise than as between master and servant. *Dubiver v. City, etc., R. Co. (Ore.)*, 1-889.

A master cannot escape liability for personal injuries to his servant on the ground that the latter assumes the risk, if the master orders the servant to perform an act which is apparently safe, but which is, by the negligence of the master, rendered extremely dangerous. *Graham v. Mattoon City R. Co.* (Ill.), 14-853.

Under a statute prohibiting masters from permitting any female employee under the age of eighteen years to clean machinery while in motion, a person within the age limit thus fixed is presumptively incapable of recognizing or appreciating the danger attending this prohibited employment and it devolves upon the employer to show affirmatively sufficient capacity and judgment on the part of the employee to recognize the attendant risks. *Bromberg v. Evans Laundry Co.* (Ia.), 13-33.

Distinguished from contributory negligence. — Assumption of risk, as distinguished from contributory negligence, is a waiver of defects and a consent on the part of the servant to assume them whether he is careful or negligent, and is a matter of contract, while contributory negligence is a matter of conduct. *Miller v. White Bronze Monument Co.* (Ia.), 18-957.

The distinction between "contributory negligence" and "assumption of risk" as defenses to an action based on negligence is that the former rests on some fault or omission on the part of the plaintiff and will, when established, defeat a right of action for the defendant's negligence, while the latter rests on an implied contract that a servant will assume the ordinary risk of his employment and precludes any right of action from arising at all. *Choctaw, etc., R. Co. v. Jones* (Ark.), 7-430.

(2) Risks assumed.

(a) In general.

Unknown dangers. — In an action by a brakeman against a railroad company to recover damages for personal injuries sustained by the plaintiff in consequence of collision with a switch target near the defendant's track, where it appears that the target was so close to the track that there was not room enough to permit the body of the brakeman, who was on the side ladder of the freight car, to pass in safety, and the plaintiff testifies that prior to the accident he had never operated the target or been warned regarding its location, it cannot be maintained that the danger from the structure was one of the ordinary risks assumed by the plaintiff on entering the defendant's employment. *Boston, etc., R. Co. v. Gokey* (U. S.), 9-384.

Unsafe machinery. — A servant does not assume the risk of danger from the use of unsafe machinery furnished by the master, unless the defects are so glaring and obvious that a reasonably prudent man would not attempt to use the machinery. *Coin v. John M. Talge Lounge Co.* (Mo.), 17-888.

Dangers ascertainable by use of ordinary care. — In an action by a servant against his master to recover damages for personal injuries, it is erroneous to instruct the jury that the plaintiff must have had actual knowledge of the dangerous condition before he can be said to have assumed the risk thereof, as the servant not only assumes all the obvious and known dangers, but also such as by the exercise of ordinary care may become known to him. *Jones, etc., Co. v. George* (Ill.), 10-285.

Performance of new duties. — In an action by a servant against his master to recover damages for injuries alleged to have been received by the plaintiff while in the defendant's employment, an instruction to the jury that a servant's implied assumption of risks, which accompanies and is a part of the contract of hiring, is confined to that particular work and class of work for which he is employed, and if the master orders him to work temporarily in another department of the general business where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employees, he will not, by obeying such orders, necessarily thereby assume the risks incident to the work, and that, in a case involving this principle, it will not be held as a matter of law that the injured party assumed the risk, unless the evidence is clear, explicit, and uncontradicted to that point, is substantially correct in form. *Quinn v. Electric Laundry Co.* (Cal.), 17-1100.

Obeying unauthorized orders. — An employee who obeys an order given by another employee without authority in the premises assumes the risk of performing the service ordered, even though he is told at the time that the order comes from a duly authorized superior. *Southern R. Co. v. Pope* (Ky.), 19-376.

Lack of proper appliances. — A motor-man in the employ of a street railway company does not assume the risk incident to the lack of necessary and proper appliances on his own and other cars, including signal lamps. *Carter v. McDermott* (D. C.), 10-601.

Negligence of servant in different department. — Where in an action against a city by an employee thereof, who, while on a municipal bridge, where he had been ordered to make certain measurements, was injured by the negligence of the bridge tenders, it appears that the plaintiff had an understanding with the bridge tenders that they would not raise the bridge until he signaled them to do so, and that his injuries were caused by the raising of the bridge before the giving of the signal and without notice to him, such negligence of the bridge tenders is not a risk assumed by the plaintiff under his contract of employment. *Gathman v. Chicago* (Ill.), 15-830.

Lifting heavy object. — Where a servant is directed to perform labor which involves the lifting of heavy burdens, and the

master gives no heed to his complaint that the work is too heavy for him, but has him go on with it, and he sprains his back while engaged in the work, he has no cause of action against the master for the injury. In such a case the servant is the best judge of his own lifting capacity, and the risk is upon him not to overtax himself. *Stenvog v. Minnesota Transfer R. Co.* (Minn.), 17-240.

In such a case, the master is not liable merely because he disregards the protest of the servant and has him proceed with the work, provided he gives no assurance of safety and says nothing to mislead the servant or misrepresent the situation. *Stenvog v. Minnesota Transfer R. Co.* (Minn.), 17-240.

Duty of master as to assumed risks.

— While a railroad brakeman who is engaged in the hazardous work of handling disabled cars is deemed to have assumed all the ordinary risks incident to the performance of that particular duty, the same duty rests upon the railroad company and its vice-principals to avoid injuring him as when he is in discharge of other and less hazardous work. *Marshall v. St. Louis, etc., R. Co.* (Ark.), 8-420.

Though a servant cannot recover for being thrown forward from a hand car by reason of a defect of which he has assumed the risk, though free from contributory negligence, he may nevertheless hold the master liable for an injury resulting from being run over by the car, where the injury is a direct consequence of a defect due to the master's negligence as to which the servant has not assumed the risk. *Foster v. Chicago, etc., R. Co.* (Ia.), 4-150.

(b) Incidents of employment.

In general. — A servant assumes ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity, by the use of ordinary care; and he is bound to take notice of the ordinary operation of the familiar laws of gravitation, and assumes the risks necessarily incident thereto. *Westlake v. Murphy* (Neb.), 19-149.

The rule that the servant is presumed to have assumed the ordinary risks incident to the employment in which he is engaged is subject to the limitation that he not only must have knowledge of the existence of the defect out of which the danger arises, but must also be chargeable with the knowledge that the defect exposes him to danger; but if the danger arising from the defect is so obvious as to be apparent to a person of ordinary intelligence, the law will charge the servant with knowledge of the danger. *Christiansen v. William Graver Tank Works* (Ill.), 7-69.

Perilous occupation. — A servant who enters upon a perilous work with knowledge and appreciation of the danger assumes the risk of being injured though he does the

work unwillingly under orders from the master, provided no physical compulsion is brought to bear upon him. *Choctaw, etc., R. Co. v. Jones* (Ark.), 7-430.

The rule that imposes on the master the duty to furnish a reasonably safe place for the servant to work in is not applicable where the servant is engaged in removing from a railroad track rock and dirt cast thereon by a landslide. The purpose of such work is to make safe a place that is known to be dangerous and servants who undertake to engage in such work necessarily assume the incidental risks. *Maloney v. Florence, etc., R. Co.* (Colo.), 12-621.

Fall of stone in stone quarry. — A servant working in a stone quarry and engaged in removing the earth which covers a ledge of rock cannot recover damages for personal injuries sustained by him in consequence of the fall of a loose stone, in the side of a bank of earth, which is not connected with the ledge and is no part of the quarry proper, and which is dislodged by reason of the servant's action in removing the earth beneath it, as the risk of injury from such cause is one which the servant is deemed to have assumed. *Welch v. Calucci Stone Co.* (Pa.), 7-299.

Taking disabled car to repair shop.

— A railroad company is only bound to exercise due care, through its vice-principals and through a proper system of timely inspection, to discover defective or disabled cars and to notify its trainmen of their condition, and when this is done the risk in handling cars and in carrying them to the shop to be repaired is assumed by the trainmen as one of the risks ordinarily incident to their employment. *Marshall v. St. Louis, etc., R. Co.* (Ark.), 8-420.

Danger to lineman of contact with highly charged wires. — The danger from indirect contact with highly charged wires is a risk assumed by a lineman who undertakes to string telephone wires in a large city. A telephone lineman is presumed to know those things with reference to the creating of grounds and circuits which such a lineman must necessarily know in order to perform his work with any degree of safety to himself, his employer, or coemployees. *De Kallands v. Washtenaw Home Tel. Co.* (Mich.), 15-593.

The fact that for more than a year the plaintiff in such an action had worked for the defendant as "trouble man," lineman, ground man, and otherwise, is sufficient to charge him with constructive knowledge of the grounding of the telephone company's wires. *De Kallands v. Washtenaw Home Tel. Co.* (Mich.), 15-593.

(c) Known defects.

Unguarded machinery. — A servant assumes the risk of injury arising from the defective, unguarded, or unprotected condition of a machine, where he continues to work with or upon the machine with knowledge of its dangerous condition. *Christian-*

sen v. William Graver Tank Works (Ill.), 7-69.

Where the person injured is an expert workman, and not only knows that a suitable device or shield has been furnished by his employer for the purpose of guarding the machinery but also understands the risks incident to its use in an unguarded condition, he assumes all risk of injury if he neglects to attach the device so furnished. *McGinty v. Waterman* (Minn.), 3-39.

Car known to be defective. — A railroad section hand, who is injured while riding on a hand car, must be held to have assumed the risk of injury from a defect in the car of which he has known for a long time but of which he has made no complaint. *Foster v. Chicago, etc., R. Co.* (Ia.), 4-150.

Where a railroad brakeman has notice that a car in his train is in such bad order that it has been withdrawn from service and is being laid up for repairs, but he has no definite information as to the respect in which the car is defective, he assumes the risk of handling the car as one in bad order, and the burden of ascertaining the defect and the source of danger is cast upon and assumed by him. *Marshall v. St. Louis, etc., R. Co.* (Ark.), 8-420.

(d) Negligence of master.

In use of appliances. — While an employee upon entering on his employment impliedly agrees to assume the ordinary risks arising from the use of the appliances, and which are incident to the use for which they were designed, he does not assume the risks resulting from the negligent operation thereof, of which he has no notice. Therefore, where an employee was injured by the raising of the guard rails surrounding a mine shaft when the cage was in place, by a co-servant, and it appears that the deceased was not aware that the coemployees, or any one else, were in the habit of raising the guard rails until the cage was in place and ready to receive and carry the men to the surface, such negligent operation of the guard rails was not a risk which the employee assumed. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

Altered condition of service by negligence. — While a servant is deemed to assume the ordinary risks in his employment, he is not presumed to assume risks due to some altered condition of the service, and caused by the negligence of the master, unless, after fully realizing the danger, he elects to go ahead and expose himself to it. *Choctaw, etc., R. Co. v. Jones* (Ark.), 7-430.

Failure to furnish safe place to work. — A servant employed by a railroad company as the foreman of a switch crew has the right to assume that the company will furnish him a reasonably safe place in which to do his work, and he does not assume the risk of the company's negligence in performing its duty in that respect. *Chicago, etc., R. Co. v. Riley* (U. S.), 7-327.

Failure to discharge statutory duty.

— A collision resulting from the failure of an electric railway company to discharge a duty imposed by law and enforced by consideration for the lives of its employees and patrons is not one of the ordinary and usual hazards of operating an electric car. *Graham v. Mattoon City R. Co.* (Ill.), 14-853.

Negligence of master or vice-principal. — Plaintiff, a brakeman on a logging train injured by its sudden stoppage, cannot be considered as assuming the risk of the negligence of the railroad company or of its conductors, or engineers acting as conductors. *Williams v. W. R. Pickering Lumber Co.* (La.), 19-1244.

When negligence and risk arising therefrom known. — A servant does not assume the risk of the negligence of his master or of one acting for the master, even though he continues at the work without objection and with knowledge of such negligence, unless he also realizes the danger to which the negligence exposes him. *Choctaw, etc., R. Co. v. Jones* (Ark.), 7-430.

Except when an employer violates statutory provisions for safeguarding employees, the rule that an employee does not assume the risk of dangers arising through the negligence of the employer does not apply where such negligence and the resulting danger are known to the employee before entering upon the performance of the work. *De Kallands v. Washtenaw Home Tel. Co.* (Mich.), 15-593.

(e) After promise to repair.

In general. — In an action by a servant against his master to recover damages for personal injuries sustained by the plaintiff, it does not follow that whenever it is proved that a promise to repair was made and acted upon, the case is *prima facie* for the jury. *Andrecsik v. New Jersey Tube Co.* (N. J.), 9-1006.

Evidence reviewed, in an action by a foreman in a sawmill against his employer to recover damages for personal injuries sustained by the plaintiff during the course of his employment in a dangerous place, and held sufficient to show such complaint of peril by the plaintiff and such promise to repair by the defendant as to warrant submission to the jury of the question whether the plaintiff assumed the risk of danger by continuing in the dangerous employment after the making of the promise to repair. *Viou v. Brooks-Scanlon Lumber Co.* (Minn.), 9-318.

The rule that where the peril is so obvious, imminent, and constant, and so unavoidable by any precaution that no reasonably prudent person would expose himself to it, even temporarily, a promise by the master to remove the danger does not relieve the employer from the assumption of risk, is held not to apply to the case at bar under the facts alleged in the complaint. *Williams v. Kimberley, etc., Co.* (Wis.), 11-622.

The rule that justifies an employee in re-

maining in the master's employment upon the promise of the latter to remove a known danger, applies to risks arising from the incompetence of fellow servants as well as to risks arising from dangerous appliances; and there is no distinction in respect to the application of the rule to fellow servants by reason of the relative simplicity or complexity of the work in which they are engaged. *Williams v. Kimberley, etc., Co. (Wis.)*, 11-622.

Suspension of assumption of risk by promise to repair. — The assumption of risk implied from a servant's knowledge that an appliance is defective is suspended instantly by the master's promise to repair made in response to the servant's complaint; and a servant who continues at work in reliance on such promise may recover for an injury resulting from the defect, though the injury is inflicted so soon after promise that the master has not had sufficient time to make the repair. *Foster v. Chicago, etc., R. Co. (Ia.)*, 4-150.

Where a master has expressly promised to repair a defect in machinery or appliances used by his servant, and the latter, in reliance upon such promise, continues to use the defective machinery, he can recover for an injury caused by the defect within such a period of time after the promise as it would be reasonable to allow for its performance, and to this extent the ordinary doctrine of assumption of risk by the servant is modified. It is an essential element of this rule, however, that there shall be a defect in the appliances or machinery which it is the duty of the master to repair and remedy; and it is also essential to show that the servant continued at work in reliance upon the master's promise. *Coin v. John M. Talge Lounge Co. (Mo.)*, 17-888.

[See notes, 4 Ann. Cas. 163; 9 Ann. Cas. 1011.]

The doctrine of a promise to repair as above stated, does not apply to a case where the promise of the master is to furnish additional appliances to a machine which is not defective, and, consequently, in an action by a servant against his master to recover for injuries caused by the slipping of a band saw, where the evidence fails to show that the saw was defective, it is reversible error for the trial court to charge the jury that the plaintiff is entitled to recover if they believe from the evidence that the defendant promised to provide a guard or gates for the saw, but negligently failed to do so, and the accident resulted because of such failure. *Coin v. John M. Talge Lounge Co. (Mo.)*, 17-888.

Duration of suspension. — Where the master's agreement to repair is general, *i. e.* inferential, as to the time of its performance, if the promise is not performed within a reasonable time for its fulfilment, and the servant continues to incur danger in the employment after the lapse of such reasonable time, the servant assumes the risk of injuries occurring thereafter. In such a case there may be a question of reasonable time

for the jury. *Andrecsik v. New Jersey Tube Co. (N. J.)*, 9-1006.

Where the master's agreement to repair is not definite, but specific, as to the time of its performance, if the promise is not performed within the time specified for its fulfilment, and the servant continue in the employment after the manifest breach of the master's promise to repair, the assumption of risk by the master ceases, and the servant reassumes the risk of subsequent injuries therefrom. Where the time of performance is clearly fixed by agreement of the parties, there is no question for the jury of a reasonable time for performance. *Andrecsik v. New Jersey Tube Co. (N. J.)*, 9-1006.

The servant assumes not only the ordinary risks incidental to the employment, but as well all risks arising and becoming known to him during his service. The master, by promising to amend the defect complained of, as an inducement to the servant to continue, forthwith takes from the servant the risk, and thereafter and during the period for repair assumes it. Where the promise is general and indefinite, the master's undertaking runs for a reasonable time. Where the promise is to repair at a fixed time, it runs until the termination of the time fixed. *Andrecsik v. New Jersey Tube Co. (N. J.)*, 9-1006.

In an action by a servant against his master to recover damages for personal injuries sustained by the plaintiff, where the evidence shows that the plaintiff complained to the defendant's superintendent at ten o'clock in the forenoon that the machine upon which he was working was out of order; that the defect was obvious; that the superintendent told the plaintiff to go ahead with his work, and said, "We are overloaded with work, and noon hour I will fix this for you;" that repair was not made at the noon hour; and that nevertheless the plaintiff resumed work upon the obviously defective machine, and at three o'clock was injured by reason of the defect complained of, there is no question for the jury, and it is proper to nonsuit the plaintiff, as the promise to repair was definite and specific as to the time of performance. *Andrecsik v. New Jersey Tube Co. (N. J.)*, 9-1006.

(3) Question of law or fact.

Knowledge and appreciation of danger. — In an action by a servant to recover damages for personal injuries, where the defense is assumption of risk it is for the jury to say whether the servant entered upon the work with knowledge and appreciation of the danger. *Choctaw, etc., R. Co. v. Jones (Ark.)*, 7-430.

In an action by an employee against his employer for injuries received while operating a machine in a defectively lighted room, the defendant is entitled to have submitted to the jury the question of the assumption by the plaintiff of the risk arising from the darkness of the room, where the plaintiff testifies that he knew that the room was dark and that the darkness had something to

do with his getting hurt. *Schow et al. v. McCloskey* (Tex.), 20-1.

In an action against a railway company by a section hand to recover damages for being thrown from and being run over by a hand car, evidence held to be insufficient as to the assumption of risk to warrant a direction of a verdict for the defendant. *Foster v. Chicago, etc., R. Co.* (Ia.), 4-150.

Knowledge of latent danger. — The burden of proof is upon the master to show that the servant knew of a latent danger or that the master had informed the servant of such danger, and although there is some evidence tending to show that the servant knew of the danger, the question of assumption of risk should be left to the jury and not determined as a matter of law. *Williams v. Sleepy Hollow Mining Co.* (Colo.), 11-111.

Continuance at work after promise to repair. — What is a reasonable time for a servant to remain at work in an unsafe place after a promise by the master to repair is a question for the jury. *Miller v. White Bronze Monument Co.* (Ia.), 18-957.

Continuance in service after knowledge of master's negligence. — The question whether an employee who was exposed to danger by the negligence of the employer and remained in service and suffered injury assumed a risk held to be a question for the jury. *Marks v. Harriett Cotton Mills* (N. Car.), 3-812.

h. Contributory negligence.

(1) In general.

Standard of care required. — Where a servant is engaged in performing services for his master under circumstances which justify him in assuming that ordinary care will be observed to warn him of approaching danger, he is required to exercise only such care and diligence in discovering peril and avoiding injury as are consistent with the performance of the work in which he is engaged. *St. Louis, etc., R. Co. v. Jackson* (Ark.), 8-328.

Failure to discover danger. — The fact that a master is guilty of negligence in ordering his servant to do a dangerous piece of work does not necessarily make it contributory negligence for the servant to fail to discover the danger. *Choctaw, etc., R. Co. v. Jones* (Ark.), 7-430.

Servant employed in hazardous occupation. — The right of a servant to recover damages for injuries received in a hazardous position is not lost by the fact that the plaintiff voluntarily and unnecessarily took such hazardous position, where the hazard to which the plaintiff exposed himself in no way contributed to his injury. *Kiley v. Rutland R. Co.* (Vt.), 13-269.

(2) Acts constituting contributory negligence.

In general. — Where there are two known ways of doing a thing, one safe and the other unsafe, an employee who voluntarily

and knowingly chooses the unsafe way because it is easier and more convenient or for other reasons, is guilty of contributory negligence which bars a recovery for injuries sustained by him. *New York, etc., R. Co. v. Hamlin* (Ind.), 15-988.

Failure to look for approaching train. — Where a flagman at a crossing, after having been engaged in flagging a train, steps on to a switch track where he is not required to be, with his back turned toward an engine and car that are backing toward him, and is struck and killed, his death is due solely to his own negligence in failing to discover and avoid the danger. *Zulke v. Michigan Cent. R. Co.* (Mich.), 11-50.

The rule that a railroad employee who is engaged in the discharge of a duty, the performance of which requires him to be on or near the track, need not keep a strict watch for approaching trains, in order to be deemed to be exercising reasonable care for his own protection, does not apply to the case of an employee who is injured while attempting to cross a track merely for the purpose of getting from one point to another, the circumstances not requiring the crossing to be made at a particular time or place. *Dyerson v. Union Pacific R. Co.* (Kan.), 11-207.

The fact that an employee works close to a track and has frequent occasion to pass back and forth over it does not relieve him from the requirement that in order that he may be deemed to be in the exercise of ordinary diligence he must look in both directions for an approaching train before undertaking to cross it. *Dyerson v. Union Pacific R. Co.* (Kan.), 11-207.

The fact that an employee working close to a track knows that it had previously been the rule and practice of the company to run trains along said track only in one direction, except under unusual circumstances, does not relieve him from such requirement, although a change has been made in such rule and practice without notice to him. *Dyerson v. Union Pacific R. Co.* (Kan.), 11-207.

Disobedience of rules. — A servant cannot recover for personal injuries sustained in an accident due to his own disregard of the rule of his master. *Harris v. London St. R. Co.* (Can.), 10-151.

Where in an action by a street railway employee against the company for injuries received in a collision, the complaint alleges two acts of negligence on the part of the defendant in knowingly placing a motorman in charge of a car when he was inexperienced in handling an electric car and in knowingly placing said motorman in charge of said car at a time when he was unfit to perform his work by reason of overwork and loss of sleep, but does not clearly show whether the pleader intends to combine the two acts of negligence therein averred or to set up separately each act of negligence as a cause of action, and the jury finds that the motorman failed at the time of the accident to obey a rule of which he had knowledge providing that when one car is following another the motorman on the rear car shall keep a cer-

tain distance in the rear of the first car, and that his failure to observe the rule was the result of his overwork and loss of sleep, the defendant, having placed the motorman in charge of the car in his unfit condition because of overwork and loss of sleep is not in a position successfully to interpose his non-compliance with the rule in question in order to exempt itself from liability. *Ft. Wayne, etc., Traction Co. v. Crosbie (Ind.)*, 14-117.

Riding on pilot of engine. — It is negligence *per se* for an employee of a railroad company to ride upon the pilot in front of a locomotive without a necessity for so doing, unless the rules of the company authorize its employees to ride on the pilot in certain instances, or unless provision is made for the employee to stand in front of the locomotive for the convenient discharge of his duty. *Williams v. Monongahela Connecting R. Co. (Pa.)*, 16-271.

The conductor of a freight train who, for the purpose of flagging the train into a shipper's yard, rides in a dangerous position upon the pilot in front of the locomotive, which is not equipped with a standing board, without any justifying necessity and without any authority from the railroad company, is guilty of contributory negligence. *Williams v. Monongahela Connecting R. Co. (Pa.)*, 16-271.

The fact that such conductor had always, during his many years' experience as a freight conductor, walked ahead of the engine in flagging a train, prevents him from saying that he was misled by a custom under which employees of the company would stand on the pilot while the engine was passing into the shipper's yard. *Williams v. Monongahela Connecting R. Co. (Pa.)*, 16-271.

Uncoupling moving car. — A switchman of sixteen years' experience is chargeable with knowledge that it is unsafe to step in front of a moving car to open the knuckle preparatory to a coupling, and is bound to know that a safe way to effect a coupling is to cause the moving car to be stopped until an adjustment of the coupling can be made, and if by having control of the movements of the engine he can make the safe way available, but voluntarily chooses the unsafe way, he is guilty of contributory negligence. *New York, etc., R. Co. v. Hamlin (Ind.)*, 15-988.

Falling asleep on track. — A brakeman who is sent to flag an approaching train and who, after placing his signals and while waiting for the train, sits down near the track and falls asleep, in consequence of which his arm is crushed by the train, is negligent and cannot recover for his injuries, unless the engineer of the approaching train sees his danger in time to avoid the accident. *St. Louis, etc., R. Co. v. Finley (Tenn.)*, 18-1141.

Failure to foresee sudden stopping of train. — Plaintiff, a brakeman on a logging train, cannot be considered as guilty of contributory negligence for failing to foresee

and guard against a sudden and unexpected emergency stop, which no one anticipated. *Williams v. W. R. Pickering Lumber Co. (La.)*, 19-1244.

Where the evidence tends to show that the position of the brakeman on a car, injured by the sudden stoppage of the train, would have been safe under ordinary circumstances, he cannot be considered as guilty of contributory negligence for assuming such a position. *Williams v. W. R. Pickering Lumber Co. (La.)*, 19-1244.

Following one of two contradictory instructions. — In an action by a minor against his employer for personal injuries sustained while operating a machine, contributory negligence as a matter of law cannot be imputed to the minor because he followed one or the other of two conflicting and contradictory instructions as to the method to be employed in doing his work. *O'Neill v. Thomas Day Co. (Cal.)*, 14-970.

Placing hand in cutting machine. — An intelligent boy sixteen years old who is employed to remove straw as it comes from a cutting machine, with directions to "keep it clear," is negligent in putting his hands into the spout through which the cut straw comes from the knives, in order to clear away straw which he supposes has accumulated there and clogged the machine, even though he may not have been sufficiently instructed. The danger of putting one's hands near concealed and rapidly revolving knives is obvious. *Wyman v. Berry (Me.)*, 20-439.

Stepping in hole through forgetfulness. — A servant who steps into a hole in the floor is guilty of contributory negligence where he knows of the existence of the hole and could see it by looking, his only excuse being forgetfulness. *Miller v. White Bronze Monument Co. (Ia.)*, 18-957.

(3) Question of law or fact.

In general. — In an action against a railway company by a section hand to recover damages for being thrown from and being run over by a hand car, evidence held to be insufficient to establish contributory negligence of the plaintiff as a matter of law. *Foster v. Chicago, etc., R. Co. (Ia.)*, 4-150.

Where, in an action against an employer to recover for the death of an employee resulting from the negligent operation by a coemployee of the guard rails surrounding a mine shaft, it appears that the deceased was in plain view of the coemployee whose culpable act left the shaft unguarded, and it further appears that the deceased was not aware of the act of the coemployee, and that it was not the custom to raise the guard rails until the cage had descended to its place, or that it was necessary to do so, and the only act of the deceased savoring of negligence was his attempt to lean upon the guard rails without noticing whether they were in place, the question as to the contributory negligence of the deceased is for the determination of the jury. *Consol. Gold Min. Co. v. Firstbrook (Colo.)*, 10-1108.

In an action against an employer to recover for the death of an employee, it is not prejudicial error to admit evidence that the rails guarding a mine shaft down which the plaintiff's intestate fell were constructed or arranged differently from those intended to serve the same purpose in other mines, where it appears that the injury was caused by the operation of the cage in the shaft by a co-employee having full knowledge of the manner in which the guard rails were constructed, and of the intestate's position with reference thereto, and it further appears that it was not necessary to raise the guard rails, and that it was not the custom to do so, as the act of the coemployee under the circumstances was culpable and inexcusable negligence, and the only question for the jury was the question whether the plaintiff's intestate was guilty of contributory negligence. *Consol. Gold Min. Co. v. Firstbrook (Colo.)*, 10-1108.

Evidence reviewed, in an action by the foreman in a sawmill against his employer to recover damages for personal injuries sustained by the plaintiff during the course of his employment in a dangerous place, and held insufficient to show that the plaintiff was guilty of contributory negligence as a matter of law. *Viou v. Brooks-Scanlon Lumber Co. (Minn.)*, 9-318.

Evidence examined in an action for personal injuries brought by a servant against the master, and held to justify the trial court in leaving the question of contributory negligence to the jury. *Denver, etc., R. Co. v. Norgate (U. S.)*, 5-448.

Evidence reviewed in an action by a servant to recover damages for personal injuries and held sufficient to justify the jury in determining the questions of negligence and contributory negligence in favor of the plaintiff. *Choctaw, etc., R. Co. v. Jones (Ark.)*, 7-430.

In an action to recover damages for the death of a section hand who was killed by a passing train, evidence examined and held to show that the accident was due to the negligence of the deceased. *Sissel v. St. Louis, etc., R. Co. (Mo.)*, 15-429.

An employee drowned by the flooding of the mine in which he was at work, by water breaking through from a neighboring mine, held not to be guilty of contributory negligence as a matter of law. *Williams v. Sleepy Hollow Mining Co. (Colo.)*, 11-111.

In an action by a train employee for damages for personal injuries sustained in falling from a defective ladder on the end of a box car boarded by the plaintiff while the train was in motion and leaving a station at which freight had been discharged, evidence examined and held not to show as a matter of law that the plaintiff was guilty of contributory negligence. *Kiley v. Rutland R. Co. (Vt.)*, 13-269.

In an action by a switchman who was injured while coupling cars, apparently conflicting answers to special interrogatories construed, and held to show that the plain-

tiff was guilty of contributory negligence. *New York, etc., R. Co. v. Hamlin (Ind.)*, 15-988.

Riding in unsafe position. — Where plaintiff, a brakeman riding on a skeleton car of a logging train, was thrown beneath the wheels and badly injured by the sudden and violent stopping of the train by the engineer without warning or notice, the question whether he was guilty of contributory negligence in riding in an unsafe position on the car is one of fact, peculiarly within the province of the jury, and after a review of the evidence in this case, the court was not prepared to say that the finding was against the preponderance of the evidence. *Williams v. W. R. Pickering Lumber Co. (La.)*, 19-1244.

Jumping from moving train. — In an action against a railroad company to recover damages sustained by the plaintiff, a locomotive engineer in the employ of the defendant, in jumping from his engine to avoid an apprehended collision which did not actually occur, the evidence examined and held to present a question for the jury as to the plaintiff's contributory negligence. *Jennings v. Philadelphia, etc., R. Co. (D. C.)*, 10-761.

Failure to observe rules. — A trainman, caused to fall from a box car by a defective round in the ladder on the end of the car, is not rendered guilty of contributory negligence as a matter of law by reason of a rule of the railroad company requiring trainmen to "inspect their trains before leaving a terminal and at intervals during the trip," and by his failure to discover this defect in a ladder, where there is evidence that the inspection required by the rule did not relate to the ladders, and was very different from the inspection required of the car inspectors. *Kiley v. Rutland R. Co. (Vt.)*, 13-269.

Duty to look and listen for approaching trains. — In an action against a railroad company to recover damages for the negligent killing of a person employed by it as a workman in a track gang, evidence considered, and held that it was for the jury to say from all the circumstances whether the deceased was guilty of contributory negligence, and that it was erroneous to instruct the jury that it was the duty of the deceased to look and listen constantly for the approach of trains. *St. Louis, etc., R. Co. v. Jackson (Ark.)*, 8-328.

Stepping off of and in front of engine. — A member of a switching crew who, after riding on the footboard in front of an engine which has been shifting cars and which has stopped near a shanty where the crew is to eat a meal, steps from the footboard onto the track, for the purpose of crossing the same in order to go to the shanty, believing and having reasonable ground to believe that the engine will not be started again without proper notice, and while crossing the track is struck by the engine which starts slowly forward and which is obscured or partly obscured by a cloud

of steam and the darkness of the night, is not guilty of contributory negligence in stepping off the footboard in front of the engine, so as to take that question from the jury. *Cooper v. Baltimore, etc., R. Co. (U. S.), 14-693.*

Motorman sitting on stool. — Where it appears that the motorman of an electric car, who had no reason to anticipate that he would meet another car at that point, was looking forward, and as soon as he discovered another car approaching applied the brakes and did everything in his power to avoid a collision, the question of whether he was guilty of contributory negligence in sitting on a stool when, if he had been standing, he could have avoided the collision, is one of fact for the jury. *Graham v. Mattoon City R. Co. (Ill.), 14-853.*

i. Proximate cause.

In general. — In an action against a master to recover damages for personal injuries sustained by a minor servant, where the evidence shows that the servant was not quite thirteen years of age when the injury was received, and had not been instructed or warned of the dangers incident to his employment, but was ignorant of them, and that in attempting to enter a narrow and dangerous passageway on the master's premises he slipped and fell on a wet floor, and, in falling, caught and crushed his hand on an exposed cogwheel located on one side of the passageway, the negligent exposure of the gearing must be considered the efficient cause of the injury, and the slip and fall a mere condition. *Rossey v. Lawrence (La.), 17-484.*

Negligence creating emergency as proximate cause. — Where plaintiff, a brakeman, was thrown beneath the wheels of a train on which he was riding and badly injured by the sudden and violent stopping of the train by the engineer without warning or notice in order to avoid running into a switch which had been negligently left open, the emergency stop was the immediate cause of the injury, but the necessity for such a stop was created by the negligence of the superior servants of the railroad company in leaving the switch open, contrary to custom, and in not inspecting the switch before attempting to use it, and by the negligence of the management in not making and enforcing proper rules for the operation of the switch. *Williams v. W. R. Pickering Lumber Co. (La.), 19-1244.*

But from any point of view, the efficient cause, the *causa causans*, was the negligence of the company and of its servants for whose fault it is answerable. *Williams v. W. R. Pickering Lumber Co. (La.), 19-1244.*

Intervening negligence as proximate cause. — Where a member of a switching crew, after riding on the footboard in front of an engine which has been shifting cars and which has stopped near a shanty where the crew is to eat a meal, steps from the

footboard onto the track, for the purpose of crossing the same in order to go to the shanty, believing and having reasonable ground to believe that the engine will not be started again without proper notice, and while crossing the track is struck by the engine which starts slowly forward and which is obscured or partly obscured by a cloud of steam and the darkness of the night, and after being struck and knocked down by the engine, catches hold of the footboard as it is passing over him, and thus holding on and being held by some part of his clothing which has caught on the footboard, is dragged on his back practically unhurt until his heel catches in an unblocked frog and he is thus pulled loose from the footboard and crushed by the wheels of the engine, the catching of his foot in the unblocked switch is the proximate cause of the injury. *Cooper v. Baltimore, etc., R. Co. (U. S.), 14-693.*

Contributory negligence as proximate cause. — In an action by a switchman to recover damages for personal injuries sustained while coupling cars by tripping over a nail projecting from the brake beam of a car, the contributory negligence of the plaintiff in going upon the track in front of a moving car, and not the failure of the railroad company to warn him of the presence of the nail, held to be the proximate cause of the injuries. *New York, etc., R. Co. v. Hamlin (Ind.), 15-988.*

j. Employers' relief associations.

Hospital association maintained by compulsory assessments as charitable institution. — A hospital association maintained in connection with a railroad system for the treatment of the railroad's employees whose wages are regularly assessed to pay for the maintenance of such hospital, is not a charitable institution or exempt from liability as such, but is under a legal duty to treat competently the patients received, and cannot escape liability in that respect by the mere employment of competent servants. *Phillips v. St. Louis, etc., R. Co. (Mo.), 14-742.*

Liability of master for negligence of hospital authorities. — Where an incorporated hospital association organized by a railroad company for the treatment of its employees is maintained solely by compulsory assessments on the employees and an annual contribution from the railroad company, and the chief surgeon and other surgeons of the hospital association are made the chief surgeon and local and division surgeons of the railroad company, the hospital association together with its surgeons and physicians are but the agents of the railroad, and the latter is liable for acts of negligence of the former. *Phillips v. St. Louis, etc., R. Co. (Mo.), 14-742.*

Proximate cause. — Where a person who has been treated in a railroad hospital and is placed by the chief surgeon of the hospital unattended on a train for transportation to

his home, and after safely leaving the train at his destination places his body on a street car track and is killed, the insane act resulting in death is not such a remote or unforeseeable consequence of the negligence of the railroad company in sending the deceased on his journey unattended as will relieve it of liability for its negligence. *Phillips v. St. Louis, etc., R. Co. (Mo.)*, 14-742.

Acceptance of benefits by servant as release of master. — Where a railroad employee, after being injured, elects to accept the benefits to which he is entitled by virtue of his membership in a relief association maintained by the railroad company and its employees, he precludes himself from maintaining an action against the company for the injury, if his contract of membership provides that his election to accept the benefits shall have such effect. *Harrison v. Alabama Midland R. Co. (Ala.)*, 6-804.

Admissibility of evidence. — The chief surgeon of a hospital association organized by a railroad company for the treatment of its employees, who is also, under the rules of the association, the chief surgeon of the railroad company, is, in respect to the cure of a patient in the hospital, the agent of the railroad company, and a letter written by such surgeon to the auditor's department of the railroad company conveying information of the insanity of a patient who had been confined in the hospital, and who, under the rules of the association, was on that account ineligible for treatment there, and notifying the department that the patient should be sent to a proper asylum for treatment, is within the line of the surgeon's duty as agent of the railroad company, and is competent evidence against the railroad company in an action against it for the death of such patient after he left the hospital and was placed unattended on the plaintiff's train, as showing knowledge on the part of the defendant's agent that the deceased was of unbalanced mind when he was permitted to depart. *Phillips v. St. Louis, etc., R. Co. (Mo.)*, 14-742.

k. Limitation of liability by contract.

Validity of contract whereby servant releases master from liability for future injuries. — A master cannot, by contract in advance, absolve himself from liability which would exist in the absence of contract, for injuries to his servant caused by the master's negligence, as such contract is against public policy and void. *Pugmire v. Oregon Short Line R. Co. (Utah)*, 14-384.

A student brakeman, who, in consideration of being permitted to ride on a railway company's freight train to observe and learn the duties of a freight brakeman, agrees to perform service on its engines, trains, and cars while learning such duties, is an employee of the company. Under the statutes of Kansas a contract entered into by such employee exempting the company from all liability for

damages which he may sustain in consequence of the negligence of the company, its agents, servants, or employees, is against public policy and void. *Atchison, etc., R. Co. v. Fronk (Kan.)*, 11-174.

An agreement whereby a servant relieves the master from all liability for personal injuries which the servant shall or may sustain in the course of his employment as the result of the master's negligence is void as against public policy. *Johnston v. Fargo (N. Y.)*, 6-1.

Validity of contract whereby servant releases third person from liability for future injuries. — A railroad company, being under no duty to the public to furnish sleeping cars in its trains, may impose such terms as it may elect as a condition of its undertaking to haul the cars of a sleeping car company; and hence a stipulation exempting the former from liability to the employees of the latter is not void as against public policy. *Chicago, etc., R. Co. v. Hamler (Ill.)*, 3-42.

Such a contract is not void as without consideration because, though dated at the commencement of his employment, it was not signed by the employee until some time thereafter, where the employment was for certain daily wages, payable monthly and for no particular time. Under such circumstances the contract would be effective as to any occurrence after its execution while the employment continued. *Chicago, etc., R. Co. v. Hamler (Ill.)*, 3-42.

Nor is such a contract void because the employee failed to read before signing it, where he was able to read and there was no fraud or misrepresentation connected with the execution thereof. *Chicago, etc., R. Co. v. Hamler (Ill.)*, 3-42.

Nor is such a contract void as one releasing liability as between master and servant, where the employee of the sleeping car company is not subject to the orders of and is therefore not a servant of the railroad companies over whose lines the sleeping cars are operated. *Chicago, etc., R. Co. v. Hamler (Ill.)*, 3-42.

A contract between a sleeping car company and an employee releasing from liability to the latter a railroad company hauling the former's cars is a good defense to an action brought by the employee against the railroad company except in the case of wilful or intentional negligence by the railroad company. *Chicago, etc., R. Co. v. Hamler (Ill.)*, 3-42.

Proof of contract. — Where a contract between a sleeping car company and an employee recites that the sleeping car company secures the operation of its cars on lines of railroads by means of contracts, and releases from liability any corporation over whose lines the cars may run, such a recital is sufficient evidence of the existence of a contract releasing from liability any particular railroad over whose lines the sleeping cars are actually run without further proof thereof. *Chicago, etc., R. Co. v. Hamler (Ill.)*, 3-42.

A messenger of an express company is not

charged with knowledge of anything in the contract between his employer and the railroad company affecting his right of recovery against the railroad company under the law of negligence. *Robinson v. St. Johnsbury, etc., R. Co. (Vt.), 12-1060.*

1. Liability for blacklisting discharged employee.

Where several companies agree to report to each other the employees leaving the employ without giving notice and not to employ the men so reported, such an agreement is not, in the absence of malice, an unlawful combination or conspiracy so as to make the companies liable to the men properly reported; but an employee wrongfully reported may hold the reporting company liable. *Willis v. Muscogee Mfg. Co. (Ga.), 1-472.*

In a suit for damages by an employee against an employer for having wrongfully reported him to other employers as having left the service without complying with the rule as to notice, where the plaintiff introduces evidence from which the jury might find that the plaintiff had not violated the rule requiring the giving of notice and that the plaintiff had been damaged by being deprived of employment elsewhere by reason of the wrongful act of the defendant, a nonsuit should not be granted. *Willis v. Muscogee Mfg. Co. (Ga.), 1-472.*

m. English Workmen's Compensation Act.

(1) What is accident arising from employment.

Enteritis by inhaling sewer gas. — A workman who contracts enteritis by inhaling sewer gas in the course of his employment does not sustain a "personal injury by accident" within the meaning of the English Workmen's Compensation Act of 1906. *Broderrick v. London County Council (Eng.), 15-885.*

Paralysis from contact with lead. — Paralysis resulting to a workman through long continued exposure in the course of his employment in contact with lead is not an injury by accident within the meaning of the Workmen's Compensation Act. *Steel v. Cammell, Laird & Co. (Eng.), 2-142.*

Catching of anthrax. — The catching of anthrax by a workman while engaged in handling wool in the course of his employment is an accident within the meaning of the English Workmen's Compensation Act. *Brintons v. Turvey (Eng.), 2-137.*

Fall caused by epileptic fit. — Where a workman is required by the conditions of employment to stand near the open hatchway of a ship, and while so standing is seized with an epileptic fit and falls into the hold and is injured, the accident is one arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act. *Wicks v. Dowell & Co. (Eng.), 2-732.*

(2) What amounts to "serious and wilful misconduct" precluding recovery.

Term defined. — The term "serious and wilful misconduct," as used in the English Workmen's Compensation Act exempting masters from liability to servants for injuries resulting from such misconduct on the part of the latter, considered and defined. *Johnson v. Marshall, Sons & Co. (Eng.), 5-630.*

Disobedience of rules. — In an action under the English Workmen's Compensation Act to recover damages from a railway company for the death of an engine driver employed by it, evidence that the deceased servant was killed while violating a rule of the company held sufficient to support a finding that his act amounted to "serious and wilful misconduct," precluding recovery for his death. *Bist v. London, etc., R. Co. (Eng.), 8-1.*

Burden of proof. — In an application under the English Workmen's Compensation Act for compensation from a master for the death of his servant, which statute supercedes the doctrine of contributory negligence, the burden of proving that the servant was guilty of "serious and wilful misconduct" within the meaning of the act is upon the master, and the evidence on the case at bar held not to show such misconduct on the part of the servant. *Johnson v. Marshall, Sons & Co. (Eng.), 5-630.*

(3) What are earnings of the employment.

"Tips." — "Earnings in the employment of the same employer" in respect to which compensation is recoverable under the English Workmen's Compensation Act of 1906, need not always come from the employer; and where the employment is of such a nature that the habitual giving and receiving of "tips" is open and notorious, and is sanctioned by the employer, the money thus received with his knowledge and approval must be brought into account in estimating the average weekly earnings in respect to which compensation is to be awarded. *Penn v. Spiers and Pond (Eng.), 14-335.*

Employment as a waiter on a restaurant car is of such a nature that the tips given to such waiter must be considered to be a part of the earnings of the employment which are recoverable under the English Workmen's Compensation Act of 1906. *Penn v. Spiers and Pond (Eng.), 14-335.*

n. Actions to enforce liability.

(1) In general.

Application of Federal Employers' Liability Act to state courts. — The Federal Employers' Liability Act of 1908 (Act of April 22, 1908, c. 149, 35 St. L. 65, Fed. 81, Ann. Supp. 1909, p. 584) which makes common carriers by railroad engaged in interstate commerce liable for personal injuries sustained by their employees, was not intended by Congress to authorize the institution of actions for such injuries in the

state courts. Many of the provisions of such act relative to procedure could only be observed in a state court at the cost of setting up in the same tribunal conflicting standards of right, policy, and practice, and it cannot be presumed that Congress would, if it could, require the courts of a state to enforce rights newly vested by the laws of the United States, which could only be enforced by following modes of procedure not permitted by the state law and opposed to the public policy which that law declares. *Hoxie v. New York, etc., R. Co. (Conn.)*, 17-324.

Condition precedent to recovery. — The notice of the injury required by the Massachusetts Employers' Liability Act to be given to the employer is a condition precedent to an employee's right of action thereunder, and must precede the writ. If it appears that such notice was given on the day on which the action was commenced, it must also appear that the notice was served before the writ was sued out. *Finneran v. Graham (Mass.)*, 15-291.

The provision of the Massachusetts employers' liability law that no action shall be maintained thereunder unless it is "commenced within one year after the accident," is not a statute of limitations affecting only the remedy, but is one of the conditions upon which a right of action depends. *McRae v. New York, etc., R. Co. (Mass.)*, 15-489.

Consequently the employer may, under a general denial, avail himself of the employee's failure to institute the action within the time prescribed in such statute, and may have a verdict directed for the defendant. *McRae v. New York, etc., R. Co. (Mass.)*, 15-489.

Consistency of defenses of assumption of risk and contributory negligence. — Though the defenses of contributory negligence and assumption of risk are separate and distinct, both may be available in the same case and under the same state of facts. *Choctaw, etc., R. Co. v. Jones (Ark.)*, 7-430.

(2) Pleadings.

Sufficiency of complaint in general. —

In an action by a servant against his master to recover damages for personal injuries, where the complaint alleges an injury to the plaintiff in plain and concise language, and that the injury resulted from the carelessness and negligence of the defendant in the construction and operation of its sawmill and appliances thereto, and that the plaintiff was in no way guilty of contributory negligence, and used ordinary prudence and care in the performance of the labor assigned to him, and in the performance of which he was injured, it is not subject to a demurrer. *Crawford v. Bonners Ferry Lumber Co. (Idaho)*, 10-1.

In an action against an employer by an employee for an injury suffered by the plaintiff while being driven in a vehicle of the defendant in charge of another employee of the defendant, a complaint alleging in substance that the defendant sent the vehicle and driver to convey the plaintiff and other

employees of the defendant from one point to a place of work, and that the driver, who was the defendant's agent, carelessly and improperly overloaded said vehicle and negligently drove the same, and thereby caused the injury of the plaintiff, does not preclude the plaintiff from showing that the relation between the defendant and the plaintiff at the time of the injury was that of licensor and licensee and not that of employer and employee, or authorize the court to direct a verdict for the defendant on the assumption that the plaintiff and the driver of defendant's vehicle were fellow servants, and that the defendant could not therefore be liable, there being no allegation that it was a part of the contract of employment to convey the plaintiff in the manner stated, or that while being so conveyed the plaintiff was engaged in the performance of any duty of his employment. *Pigeon v. Lane (Conn.)*, 11-371.

Allegations of negligence on the part of a switchman in turning the switch stand on which the signal rested so as to open the switch and in permitting frost and snow to accumulate on the red signal so that an engineer could not distinguish the signal as his train approached, are insufficient, where it is shown that the switch worked automatically, and that the signal was moved only by moving the switch, and it is not averred that the engineer could have seen the signal if there had been no frost or snow upon it, but is, alleged on the contrary that he could not have seen the signal on account of weather conditions. *Chicago, etc., R. Co. v. Barker (Ind.)*, 14-375.

An allegation of negligence on the part of a railroad employee in permitting snow and ice to get upon and obscure the red signal of a switch stand so that an engineer failed to see that the switch was open and ran into it is insufficient in not repelling an inference that the signal panels of the switch stand could be as readily distinguished by their shape as by their color, one being oval in shape with a hole in the centre of each disk, and the other being square in form with pointed ends, and in wholly failing to show that the accident would not have happened had there been no snow or ice at all formed on the signal disks. *Chicago, etc., R. Co. v. Barker (Ind.)*, 14-375.

In an action against a railroad company for the wrongful death of an engineer whose train ran into an open switch, allegations in the complaint that the defendant was negligent in failing to furnish the cab of the decedent's engine with double glass windows so as to prevent the accumulation of frost or ice on the windows obstructing the decedent's view of the switch, are insufficient for failing to show that the windows of the cab were used by the decedent to look for the switch or that he could have seen the switch had there been no frost or ice on the windows, or that the decedent did not assume the risk of an accumulation of frost on the single window glass on a cold day. *Chicago, etc., R. Co. v. Barker (Ind.)*, 14-375.

In an action by a brakeman against a rail-

road company to recover damages for personal injuries, where the petition alleges that the plaintiff was compelled, by reason of a defective coupling rod, to step between moving cars in order to uncouple them, and that while he was between the cars in the act of uncoupling them his foot was caught and held fast in an open or unblocked frog or guard rail on the track; that the accident was due to the negligence of the defendant in failing to block said frog or guard rail properly; and that the accident occurred solely by reason of such negligence, the petition does not charge two substantive acts of negligence, but merely relies on the negligent failure to block the frog, and sets forth the defective condition of the coupling rod as the excuse for the plaintiff's action in going between the moving cars. *Wabash R. Co. v. Kithcart* (U. S.), 9-497.

The plaintiff's pleadings considered, in an action to recover for the negligent killing of a section hand by means of a crowbar hurled by a passing train, and held to aver sufficiently negligence in the operation of the train and negligence on the part of a co-employee of the decedent who was working on the section gang. *Dunn v. Chicago, etc., R. Co.* (Ia.), 8-226.

The court committed no error in dismissing the petition upon the general demurrer filed thereto. *Hagins v. Southern Bell Tel. Co.* (Ga.), 20-248.

Joinder of common-law and statutory causes of action. — Where the petition, in an action to recover for the death of the plaintiff's intestate from the latter's employer, alleges in one count that the death resulted through the negligence of the defendant in failing to furnish the deceased a safe place to work, and alleges in another count the right to recover upon a liability arising under the Employers' Liability Act, and that the intestate's death was caused by the negligence of a coemployee, the counts of the petition are not in contemplation of law inconsistent with each other, although they state different grounds of liability for the same ultimate act dependent upon the proof to be added at the trial, and the plaintiff cannot be compelled to elect upon which count reliance will be placed for recovery. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

Allegation of master's knowledge of defect. — A complaint in an action by a servant against his master to recover for personal injuries alleged to have been received while operating a defective machine, will not be held insufficient for failure to allege directly that the defendant knew of the defect in the machine, where it contains an allegation that the defendant operated the machine while it was insufficiently provided with guards. *Quinn v. Electric Laundry Co.* (Cal.), 17-1100.

Allegation of failure to inspect and repair. — In an action by a switchman who was injured while coupling a defective foreign car, a paragraph of the complaint alleging that the railroad company failed to give

such car a reasonable inspection is not subject to general demurrer. *New York, etc., R. Co. v. Hamlin* (Ind.), 15-988.

Nor is a paragraph of the complaint in such an action alleging that the company failed to repair a discovered defect or to notify the plaintiff of the existence thereof, subject to general demurrer. *New York, etc., R. Co. v. Hamlin* (Ind.), 15-988.

Allegation of duty. — An allegation that it was the "duty" of the station agent of a railroad, before the arrival of trains, to look out of the window and examine the track, and observe the condition of the track and switch, and to signify by the use of the semaphore the safe or unsafe condition of the track and switch, to employees approaching the station with trains, but failing to aver how such became the duty of the agent, whether by contract of employment, rule of the company, or prevailing custom, is totally insufficient. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

An allegation of negligence on the part of a railroad company in obstructing the view of a switch from the window of the railroad station by maintaining in the line of vision a warning board at a country highway crossing, and thus preventing the station agent from seeing an open switch and warning an engineer on an approaching train, is bad for failing to state how it was the duty of the agent to inspect and note the condition of the tracks and switches, or that the agent could have seen the target on the switch stand except for the warning board and have given a signal to the engineer. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

Allegation of failure to furnish safe appliances. — In an action against a railroad company for the wrongful death of an engineer whose train ran into an open switch, a complaint alleging that the defendant negligently permitted such switch to become unlocked and opened, and so adjusted as to carry the decedent's train from the main track onto the siding, but not alleging that the switch or any of its appliances was unsound, defective, or out of repair, shows that the only negligence was in the operation of the switch, and that the defendant had not failed in its duty to furnish the decedent safe instrumentalities or to employ competent servants. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

Allegation of incompetency of fellow servant. — In an action by a servant against the master for personal injuries alleged to have been caused by the negligence of a fellow employee a complaint alleging that the plaintiff had repeatedly protested to the master against the incompetency of such fellow employee, and that especially about ten days prior to the injury he entreated that the fellow servant should be discharged and a competent person employed in his place, that the master promised to do so, and that the plaintiff relying on such promise continued in the employment until the day of his injury, does not negative a cause of action as showing conclusively that such a

length of time had elapsed between the master's promise and the injury that the plaintiff could no longer rely upon it; for evidence is admissible under the pleading to show special circumstances protracting the time requisite to the performance of the promise and continuing the right of the employee to rely upon it. *Williams v. Kimberly, etc., Co. (Wis.)*, 11-622.

Allegation of character of vice-principal. — The averment in a complaint that a switchman was charged with keeping the track in repair does not fix his character as a vice-principal while engaged in handling a switch, since handling a switch is not a master's duty and cannot be made such by an averment. *Chicago, etc., R. Co. (Ind.)*, 14-375.

Allegation of weather conditions demanding display of signals. — In an action against a railroad company for the wrongful death of an engineer whose train ran into an open switch, an allegation in the complaint that the day was extremely cold and the air filled with flying frost, and that "by reason of the hazy condition of the weather it was impossible for . . . [the decedent] to see the open switch," is not a sufficient averment that the day was "dark and foggy" or that any other reason existed for maintaining a light on the switch in the day time, within a statute requiring the display of a light on switches in the day time when the day is "dark and foggy." *Chicago, etc., R. Co. v. Barker (Ind.)*, 14-375.

In such an action, an allegation in a complaint that it was the duty of the defendant to maintain a light on the switch cannot be considered in the absence of any allegation of the facts showing that such duty existed. *Chicago, etc., R. Co. v. Barker (Ind.)*, 14-375.

In such an action, allegations that the defendant knew that the day was dark and hazy and the atmosphere filled with flying particles, and that it was impossible for the plaintiff's intestate to see along the track but for a short distance, are mere recitals and not allegations of fact. *Chicago, etc., R. Co. v. Barker (Ind.)*, 14-375.

Contributory negligence. — In an action to recover damages for the death of a section hand who was killed by a train, answer examined and held to contain a good plea of contributory negligence. *Sissel v. St. Louis, etc., R. Co. (Mo.)*, 15-429.

(3) Evidence.

(a) Presumptions and burden of proof.

Burden of proof of negligence in general. — If an accident causing injury to a servant may have resulted from either one of two causes, for one of which the master is liable and for the other of which he is not, the servant, in an action to recover for the injury, must show with reasonable certainty that the cause for which the master is liable produced the injury, and if the evidence merely leaves this to conjecture the plaintiff

must fail in his action. *Coin v. John M. Talge Lounge Co. (Mo.)*, 17-888.

The mere happening of an accident by which a servant is injured does not raise a presumption of negligence on the part of the master. *Siegel v. Detroit, etc., R. Co. (Mich.)*, 19-1095.

Violation of statute as presumption of negligence. — The employment of a child in a factory contrary to the provisions of a statute prohibiting the employment in factories of children under a specified age is very strong evidence of negligence. *Rolin v. R. J. Reynolds Tobacco Co. (N. Car.)*, 8-638.

Burden of proof of safety of appliances. — In an action by a train employee for damages for injuries sustained in falling from an alleged defective ladder on a box car, there is no presumption of law that the ladder was sufficient or insufficient. The burden of proof is on the plaintiff, however, as to the insufficiency of the ladder and the negligence of the railroad company. *Kiley v. Rutland R. Co. (Vt.)*, 13-269.

Proof of injury to a servant from the failure of machinery or appliances furnished by the master does not raise a presumption of negligence on the part of the master. *Green v. Catawba Power Co. (S. Car.)*, 9-1050.

In an action by a servant to recover damages for personal injuries caused by defective machinery, it is incumbent upon him to prove that the injury was caused by the defective condition of the machinery as a matter of fact, that the master knew or by the exercise of reasonable care could have known of such defective condition, and that the master did not provide the servant a safe place in which to work. *Comer v. W. M. Ritter Lumber Co. (W. Va.)*, 8-1105.

Practicability of guarding machinery. — Where the practicability of guarding dangerous machinery is in dispute, the burden is upon the plaintiff to prove that it is practical. *Glockner v. Hardwood Mfg. Co. (Minn.)*, 18-130.

Contributory negligence. — In an action by a servant against his master to recover damages for personal injuries, where the plaintiff has sufficiently pleaded the carelessness and negligence in the construction and operation of defendant's sawmill and other machinery connected therewith, and that through no fault of his he was injured and damaged by the defendant while in its employ and performing the work prescribed for him by his employer, a demurrer to such complaint should be overruled, and the defendant permitted to answer setting up its defense, as the burden of proof is upon the defendant to show that the plaintiff was guilty of contributory negligence. *Crawford v. Bonners Ferry Lumber Co. (Idaho)*, 10-1.

(b) Admissibility.

In general — The liability of a railroad company for personal injuries to a woman working on one of its outfit cars as assistant to a man in the employ of the company, de-

pends in no way upon the marital relationship existing between such woman and man, but on the relationship existing between her and the company at the time of the accident, and evidence that such woman and man were not married is immaterial and properly excluded, in an action by her for the injuries sustained. *Pugmire v. Oregon Short R. Co.* (Utah), 14-384.

In an action against an employer by an employee for an injury suffered by the plaintiff while being driven in a vehicle of the defendant in charge of another employee of the defendant, an allegation in the complaint that the injury was caused by the careless, negligent, and improper driving of the conveyance by the defendant's servant is a sufficient averment to permit proof of that active negligence which alone could render the defendant liable as licensor. *Pigeon v. Lane* (Conn.), 11-371.

Custom of other masters as to construction. — In an action against a railroad company to recover for the death of a fireman, caused by coming in contact with a rail crane, where the negligence charged is that the crane was located and maintained in unnecessary and dangerous proximity to the defendant's track, the defendant is entitled to introduce evidence to show the custom obtaining on other roads as to the location and maintenance of cranes; and it is prejudicial error to exclude this evidence upon the theory that there is no evidence of negligence in the location and maintenance of the crane, where the court subsequently gives the jury instructions submitting to them the questions whether the crane was located unnecessarily near the track, and whether the defendant's negligence was the cause of the injury. *Denver, etc., R. Co. v. Burehard* (Colo.), 9-994.

Lack of proper safeguards. — In an action against a mining company for the wrongful death of an employee drowned by the flooding of the mine, evidence of a lack of ladders and bulkheads at places where it is contended they should have been stationed is improperly excluded unless it affirmatively appears that the employee had knowledge of the danger as well as of the absence of ladders and bulkheads; the evidence being competent for the purpose of showing that if the defendant knew, or in the exercise of ordinary care could have known, of the existence of danger, it further neglected to exercise reasonable care to make the place ordinarily safe. *Williams v. Sleepy Hollow Mining Co.* (Colo.), 11-111.

Repair of machinery after accident. — In an action by a servant against his master for personal injuries alleged to have been caused by defective machinery or appliances furnished by the master, evidence that after the accident the master repaired the machinery or adopted a different method of conducting his business is inadmissible to prove his negligence at the time of the accident. *Camp Bird v. Larson* (U. S.), 11-500.

In an action for damages for personal injuries to an employee sustained by having

his hand caught in the cogs of the employer's machinery, evidence that the master placed additional safeguards around machinery after the servant had been injured thereby is inadmissible. *Worthy v. Joesville Oil Mill* (S. Car.), 12-688.

Reputation of servant for incompetency. — The reputation of a servant among a limited number of his coemployees for incompetency is not admissible to charge the master with knowledge of the incompetency. *Moering v. Falk Co.* (Wis.), 18-926.

In an action by a servant against his master to recover damages for personal injuries, evidence of the general reputation for incompetency and carelessness of a fellow servant whose negligence is alleged to have caused the plaintiff's injuries is admissible to show knowledge on the part of the defendant where sufficient evidence has been given to warrant a finding that the fellow servant was incompetent. *Moering v. Falk Co.* (Wis.), 18-926.

Statement of injured person at time of accident. — In an action against a railroad company to recover damages for the negligent killing of a brakeman who lived but a short while after the happening of the accident, the brakeman's brief account of the accident, given after he had partially revived from the shock, is admissible in evidence as a part of the *res gestæ*. *Marshall v. St. Louis, etc., R. Co.* (Ark.), 8-420.

In an action to recover for the negligent killing of a section hand by means of a crowbar hurled by a passing train, it is not competent for a witness to testify that the decedent stated, in a conversation had with his fellow workmen a few minutes after the accident, that a coemployee had left the bar too near the track, as the statement, though part of the *res gestæ*, is a conclusion relative to the negligence of the coemployee. *Dunn v. Chicago, etc., R. Co.* (Ia.), 8-226.

Connection of liability insurance company with defense. — In an action against an employer to recover for the death of an employee, it is not error to permit a witness to testify on cross-examination that whatever judgment is rendered against the defendant will be paid by the employers' accident insurance company, where the defendant pleaded a release and there is a conflict of testimony with respect to the circumstances under which the release was obtained, and the evidence in question is adduced to show that the release was obtained by the witness as an agent of the insurance company. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

Abrogation of rule by nonobservance. — On an issue whether the rule of a railway company, which it claimed an employee had expressly contracted to observe, had been abrogated by general nonobservance by the employees, with knowledge of the company, the court should instruct the jury upon request that they should not consider the nonobservance occurring prior to the date of the contract. *Central of Georgia R. Co. v. Goodwin* (Ga.), 1-806.

Opinion of witness. — In an action to

recover for the negligent killing of a section hand by means of a crowbar hurled by a passing train, it is not competent to ask a medical expert whether the decedent's injury might have been caused by a crowbar "thrown by coming in contact with a swiftly moving object like a train," as the material question for the witness is whether the injury might have been caused by the impact, and not whether the bar might have been thrown by the train or some other force. *Dunn v. Chicago, etc., R. Co.* (Ia.), 8-226.

In an action by a servant against the master to recover damages for personal injuries sustained by reason of the alleged failure of the defendant to provide a safe way for the plaintiff to get to his work, where it appears that there were two ways open to use by the plaintiff, the defendant cannot introduce in evidence the opinion of a fellow servant that the way which the plaintiff did not use was the safer of the two. *Virginia Bridge, etc., Co. v. Jordan* (Ala.), 5-709.

(c) Sufficiency.

In general. — In an action against the owner of a private railway used for the transportation of logs, to recover damages for the death of a person employed as locomotive engineer on such railway, it was shown that the deceased was killed by jumping from a train which he was taking over the railway and which had gotten beyond his control while on a down grade. There was also evidence tending to show that the brakes on some of the cars were defective or out of order, that the brakeman on the train was either incompetent or negligent, and that the defendant had failed to provide any sufficient safety switch at the foot of the down grade where the accident happened, to guard against the contingency of a train getting beyond control on such grade. Held, that the jury were justified in finding the defendant guilty of negligence, and in acquitting the deceased of contributory negligence.

In an action against a railroad company to recover damages for the death of one of its servants, alleged to have been caused by its negligence in requiring such servant to work at a time when he was physically unfit therefor by reason of want of sleep and rest, evidence examined and held sufficient to call for the submission of the case to the jury. *McCrary v. Southern Ry.* (S. Car.), 18-840.

In an action by a section hand against a railroad company to recover damages for personal injuries alleged to have been caused by the defendant's negligence, where the evidence tends to show that the injury was the result of the confusion arising from conflicting orders given to the plaintiff and those who were working with him, by two persons, each of whom had the right to direct the plaintiff's services, the case is properly submitted to the jury, and their verdict in favor of the plaintiff will not be disturbed. *Hallums v. Southern R. Co.* (S. Car.), 17-511.

In an action by a servant against his mas-

ter to recover damages for injuries received while operating a steam mangle in a laundry, evidence examined and held sufficient to justify the submission of the question of the defendant's negligence to the jury, and to sustain their verdict in plaintiff's favor. *Quinn v. Electric Laundry Co.* (Cal.), 17-1100.

In an action against a master to recover damages for personal injuries, where the cause of the accident which caused the injury is wholly unexplained, so that the jury have nothing but the merest conjecture to guide them, there is no efficient basis for a verdict for the plaintiff. *Hamann v. Milwaukee Bridge Co.* (Wis.), 7-458.

In an action against a railroad company for damages for the death of the plaintiff's intestate alleged to have been caused by the buckling of a freight train and its falling over to some extent on an adjacent track, where a collision occurred which produced the explosion of material in a car of the train, evidence examined and held too conjectural to justify any finding as to the cause of the accident or any determination that the defendant was liable. *Lewis v. Pennsylvania R. Co.* (Pa.), 13-1142.

In an action for damages for personal injuries to an employee sustained by having his hand caught in the cogs of the employer's machinery, evidence examined and held to justify the refusal of a nonsuit requested on the ground of an entire lack of evidence of negligence on the part of the defendant. *Worthy v. Jonesville Oil Mill* (S. Car.), 12-688.

In an action against a master by a servant for personal injuries sustained by the servant, evidence examined and held to show that there was no negligence on the part of the defendant creating a common-law liability. *Beale v. Northern Pacific R. Co.* (N. Dak.), 11-921.

Evidence reviewed, in an action by a fireman against a railroad company to recover damages for personal injuries sustained by the plaintiff, and held sufficient to justify the submission of the case to the jury. *Ricker v. Central R. Co.* (N. J.), 9-785.

Existence of duty. — In an action by a telephone lineman for personal injuries sustained by receiving an electric shock while stringing wires, evidence examined and held to be sufficient to justify the submission to the jury of the questions whether it was the duty of the telephone company to furnish the plaintiff a sufficient quantity of insulated wire, and whether it discharged such duty. *De Kallands v. Washtenaw Home Tel. Co.* (Mich.), 15-593.

In such an action the trial court held not to have erred in refusing to direct a verdict for the defendant on the ground that the uninsulated wire furnished by the defendant was not the proximate cause of the injuries. *De Kallands v. Washtenaw Home Tel. Co.* (Mich.), 15-593.

Practicability of guarding machinery. — Where, in an action by a servant to recover damages for personal injuries incurred in feeding a printing press, the prac-

ticability of guarding the machine is denied by the defendant, testimony that a guard was applied to a similar press in a competing factory, seven months after the accident to the plaintiff, which tended to lessen the hazard, is insufficient, in the absence of any other evidence, to prove practicability of applying a sufficient guard. *Glockner v. Hardwood Mfg. Co. (Minn.)*, 18-130.

Defective machinery and appliances.

— In an action by a servant against his master to recover damages for personal injuries caused by the slipping of a band saw which the plaintiff was operating, evidence examined and held insufficient to raise any question for the jury as to whether the accident was caused by defects in the machinery to which the saw was attached. *Coin v. John M. Talge Lounge Co. (Mo.)*, 17-888.

In an action by a servant to recover for injuries alleged to have been caused by a defective appliance, where the evidence is purely conjectural and shows that the accident causing the injury might have arisen from any one of several causes, for some of which the master is liable, and for others of which he is not liable, there can be no recovery. *Green v. Southern R. Co. (S. Car.)*, 5-165.

Evidence reviewed in an action by a servant against the master to recover damages for personal injuries resulting from an unsafe appliance, and held sufficient to entitle the plaintiff to have the question of the defendant's negligence submitted to the jury. *Martin v. Wabash R. Co. (U. S.)*, 6-582.

In an action by a servant against the master to recover damages for personal injuries caused by a defective appliance, the fact that the appliance had been used without accident for a number of years prior to the accident which injured the plaintiff does not require the court to direct a verdict for the defendant, as, though it is strong, it is not conclusive evidence that the master was not guilty of negligence. *Commarford v. Empire Limestone Co. (Ont.)*, 5-1012.

Existence and cause of infectious disease.

— In an action by a servant against his master for damages for injuries alleged to have been suffered by the plaintiff by reason of the disease, anthrax, contracted in handling the carcass of an animal while engaged in the master's employment, evidence examined and held to require the submission to the jury of the issues as to whether the plaintiff was afflicted with anthrax, and whether he became infected with that disease by handling the carcass in question. *O'Connor v. Armour Packing Co. (U. S.)*, 14-66.

Negligence and assumption of risk.

— Evidence in an action for injuries to a servant, alleged to have been caused by the unsafe condition of the premises, held sufficient to present questions for the jury as to negligence on the part of the defendant and assumption of the risk by the plaintiff. *Miller v. White Bronze Monument Co. (Ia.)*, 18-957.

Negligence and contributory negligence. — Evidence considered in an action to recover for the negligent killing of a section

hand by means of a crowbar hurled by a passing train, and held insufficient to show negligence in the operation of the train, but sufficient to make a fair case for the jury on the issues of negligence on the part of a coemployee of the decedent who was working on the section gang, and of the decedent's freedom from contributory negligence. *Dunn v. Chicago, etc., R. Co. (Ia.)*, 8-226.

Contributory negligence and assumption of risk.

— In an action to recover damages for injuries received by a servant by the falling of a plank from a scaffold which he was engaged in moving, evidence examined and held sufficient to sustain the jury in finding that the plaintiff was not guilty of contributory negligence and did not assume the risks attending the work in which he was engaged. *Dougherty v. Minneapolis Steel, etc., Co. (Minn.)*, 19-1043.

Proximate cause. — In an action by a servant against his master to recover damages for personal injuries, evidence examined and held to sustain the verdict of the jury that the proximate cause of the accident was the failure of the master to furnish the requisite number of men to move a scaffold used during the erection of a building, and in failing to notify the plaintiff of the dangers attending the moving of the scaffold by taking it apart. *Dougherty v. Minneapolis Steel, etc., Co. (Minn.)*, 19-1043.

(d) Functions of court and jury.

Existence of relation of master and servant.

— In an action to recover damages for personal injuries brought against a master by a person employed and paid by a servant as a temporary substitute, held to be for the jury to determine whether the plaintiff was a mere volunteer or was employed with the defendant's knowledge and consent. *Aga v. Harbach (Ia.)*, 4-441.

Negligence. — In an action by an employee against his employer to recover damages for injuries caused by the fall of a derrick, where there is testimony that before the accident the head foreman's attention was called to a movement in the mast which indicated that something was wrong in the arrangement and operation of the derrick, and that he went above to see about the matter, it is proper to refuse to direct a verdict for the defendant, and to charge that if the situation was such that in the exercise of ordinary care the foreman would or should have seen the defect, and would or should have remedied the same, then the defendant was guilty of negligence. *Hamlin v. Lanquist, etc., Co. (Minn.)*, 20-893.

The location by a railroad company of a switch stand between and close to two tracks is an engineering problem, and therefore, in the absence of manifest errors in construction which are patent to an ordinary observer, does not involve a question of negligence to be passed upon by the jury in an action by a servant to recover damages for personal injuries sustained while operating the switch. *Chicago, etc., R. Co. v. Riley (U. S.)*, 7-327.

The question of the negligence of an employer in requiring machinery to be cleaned while in motion held to be a question for the jury. *Marks v. Harriet Cotton Mills* (N. Car.), 3-812.

In an action against a railroad company for damages for personal injuries received by an employee in making a coupling with a car on which the automatic coupler required by the Federal Safety Appliance Act of March 2, 1893, was out of repair, evidence examined and held to raise a question for the jury as to whether the defendant, in the exercise of reasonable diligence, should have put the coupling in repair before the accident happened. *St. Louis, etc., R. Co. v. Delk* (U. S.), 14-233.

Contributory negligence. — In an action by a telephone lineman for personal injuries the question whether the plaintiff's method of stringing wires was the more unsafe method held to be, under the evidence, a question of fact for the jury. *De Kallands v. Washtenaw Home Tel. Co.* (Mich.), 15-593.

In such an action the question whether the plaintiff actually had knowledge of what constituted a grounding of himself or of the telephone wires, and whether he was ignorant of the fact that he was not insulated by being upon a dry cedar pole, held to be questions of fact for the jury. *De Kallands v. Washtenaw Home Tel. Co.* (Mich.), 15-593.

The question whether a servant was acting within the scope of his employment at the time when he was injured is ordinarily for the jury. *Rolin v. R. J. Reynolds Tobacco Co.* (N. Car.), 8-638.

Negligence and contributory negligence. — Where in an action against a railroad company for injuries to an employee at work in an unfit car standing on a side track, the evidence shows that an engine propelled on the defendant's railroad track was, without warning or signal, run onto the side track and into the outfit car, and that the plaintiff, upon discovering that the engine was about to collide with the outfit car, immediately endeavored to leave the car, but was unable to do so before the collision, the question of negligence and contributory negligence are for the jury, and their verdict against the defendant on such issues under proper instructions is final and cannot be disturbed on appeal. *Pugmire v. Oregon Short Line R. Co.* (Utah), 14-384.

In an action by a brakeman against a railroad company to recover damages for personal injuries sustained by the plaintiff in consequence of a collision with a switch target near the defendant's track, the questions whether the structure was one reasonably safe and proper to be maintained by the defendant, and whether the plaintiff was guilty of contributory negligence, are questions for the jury. *Boston, etc., R. Co. v. Gokey* (U. S.), 9-384.

Negligence, contributory negligence, and assumption of risk. — Evidence reviewed in an action against a master to recover damages for personal injuries sustained by his

servant, and held to justify the trial court in submitting the questions of negligence, contributory negligence, and assumption of risk, to the jury, and to justify the jury in determining those questions in favor of the defendant. *Christiansen v. William Graver Tank Works* (Ill.), 7-69.

Assumption of risk and contributory negligence. — Evidence reviewed in an action against a railroad company to recover for the death of a fireman caused by coming in contact with a mail crane near the defendant's track, and held to show that the questions of assumption of risk and of contributory negligence were for the jury to determine. *Denver, etc., R. Co. v. Burchard* (Colo.), 9-994.

(e) Variance.

Manner of happening of accident. — In an action by a driver in a coal mine against his employer to recover damages for personal injuries sustained by the plaintiff, where the declaration alleges that the car which the plaintiff was driving caught on the timbers of the roof by reason of the fact that the roof was swayed down, and the proof shows that the coal on the car caught on the timbers of the roof and that the timbers or one of them was swayed down, there is no essential variance. *Jones, etc., Co. v. George* (Ill.), 10-285.

Where, in an action against an employer to recover for the death of an employee resulting from his falling down an unguarded mine shaft, the petition alleges that it was necessary for the deceased to approach the shaft along the level he was in in order to get on the cage which was being lowered to receive him and raise him to the surface, and the evidence discloses that the deceased approached the shaft for the purpose of leaning on the guard rails while waiting for the cage to descend, there is no variance between the pleading and proof, as his movements preceding the time when the cage did descend were but incident to the purpose for which he approached the shaft. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

(4) Instructions.

Negligence. — In an action against a railroad company to recover for the death of a fireman, caused by coming in contact with a mail crane near the defendant's track, where the plaintiff introduces much evidence to show that the defendant was guilty of negligence, the defendant is entitled to an instruction that if there was no negligence in the location or maintenance of the crane, the verdict should be for the defendant. *Denver, etc., R. Co. v. Burchard* (Colo.), 9-994.

Defects in machinery. — In an action by a servant against his master, where the evidence is conflicting on the question whether the apparatus and appliances furnished by the master were reasonably safe, it is reversible error to instruct the jury that the mere fact of injury "by reason of the machinery and appliances" furnished by the master

raises a presumption that the master was negligent, if there is nothing in the instruction from which the jury can see that the omission to use the word "defects" or some similar expression is an inadvertence. *Green v. Catawba Power Co.* (S. Car.), 9-1050.

Degree of care required of infant servant. — In an action against a master to recover for injuries to an infant servant, an instruction as to the degree of care due to and required of the infant servant held not open to objection. *Kirkham v. Wheeler-Osgood Co.* (Wash.), 4-532.

Duty to board moving train. — In an action by a train employee for damages for injuries sustained in falling from a defective ladder on the end of a box car boarded by the plaintiff while the train was in motion and leaving the station at which it had stopped, it is proper to refuse a requested instruction that there is no evidence that any duty was imposed upon the plaintiff to board the train under the circumstances, where it appears that the cars were provided with appliances evidently intended to enable trainmen to mount moving trains, and there is evidence tending to show that the mounting of moving trains was incidental to the trainman's employment. *Kiley v. Rutland R. Co.* (Vt.), 13-269.

Ignoring question of contributory negligence. — In an action by a servant against the master to recover damages for personal injuries where the defense of contributory negligence is set up, a charge by the court to the effect that if the jury shall believe from the evidence that the negligence of the defendant was the proximate cause of the plaintiff's injuries, they must find for the plaintiff, is technically accurate, and if the defendant apprehends that the jury may overlook the defense of contributory negligence, a charge calling attention to it should be requested. *Virginia Bridge, etc., Co. v. Jordan* (Ala.), 5-709.

Ignoring question of assumption of risk. — Where the question of assumption of risk is not involved in the case, it is not error to give an instruction which ignores that question. *Graham v. Mattoon City R. Co.* (Ill.), 14-853.

Refusing instruction on sympathy and prejudice. — In an action by a servant against his master to recover damages for personal injuries, there is no justifiable reason for refusing an instruction telling the jury that neither sympathy for the plaintiff nor prejudice against the defendant should influence their verdict. *Jones, etc., Co. v. George* (Ill.), 10-285.

(5) Appeal and error.

Evidence. — In an action against a railroad company to recover damages for the death of one of its employees, alleged to have been caused by the defendant's negligence, it is not error for the trial court to receive in evidence the entire rule book of the defendant company, over an objection by defendant's counsel that such book contains a great

deal of matter not relevant to the issue, and that only such rules therein as are relevant should be admitted; at least, where the trial court states that it will allow the defendant to reply in case any rule is read which takes it by surprise, and defendant's counsel does not take advantage of such opportunity. *McCrary v. Southern Ry.* (S. Car.), 18-840.

Instructions. — In an action against a railroad company to recover for the death of a fireman, caused by coming in contact with a mail crane near the defendant's track, error in refusing an instruction that the verdict should be for the defendant if the defendant was not guilty of negligence in the location or maintenance of the crane is not cured by the giving of an instruction that the defendant is entitled to a verdict if the plaintiff was guilty of contributory negligence. *Denver, etc., R. Co. v. Burchard* (Colo.), 9-994.

4. LIABILITY OF MASTER TO THIRD PERSONS FOR ACTS OF SERVANT.

a. Nature of liability.

In general. — The relation of master and servant does not render the master liable for torts of the servant, unless connected with his duties as such servant or within the scope of his employment. *Clancy v. Barker* (Neb.), 8-682.

In the ordinary hiring from a livery stable of a carriage, horses, and driver, the owner of the turnout and employer of the driver, and not the hirer, who exercises no control over the driver further than a general direction where to go, is liable in damages to a third person occupying the vehicle who receives injuries as the result of the driver's negligence. *Frerker v. Nicholson* (Colo.), 14-730.

The rule that where a servant has made a temporary departure from the scope of his employment, the responsibility of the master for the servant's tort attaches immediately after the purpose of such departure has been accomplished, applied to the facts in the case at bar. *Barmore v. Vicksburg, etc., R. Co.* (Miss.), 3-594.

In order to relieve a master from liability for the tort of a servant, the master must show that the servant was acting outside the scope of the employment. *Barmore v. Vicksburg, etc., R. Co.* (Miss.), 3-594.

Willful acts of servant. — A railroad company is liable for personal injuries wantonly inflicted by one of its employees, even though the person injured was a trespasser and was guilty of contributory negligence. *Barmore v. Vicksburg, etc., R. Co.* (Miss.), 3-594.

Servant who is also public officer. — If a servant who is also a public officer acts maliciously or in pursuit of some purpose of his own, his master is not liable for his acts; but if, while acting within the general scope of his employment, he simply disregards his master's orders or extends his powers, the master is liable. *Sharp v. Erie R. Co.* (N. Y.), 6-250.

A special officer, appointed and commissioned by the governor, at the instance of a railroad company, under the provisions of the West Virginia statute (Code 1899, c. 145, § 31, Code 1906, § 4281), and paid by such company for his services, is *prima facie* a public officer for whose wrongful acts such company is not liable. *McKain v. Baltimore, etc., R. Co. (W. Va.), 17-634.*

If such an officer is engaged in special service for the company, such as guarding its property or enforcing obedience to its rules and regulations, and does a wrongful act for which the injured party is entitled to damages, and such act is within the scope of such service or employment, the company is liable as in the case of its regular employees, such as conductors and station masters. *McKain v. Baltimore, etc., R. Co. (W. Va.), 17-634.*

A railroad company is not liable for a false arrest, assault and battery, and malicious prosecution by such an officer, where the acts are not directed or instigated by it, but are founded upon an alleged breach of the peace at one of its stations, in no way affecting or involving, so far as the evidence discloses, any of its property, rights, or servants, or growing out of any transaction between the person arrested and the company, although the former is rightfully in the station, having a ticket and awaiting the arrival of a train, and the alleged breach of the peace, arrest, and assault and battery occur on the premises of the company. *McKain v. Baltimore, etc., R. Co. (W. Va.), 17-634.*

Question of law or fact. — In an action against a master for the tort of a servant, the question whether the servant was acting within the scope of employment is for the court if the facts are not in dispute, but for the jury if the facts are in dispute. *Barmore v. Vicksburg, etc., R. Co. (Miss.), 3-594.*

The question whether a railroad tricycle propelled on the tracks of a railroad company is a dangerous appliance, within the rule that a master who intrusts the custody of a dangerous appliance to the management of a servant will not be permitted to avoid responsibility for injuries inflicted thereby on the ground that the servant in the particular act complained of was acting outside of the scope of management, is a question for the jury. *Barmore v. Vicksburg, etc., R. Co. (Miss.), 3-594.*

In an action against a master to recover for injuries inflicted by his servants who exceeded instructions, evidence held sufficient to go to the jury on the question of negligence of the servants. *Crandall v. Boutell (Minn.), 5-122.*

In an action for damages against a railroad company for the death of the plaintiff's intestate caused by a detective in the employ of the defendant, and who was also a public officer, held to be for the jury to determine whether the detective acted within the scope of his employment or whether he acted in the capacity of a public officer alone. *Sharp v. Erie R. Co. (N. Y.), 6-250.*

b. Acts within scope of employment.

In general. — In an action against a master to recover damages for the act of his servant, declaration construed and held to allege by necessary implication that the servant was acting within the scope of his employment. *Ploof v. Putnam (Vt.), 15-1151.*

Within line of duty but in excess of instructions. — A master is responsible for the negligent conduct of his servants in furtherance of the master's business and within the line of their duty, although in excess of express instructions. *Crandall v. Boutell (Minn.), 5-122.*

Workmen leaving water turned on. — Where workmen are employed in tearing down part of a building and in so doing turn on the water and neglect to turn it off, whereby goods on the floor below are damaged, such act of the workmen is within the scope of their employment and their employer is liable. *Sievert v. Brookfield (Can.), 2-647.*

c. Acts outside scope of employment.

Theft by servant. — A master undertaking for a consideration to carry a traveler and his goods to the traveler's destination is not responsible for the theft by his servant of goods intrusted to his care, such act of the servant being outside the scope of employment and the master not being shown to be negligent. *Cheshire v. Bailey (Eng.), 1-94.*

Use of automobile by chauffeur for individual purposes. — A chauffeur who, by his contract of employment, is required to go to his home for his meals, is not engaged in his master's service while going to his dinner, and where he uses the employer's automobile for that purpose without his knowledge or consent, the employer is not liable for the negligence of the chauffeur while so using the automobile. *Steffen v. McNaughton (Wis.), 19-1227.*

An employer is liable for the act of an employee in charge of his vehicle only when it is committed under express or implied authority and in the course of the employment; and hence the owner of an automobile, who engages a person to drive the car to a certain shop for repairs, is not liable for injury caused by the driver while returning to the repair shop after deviating several miles from his route on a personal errand, without the owner's knowledge. *Flushner v. Durgin (Mass.), 20-1291.*

Servant assisting third person. — Where a servant in the general employ of the master assists a third person whom the master has engaged to repair his passenger elevator, and the servant acts solely at the request of the third person, the master being under no obligation to furnish assistance, the master is not liable for an injury sustained by a third person in consequence of the negligent operation of the elevator by the servant during the time he is rendering the assistance requested and while the elevator is being used solely for the making of repairs. *Sherwood v. Warner (D. C.), 7-98.*

d. Services rendered servant by third person.

Medical services. — Evidence reviewed, in an action against a master to recover for medical services rendered his servants, and held to justify the trial court in finding that the defendant was liable. *General Hospital Soc. v. New Haven Rendering Co. (Conn.)*, 9-168.

5. JOINT LIABILITY OF MASTER AND SERVANT TO THIRD PERSONS.

Nonfeasance of servant. — A master is liable to a third person for the nonfeasance of his servant, but the servant is not liable therefor. *McGinnis v. Chicago, etc., R. Co. (Mo.)*, 9-656.

Misfeasance of servant. — Both a master and his servant are liable to a third person for the misfeasance of the servant. *McGinnis v. Chicago, etc., R. Co. (Mo.)*, 9-656.

In an action against a master and his servant to recover damages for personal injuries sustained by the plaintiff in consequence of the servant's misfeasance, where the liability of the master is dependent solely upon the doctrine of *respondet superior*, and there is a verdict that the servant has not been negligent, there should be no verdict or judgment against the master. *McGinnis v. Chicago, etc., R. Co. (Mo.)*, 9-656.

A joint action against a master and his servant may be maintained when it is based upon the negligent or other act of the servant for which the master is liable. *Mayberry v. Northern Pac. R. Co. (Minn.)*, 10-754.

6. RESPONSIBILITY OF MASTER FOR CRIMINAL ACT OF SERVANT.

Violation of municipal ordinance. — It is no defense to a criminal prosecution for the violation of a municipal ordinance requiring all blasts in the city to be so covered as to prevent danger to persons or property, that the blast was discharged by the defendant's servant who left the blast uncovered without the knowledge of the defendant and in disregard of instructions. *Spokane v. Patterson (Wash.)*, 13-706.

The criminal liability of a defendant for the violation of a municipal ordinance by his servant is not affected by the fact that the defendant is a member of a partnership, as there is no distinction between his assent to the act as a partner and his assent in his individual capacity. *Spokane v. Patterson (Wash.)*, 13-706.

7. LIABILITY OF SERVANT TO MASTER.

Extension of credit and payment for goods lost to customers of master. — A driver employed by a laundryman to deliver laundered articles to customer's, and specially instructed to do so only on payment of charges, is liable for charges which, in violation of his instructions, he has failed to collect. In such case the employer is not bound to refund to the driver sums paid by him to customers for goods lost while in the employer's hands, there being no evidence that the

driver had authority to make such payments. *Shovelin v. Hanson (Que.)*, 11-275.

A driver employed by the owner of a laundry to deliver laundered articles to customers is not liable to his employer for credit given them, where it appears that, to the knowledge and without the objection of the employer, it was customary for all the drivers in the latter's employ to give credit to customers, especially where there is no evidence of any effort made by the employer to recover from the customers the amounts uncollected by the driver. *Shovelin v. Hanson (Can.)*, 14-681.

In such case the driver is entitled to deduct from the amount collected by him for his employer sums of money paid by the driver, in the interest of the employer and for the purpose of promoting the latter's business, which the employer owed to various customers for articles which had been lost. *Shovelin v. Hanson (Can.)*, 14-681.

8. INTERFERENCE BY THIRD PERSON WITH RELATION.

Reporting misconduct of servant to master. — A patron of a street railway company is not liable to a conductor for reporting the latter's misconduct to the superintendent of the company, though such report is prompted by ill will and a desire to secure the conductor's discharge. *Lancaster v. Hamburger (Ohio)*, 1-248.

MASTERS IN CHANCERY.

Reference of injunction suit to master, see INJUNCTIONS, 3 f.

Conclusiveness of findings of fact. — Though the findings of fact by a master in chancery on conflicting evidence are not conclusive on the court, they are entitled to great weight, and may not be set aside arbitrarily, but only when clearly against the preponderance of the evidence weighed according to the rules of law. *Carr v. Fair (Ark.)*, 19-906.

MASTERS OF VESSELS.

Duty of master to passengers, see SHIPS AND SHIPPING, 5.

Duty of master with respect to pilot, see PILOTS.

Duty to furnish medical treatment to seamen, see SEAMEN, 3 a.

Right to call for aid, see SALVAGE.

MATERIAL ALTERATION.

See ALTERATION OF INSTRUMENTS, 2.

MATERIALMEN.

See MECHANICS' LIENS, 3.

MATRIMONIAL OFFENSES.

See **DIVORCE**.

MAXIMS.

Equitable maxims, see **EQUITY**, 1.

MAY.

Meaning of word "may" in statute, see **STATUTES**, 4 d.

MAYHEM.

Elements of offense. — Under the Alabama statute providing that mayhem is committed when any person "unlawfully, maliciously, and intentionally" cuts, bites, or strikes off an ear of another person, the essential ingredients of the offense are, in addition to a disfigurement apparent to ordinary observation, want of legal authority, and evil intent and design. Whether the injury is of the necessary character must ordinarily be determined by the jury. *Green v. State* (Ala.), 15-81.

Defenses. — Self-defense is available in justification of the offense of mayhem, provided the resistance of the accused was proportionate to the injury threatened. *Green v. State* (Ala.), 15-81.

Evidence. — In a prosecution for mayhem a physician who treated the prosecuting witness may testify as to the character and extent of the injuries inflicted and the treatment and duration thereof, and may give his professional opinion thereon. *Green v. State* (Ala.), 15-81.

In a prosecution for mayhem the testimony of a witness that some one not remembered by him had informed him that an attack was to be made by the defendant and others on the prosecuting witness is hearsay, and is inadmissible to prove a preconceived purpose to injure the prosecuting witness, and the admission of such testimony over objection is reversible error. *Green v. State* (Ala.), 15-81.

Instructions. — In a prosecution for mayhem under a statute providing in effect that to constitute a crime the act must be done "maliciously," a charge requiring the jury to acquit the defendant unless the act was done with "malice aforethought" is properly refused. *Green v. State* (Ala.), 15-81.

MAYOR.

Veto power of mayor, see **MUNICIPAL CORPORATIONS**, 5 b.

MEASURE OF DAMAGES.

See **DAMAGES**, 9.

MEASUREMENTS.

Nonexpert testimony as to result of measurements, see **EVIDENCE**, 8 c.

MECHANICS' LIENS.

1. **VALIDITY AND CONSTRUCTION OF STATUTES**, 1140.
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Competency of contractor to testify as to time of completion of building in action by subcontractor against executor of deceased owner and the contractor to enforce a subcontractor's lien, see **WITNESSES**, 3 c (1).

Pleading statute of limitations in action to enforce mechanic's lien, see **LIMITATION OF ACTIONS**, 8 b (1).

1. **VALIDITY AND CONSTRUCTION OF STATUTES.**

Validity of Georgia statute. — The Georgia statute creating liens in favor of materialmen furnishing materials to a contractor for the improvement of real estate held constitutional. *Prince v. Neal-Millard Co.* (Ga.), 4-615.

Validity of California statute with reference to attorney's fees. — The California statute providing in regard to mechanics' lien cases that "the court must also allow as a part of the costs . . . reasonable attorney's fees . . . to be allowed each claimant whose lien is established whether he be plaintiff or defendant," is violative both of the federal and state constitutions as denying the equal protection of the laws, and as a special law, in that it provides for an attorney's fee to the plaintiff but not to the defendant. Notwithstanding the invalidity of such statute, the small expense of filing a mechanic's lien that is properly included in the phrase "costs and disbursements" may be allowed the plaintiff as costs. *Builders' Supply Depot v. O'Connor* (Cal.), 11-712.

Construction of statutes. — Though mechanics' lien laws are in derogation of the common law so far as they create the right to a lien, and are therefore to be strictly construed as against persons claiming the right, yet the provisions prescribing the steps neces-

sary to perfect a lien, being remedial, are liberally construed, and a substantial compliance therewith is sufficient. *Fidelity Storage Corp. v. Trussed Concrete Steel Co.* (D. C.), 20-1157.

2. CONTRACT UNDER WHICH LIEN ACQUIRES.

Contract containing nonlienable items. — Under the Maryland act giving mechanics' liens on buildings in Baltimore for work furnished in their erection or repair, but not allowing liens for materials furnished, if work and materials are furnished in the erection of a building under an entire contract for the furnishing of both for an entire consideration, no lien attaches on the building for the labor furnished, since if an entire contract embraces for one entire consideration both lienable and nonlienable items, no lien attaches as to the lienable items. *Evans Marble Co. v. International Trust Co.* (Md.), 4-831.

Under the Maryland statute regulating mechanics' liens in Baltimore, a building contract construed and held to be a contract for the furnishing of work only, and not work and materials, and hence to be a proper basis for a lien on the building. *Evans Marble Co. v. International Trust Co.* (Md.), 4-831.

Consent of owner to construction. — Under the Wisconsin statute providing in substance that a mechanic's lien shall attach to the real property of any person with whose knowledge or consent the improvement is made, the owner of the land, who, upon being informed by a person about to dig a well thereon that he has been sent by another person to dig the well, replies that such other person is to furnish the well complete and that he, the owner of the land, will not pay anything in connection with the well, does not "consent" to the digging of the well within the meaning of the statute, although he has knowledge of the construction of the well at the time the work is being done. *Clark v. North* (Wis.), 11-1080.

Stipulation against liens. — The stipulation in a building contract to deliver the building free of liens should not be construed as a waiver of the builder's lien. *Davis v. La Crosse Hospital Assoc.* (Wis.), 1-950.

Where the terms of a contract are ambiguous, the doubt should be resolved against a waiver of the mechanic's lien. *Davis v. La Crosse Hospital Assoc.* (Wis.), 1-950.

A builder may waive the right to a mechanic's lien by an express or implied contract. *Davis v. La Crosse Hospital Assoc.* (Wis.), 1-950.

The defense to the assertion of a lien for materials by a corporation, that a named individual was president and general manager of the corporation and agreed that no lien would attach to the materials furnished, should not be submitted to the jury, where the undisputed evidence is that such individual resigned his position as president and manager of the corporation before the transaction in question and there was no proof that he had authority to bind the corporation.

Cost v. Newport Builders' Supply, etc., Co. (Ark.), 14-142.

Validity of stipulation against liens as to subcontractor. — Under the Arkansas statute giving to specified classes of persons a lien for work or materials furnished, with the sole limitation that the aggregate shall not exceed the amount contracted for between the employer and the principal contractor, a stipulation in a building contract between the owner and the principal contractor against any lien for labor or materials is not binding on a subcontractor unless he has actual notice thereof. *Cost v. Newport Builders' Supply, etc., Co.* (Ark.), 14-142.

3. PERSONS ENTITLED TO LIEN.

Corporations. — A corporation is a "person" within the meaning of the West Virginia mechanics' lien law, and a corporation which, through its officers and agents, supervises the construction of a street railway, performs "work or labor" entitling it to the benefit of that law, though its compensation for its services is not fixed at a specific sum, but is measured by the percentage on the cost of the materials and the labor necessary for the construction of the railway. *Wetzel, etc., R. Co. v. Tennis Bros. Co.* (U. S.), 7-426.

Laborers and materialmen. — The Mississippi mechanic's lien law (Code 1906, § 3 [74]) does not give a lien directly to laborers, materialmen, etc., but merely subrogates them to the lien given to the contractor. *Spengler v. Stiles-Tull Lumber Co.* (Miss.), 19-426.

Subcontractors. — Subcontractors are not included in the designation of "all persons who shall perform work or labor . . . and all persons who shall furnish any material," in the Indiana statute (Burns' Ann. St. 1908, § 8305) prescribing the persons entitled to mechanics' liens. *Korbly v. Loomis* (Ind.), 19-904.

The Maryland statute regulating mechanics' liens in Baltimore and authorizing a lien on a building and not a lien for materials, does not require that the person furnishing the work shall have personally done the same. Hence a subcontractor's contract of employment brings him within the terms of the statute as one "furnishing" work, where he is employed for the work specified in his contract because of his skill and knowledge in that class of work, and he does the work in the sense of giving it intelligent direction and being responsible for its due execution. *Evans Marble Co. v. International Trust Co.* (Md.), 4-831.

Person furnishing materials to subcontractor. — The Arkansas railroad lien statute gives a lien upon the property of a railroad company to a person who furnishes a subcontractor with material which enters into the construction, equipment, or repair of the railroad. *Midland Valley R. Co. v. Moran Bolt, etc., Co.* (Ark.), 10-372.

Supervising architect. — A supervising architect, who furnishes plans and specifications and supervises the construction of a

building pursuant to a contract with the owner for such service, is entitled to a lien therefor under the North Dakota statute giving a lien to "any person who shall perform any labor upon . . . any building." *Friendlander v. Taintor* (N. Dak.), 9-96.

4. FOR WHAT LIEN MAY BE ACQUIRED.

Materials in general. — Under a statute authorizing a mechanic's lien for the value of material furnished "for any building," the materials furnished for the building must be actually used in its construction or repair before the lien can attach. *Central Lumber Co. v. Braddock Land, etc., Co.* (Ark.), 13-11.

Materials not intended to be incorporated in structure. — Neither tools sold to a contractor for use on a building, nor articles furnished him for making experiments in regard to the work but not intended to form a part of the material of the building, and not incorporated therein, are furnished "to be used in the making, constructing, erecting," etc., of the building, within the Ontario statute (Rev. St. 1897, c. 153) providing for a lien in favor of materialmen. *Brooks-Sanford Co. v. Theodore Telier Const. Co.* (Can.), 19-585.

Materials used in foreign state. — In an action to enforce a statutory lien upon the property of a railroad company for materials furnished for use in the construction of a railroad, where it appears that part of the materials have gone into the construction of the railroad within the state, and part into the construction of the railroad in a foreign state or territory, the court cannot allow a lien for the materials used without the state, even if the statute has extraterritorial effect; and this is so notwithstanding the rule that a railroad must be treated as an entirety, and not sold in parcels in the enforcement of liens against it, as the rule extends only to the roadbed and easements within the state. *Midland Valley R. Co. v. Moran Bolt, etc., Co.* (Ark.), 10-372.

Explosives used in excavating. — Explosives used in breaking up earth which must be excavated or removed in the construction of a roadbed are "materials" used in the improvement of real estate within the meaning of that term as used in the New York statute, which he provides for a mechanic's lien for furnishing such materials. *Schaghticoke Powder Co. v. Greenwich, etc., R. Co.* (N. Y.), 5-443.

Hay, grain, etc., furnished contractor or subcontractor. — While the Ohio mechanic's lien statute in terms extends the provisions of another statute giving a lien against a railroad to a person who furnishes material for the construction thereof, to such persons as furnish hay, grain, etc., on the order of contractors or subcontractors for their use or the use of persons employed by them while furnishing material or labor for the construction of a railroad, it does not extend or enlarge the meaning of the word "materials;" nor does it impose upon the railroad company

a liability for the articles thus furnished if no lien therefor is taken and perfected. *Pennsylvania Co. v. Mehafeey* (Ohio), 9-305.

As used in the Ohio statute which provides that "a person who . . . furnishes materials for or in the construction of any railroad, . . . in addition to his rights under the preceding section shall have a lien for the payment of the same upon such railroad," the term "materials" comprehends and includes such articles only as are furnished for and to be used in the construction of such railroad. Therefore, a person who furnishes hay, grain, straw, and feed to contractors or subcontractors for the keep of teams employed by them in working on said railroad, does not, within the purview and meaning of this statute, furnish materials. *Pennsylvania Co. v. Mehafeey* (Ohio), 9-305.

Work performed on materials. — The Maryland statutes regulating mechanics' liens in Baltimore, and authorizing liens on buildings but not liens for materials, is satisfied although the work done is on materials which are to form a part of the building and is performed away from the building at the shops of the person undertaking the work. *Evans Marble Co. v. International Trust Co. (Md.)*, 4-831.

Supervision of construction by architect. — Where an architect's contract provides that he shall receive a specified sum for preparing plans and specifications and for supervising the construction of a building, and the contract is an entire one for an entire price, and the architect is not entitled to a lien for preparing the plans and specifications, he is not entitled to a lien for any services rendered under the contract. *Libbey v. Tidden* (Mass.), 7-617.

Hire of horses and harness. — One who hires to a contractor horses and harness to be used in the construction of a railroad, the contractor having control of the horses during the time of the hiring, and employing and paying the drivers thereof, does not "bestow labor" upon the work so as to entitle him to a lien under the California mechanics' lien law. *Wood, Curtis & Co. v. El Dorado Lumber Co.* (Cal.), 15-382.

One who merely rents appliances, whether tools, implements, and machinery, or horses and harness, to a person employed in a work of construction is not a subcontractor, and is not entitled to a mechanic's lien for the value of the use of such appliances. *Wood, Curtis & Co. v. El Dorado Lumber Co. (Cal.)*, 15-382.

5. PROPERTY SUBJECT TO LIEN.

Lands of owner in general. — The Michigan statute providing generally for mechanics' liens contemplates a lien where the land is owned by the party for whom the work is done or the materials are furnished. *Bauer v. Long* (Mich.), 11-86.

Land of tenants by entirety. — The Michigan statute creating a mechanic's lien upon land owned jointly by husband and wife, provided both sign the contract, does not au-

thorize a lien upon land owned jointly by the husband and wife as tenants by the entirety under a contract signed only by the husband. *Bauer v. Long* (Mich.), 11-86.

Leasehold estate. — A leasehold estate is subject to a lien under the West Virginia statute in so far as any structure is erected thereon by the lessee which enhances the value or otherwise benefits such estate; an oil-well derrick erected for the purposes of such lease is such a structure. *Showalter v. Lowndes* (W. Va.), 3-1096.

Where one causes a building to be erected on real estate in his possession to which he has not a perfect legal title, and fails to pay for material furnished for such building, the materialmen have a lien under the laws of Oklahoma. A leasehold interest is a sufficient title to authorize such lien if the erection of the building is within the authority conferred by the lease, and the fact that title to the reversion is in the federal government is immaterial. Upon the foreclosure of the lien the rights of the lessee in the land or the occupancy thereof under his lease, as well as the building, may be sold to satisfy the judgment. *Crutcher v. Block* (Okla.), 14-1029.

A mechanic's lien attaches to a leasehold interest and to buildings erected by one tenant and sold to another who has acquired a lease of the same interest, though the removal of the buildings at the end of the term is expressly required by the lease. *Zabriskie v. Greater American Exposition Co.* (Neb.), 2-687.

A building erected on demised premises by the lessee, as permitted by the lease, is the subject of a mechanics' lien under the Alberta Mechanic's Lien Act (6 Edw. VII., c. 21) giving a lien for materials, etc., furnished "at the request of the owner of such land," and providing that every building constructed "with the knowledge of the owner or his authorized agent . . . shall be held to have been constructed at the request of such owner." *Limoges v. Scratch* (Can.), 19-732.

Building erected. — Materialmen and laborers having liens upon a building constructed by a contractor are entitled to enforce their liens in full if the contract price of the building is sufficient to cover them, but if not, the building is liable to the holder of each lien only for a proportionate amount. *Central Lumber Co. v. Braddock Land, etc., Co.* (Ark.), 13-11.

Several buildings constructed by same contractor. — Where several buildings are constructed by a contractor, each building is liable only for the material furnished and labor done in its construction, unless the labor is performed upon and the materials furnished for buildings upon the same or contiguous lots and under one entire contract, in which case all such lots are jointly liable. *Central Lumber Co. v. Braddock Land, etc., Co.* (Ark.), 13-11.

One who furnishes, under a running account with the common owner of a group of exposition buildings, materials for use in the illuminating equipment thereof, is entitled

to a lien on such buildings, where they are maintained for a common purpose, though they are not all situated on contiguous lots, and though the claimant is not able to show what portion of the materials was used in any particular building. *Lehmer v. Horton* (Neb.), 2-683.

Land on which building destroyed. — Under the mechanics' lien law of California, a mechanic's lien cannot attach to the land where the building for which the labor or material is furnished is destroyed before completion. *Humboldt Lumber Mill Co. v. Crisp* (Cal.), 2-811.

Property of infant. — The mere fact that lumber is used in the construction of a house on an infant's land gives no lien on the land enforceable in equity. *Logan Planing Mill Co. v. Aldredge* (W. Va.), 15-1087.

The fact that in a suit brought by a guardian under the West Virginia Code to sell his ward's land the court authorizes such guardian to use part of the proceeds of sale in building a house on other land of the infant, does not warrant the enforcement against such land of a mechanic's lien for lumber used in the construction of the house. *Logan Planing Mill Co. v. Aldredge* (W. Va.), 15-1087.

Property of railway company. — Under the New York Mechanics' Lien Law a lien may be acquired against a railroad company for materials furnished and used in the construction of its railroad, though the company is a quasi-public corporation. *Schaghticoke Powder Co. v. Greenwich, etc., R. Co.* (N. Y.), 5-443.

The Ontario Mechanics' and Wage Earners' Lien Act does not apply to a railway company which is incorporated under a statute of the Dominion of Canada and which the incorporating statute declares to be a work for the general advantage of Canada. *Crawford v. Tilden* (Ont.), 7-267.

Public school building. — There being nothing in the North Carolina statute relative to mechanics' liens which indicates a purpose on the part of the legislature to change the general rule of law that such liens do not attach to public buildings, it must be held that a public school building is not subject to a statutory lien for materials furnished in its construction. *Morgantown Hardware Co. v. Morgantown Graded School* (N. Car.), 17-130.

Sidewalks. — Under a mechanic's lien law providing for a lien on any "building, erection, or improvement," and the land on which it is situated, a materialman has a lien upon a sidewalk and abutting lots for materials furnished for the construction of the sidewalk. *Leiper v. Mining* (Ark.), 4-1013.

6. FORMAL REQUISITES.

a. Statement of claim.

Naming person against whom claimed. — The mere naming of a certain person in the caption to a notice of a mechanic's lien as the owner of the premises sought to be affected is not a statement that

the lien is claimed against his interest so as to satisfy the requirement of the District of Columbia statute (Code, § 1238) that the notice shall set forth "the name of the party against whose interest a lien is claimed." *Fidelity Storage Corp. v. Trussed Concrete Steel Co.* (D. C.), 20-1157.

The requirement of the mechanics' lien law of the District of Columbia (Code, § 1238) that the notice of lien shall specifically set forth "the name of the party against whose interest a lien is claimed" is material, and no lien is acquired if the notice omits such requirement. *Fidelity Storage Corp. v. Trussed Concrete Steel Co.* (D. C.), 20-1157.

Under a statute requiring the claimant for a mechanic's lien to file a description of the property, "and the name of the owner, if known," a mistake in the name of the owner does not invalidate the lien. *Mivelaz v. Johnson* (Ky.), 14-688.

Description of property. — A statement of a claim for a mechanic's lien for building a cement sidewalk erroneously describing the property on which the lien is claimed as beginning at a point 647½ feet south of a certain street, instead of 637½ feet south of that street, but including in the description enough of the property to satisfy the claim, is a sufficient compliance with a statute requiring the statement to describe the property so as to identify it. *Mivelaz v. Johnson* (Ky.), 14-688.

Filing new claim. — Under the New Jersey Mechanics' Lien Law which requires that the claimant shall specify in his claim "the name of the owner or owners of the land or of the estate therein on which the lien is claimed," the claimant cannot, without amendment, bind any estate or interest other than that of the person named in the claim as owner, but there is nothing in the letter or spirit of the act that renders an error made in stating the name of the owner fatal to a subsequent attempt, either by way of amendment or by the filing of a separate claim, to reach estates or interests in the land owned by parties other than the one who is named as owner in the claim first filed. *J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Ref. Co.* (N. J.), 15-1083.

b. Time of filing.

Running account. — A running account for materials furnished for the construction of a building constitutes but one entire payment, which accrues only when the last item is furnished; and a mechanic's lien for materials so furnished is filed in time if filed within the statutory period from the time of the furnishing of the last item. *Big Horn Lumber Co. v. Davis* (Wyo.), 7-940.

Under a statute providing that a mechanic's lien may be filed within the specified time "after the indebtedness shall have accrued," the time for filing a lien for materials furnished upon a running account is to be computed as to each item in the account from the date the last item was furnished, though the last item has been paid.

Big Horn Lumber Co. v. Davis (Wyo.), 7-940.

The time for filing a lien for materials furnished to a contractor cannot be computed from the date of the last item in the claimant's account unless such item was the subject of a lien. *Brooks-Sanford Co. v. Theodore Telier Const. Co.* (Can.), 19-585.

Where materials are furnished for the same building or improvement in instalments and at intervals, and the parties intend them to be included in one account and settlement, the entire account will be treated as a continuous and connected transaction, and the time in which to file the lien begins to run from the date of the last item of the account. *Valley Lumber, etc., Co. v. Driessel* (Idaho), 13-63.

Materials furnished under two contracts. — Where a dwelling house and a porch thereto are constructed by the builder under two separate and distinct contracts, a materialman who first furnishes lumber for the dwelling and about two months after the completion thereof furnishes lumber on the order of the builder for the construction of the porch, acquires a lien for all materials furnished by filing his claim for the lien within the statutory period from the furnishing of the material covered by the last order, provided he does not have knowledge that the dwelling and the porch are erected under separate contracts. *Valley Lumber, etc., Co. v. Driessel* (Idaho), 13-63.

One who seeks to defeat a materialman's lien by showing that the material was furnished on two separate and distinct contracts and that the lien was not filed in time to secure the claim for the material furnished on the first contract, has the burden of proving either that the plaintiff had actual notice that the material was furnished and used on two separate contracts, or that such circumstances existed as would impute to the plaintiff constructive notice and put him on his inquiry to ascertain that two or more contracts did in fact exist. *Valley Lumber, etc., Co. v. Driessel* (Idaho), 13-63.

c. Service of notice.

Service on agent of owner. — Under that section of the Massachusetts statute relative to mechanics' liens which provides that "the lien shall not attach for materials unless the person who furnishes them, before so doing, gives notice in writing to the owner of the property to be affected by the lien, if such owner is not the purchaser of such materials, that he intends to claim such lien," the statutory notice must be served upon or received by the owner himself, and service upon an agent of the owner is not sufficient. *Street Lumber Co. v. Sullivan* (Mass.), 16-354.

7. LOSS OF RIGHT TO LIEN.

a. Payment.

Payment by owner to contractor. — Where the owner, under a building contract, makes a payment to the original contractor

in good faith, at the time when it is due under the contract, and without knowledge that particular subcontractors are furnishing labor or materials for the work, such subcontractors can claim no lien on account of the payment. The only payments which are void as against subcontractors are those which are not made in good faith, or which are made before they are due and without giving notice to subcontractors known to be furnishing materials and labor. *Tice v. Moore* (Conn.), 17-113.

Payment of the full sum due on a contract by the owner of a building to the contractor after ninety days from the time the last materials were furnished, and before the lien of a subcontractor was filed, exempts the building and land from a lien filed after such payment was made, although the owner does not show that payment was altogether made after the ninety days had expired and before the lien was filed. The fact that some payments were made before the ninety days had expired does not prejudice the subcontractor, as the last payment made was more than sufficient to protect it if the lien had been filed in time. *First National Bank v. Warner* (N. Dak.), 17-213.

Acceptance of contractor's note by subcontractor or materialman. — As a general rule the taking of the notes of a contractor for the amount due to a materialman does not effect a relinquishment of the latter's lien, unless it is agreed that the taking of such notes shall have such effect. Where the materialman's agent, who receives the contractor's notes, has no authority to accept such notes in payment of the account, the materialman does not part with the right to enforce his lien. *American Car, etc., Co. v. Alexandria Water Co.* (Pa.), 15-641.

The right of a subcontractor to enforce a mechanic's lien is not affected by his acceptance of a note from the principal contractor for the amount due. *Mivelaz v. Johnson* (Ky.), 14-688.

b. Default of contractor.

Abandonment of contractor as affecting subcontractor. — Mechanics' lien statutes allowing liens to subcontractors are of two classes. In the first class, the lien is allowed upon the ground that the subcontractor is equitably entitled to a lien which would otherwise attach in favor of the original contractor. In the second class, the lien is allowed upon the ground that the labor or materials furnished have so enhanced the value of the real estate that it would be inequitable to allow the owner to be enriched at the expense of the subcontractor. The Connecticut statute relative to mechanics' liens belong to the first class above mentioned. Under that statute, the subcontractor is simply subrogated to the rights of the original contractor; and if the latter, without fault on the owner's part, abandons his contract before it is substantially completed, so that there is nothing due him thereunder, the subcontractor has no lien for labor or ma-

terials furnished, even though the expense of completing the improvement according to the contract would be less than the balance of the contract price for the entire work remaining unpaid. *Tice v. Moore* (Conn.), 17-113.

Deduction for delay as against subcontractor or materialman. — Where the written and duly recorded contract between the owners of land and contractors for the erection of a building thereon stipulates that the building shall be finished by a certain time, and that the owners shall be allowed damages caused by delay in completion beyond that time, the owners have a right to deduct from the contract price whatever damages they have suffered by reason of the delay in finishing the building at the time stipulated, the statute which prohibits as to all liens except that of the contractor, the offset of any prior or subsequent indebtedness, having reference only to offsets not arising under the terms of the contract and as to which materialmen and laborers can have no notice from an inspection of the contract. *Builders' Supply Depot v. O'Connor* (Cal.), 11-712.

Deduction for completion of work as against materialman. — It is no defense to the assertion of a lien for building material furnished, that the owner of the premises has paid out more than the contract price for labor and material, where it appears that after the contractor abandoned the contract the owner completed the work, and it is not shown that the building was completed in accordance with the original contract. *Cost v. Newport Builders' Supply, etc., Co.* (Ark.), 14-142.

8. PRIORITIES.

Assignee of contractor and materialman. — The money due and to become due under a contract for the erection of a house, and not the contract itself, is transferred by an assignment by the contractor of "the balance due us under said contract," to secure advances made and to be made to enable the assignor to perform the contract, with a direction to the owner of the house "to pay over the said balance to the said S. [assignee] as the payments become due," and to pay to the assignor whatever amount may remain after satisfying the assignee's claim; and therefore the claims of materialmen whose stop notices are served after the assignment are not entitled to priority over the assignee on the theory that the assignee stands in the place of the assignor with respect to the performance of the contract. *Spengler v. Stiles-Tull Lumber Co.* (Miss.), 19-426.

An assignment by a contractor of the payments to become due under a contract for the erection of a house is good as against the claims of materialmen who serve their stop notices after the assignment has been executed and notice thereof given to the owner of the house, though notice of the assignment is not given to the materialmen; because materialmen can acquire a lien under the Mississippi statute (Code 1906, § 3074) only by the

service of stop notices when there is something due or to become due from the owner to the contractor. *Spengler v. Stiles-Tull Lumber Co.* (Miss.), 19-426.

Materialman and mortgagee acquiring rights subsequent to execution of contract. — Where a person, after contracting for the construction of a building, acquires title to the land upon which the building is to be constructed, and at the same time mortgages the property, the lien of the contractor for labor and materials furnished in the construction is prior to the lien of the mortgage, irrespective of any subsequent ratification by the builder; and such lien extends as well to labor and materials furnished before the delivery of the deed to the builder as to those furnished afterwards. *Libbey v. Tidden* (Mass.), 7-617.

In a proceeding to enforce a mechanic's lien for labor and materials furnished in the construction of a building, where the evidence shows that the contract between the contractor and the builder was entered into prior to the acquisition of title to the property by the builder, and that subsequently the builder acquired title to the property and at the same time executed a mortgage thereon, but that such mortgage was executed to obtain money for the construction of the building and not to pay the purchase money, the mechanic's lien of the contractor will be held to be prior to the lien of the mortgage, notwithstanding the doctrine of instantaneous seizin, as the deed to the builder and the mortgage by the builder were separate transactions consummated at one time, and not merely component parts of one transaction. *Libbey v. Tidden* (Mass.), 7-617.

Evidence reviewed in a proceeding to enforce a mechanic's lien for labor and materials furnished in the construction of a building, and held to show that the trial court was justified in finding that an oral contract, sufficient to form the basis for a lien, was entered into between the contractor and the builder prior to the execution of the mortgage by the builder, and that a written contract entered into by the contractor and the builder after the execution and recordation of the mortgage on the property was an affirmation of the oral contract and not a substitute therefor. *Libbey v. Tidden* (Mass.), 7-617.

9. WAIVER AND ESTOPPEL.

Waiver by extension of credit. — A mechanic's lien is not waived by an extension of credit for a reasonable time only and not to a day later than the time fixed by the law for commencing the lien action. *Thien v. Brand* (Wis.), 20-521.

Estoppel. — Pleadings and findings reviewed in an action to enforce a mechanic's lien, and held not to show that the plaintiff is estopped to claim a lien for the full amount of his account. *Big Horn Lumber Co. v. Davis* (Wyo.), 7-940.

In a suit by a construction company against a street railway company to enforce a me-

chanic's lien for work and labor done, where it appears that the defendant, before the suit, canceled the contract, deprived the plaintiff of the power to complete the contract, and at the same time denied all liability either by reason of services rendered thereunder or by reason of the cancellation thereof, the defendant is estopped to claim that the plaintiff lost its right to a lien or to a first lien by agreeing to accept part of its compensation in the defendant's bonds, whether or not any lienor other than the plaintiff may raise such objection. *Wetzel, etc., R. Co. v. Tennis Bros. Co.* (U. S.), 7-426.

10. ACTIONS.

In general. — A petition for a mechanic's lien may be prosecuted simultaneously with an action at common law to recover the debt out of which the alleged right to the lien arises. *Hunt v. Darling* (R. I.), 3-1098.

Enforcement of lien in equity. — To enable a court of equity to enforce a mechanic's lien, the lien must have legal validity. *Logan Planing Mill Co. v. Aldredge* (W. Va.), 15-1087.

A court of equity has jurisdiction to cancel and expunge from the record a bond given to dissolve a mechanic's lien where the approval of the bond by a magistrate has been fraudulently procured by means of false testimony. *Keyes v. Brackett* (Mass.), 3-81.

Where a suit in equity has been brought under the Michigan statute to enforce a mechanic's lien, the court may entertain an answer in the nature of a cross-bill asking for an accounting and for a decree against the complainants for damages sustained by the defendant in excess of the plaintiff's demand, in order that all the questions in dispute between the parties in relation to the subject-matter shall be finally settled, notwithstanding the fact that the statute does not expressly authorize a decree in favor of the defendant. *Koch v. Sumner* (Mich.), 9-225.

Raising question of right of foreign corporation to sue. — In a suit to enforce a mechanic's lien, brought by a foreign corporation which has not acquired the right to do business within the state, the question whether the plaintiff has the right to maintain the suit can be raised only by a plea in abatement, which must be filed before the defendant pleads to the merits. *Wetzel, etc., R. Co. v. Tennis Bros. Co.* (U. S.), 7-426.

Presumption that materials were used in construction. — In an action to enforce a mechanic's lien for materials, proof that the materials contracted for were delivered at or near the place where the building was to be erected or was in course of construction, at the place designated by the contracting party, and that the building was thereafter actually completed with materials of the description of those furnished, is *prima facie* evidence that such materials were used in its construction, and the burden of disproving such use of the materials in the building is upon the owner. *Central Lumber Co. v. Braddock Land, etc., Co.* (Ark.), 13-11.

Burden of proof as to compliance with statute. — The New Jersey mechanic's lien law which allows to the owner or mortgagee the plea "that said building or land are not liable to said debt," simply imposes upon the claimant the burden of establishing that, as against the interest of the party thus pleading, the provisions of the act requisite to constitute the lien have been complied with. *J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Ref. Co.* (N. J.), 15-1083.

Burden of proof of payments by owner. — Where an owner of property entered into an agreement with a contractor to make improvements thereon, and the contractor, after partly completing the work, abandoned it and the owner took charge and completed it at a cost less than the total contract price, and where a materialman who had furnished material to the contractor which was used in the improvement proceeded to foreclose his lien on the property for an amount less than the balance left after deducting the cost of completion from the contract price, held that if the owner sought to defend against such proceeding on the ground that he had made advances or payments to the contractor, it was incumbent on him to show that he had done so in accordance with the provisions of the law creating materialmen's liens, or that amounts advanced by him to the contractor had been properly appropriated. *Prince v. Neal-Millard Co.* (Ga.), 4-615.

Showing application of payment to contractor in defense. — The Arkansas statute providing that "the owner, employer, or builder shall pay no money to the contractor until all laborers and mechanics employed on the same shall have been paid for work done and materials furnished" intends merely to prohibit payments direct to the contractor for his own use, and it is competent for the owner to show in defense of an asserted mechanic's lien that the payment of an amount direct to the contractor was used in paying for labor and material; but the rejection of such evidence is not prejudicial where its admission would only reduce the contract price to a sum more than sufficient to satisfy the lien. *Cost v. Newport Builders' Supply, etc., Co.* (Ark.), 14-142.

Former attempt to subject interest of another to lien as defense. — In an action to enforce a mechanic's lien the party sued as owner cannot discharge his interest in the land from the lien by showing that the claimant has formerly attempted to subject the interest of another party in the land to a lien for the same debt. *J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Ref. Co.* (N. J.), 15-1083.

Findings of fact. — In an action to enforce a mechanic's lien, a finding by the court that the lien notice claimed a lien "against the said frame house and the land upon which the said house stood," implies that the house and land were properly identified in the notice. *Big Horn Lumber Co. v. Davis* (Wyo.), 7-940.

Judgment. — Subcontractors, suing to

establish mechanics' liens for labor and material furnished by them, are entitled to enforce their claims only against the land, and it is error to render personal judgments in their favor. *Builder's Supply Depot v. O'Connor* (Cal.), 11-712.

Appeal and error. — In a suit in a federal court to enforce a mechanic's lien against the property of a corporation, wherein the plaintiff has been decreed to have a first lien, it is too late for the defendant to raise for the first time on appeal the questions that at the time the suit was brought there were other liens in existence, and that there was also pending in a federal court in another state a receivership suit against the defendant. *Wetzel, etc., R. Co. v. Tennis Bros. Co.* (U. S.), 7-426.

MEDICAL BOOKS.

Admissibility of medical books in evidence, see EVIDENCE, 9 b (1).

MEDICAL COMPOUNDS.

See INTOXICATING LIQUORS, 2.

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MEDICAL ETHICS.

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See PHYSICIANS AND SURGEONS.

Duty of ship owner to provide medical treatment for seamen, see SEAMEN, 3 a.

Expense of medical treatment as element of damage, see DAMAGES, 9 c.

Improper medical treatment as cause of death from wound, see HOMICIDE, 1.

Liability of wife for treatment of deceased husband, see HUSBAND AND WIFE, 5.

Neglect to procure medical assistance as cause of death, see HOMICIDE, 4 b.

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Practicing medicine, criminal liability, see PHYSICIANS AND SURGEONS, 3.

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Regulation of practice of medicine, see **PHYSICIANS AND SURGEONS**.

Right of corporation to practice medicine, see **CORPORATIONS**, 4 a.

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See **PAYMENT**, 1.

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Private memoranda as evidence, see **EVIDENCE**, 9 b (1).

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Requirement of statute of frauds, see **FRAUDS**, **STATUTE OF**, 3.

MEMORY.

Cross-examination to test memory of witness, see **WITNESSES**, 4 b.

Refreshing memory of witnesses, see **WITNESSES**, 4 c (3).

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See **THREATS**.

MENTAL ANGUISH.

Damages for breach of contract, see **DAMAGES**, 9 b.

Damages in action for criminal conversation, see **HUSBAND AND WIFE**, 7 d.

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Liability of telegraph company, see **TELEGRAPHS AND TELEPHONES**, 7 d.

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Effect of intoxication, see **DRUNKENNESS AND INTOXICATION**, 3.

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Persons of unsound mind as witnesses, see **WITNESSES**, 3 b (3).

MERCANTILE AGENCY.

Communications between mercantile agency and subscriber as privileged, see **LIBEL AND SLANDER**, 3 g.

MERCANTILE REPORTS.

Proof of existence of partnership, see **PARTNERSHIP**, 1 b.

MERCHANDISE.

Prohibiting sale of merchandise on Sunday, see **SUNDAYS AND HOLIDAYS**, 1 b.

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Obstruction of sidewalk in handling merchandise, see **STREETS AND HIGHWAYS**, 5 c.

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Purchase of fee by owner of ground rent of estates, see **GROUND RENTS**, 2.

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METERS.

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Microscopical test for evidence of rape, see **RAPE**, 2 d (2).

MIDWIFE.

Midwifery as practice of medicine, see **PHYSICIANS AND SURGEONS**.

MILEAGE.

Mileage of witness allowed as costs, see **COSTS**, 8.

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MILITARY RESERVATIONS.

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Jurisdiction of crimes committed on military reservations, see **COURTS**, 2 c (1).

MILITARY ROADS.

Land grants in aid of construction, see **PUBLIC LANDS**.

MILITIA.

Civil liability of officer. — Section 21, Act No. 181, p. 377, of 1904, relative to the state militia and the state national guard, does not exempt a superior officer from suits for damages in the civil courts. *O'Shee v. Stafford* (La.), 16-1163.

Suppression of harmless business near encampment. — Section 101 of the same act does not authorize the suppression of a lawful and harmless business carried on by a citizen on his own land or outside of the encampment, when the same kind of business is permitted within the limits of the adjoining camp grounds. *O'Shee v. Stafford* (La.), 16-1163.

Trial and punishment by court-martial. — An enlisted man of the Ohio National Guard is a soldier of "the organized militia" of the United States, as defined in the Act of Congress approved Jan. 21, 1903, entitled: "An act to promote the efficiency of the militia, and for other purposes," as amended by the Act of Congress of May 27, 1908 [Fed. St. Ann. 1909 Supp., p. 346]; and as such soldier he is liable to trial and punishment by court-martial as provided in the Code of Regulations of the Ohio National

Guard and the Articles of War of the United States [1 Fed. St. Ann. 486] as adopted in said Code of Regulations. *McGorray v. Murphy* (Ohio St.), 17-444.

MILK.

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MINES AND MINERALS.

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1. WHAT ARE MINERALS.

Oil and gas. — Before it is extracted, oil is a mineral and part of the land. *Swayne v. Lone Acre Oil Co.* (Tex.), 8-1117.

Petroleum and gas are minerals, are part of the realty, and belong to the owner of the land as long as they are on or in the ground or subject to the owner's control. *Lanyon Zinc Co. v. Freeman* (Kan.), 1-403.

Subterranean waters.—In the decisions relating to the use and enjoyment of subterranean waters such waters have always been treated as a mineral, and in a suit to prevent the waste thereof no distinction can be predicated upon the peculiar character and quantity of the salts and gases which happen to be in the solution. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

2. CONVEYANCES AND RESERVATIONS OF MINERALS.

Natural gas not included.—Even though deeds purport to convey "all minerals" underlying the land, if they, in connection with the other evidence, show that the parties did not contemplate a conveyance of the natural gas thereunder, the right to the gas does not pass. *McKinney v. Central Ky. Natural Gas Co.* (Ky.), 20-934.

In an action to quiet title to lands in which the plaintiff's grantor had previously granted "all minerals," the deeds granting the mineral rights, construed in connection with other evidence showing the intention of the parties thereto, held to show that they did not intend to grant the right to the natural gas under the land. *McKinney v. Central Ky. Natural Gas Co.* (Ky.), 20-934.

Out cropping limestone.—A reservation of mines and minerals in a deed construed and held not to include limestone cropping out on the surface of the land and the right to remove the same by open quarrying. *Brady v. Smith* (N. Y.), 2-636.

3. RIGHT OF SURFACE SUPPORT.

Right to remove pillars.—Under a mining lease granting the right to mine and remove "all the merchantable coal . . . in the veins in, under, and upon" demised premises, conferring on the lessee unlimited surface rights, and specifically providing that the lessee "shall not be liable for any falling in of any part or parts or all of the surface of the said hereby demised premises in consequence of the mining and removing of all of the said coal," the lessee has the right to remove all the coal without leaving any pillars to support the surface and without liability for any damage done to the surface. *Miles v. Pennsylvania Coal Co.* (Pa.), 10-871.

4. MINING LEASES.

Rights given special and limited.—Where the manifest purpose of a contract, considering all its terms and its subject-matter and object is to give "the exclusive privilege" "for the purposes only of digging, mining, and preparing for shipment and shipping phosphate rock," on described lands of the specified "quantity and quality, contained in said lands," in return for which a royalty of seventy-five cents per ton is to be paid,

such contract is not one for a general or ordinary use and occupation of the lands, but the right given is special and precisely limited. *Hiller v. Ray*, (Fla.), 20-1162.

Implied obligation of lessee in oil and gas lease.—A grant of oil and gas under certain premises with the right to enter for the purpose of drilling and operating for the oil and gas, reserving to the grantor a part of the product to be delivered in the pipe lines with which the grantee may connect his wells, implies an engagement by the lessee to develop the premises for oil and gas. *Venedocia Oil, etc., Co. v. Robinson* (Ohio), 2-444.

An oil and gas grant construed as to the time within which an implied engagement to develop the premises for such minerals must be performed. *Venedocia Oil, etc., Co. v. Robinson* (Ohio), 2-444.

Implied obligation of lessee in mining lease.—Where the lessors of land for the specific purpose of taking therefrom phosphate rock of a specified character and volume do not covenant that the rock actually exists in the land, and the lessees do not covenant actually to find the rock in the land, but the contract contemplates the existence of the rock and a search for it by the lessees, there is an implied obligation on the lessees to make due and reasonable effort to find the rock in the land. *Hiller v. Ray* (Fla.), 20-1162.

What is due and reasonable effort to find rock of a specified quality and quantity in lands leased for the express purpose of taking such rock from the land, depends on the fair and just requirements of the enterprise, to be determined as a fact by the application of practical knowledge and experience. *Hiller v. Ray* (Fla.), 20-1162.

Liability of mine owner for injuries to lessee of lower strata by lessee of upper strata.—The lessee of the lower strata of a mine cannot recover from the mine owner for injuries to his premises caused by the operations of the lessee of the upper strata, unless the owner could have foreseen at the time of making the lease of the upper strata that the operation thereof would necessarily injure the premises of the lower lessee. *Peterson v. Bullion-Beck, etc., Min. Co.* (Utah), 14-1122.

Defense in action for royalties.—Where the purpose of a contract is the mining of phosphate rock of a specified character, a failure on proper endeavor to find the rock is a good defense in an action for royalties, in the absence of agreements to the contrary. *Hiller v. Ray* (Fla.), 20-1162.

In a lease of land for mining purposes the failure to find the specified rock, and the character of the search made for it, being more within the knowledge of the lessees, are matters of defense in an action for royalties. *Hiller v. Ray* (Fla.), 20-1162.

Provision for minimum royalty.—Where a lease of land for mining purposes contemplates the existence of the rock to be mined, a provision for a minimum royalty in gross "whether the mining is carried on or

not" relates to a failure to mine, not to a failure to find the required rock. *Hiller v. Ray* (Fla.), 20-1162.

Under Minnesota statutes. — The Minnesota statutes providing for the issuance of mineral leases and contracts are constitutional, as a mining lease is not a sale within the meaning of the provision of the state constitution that no portion of the school or swamp lands of the state shall be sold otherwise than at public sale. *State v. Evans* (Minn.), 9-520.

5. MINING PARTNERSHIPS.

What constitutes. — If two or more owners of a mine unite in working it, without any partnership agreement, the act of working it together creates a mining partnership; and the same is true of two or more holding interests in a lease of mining property. *Kirchner v. Smith* (W. Va.), 11-870.

Contribution between partners. — In a chancery suit for contribution against his copartners by a partner in a mining partnership for money he has paid for such partnership, when he has recovered against them individually certain sums in proportion to their respective interests in the partnership, it is not error to retain the cause on the docket for further decrees against defendants for contribution in case plaintiff should fail to make on execution or otherwise the several amounts so recovered. *Kirchner v. Smith* (W. Va.), 11-870.

6. TENANCY IN COMMON.

Ouster of cotenant. — Where one of two cotenants conveys his surface rights in land to the other, but expressly reserves his right to all iron ore, an ouster of the grantor as to such ore does not occur until the grantee makes open and notorious assertion of claim to the ore and directly interferes with or denies the grantor's right thereto. *Morange v. Doe* (Ala.), 5-331.

Partition of mining rights. — A tenancy in common in "all the coal, gases, salt water, oil, and minerals of every kind and description in, upon, and under" a tract of land, together with rights of way and mining rights, is not such an estate as can be the subject of an action for partition in kind. *Robertson Consol. Land Co. v. Paull* (W. Va.), 15-775.

An estate in "all the coal, gases, salt water, oil, and minerals of every kind and description in, upon, and under" a tract of land, together with rights of way and mining rights can be partitioned among the co-owners thereof only by a sale of such estate and a division of the proceeds among them. *Robertson Consol. Land Co. v. Paull* (W. Va.), 15-775.

7. MINING CLAIMS.

Existence of minerals. — Although the mere possibility that ground contains minerals is under the Acts of Congress insufficient to support the location of a mining claim, yet where there is evidence of the dis-

covery of mineral within the limits of such claim sufficient to be submitted to the jury the locator has the right to strengthen his evidence of the actual existence of mineral by showing the situation, character, value, and mineralogical conditions of adjacent claims and by proving by experienced miners that he is justified in expending time and money in prospecting and developing the claim. *Cascaden v. Bortolis* (U. S.), 15-625.

Sufficiency of location. — In an action involving the sufficiency of the location of a mining claim, an instruction stated, and held to conform to the statutory rule that any marking of the ground, whether by stakes or permanent monuments or otherwise, whereby the boundaries of the claim may be readily traced, is sufficient. *Charlton v. Kelly* (U. S.), 13-518.

Instruction to jury as to discovery. — An instruction upon the question of the sufficiency of a discovery to support a placer claim to mineral lands, that in order to constitute a discovery the mineral discovered must be of such quality and character and found under such circumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property, uses the word "development" in the sense of "exploration," and is not erroneous as declaring insufficient a discovery merely justifying the expenditure of money for the purpose of an exploration with the reasonable expectation that, when developed, the claim will be found valuable as a placer claim. *Charlton v. Kelly* (U. S.), 13-518.

Instruction to jury as to occupancy. — In an action to recover possession of a mining claim, where the plaintiff asserts title by actual possession through an agent who, it is alleged, had to leave the claim on the day of the rival location, and was detained away for several months by jury duty, an instruction that the jury should view the absence of the alleged prior occupant and the character of its actual occupancy and possession with care and attention, does not invade the province of the jury or amount to a comment on the testimony of the case in violation of section 673 of the Code of Alaska, but only expresses a rule or law. *Charlton v. Kelly* (U. S.), 13-518.

Where, in such an action, there is evidence from which the jury might infer that the plaintiff's claim had been staked without appropriate discovery, and merely for speculative purposes, it is not error to instruct the jury that if the plaintiff was not in actual possession of the premises in good faith, but was merely holding the same for speculative purposes, and without any discovery of minerals thereon, their verdict should be for the defendant on that question. *Charlton v. Kelly* (U. S.), 13-518.

Where, in an action to recover possession of a mining claim, the jury request further instructions as to whether the placing of tools and cooking utensils on a mining claim constitutes possession when the owner is away after supplies and provisions, the an-

swer of the court that "merely placing a tent and a few tools and a small supply of provisions upon a placer mining claim do not alone and of themselves constitute actual possession," is not erroneous as not fully answering the question, where the court in the original charge had instructed the jury that where a prospector has in good faith gone away from his claim for any temporary purpose, intending to return and resume his actual occupation, possession, and labors, such temporary absence is not to be construed as an abandonment of his rights, and that one entering the ground during such temporary absence could not initiate any right thereto. *Charlton v. Kelly* (U. S.), 13-518.

8. DAMAGES FOR WRONGFUL WORKING OF MINE.

Measure of damages. — In an action to recover damages for the wrongful working by the defendants of the plaintiff's placer mining location, where the evidence discloses a sinister intention on the part of the defendants, and that the defendants deliberately blended the materials taken from the location with other materials and converted the whole mass to their own use, and thereby destroyed the means of ascertaining the quantity taken from the plaintiff's location and the expense of recovering the gold therefrom, the plaintiff is entitled to recover the total value of so much of the intermixed products as is not strictly proved to have come from the defendants' own claim, without deduction of the necessary expenses of workings and of winning the gold. *Lamb v. Kincaid* (Can.), 8-36.

9. WASTE OF MINERAL WATERS AND GAS.

Interest of people of state. — The people of a state collectively have substantial and enforceable interest in preserving the just and reasonable use by all members of the community of a common supply of a natural product such as mineral waters, and in so curtailing the rights of one or a few to get an unjust proportion thereof that the rights of other members of the community shall not be interfered with, that disputes and litigation shall not arise, and that large amounts of property shall not be endangered. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

Statute prohibiting acceleration of flow. — A statute which prohibits the acceleration or increase by artificial means of the flow of percolating waters or natural carbonic acid gas from wells bored into rock, either absolutely or where the result of such acceleration is to impair the natural flow or the quality of such waters or gas in the spring or well of another person, is an unlawful interference with the rights of landowners to use the waters percolating under their lands for a purpose naturally and legitimately connected with the improvement and enjoyment of such lands, and is therefore unconstitutional. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

Where such statute is general and applies throughout the state, the court cannot, by any process of interpretation by which definite expressions may be squared with assumed purposes, and by applying the presumption in favor of the constitutionality of statutes and utilizing every reasonable rule of construction in furtherance of such presumption, uphold the constitutionality of such statute by assuming that in enacting such statute the New York legislature intended to limit its provisions to the particular conditions prevailing at Saratoga Springs. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

A statute intended to prevent such use of mineral waters as would result in wasting the natural resources of the land to the detriment of general and public interests, or in unreasonably impairing the rights of others entitled to draw from a common source, is constitutional. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

A statute which prohibits the acceleration or increase by artificial means of the flow, from wells bored into rock, of percolating waters or natural carbonic acid gas, for the purpose of marketing the same, is constitutional. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

If pumping in wells bored into rocks is more exhaustive of natural resources and more destructive of common rights than pumping in wells sunk into the dirt, the legislature is justified in making a distinction between the two kinds of wells. Consequently the fact that such statute relates only to wells bored or drilled into rocks does not deny to persons who own such wells the equal protection of the laws. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

Enforcement of statute. — In the absence of constitutional restrictions, the legislature may by express statutory provisions authorize the people of the state collectively or a person in their stead to maintain an action to enforce such statute, even though the action should be deemed to relate to private interests. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

Injunction to restrain. — A court of equity may, under common-law principles, enjoin a landowner from greatly accelerating and increasing by means of pumps and other apparatus the natural flow of subterranean percolating mineral waters and gas through deep wells bored into a widely extended common supply of such substances, not for any purpose connected with the enjoyment of his lands, but for the purpose of procuring from the waters a supply of gas to be marketed throughout the country, and with the result of wasting great quantities of mineral waters, of impairing or destroying the natural flow of such waters and gas in and through the springs of other landowners throughout a large area, and of destroying or impairing the valuable character of such waters for the purposes for which they have been habitually used. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

Where the allegations of the complaint in an action to obtain such an injunction are to the effect that before the acts complained of the plaintiffs were enjoying a natural flow of water through their springs to the surface of the ground, and that such flow has been interfered with by the defendant, the court will, in reviewing an order granting a preliminary injunction, disregard the defendant's contention that the plaintiffs have been forcing the flow of water through their springs, the plaintiffs' rights being in such case measured by the allegations of their complaint. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

The fact that the plaintiffs in such action are selling the waters naturally flowing in their springs does not disentitle them to have the defendant restrained from continuing by artificial means the increased and wasteful flow of waters and gas. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

In an action to enjoin the pumping of mineral waters and gas from wells at Saratoga Springs, held that the New York Supreme Court was justified in granting a preliminary injunction upon the verified complaint and affidavits, the questions of fact presented by the defendant's affidavits being solely for the consideration of such court. *Hathorn v. Natural Carbonic Gas Co.* (N. Y.), 16-989.

10. STATUTORY REGULATION OF MINING OPERATIONS.

Mine foreman. — Under the Pennsylvania statute a person employed as a mine foreman whose duties as such are confined to the underground portion of the colliery that constitutes the mine proper is not the superintendent of the colliery or required to give the notices prescribed by the act. *Corgan v. George F. Lee Coal Co.* (Pa.), 11-838.

Doors in airways. — The Indiana statute providing that "breaks through" or airways shall be made in every room of a mine, and requiring that "the doors used in assisting or directing the ventilation of the mine when coal is being hauled through shall be opened and closed by persons designated to do the same, so that the driver or other persons may not cause the doors to stand open," was designed solely for the purpose of preventing an interference with the ventilation of the air in the mine and was not designed to provide aid for the drivers passing through such openings, and therefore the statute offers no remedy to a driver who has sustained an injury by reason of the failure of the mine owner to designate a person to open and close the door. *Indiana, etc., Coal Co. v. Neal* (Ind.), 9-424.

In construing the Indiana statute requiring the doors used in assisting or directing the ventilation of mines when coal is being hauled through to be opened and closed by persons designated to do the same, so that the driver or other persons may not cause the doors to stand open, a provision of such

statute that for "any injury to person or persons occasioned by any violation of this act" a right of action shall accrue, the word "any" should be so restricted in its meaning as not to give a right of action in favor of a person who is not within the purview of the statute. *Indiana, etc., Coal Co. v. Neal* (Ind.), 9-424.

Weighing output of coal. — The Arkansas statute making it unlawful for any mine owner, lessee, or operator of coal mines in the state where ten or more men are employed underground, employing miners at bushel or ton rates or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employee sending the same to the surface, and accounted for at the legal rate of weights as fixed by the laws of Arkansas, and prohibiting the suspension of the operation of the statute by contract, is clearly within the scope of the police power as designed to prevent fraud and to secure to employees in mines the fruits of their labor, and does not contravene the provisions of the state and federal constitutions granting liberty and equality of rights, either as an interference with the right of contract or as discriminating in favor of mines where less than ten men are employed. *McLean v. State* (Ark.), 11-72.

MINGLING FUNDS.

Collections mingled with general assets of bank, see **BANKS AND BANKING**, 6.

MINGLING GOODS.

See **CONFUSION OF GOODS**.

MINIMIZING DAMAGES.

Duty of discharged servant to seek other employment, see **MASTER AND SERVANT**, 1 e.

Duty of person injured, see **DAMAGES**, 8.

MINISTERS.

Communications between ministers of gospel and member of congregation as privileged, see **WITNESSES**, 3 d (3).

MINORITY STOCKHOLDERS.

See **CORPORATIONS**.

MINORS.

See **CHILDREN; GUARDIAN AND WARD; INFANTS; PARENT AND CHILD**.

MINUTES.

Reading minutes of testimony to jury, see **CRIMINAL LAW**, § n (1).
 Right of accused to inspect minutes of grand jury, see **GRAND JURY**, 5 b.

MIRRORS.

Mirrors as fixtures, see **FIXTURES**, 3.

MISAPPROPRIATION.

Bankruptcy as affecting liability for misappropriation, see **BANKRUPTCY**, b.

MISCARRIAGE.

See **ABORTION**.

Promise to answer for miscarriage of another, see **FRAUDS**, **STATUTE OF**, 6.

MISCEGENATION.

Miscegenation — octoroon and white person. — An octoroon is not a "person of the negro or black race" within the Louisiana statute (Act No. 87 of 1908, § 1) making concubinage between a person of the Caucasian or white race and a person of the negro or black race a felony. *State v. Threadaway* (La.), 20-1297.

MONEY LENT, PAID, OR RECEIVED.

Action for money had and received. — An action will lie to recover a sum certain whenever one has the money of another which he in equity and good conscience has no right to retain. *Allsman v. Oklahoma City* (Okla.), 17-184.

MISCHIEF.

See **MALICIOUS MISCHIEF**.

MISCONDUCT.

Ground for discharging jury in criminal case, see **CRIMINAL LAW**, 6 l.
 Ground for removal of public officer, see **PUBLIC OFFICERS**, 7 b (2).
 Misconduct of jurors, see **JURY**, 7 d.
 Misconduct of party as ground for new trial, see **NEW TRIAL**, 2 a (3).
 Revocation of physician's license for misconduct, see **PHYSICIANS AND SURGEONS**, 1 a.
 Serious and wilful misconduct within meaning of **Workmen's Compensation Act**, see **MASTER AND SERVANT**, 3 m (2).
 Wife's misconduct as affecting allowance of alimony, see **ALIMONY AND SUIT MONEY**, 4 b.

MISDEMEANORS.

Ballable offenses, see **BAIL**, 3.
 Classification of crimes, see **CRIMINAL LAW**, 1.
 Fixing punishment as classification of offense, see **CRIMINAL LAW**, 2 a.
 Necessity of arraignment, see **CRIMINAL LAW**, 6 h.

MISFEASANCE.

Ground for removal of public officers, see **SHERIFFS AND CONSTABLES**, 1.

MISJOINDER.

Causes of action, see **PARTITION**, 2 d (3).
 Demurrer to misjoinder of causes of action, see **PLEADING**, 4 b.
 Parties on appeal, see **APPEAL AND ERROR**, 5 b.
 Waiver of misjoinder of causes of action, see **PLEADING**, 11 b.

MISMANAGEMENT.

Right of policyholders to equitable relief for mismanagement by officers, see **INSURANCE**, 1 a.

MISNOMER.

See **INDICTMENTS AND INFORMATION**, 4.
 Effect as to validity of judgment, see **JUDGMENTS**, 2.
 Quashing indictment on ground of misnomer, see **INDICTMENTS AND INFORMATION**, 8.

MISREPRESENTATIONS.

See **FRAUD AND DECEIT**.
 As affecting liability of carrier for loss of goods, see **CARRIERS**, 4 d (1).
 Defense to specific performance, see **SPECIFIC PERFORMANCE**, 5 c.
 Innocent misrepresentations as ground for rescinding contract, see **CANCELLATION AND RESCISSION**, 1.
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MISTAKE.

Additional insurance taken by mistake, see **INSURANCE**, 5 g (13).
 Arrest of one person by mistake for another, see **FALSE IMPRISONMENT**, 2.
 Charging more than legal rate of interest by mistake, see **USURY**, 1 d.
 Collateral attack on judgment for mistake of law, see **JUDGMENTS**, 10.
 Correcting mistake in description of land sold under foreclosure, see **MORTGAGES AND DEEDS OF TRUST**, 14 f.

Correction of mistakes in construction of wills, see **WILLS**, 8 a (5).

Effect of mistake as to price in offer of sale, see **SALES**, 5 c.

Effect of mistake in name of assured in fire insurance policy, see **INSURANCE**, 5 c.

Effect of mistake in selecting form of action, see **JUDGMENTS**, 6 d.

Excuse for delivery of goods to wrong person, see **CARRIERS**, 4 b (3).

Ground for avoiding contract, see **CONTRACTS**, 2 b.

Ground for avoiding release, see **RELEASE AND DISCHARGE**, 5 a (4).

Ground for equitable relief, see **EQUITY**, 2 d.

Ground for equitable relief from judgments at law, see **JUDGMENTS**, 13.

Ground for reformation of instruments, see **REFORMATION OF INSTRUMENTS**.

Improper remedy adopted by mistake, see **ELECTION OF REMEDIES**.

Interest on money received by mistake, see **INTEREST**, 1.

Misapprehension as to allegations of complaint as ground for vacating judgments, see **JUDGMENTS**, 9 d.

New trial on ground of mistake in verdict, see **NEW TRIAL**, 2 a (3).

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Possession by mistake, see **ADVERSE POSSESSION**.

Publication by mistake as defense to action for libel, see **LIBEL AND SLANDER**, 4 d.

Recovery of payments made by mistake, see **PAYMENT**, 4 a.

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MITIGATION OF DAMAGES.

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MITTIMUS.

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Commitment of wayward child, see **INFANTS**, 4 c.

Collateral attack on commitment to insane asylum, see **INSANITY**, 3.

Correcting defective mittimus on habeas corpus, see **HABEAS CORPUS**, 2, 6 b.

Illegality of appointment of magistrate, see **HABEAS CORPUS**, 2.

MIXING GOODS.

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MOBS.

Delay in delivery of telegram caused by mob violence, see **TELEGRAPHS AND TELEPHONES**, 7 b.

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Liability of municipality for damage done by mobs, see **MUNICIPAL CORPORATIONS**, 9 d.

MODIFICATION.

Decree for alimony, see **ALIMONY AND SUIVIT**, 4 g.

Modification of judgment by appellate court, see **APPEAL AND ERROR**, 16 e.

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See **COUNTERFEITING**.

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MONEY LENDERS.

Enjoining money lender from taking possession under bill of sale, see **CHATTEL MORTGAGES**, 8.

MONEY LENT, PAID, OR RECEIVED.

Recovery of money lent for gambling, see **GAMING AND GAMING HOUSES**, 3 c.

MONOPOLIES AND CORPORATE TRUSTS.

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Charging monopoly as libelous, see LIBEL AND SLANDER, 2 i.

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1. DEFINITIONS.

Monopolies. — A monopoly, as now understood, embraces any combination, the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co. (S. Car.)*, 9-902.

A monopoly embraces any combination, the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public. *State v. Eastern Coal Co. (R. I.)*, 17-96.

Any combination, the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public, is a monopoly. *Charleston Natural Gas Co. v. Kanawha Natural Gas, etc., Co. (W. Va.)*, 6-154.

Trusts. — A trust has been defined as a contract, combination, confederation, or understanding, express or implied, between two or more persons to control the price of a commodity or services for the benefit of the parties thereto and to the injury of the public, and which tends to create a monopoly. More accurately, perhaps, it is an entity resulting from such a contract, combination, etc. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co. (S. Car.)*, 9-902.

2. AT COMMON LAW.

a. In general.

Contract in unreasonable restraint of trade. — A contract which is in unreasonable restraint of trade is void at common law because contrary to public policy. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co. (W. Va.)*, 9-667.

A contract, combination, or trust among the various producers and sellers of a commodity, the direct and necessary or natural effect of which is to restrain competition and

control the prices of such commodity, is in unreasonable restraint of trade, and void at common law because contrary to public policy. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co. (W. Va.)*, 9-667.

If a combination or trust is illegal because in unreasonable restraint of trade, the contract whereby such combination or trust was effectuated and established is void, because in unreasonable restraint of trade, and courts will not enforce the contract between the parties to it. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co. (W. Va.)*, 9-667.

Criminal offense. — It is a criminal offense for a person to obtain a monopoly of a prime necessity of life. *State v. Eastern Coal Co. (R. I.)*, 17-96.

Engrossing — as offense. — Engrossing is an offense at common law in Rhode Island. *State v. Eastern Coal Co. (R. I.)*, 17-96.

What may be engrossed. — Coal, being an article of prime necessity, is legally capable of being engrossed. *State v. Eastern Coal Co. (R. I.)*, 17-96.

Restrictions imposed by proprietor of patented article. — The proprietor of a patent medicine may fix prices and name the terms and conditions at and upon which he will sell his goods, and may refuse to sell to dealers who will not comply with the terms and conditions so fixed, provided his action is independent of an action taken by other proprietors, and is confined to his own goods. *Jayne v. Loder (U. S.)*, 9-294.

b. Particular contracts.

Contracts between coal companies. — Where three coal mining companies operating in the same vein or seam in close proximity to one another and just having commenced the development of that particular kind of coal, organize, indirectly and nominally in the names of individuals, another corporation to act as their general sales agent, and each gives the latter by contract the exclusive right to sell its entire output of coal, at prices uniform as to all three companies, and not to be departed from without the consent of all the companies, and said agent company is to advertise and introduce the coal in the markets, establish and control all agencies and subagencies, and make all sales and collections and deduct for its compensation ten cents per ton out of the proceeds of sales, such contracts are illegal and void, their tendency being to suppress competition and restrain trade, contrary to public policy. *Slaughter v. Thacker Coal, etc., Co. (W. Va.)*, 2-335.

Contract between manufacturers of coke. — A contract between the producers and manufacturers of coke to restrain competition considered, and held to be in unreasonable restraint of trade and therefore void as against public policy. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co. (W. Va.)*, 9-667.

Contract between natural gas companies. — A contract between two public service corporations organized to supply the

same community with natural gas, for a division of the territory and regulation of the selling price, held to be void as tending to create a monopoly. *Charleston Natural Gas Co. v. Kanawha Natural Gas, etc., Co.* (W. Va.), 6-154.

Contract between electric companies.

— A contract by a corporation engaged in generating electricity for public and private use, by which it leases property to a rival corporation and agrees not to engage in the business of furnishing electricity for a certain period, held to be in restraint of trade and void. *Keene Syndicate v. Wichita Gas, etc., Co.* (Kan.), 2-949.

Contract between fire insurance companies.

— A contract in restraint of trade entered into by fire insurance companies, the necessary effect and the actual result of which are to control such business within a certain area, and within such area to fix and regulate prices and to limit or eliminate competition to the injury of the public, is contrary to public policy, and *ultra vires* such corporations, and may be restrained in equity at the suit of the attorney-general. *McCarter v. Firemen's Ins. Co.* (N. J.), 18-1048.

Contract between employer and labor union.

— A tripartite contract between an employer, his employees, and a single labor union, whereby the employer binds himself to retain in his employ none but members of the union, is not obnoxious to public policy; and upon a breach of the contract by the employer, the labor union may enforce payment of a note given it by the employer as security for performance. *Jacobs v. Cohen* (N. Y.), 5-280.

Contract of employment. — A stipulation, in a contract of employment between a dentist and his assistant, binding the latter not to open an office or engage in competition with an employer in a specified city or its vicinity, is valid and enforceable, notwithstanding the fact that the assistant has just been graduated from a school of dentistry. *Turner v. Abbott* (Tenn.), 8-150.

c. Partial restraint of trade.

Complete monopoly not necessary.

— In order for a combination or trust to be in unreasonable restraint of trade, it is not necessary that a complete monopoly be formed. A combination or trust is in unreasonable restraint of trade if it tends to a monopoly and is to the injury of the public. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.* (W. Va.), 9-667.

Valid contracts. — Under the common law contracts in general restraint of trade are void, but contracts in partial restraint of trade are valid if they are reasonable and are founded upon a valuable consideration. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.* (S. Car.), 9-902.

A contract between a single independent manufacturer of agricultural implements and a single independent dealer whereby the former agrees to sell his implements exclusively to the latter, and the latter agrees to purchase

exclusively from the former is not invalid, where the territory covered by the restriction consists of but a single city and vicinity. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.* (S. Car.), 19-902.

A contract in partial restraint of trade, in order to be valid, must be reasonable as to time, place, terms, etc., and must disclose an intention simply to protect the party relying upon the covenant in the reasonable restraint of unjust discrimination against him. *Southern Fire Brick, etc., Co. v. Garden City Sand Co.* (Ill.), 7-50.

A contract regulating the sale of the output of fire clay mills held not invalid as in restraint of trade. *Southern Fire Brick, etc., Co. v. Garden City Sand Co.* (Ill.), 7-50.

Invalid contracts. — An unreasonable restraint of trade which is only partial is illegal. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.* (W. Va.), 9-667.

Tests for determination of validity.

— The test for determining whether a contract in partial restraint of trade is reasonable under the common law is whether it affords only a fair protection to the interests of the party in whose favor it is made, without being so large in its operations as to interfere with the interests of the public. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.* (S. Car.), 9-902.

In determining whether a contract or combination is in unreasonable restraint of trade, the subject-matter of the contract or combination, the situation of the parties, and all the circumstances attending the transaction should be considered. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.* (W. Va.), 9-667.

In determining whether a contract is in unreasonable restraint of trade, all the powers of the contract should be considered, and its character determined not alone by what has been done under it, but by what may be done under it when all of its powers shall have been fully exercised. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.* (W. Va.), 9-667.

Nature of subject-matter of contract.

— In determining whether a contract or combination is in unreasonable restraint of trade, it is immaterial whether the commodity which is the subject-matter of the contract or combination is of prime necessity, if the commodity is an article of legitimate trade or commerce. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.* (W. Va.), 9-667.

Sale of good will of business. — A sale of the good will of an established business in connection with a sale of the business and an agreement by the vendor not to engage in a similar business is not, if reasonable in other respects, void because such agreement is unlimited as to time. *Southworth v. Davison* (Minn.), 16-253.

Such a sale and agreement by partnership binds the members thereof individually as well as copartners. *Southworth v. Davison* (Minn.), 16-253.

In an action to restrain the former owner of an established furniture business, who had sold such business and the good will thereof

to the plaintiff's assignors, from engaging in a similar business, he having agreed not to do so, the contract whereby the defendant transferred to such assignors the good will of such business and his agreement not to engage in a similar business construed and held to confer on the purchasers, not merely a personal privilege, but the full and absolute right to the good will of such business, and to entitle the plaintiff to enjoin the defendant from violating his agreement. *Haugen v. Sundseth* (Minn.), 16-259.

Contract between employer and employee. — The plaintiffs carried on a compound business: (1) the manufacturing of white-wear and the laundering of it; (2) a general or custom laundry business. The defendant, who had been employed in the laundry department of the plaintiffs' business, and had learned their methods and secret processes, left their employment in June, 1910, and began to carry on a rival custom laundry business. By a restrictive clause contained in an agreement between the plaintiffs and defendant, made in 1904, the defendant, for good consideration, had become bound, for three years after leaving the employment of the plaintiffs, that he would be "neither directly nor indirectly interested or employed in any way by himself or with, by or through any other person in any business of a similar kind to that carried on by the plaintiffs within the limits of the Dominion of Canada." Held, that the defendant was carrying on "business of a similar kind" to that of the plaintiffs, even though the plaintiffs' laundry should be regarded as ancillary to their manufactory — all was the one business of compound and cognate nature, a material part of which the defendant was injuring. *Allen Mfg. Co. v. Murphy* (Can.), 20-657.

Restriction as to whole country. — In the above case, it was held, also, that the burden rested on the defendant to show that the contract was invalid, in that the protection extended beyond what the plaintiffs' interests required, which is the modern test of validity; and, as the evidence showed that the business of the plaintiffs as a whole extended over all parts of Canada, and as to the laundry branch extended over the greater part of Canada, the covenant not to engage in business "within the limits of the Dominion of Canada" was not too wide for the plaintiffs' protection, and its validity had not been successfully impeached — regard being had, moreover, to the trade secrets and improved methods of the plaintiffs communicated to the defendant. *Allen Mfg. Co. v. Murphy* (Can.), 20-657.

d. Assignability of contract in restraint of trade.

Use of words "successors and assigns." — Where the good will of a business is sold in connection with the business, and the vendor agrees not to engage in a similar business, such good will and contract are assignable by the vendee, even though the as-

signment and contract by the original vendor do not refer to the "successors and assigns" of the vendee. The use of such words or their equivalent is unnecessary to confer the right of subsequent assignment. *Haugen v. Sundseth* (Minn.), 16-259.

e. Actions and defenses.

Parties plaintiff. — A former member of an illegal combination whose connection with it was severed before the filing of the suit will not be denied the protection of a court of equity against an illegal act of such combination because of his previous connection therewith. *Employing Printers Club v. Dr. Blosser Co.* (Ga.), 2-694.

Parties defendant. — In an action by a retail druggist to recover damages for an unlawful conspiracy to prevent him from getting goods to sell, it is proper to make an association of retail druggists a party defendant, where the declaration, by appropriate averments, charges the association with complicity in the wrongful conspiracy. *Klingel's Pharmacy v. Sharp & Dohme* (Md.), 9-1184.

Declaration alleging good cause of action. — In an action for damages brought by a retail druggist against a wholesale druggist, a dealer in druggists' supplies, and an association of retail druggists, the declaration states a good cause of action where it alleges that the defendants are engaged in an unlawful conspiracy in restraint of trade to maintain a maximum schedule of prices for drugs and druggists' supplies; that because of the plaintiff's refusal to enter into such combination and conspiracy no drugs or supplies have been or will be supplied to him by the defendants; that no other dealer in drugs or supplies will be allowed to sell to the plaintiff without incurring the penalty of being blacklisted and boycotted by the defendants; that the action of the defendants has not been taken in the *bona fide* exercise of their right to sell or refuse to sell to whom they please, but has been taken with the malicious intent of injuring and destroying the business of the plaintiff; and that in consequence of the defendant's action the plaintiff has been wholly deprived of the ability to purchase supplies, and has been prevented from pursuing his lawful vocation. *Klingel's Pharmacy v. Sharp & Dohme* (Md.), 9-1184.

Absence of advance in price. — It is no defense to the illegality of a contract or combination which is in unreasonable restraint of trade to show that the prices of the commodity which constitutes its subject-matter have not been changed, or even that such prices have been lowered. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co.* (W. Va.), 9-667.

Equitable remedies. — The rule in equity that contracts in restraint of trade are merely unenforceable does not require that the parties so contracting be deemed to be immune from ordinary equitable remedies when their violation of public policy is di-

rected at and actually works a public injury. *McCarter v. Firemen's Ins. Co.* (N. J.), 18-1048.

Injunctions. — A court of equity will interpose by injunction to prevent the several members of an illegal combination from enforcing an illegal agreement to the injury of one engaged in competitive business. *Employing Printers Club v. Dr. Blosser Co.* (Ga.), 2-694.

3. UNDER STATE STATUTES.

a. Constitutionality.

Extent of police power. — The prohibition of contracts and combinations to stifle competition in business is within the police power of the state. *Knight, etc., Co. v. Miller* (Ind.), 18-1146.

Denial of due process of law. — A statute prohibiting contracts and combinations to prevent competition in business is mere regulation and not a denial to any one of the process of law. *Knight, etc., Co. v. Miller* (Ind.), 18-1146.

Kansas statute. — The Kansas anti-trust law of 1897 is not in contravention of the Fourteenth Amendment to the Federal Constitution, but is a valid exercise of legislative power. *State v. Jack* (Kan.), 2-171.

Massachusetts statute. — The Massachusetts statute prohibiting sales of goods made on a condition that the purchaser shall not sell the goods of any other person is a valid exercise of the state's police power, and is not unconstitutional, either as interfering with freedom of contract or as interfering with interstate commerce. *Commonwealth v. Strauss* (Mass.), 6-842.

The federal anti-trust law does not affect the validity of the Massachusetts statute prohibiting sales of goods made on condition that the purchaser shall not sell the goods of any other person. *Commonwealth v. Strauss* (Mass.), 6-842.

Montana statute. — The provision of the Montana statute prohibiting the formation of trusts or combinations for the purpose of fixing the prices or regulating the production of merchandise, commodities, articles of commerce, or products of the soil, and the provision of the statute excepting from this prohibition persons engaged in horticulture or agriculture, must be construed as being interdependent, and as so construed the provisions are violative of the prohibition of the Fourteenth Amendment to the Federal Constitution against the denial of the equal protection of the laws. *State v. Cudahy Packing Co.* (Mont.), 8-717.

Texas statute. — The Texas Anti-trust Act of 1903, in applying to and making unlawful combinations formed before the act took effect, and carried out afterwards, does not impair the obligation of a valid contract as applied to a contract between a railroad company and an express company giving the latter the exclusive facilities of the road, where such contract was not originally reasonable or, strictly speaking, lawful. *State v. Missouri, etc., R. Co.* (Tex.), 13-1072.

b. Construction and operation.

Test for determining applicability of statute. — The main general test for determining whether a particular contract, trust, or combination is in restraint of trade within the prohibitory statute is to ascertain whether it is monopolistic in its purpose or in its natural tendency. If it is, it unreasonably affects competition and prices to the detriment of the public, and therefore is obnoxious to the statute. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.* (S. Car.), 9-902.

In determining whether a particular contract falls within a statute prohibiting contracts in restraint of trade, the court must consider the tendency or power of the contract to injure the public either considered in itself or as part of a scheme to destroy or impede competition and control supply and prices. A contract may be lawful in itself as an isolated matter, but be unlawful as a part of a scheme to create a virtual monopoly. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.* (S. Car.), 9-902.

Unreasonable restraint. — The South Carolina statute prohibiting contracts which are made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of foreign articles, or in the manufacture or sale of domestic articles, must be construed as applying only to contracts which are made with a view to lessen, or which tend to lessen, full and free competition to an unreasonable extent, as the purpose of the legislature in passing the statute was not to destroy the rights to make those contracts in partial restraint of trade which the common law had long upheld, but was to destroy trusts and combinations designed, or having a natural tendency or potentiality, to create a virtual monopoly. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.* (S. Car.), 9-902.

Meaning of term "exclusive sale." — As used in the Massachusetts statute prohibiting sales of goods made on condition that the purchaser shall not sell the goods of any other person, and providing that the prohibition shall not apply to the making of a contract for the exclusive sale of goods, the term "exclusive sale" means sale within a prescribed territory and not sale of the goods of the seller to the exclusion of goods of other persons. *Commonwealth v. Strauss* (Mass.), 6-842.

Extent of prohibition. — The provision of the Kansas anti-trust law that every person or corporation violating the act shall be prohibited from doing further business within the state contemplates a prohibition of such business only as is in violation of the act. *State v. Jack* (Kan.), 2-171.

Application to articles not necessities. — The Massachusetts statute prohibiting a sale of goods made on a condition that the purchaser shall not sell the goods of any other person applies to sales of tobacco, though tobacco is not a necessary of

life. *Commonwealth v. Strauss* (Mass.), 6-842.

Application to collateral contracts. — The provision of the Illinois anti-trust statute that "any contract or agreement in violation of any provision of the . . . act shall be void" does not apply to the contracts of a trust which are collateral to the unlawful scheme or combination and are not tainted thereby, such as contracts for the sale of goods dealt in by the trust. *Chicago Wall Paper Mills v. General Paper Co.* (U. S.), 8-889.

Restriction that purchaser shall not sell goods of other manufacturers. — The Massachusetts statute prohibiting sales of goods made on condition that the purchaser shall not sell the goods of any other person is violated by a sale made at a certain price with the promise that the purchaser will be given a rebate if he sells no other goods than those of the seller, where the price named and the rebate offered amount to and are intended by the seller as a practical refusal to sell goods except upon the prohibited condition. *Commonwealth v. Strauss* (Mass.), 6-842.

The South Carolina statute prohibiting contracts in restraint of trade is not violated by a contract between a single independent manufacturer of agricultural implements and a single independent dealer whereby the manufacturer agrees to sell his implements exclusively to the dealer, and the dealer agrees to purchase exclusively from the manufacturer, where the territory covered by the restriction consists of but a single city and vicinity. *Walter A. Wood Mowing, etc., Co. v. Greenwood Hardware Co.* (S. Car.), 9-902.

Incidental restraint of trade. — A contract may incidentally restrain competition or trade without violating the Illinois anti-trust law, if its chief purpose is to promote and increase the trade or business of the parties thereto. *Southern Fire Brick, etc., Co. v. Garden City Sand Co.* (Ill.), 7-50.

Combination of railroad and express companies. — While the business of a railroad company and an express company necessarily employ, to an extent, the same instrumentalities, their businesses may be kept distinct and without a combination of any character, and when two such companies agree upon and carry out a contract by which the express company is given the exclusive privilege of using the facilities of the road, there is a combination of capital, skill, or acts to accomplish the unlawful purpose within the meaning of the Texas Anti-trust Act. *State v. Missouri, etc., R. Co.* (Tex.), 13-1072.

Under the Texas Anti-trust Act of 1903, providing that an unlawful trust is a "combination of capital, skill, or acts by two or more persons, firms, or corporations or associations of persons, or either two or more of them . . . to create or carry out restrictions in the free pursuit of any business authorized or permitted by the law of this state," and the Texas statute providing that "every railroad company operating a rail-

road in this state shall furnish reasonable facilities and accommodations, and upon reasonable and equal rates to all corporations and persons engaged in the express business, for the transportation of themselves, agents, servants, merchandise, and other property, and for use of their cars, depots, buildings, and grounds, and for exchanges at points of junction with other roads," the authorized scope of the business of an express company is to pursue its business on all railroads controlled by state legislation with equal facilities and upon equal rates, and any combination of the kind denounced by the Anti-trust Act which will limit or narrow the authorized scope of the business is one to create or carry a restriction in the free pursuit of business in violation of the Anti-trust Act. *State v. Missouri, etc., R. Co.* (Tex.), 13-1072.

A contract between a railroad company and an express company showing by its terms that its purpose is to secure to the express company the exclusive right to do an express business upon the railroad, and to exclude other railroads from the enjoyment of like rights, is intended to create and carry out a restriction in the free pursuit of a business in violation of the Texas anti-trust law; and it is immaterial that the railroad company only binds itself not to contract with other express companies to do an express business on its road, where the rights of the express company are called "exclusive facilities," and it is provided that they shall not be given to other companies except in the event of legislative or judicial compulsion, and that then the contracting express company shall have credit for such sums as other companies pay. *State v. Missouri, etc., R. Co.* (Tex.), 13-1072.

Agreements of physicians as to fees. — Labor, whether skilled or unskilled, is not a commodity within the meaning of the Iowa statute which makes it a criminal offense to enter into or become a member of, or party to, any pool, trust, agreement, contract, combination, confederation, or understanding to regulate or fix the price of any article of merchandise or commodity, and, consequently, such statute has no application to an agreement or combination between physicians to regulate the fees or charges to be exacted for their professional services. *Rohlf v. Kase-meier* (Ia.), 17-750.

Application of Texas statute. — The Texas Anti-trust Act of 1903, making it unlawful "to carry out" restrictions upon the pursuit of an authorized business, and providing penalties for each day the offense is "continued," applies to combinations formed before the act took effect and carried out afterwards. *State v. Missouri, etc., R. Co.* 13-1072.

The Texas statute creating the state railroad commission and investing it with power to regulate the rates to be charged by railroad and express companies, does not take such companies out of the reason and purpose of the subsequent Anti-trust Act of 1903, which expressly deals with combina-

tions affecting transportation. *State v. Missouri, etc., R. Co. (Tex.)*, 13-1072.

c. Actions and defenses.

Sufficiency of petition. — In an action against a railroad company and an express company to recover penalties for an alleged violation of the Texas Anti-trust Act of 1903, in entering into an unlawful contract or combination, a petition alleging that after the law was passed the defendant "continued to treat said contract . . . as a valid and binding contract between said parties, and executed and carried out said contract," sufficiently alleges, as against a general demurrer, that the features of the contract constituting the unlawful combination were carried out after the law went into effect. *State v. Missouri, etc., R. Co. (Tex.)*, 13-1072.

Determination of character of suit. — The fact that the complaint in a suit to enjoin an alleged illegal combination asks for, and the court allows, counsel fees, the recovery of which is authorized by the Conspiracy Act (Acts Ind. 1899, p. 257), but which are not recoverable in a common-law action, determines the character of the suit as based on the statute. *Knight, etc., Co. v. Miller (Ind.)*, 18-1146.

Statute as a defense. — The provision of the Illinois anti-trust law that "any purchaser of any article or commodity from any individual, company, or corporation, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment" is penal in its character and does not apply to sales by an unlawful combination which was formed in a foreign state, and which has not committed in the domestic state any act prohibited by the local anti-trust law. *Chicago Wall Paper Mills v. General Paper Co. (U. S.)*, 8-889.

4. UNDER FEDERAL STATUTE.

a. Effect on contracts.

In general. — Before a contract can be declared illegal as contravening the Sherman Anti-trust Act, it must appear that it is clearly within the provisions of the statute. *Pocahontas Coke Co. v. Powhatan Coal, etc., Co. (W. Va.)*, 9-667.

Incidental restraint of trade. — A contract may incidentally restrain competition or trade without violating the Federal Anti-trust Act, if its chief purpose is to promote and increase the trade or business of the parties thereto. *Southern Fire Brick, etc., Co. v. Garden City Sand Co. (Ill.)*, 7-50.

Contract capable of being performed in one state. — A contract will not be declared illegal under the Sherman Anti-trust Act if it is capable of being fully performed within the limits of one state and there is nothing to show that it contemplates interstate or international commerce. *Pocahontas*

Coke Co. v. Powhatan Coal, etc., Co. (W. Va.), 9-667.

Agreements not to sell to certain dealers. — Where two or more proprietors of patent medicines combine and agree that neither will sell any of his goods to any dealer who cuts the prices of the goods manufactured by any member of the combination, the combination is a direct interference with and a restraint upon the freedom of trade within the meaning of the Sherman Anti-trust Law. *Jayne v. Loder (U. S.)*, 9-294.

A so-called "tripartite agreement" between the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists, whereby the proprietors of patent medicines bind themselves to sell their medicines at uniform and fixed prices to those wholesalers and jobbers only who agree to maintain prices and not to sell to "aggressive cutters" and brokers ("aggressive cutter" being a retail druggist who sells patent medicines at prices lower than those fixed by a local retail druggists' association in his city), is a combination in restraint of trade within the meaning of the Sherman anti-trust law, as its purpose is to put the "aggressive cutter" out of business and to compel the consumer to pay prices which he would not otherwise be required to pay. *Jayne v. Loder (U. S.)*, 9-294.

Agreements between owners of coal mines. — Contracts entered into by a majority of the owners of coal mines and lands within a certain territory whereby their properties are sold to a single company and they agree not to engage in the coal business in such territory for a certain period are not void as contrary to the public policy of Pennsylvania; but so far as such contracts restrict trade in other states than Pennsylvania, they are in restraint of interstate commerce, and to such an extent are void under the Sherman Anti-trust Act. *Monongahela River Consol. Coal, etc., Co. v. Jutte (Pa.)*, 2-951.

Acts performed in foreign country. — Acts performed by citizens of the United States in a foreign country are not within the scope of the Act of Congress to protect trade against monopolies, commonly known as the Sherman Act. *American Banana Co. v. United Fruit Co. (U. S.)*, 16-1047.

b. Actions.

Complaint failing to state cause of action. — A complaint in an action to recover three-fold damages under the Act of Congress to protect trade against monopolies, commonly known as the Sherman Act, which alleges, in substance, that the plaintiff is an Alabama corporation engaged in the banana trade, and the defendant a New Jersey corporation engaged in the same trade; that prior to plaintiff's organization, the defendant, by various means which are set forth in detail, monopolized and restrained the trade and maintained unreasonable prices; that the plaintiff is the owner of a planta-

tion and a partly completed railway located in territory formerly belonging to, and still claimed by, Panama, but which is being administered by the national government of Costa Rica; that Costa Rican soldiers and officers, instigated by the defendant, have seized and held a part of the plantation and stopped the construction of the railway; that one A by *ex parte* and void proceedings, has obtained a judgment from a Costa Rican court declaring the plantation to be his, and agents of the defendant have bought the land from him; that the plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers, and also has tried to persuade the United States to interfere, but has failed; and that the government of Costa Rica remains in possession of the property, falls to state a cause of action under the statute, and is properly dismissed upon motion. *American Banana Co. v. United Fruit Co.* (U. S.), 16-1047.

Evidence. — In an action by a retail druggist who is what is known as an "aggressive cutter," to recover damages under the Sherman anti-trust law for the action of the defendants in combining and conspiring to drive him out of business, where it appears that the defendants are parties to what is known as a "tripartite agreement" between the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists, which agreement has for its purpose the discontinuance of the sale of patent medicines to "aggressive cutters," and it further appears that some but not all of the defendants have agreed to and acted upon a resolution, known as "Resolution C," passed by the National Association of Retail Druggists and providing that "the secretary be instructed to request all manufacturers of chemicals, pharmaceuticals, plasters, dressing, and like products, handled by the drug trade, to desist from selling to aggressive cutters, or suppliers of cutters, when solicited to do so by the respective local associations," it is improper to admit evidence of the resolution or of anything done under it, as the wrong committed by its adoption and enforcement is separate and distinct from that resulting from the making and carrying out of the tripartite agreement, and where a joint tort is charged, it not only must be proved as laid, but the defendants must all be liable for everything that has been done to the injury of the plaintiff. *Jayne v. Loder* (U. S.), 9-294.

5. GRANTS OF EXCLUSIVE PRIVILEGES.

Invalidity. — Under a constitutional provision that no law shall be passed granting to any citizen or class of citizens privileges or immunities which shall not equally belong to all citizens, the state may not grant an exclusive right to carry on a lawful business. *White v. Holman* (Ore.), 1-843.

Keeping a sailors' boarding house is a legitimate business, and while the legislature may require those intending to engage there-

in to procure a license, it may not constitutionally authorize the creation of a monopoly by vesting in a board of commissioners the arbitrary power to reject any application for a license. *White v. Holman* (Ore.); 1-843.

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1. NATURE OF MORTGAGE.

Immovable. — A mortgage on land is an immovable. *In re Hoyles* (Eng.), 20-713.

2. EQUITABLE MORTGAGES.

Instrument in form of chattel mortgage. — An instrument which, though in the form of a chattel mortgage, was evidently intended by the parties as security on real property, will be construed to be an equitable mortgage, and will be enforced as such as between the parties thereto and as to those having notice thereof. *Standorf v. Shockley* (N. D.), 14-1099.

It is not necessary to reform such instrument in order to enforce the same in a suit in equity. *Standorf v. Shockley* (N. D.), 14-1099.

Instrument inartificially drawn. — In order that an instrument inartificially drawn may be held to operate as an equitable mortgage, the essential feature of a debt due or to become due must exist, or it must appear that it was the intention of the parties that the instrument should operate as security for some contingent liability. *Lewman & Co. v. Ogden Bros.* (Ala.), 5-265.

Oral agreement to execute mortgage.

— Where a lender advances money for the purpose of buying a specific tract of land upon the oral promise of the borrower to secure its repayment by a mortgage upon the property when title thereto is obtained, and after the conveyance has been procured by the use of the money, the borrower refuses to execute the mortgage, equity will treat the transaction as creating an equitable mortgage upon the land in favor of the

lender. *Foster Lumber Co. v. Harlan County Bank* (Kan.), 6-44.

Loan of money for erection of building. — One who lends money to another for the purpose of erecting a building on a lot, upon the faith of a verbal agreement based upon the prior assignment of a lease combined with an option to purchase, has an equity against such debtor for the amount of money so advanced or loaned superior to that of after-acquired judgments, or deficiency decrees in a mortgage foreclosure against him, or to the equity, if any, of a volunteer purchaser at an illegal execution sale of the debtor's interest in the property, even though the judgments against such debtor on which the executions issued may have been recovered prior to the lending of the money to him by such creditor. *Thalheimer v. Tischler* (Fla.), 15-863.

Consent of borrower's wife. — Where an equitable mortgage on land is created in favor of the lender of money to pay the purchase price of the land, it is a purchase-money mortgage, and therefore is valid without the consent of the borrower's wife, notwithstanding the fact that the property is occupied as a homestead. *Foster Lumber Co. v. Harlan County Bank* (Kan.), 6-44.

Lien as against subsequent mortgagee with notice. — The lien of an equitable mortgage created by the owner's refusal to fulfil an oral promise to give a mortgage to secure the repayment of money borrowed by him for the purpose of buying land is superior to the lien of a mortgage executed to a third person having actual notice of the rights of the equitable mortgage. *Foster Lumber Co. v. Harlan County Bank* (Kan.), 6-44.

3. MORTGAGE BY CONVEYANCE ABSOLUTE IN FORM.

Parol evidence admissible. — An absolute deed may be shown by parol evidence to have been intended as a mortgage. *Welborn v. Dixon* (S. Car.), 3-407.

Burden of proof. — The burden of proving that a conveyance, absolute in form, is in fact a mortgage, is on the party asserting it. *Schmidt v. Barclay* (Mich.), 20-1194.

Preponderance of evidence. — A preponderance of the evidence that a deed, absolute in form, is in fact a mortgage, is sufficient to prove that it is a mortgage. *Schmidt v. Barclay*, (Mich.), 20-1194.

Price as evidence. — On the question whether a deed, absolute in form, is in fact a mortgage, the question whether the price is adequate is entitled to great weight. *Schmidt v. Barclay* (Mich.), 20-1194.

Sufficiency of evidence. — Evidence held to show that a deed absolute in form was in fact a mortgage. *Schmidt v. Barclay* (Mich.), 20-1194.

Effect of payment of debt. — Where an absolute deed is given to secure the payment of a loan, the grantor is entitled to a reconveyance upon payment of the loan. *Welborn v. Dixon* (S. Car.), 3-407.

4. DESCRIPTION OF MORTGAGED PROPERTY.

Sufficiency. — A mortgage which describes the property mortgaged as "100 acres in the southeast corner" of a given lot of land, which contains 400 acres and is in the form of a square, is sufficient as a description. The corner of the lot is to be taken as a base point from which two sides of the tract of land conveyed shall extend an equal distance, so as to enclose by parallel lines the quantity conveyed. *Payton v. McPhaul* (Ga.), 11-163.

5. THE MORTGAGE DEBT.

Lien for future debts. — An owner of property may by a deed of trust in the nature of a mortgage subject it to a lien for the payment of future debts. *Diggs v. Fidelity, etc., Co.* (Mass.), 20-1274.

Mortgage for antecedent debt. — A mortgage given merely to secure an antecedent debt is not given for value within the meaning of the National Bankruptcy Act, or for a valuable consideration within the meaning of the New Jersey Corporation Act. *Empire State Trust Co. v. Trustees, etc.* (N. J.), 3-393.

Continuation of lien after payment of debt. — Parties to a mortgage, as between themselves, notwithstanding payment in full has been made by the debtor, may continue the lien of the mortgage for the security of another debt, provided the rights of other mortgage and judgment creditors have not intervened. Consequently, where a person gives successive equitable mortgages, none of which are recorded, an agreement between the mortgagor and the first mortgagee, upon payment in full of the amount secured, that the mortgage shall stand as security for a further loan, is good as against a subsequent mortgage taken with notice of the agreement. *Girard Trust Co. v. Baird* (Pa.), 4-314.

6. INTEREST.

When not in arrear. — Interest is not in arrear within the meaning of a proviso in a mortgage deed that the interest twenty-one days in arrear shall be treated as an accession to the capital, if, after making proper deductions for outgoings, a mortgagee in possession has in his hands rents sufficient and available for the payment of the interest when it becomes due, and it does not matter that he has not actually appropriated the rents to the payment of such interest. *Wrigley v. Gill* (Eng.), 3-1128.

7. BOND OR NOTE ACCOMPANYING MORTGAGE.

Construction of note and mortgage. — Where a note evidencing a debt and a mortgage to secure its payment are executed at the same time in one transaction, and the mortgage refers to the note, they should be considered together in determining their meaning and effect. *Graham v. Pitts* (Fla.), 13-149.

Right of subsequent purchaser from mortgagor. — Where a mortgage to a trus-

tee provides that bonds secured thereby shall be certified and issued by the trustee to re-tire prior lien bonds whenever the mortgagor shall acquire any of such prior lien bonds and tender them to the trustee, the right to acquire the prior lien bonds and have them exchanged for others under the mortgage can be exercised by any subsequent owner of the mortgaged property, the right being in equity an incident to the title of the property so long as it remains subject to the mortgage. *Diggs v. Fidelity, etc., Co. (Md.)*, 20-1274.

8. CONVEYANCES OF MORTGAGED PREMISES.

a. Continuing liability of mortgagor.

Effect of release by mortgagee. —

Where, after a mortgagor has conveyed the mortgaged premises to a third person, the mortgagee releases a portion of the premises without the knowledge or consent of the mortgagor, the release discharges the mortgagor from personal liability on the mortgage debt; and this is so though the mortgagor's conveyance contains a covenant against incumbrances, especially if the mortgagee has no actual knowledge of such covenant. *Meigs v. Tunnicliffe (Pa.)*, 6-549.

Effect of extension of time of payment. — Where mortgaged premises are conveyed by the mortgagor subject to the mortgage, and the grantee, with the knowledge and consent of the mortgagee, assumes the payment of the mortgage debt, the grantee becomes the principal debtor and the mortgagor becomes a surety, and therefore a legal agreement between the mortgagee and the grantee extending the time for the payment of the debt, without the consent of the original mortgagor, releases such mortgagor from his liability upon the note and mortgage. *Iowa Loan, etc., Co. v. Schnose (S. Dak.)*, 9-255.

Effect of agreement entered into under mistake of fact. — Under the South Dakota statute specifying the essential elements of a contract, providing that one of these elements is lacking in a contract which is entered into through a mistake of fact or of law, and defining a mistake of fact as "a mistake not caused by the neglect of a legal duty on the part of the person making the mistake," an agreement between a mortgagee and the grantee of the mortgagor for an extension of the time for the payment of the mortgage debt is entered into through a mistake of fact, and therefore is not binding on the parties, where it is entered into under the mistaken belief that the grantee has a valid legal title to the property, subject to the mortgage, and that the mortgage assumed is a valid lien on the property. *Iowa Loan, etc., Co. v. Schnose (S. Dak.)*, 9-255.

b. Liability of purchaser.

Purchaser buying clear of mortgage.

— Where a purchaser of mortgaged land is given, at the time of the purchase, the right to elect to buy the premises subject to the

mortgage, in that case assuming the debt, or to buy clear of the mortgage by paying the entire purchase price, his subsequent election to do the latter precludes him from becoming liable for the debt as between himself and his grantor. *Marling v. Nommensen (Wis.)*, 7-364.

Assumption of debt by purchaser. —

A provision in a deed whereby the grantee assumes and agrees to pay an existing mortgage creates no enforceable obligation, unless the grantor in the deed is personally liable to pay the mortgage debt, or owes the owner thereof some duty or obligation respecting the subject-matter of the promise. *Clement v. Willett (Minn.)*, 15-1053.

Where a deed conveying land situated in Iowa, which is executed and delivered in Minnesota between parties residing therein, contains a provision whereby the grantee assumes and agrees to pay an existing mortgage on the land, the assumption agreement is a personal contract and is governed by the laws of Minnesota. *Clement v. Willett (Minn.)*, 15-1053.

9. RESPECTIVE RIGHTS OF PARTIES DURING LIFE OF MORTGAGE.

Power of substitution of new trustee. —

The power of substitution of a new trustee granted in a trust deed to the beneficiary therein is a power coupled with an interest and is not revocable by the death of the grantor. *Frank v. Colonial, etc., Mortgage Co. (Miss.)*, 4-54.

Payment of taxes by mortgagee. — A mortgagee who, in order to protect his liens, pays taxes on the mortgaged property, cannot, in a direct suit against the owner of the property, recover the amount paid, but can enforce his claim for such amount only as part of his mortgage lien. *Stone v. Tilley (Tex.)*, 15-524.

Fire insurance. — When a mortgagee who has received for his protection an assignment from the mortgagor of a policy of fire insurance on the premises, afterwards, for reasons satisfactory to himself, assumes the duty of obtaining the insurance and collects the premiums from the mortgagor, it becomes the duty of the mortgagee to see that the insurance is validly placed, and for a failure to perform the duty and a resulting loss the mortgagor may maintain assumpsit and a foreign attachment. *Boyce v. Union Dime Permanent Loan Assoc. (Pa.)*, 11-934.

10. DISCHARGE OF MORTGAGE BY PAYMENT OR TENDER.

a. Payment.

To bank as agent for mortgagee. —

When the holder of a bond secured by mortgage transmits the papers to a bank "with directions and special authority to collect the amount due and to remit the proceeds" to him, payment to the bank satisfies the debt, regardless of what subsequently becomes of the money or of the papers. *Griffin v. Erskine (Ia.)*, 9-1193.

Where the holder of a bond secured by mortgage forwards the papers to a bank for collection, he is chargeable with knowledge of a general custom on the part of banks to receive drafts in payment; and if the bank accepts in payment a draft which is subsequently paid, the bond and mortgage are thereby satisfied, irrespective of the disposition which the bank makes of the draft so received. *Griffin v. Erskine* (Ia.), 9-1193.

Who may make. — In an action by the purchaser of land subject to a mortgage to compel cancellation of the bond and mortgage on the ground that he has satisfied the mortgage by payment of the debt to a bank appointed by the mortgagee as his collecting agent, where it appears that prior to the payment of the bond the plaintiff paid the interest to the bank, and that such payment was fully ratified by the mortgagee, the mortgagee cannot claim on appeal that the plaintiff has failed to show such an interest in the land as entitled him to satisfy the bond, especially if this contention was not made in the trial court. *Griffin v. Erskine* (Ia.), 9-1193.

Payment by mortgagor after sale of equity of redemption. — Payment of a mortgage by the mortgagor, after the execution sale of his equity of redemption subject to the mortgage, does not, unless the mortgagor so intends, extinguish the mortgage as between him and the purchaser at the execution sale, but the mortgagor is entitled to be subrogated to the rights of the mortgagee under the mortgage. *Parsons v. Urie* (Md.), 10-278.

Application of insurance money. — A mortgagee, who receives money on a fire insurance policy procured for his benefit by the mortgagor, must hold the money until some part of the mortgage debt is due, and must thereafter apply the money to an extinguishment of the debt as fast as it falls due, but no faster. *Thorpe v. Croto* (Vt.), 9-58.

b. Tender.

Effect of tender. — The lien on a mortgage is not discharged by the mere tender of the mortgage debt after maturity, the only effect of the tender being to arrest the accrual of interest and to free the debtor from future costs, and if the mortgagor desires by his tender to discharge the lien he must, when it is not accepted, bring his suit for redemption and pay the money into court. *Dickerson v. Simmons* (N. Car.), 8-361.

Tender before maturity. — In an action to foreclose a mortgage it is no defense that the mortgagor tendered payment of a part of the mortgage debt before maturity, and that the tender was refused. Such a tender is not a legal tender within the meaning of section 2375 of the Civil Code of South Carolina which requires the satisfaction of mortgages on payment or legal tender of the debt. *Pyross v. Fraser* (S. Car.), 17-150.

Duty of mortgagee to accept tender. — Where, after the maturity of a mortgage debt, the principal and accrued interest are

tendered by the mortgagors, it is the duty of the mortgagee to accept the money, and he has no right to impose the condition that the mortgage shall be released in order that the lien may be extinguished for the benefit of the purchaser of the equity of one of the mortgagors, whether or not he has the right to refuse to assign the mortgage to the mortgagors. *Parsons v. Urie* (Md.), 10-278.

Keeping tender good. — A mortgagor who has tendered payment of a mortgage debt may keep his tender good without paying the money into court if he keeps himself ready, able, and willing at all times to pay the debt, except where there is a statute requiring the payment into court, or where he has a suit pending to redeem the land and the suit has the effect of discharging the mortgage lien. *Dickerson v. Simmons* (N. Car.), 8-361.

Tender by stranger. — In order that a tender of a mortgaged debt at the time and in the manner prescribed in the condition of the mortgage shall have the effect of extinguishing the lien of the mortgage, it must be made by a person having the right to make it, and a tender by a stranger is not sufficient. *Graffin v. State*, use of Ruckle (Md.), 7-1061.

11. MERGER OF MORTGAGE IN FEE.

Purchase of mortgaged premises by mortgagee. — When a trust deed creditor buys the trust subject and takes a conveyance therefor from his debtor, his lien is not thereby so merged in his estate as to make his entire estate in the land subject to an intervening lien; equity will preserve the trust lien for his protection, or the protection of his grantee notwithstanding he may have executed a formal release of it. *Sullivan v. Saunders* (W. Va.), 19-480.

12. EQUITY OF REDEMPTION,

a. Who may redeem.

Tenant in common. — A tenant in common of the equity of redemption in mortgaged land, who has acquired his interest in the property since the execution of the mortgage, has the same right as his mortgagor had to redeem, to pay the mortgage, and to have the mortgage canceled. *Dickerson v. Simmons* (N. Car.), 8-361.

Subsequent incumbrancers. — Subsequent incumbrancers who are not made parties to the suit to foreclose against the original mortgagor can claim the right to redeem within a reasonable time. *Dickerson v. Duckworth* (Ark.), 4-846.

Married woman. — Where a married woman has not been made a party to proceedings to foreclose a mortgage on land in which she has an inchoate right of dower, she may maintain an action to redeem, even though her husband is alive. *Mackenna v. Fidelity Trust Co.* (N. Y.), 6-471.

b. Terms of redemption.

Payment of judgment in other action. — In an action by a married woman

to redeem from mortgage land sold under foreclosure proceedings to which she was not a party, it is erroneous to require as a condition of redemption that the plaintiff shall pay a deficiency judgment recovered against her by the defendants in proceedings brought by them to foreclose a mortgage on other land. *Mackenna v. Fidelity Trust Co.* (N. Y.), 6-471.

Where land has materially increased in value. — In an action by a married woman to redeem from a mortgage land sold under foreclosure proceedings to which she was not a party, where it appears that she has delayed seeking relief until the land has materially increased in value, it is not inequitable for the court to deny redemption upon condition that the foreclosure purchaser shall either release the plaintiff's right of dower from the mortgage or pay her the value of her inchoate right of dower as she may elect. *Mackenna v. Fidelity Trust Co.* (N. Y.), 6-471.

c. Clogging equity of redemption.

Mortgaged land in foreign country. — The equitable rule against clogging the equity of redemption of a mortgage applies to an English contract for an issue of debentures to secure a loan, and will be enforced against a contracting party in the jurisdiction although the floating security to be created by the debentures comprises foreign land where the clog doctrine is possibly not recognized. *British Sp. Africa Co. v. De Beers Consol. Mines* (Eng.), 20-461.

13. FORECLOSURE OF MORTGAGES.

a. Time of.

When proceedings are not premature. — Foreclosure proceedings are not prematurely brought where the principal note provides for the payment of a given amount at a stated future date, with interest thereon for which other notes were given payable semi-annually, and also provides that "if default be made in the payment of any interest note or any portion thereof for the space of ten days after the same becomes due and payable, then all said principal and interest shall, at the option of the legal holder thereof, become due and payable without further notice," and the mortgage provides for the payment of the debt evidenced by the principal with the interest accruing thereon, according to the true intent and meaning of said note," and the bill for foreclosure brought by the holder of the principal note alleges a default in the payment of interest and that the complainant "exercises the option given him in and by the terms of said note, and hereby declares all interest and principal due and owing to him, if any, by the terms of said notes, due and payable at once." *Graham v. Fitts* (Fla.), 13-149.

b. Bill to foreclose.

Necessary allegations. — Where a bill to foreclose a mortgage is brought by the

original payee and mortgagee against the original debtor and mortgagor, it is not necessary specifically to allege that the complainant is the owner of the note and mortgage. *Graham v. Fitts* (Fla.), 13-149.

In an action to foreclose a mortgage made in the form of a deed and an option agreement, the complaint should state the consideration for the indebtedness. *Chesney v. Chesney* (Utah), 14-835.

Defects cured by answer. — Although matters set forth in an answer filed after the overruling of a demurrer may be so stated as to cure substantive defects in the complaint, a defective complaint for the recovery of a debt and the foreclosure of a mortgage is not cured by an answer containing no admission of a present indebtedness. *Chesney v. Chesney* (Utah), 14-835.

c. Evidence.

Proof of mortgagor's title. — In an action brought to foreclose a mortgage, in order to establish a ground of recovery against a defendant who does not claim under its maker, the plaintiff is required to show that the mortgagor had title to the property, so that the mortgage created a lien. *Cooper v. Rhea* (Kan.), 20-42.

d. Parties.

Subsequent incumbrancers. — Subsequent incumbrancers are necessary parties to a suit to foreclose a first lien, and if they be not joined their rights in the property will not be cut off by the sale. *Dickinson v. Duckworth* (Ark.), 4-846.

Nonjoinder of parties having part interest. — In an action to foreclose a mortgage a defendant having only a part interest in the property cannot contend that there is a defect of parties because others also having an interest in the property are not made defendants, since the defendant is not required to redeem any interest in the property except his own. *Philip v. Stearns* (S. Dak.), 11-1108.

Intervention of parties. — Persons having unexpired contracts with a lighting and heating company for furnishing light and heat are mere contract creditors and have no such interest in a suit in equity for the foreclosure of a trust deed given by the company as entitles them to intervene, notwithstanding the receiver in the suit has notified them that the contracts will not be carried out. *Wightman v. Evanston Yarn Co.* (Ill.), 3-1089.

e. Defenses.

(1) In general.

Production of mortgage by defendant. — The introduction in evidence of the record of a mortgage and of the assignment thereof makes out in favor of the assignee who is suing on the instrument a *prima facie* right of recovery which is not overcome by the introduction of the original mortgage and bond by the defendant who retains pos-

session of them. *Glymer v. Groff* (Pa.), 14-256.

Failure of warranties and covenants in deed to defendant. — In an action to foreclose a purchase money mortgage the defendant will not be permitted to prove failure of the warranties and covenants in his deed by reason of a prior mortgage on the premises, where it appears that such prior mortgage has resulted in no damage to him. *Phillip v. Stearns* (S. Dak.), 11-1108.

That plaintiff and defendant were not lawfully married. — In an action on a mortgage alleged to have been made by the plaintiff's husband to his attorney, and by the mortgagee assigned to the plaintiff, evidence tending to prove that the plaintiff and the mortgagor were not lawfully married has no relevancy to the plaintiff's right to recover on the mortgage, and is properly excluded. *Clymer v. Groff* (Pa.), 14-256.

Counterclaim for payments of interest under mistake. — In an action to enforce the payment of a promissory note secured by a mortgage, the payment of which has been assumed by the mortgagor's grantee, where it appears that the mortgagee and the grantee have entered into an agreement for an extension of the time for the payment of the mortgage debt, and that this agreement is invalid because entered into under the mistaken belief that the grantee acquired legal title to the property, subject to the mortgage, and that the mortgage is valid, the grantee is entitled to recover, as a counterclaim, the interest paid by him under the agreement for extension. *Iowa Loan, etc., Co. v. Schnose* (S. Dak.), 9-255.

(2) Statute of limitations.

Suspension of running of statute. — An action to foreclose a mortgage on real property is an action *in personam* and not *in rem*, and therefore it comes within the provision of the statute of limitations suspending the running of the statute during the time the person against whom a cause of action has accrued is absent from the state. *Colonial, etc., Mortgage Co. v. Northwestern Thresher Co.* (N. Dak.), 8-1160.

The absence of a mortgagor from the state after he has parted with the title to the mortgaged property does not prevent the statute of limitations from running in favor of his grantee against an action to foreclose the mortgage. *Colonial, etc., Mtg. Co. v. Northwestern Thresher Co.* (N. Dak.), 8-1160.

Where action on debt secured is not barred. — An action to foreclose a mortgage on real property is a remedy distinct from the remedies by which the creditor may enforce the personal obligation for the debt secured by the mortgage, and therefore it may become barred by the statute of limitations even though an action on the debt is not barred. *Colonial, etc., Mtg. Co. v. Northwestern Thresher Co.* (N. Dak.), 8-1160.

The equitable doctrine that mortgaged land is the primary fund for the payment of the mortgage debt cannot be so extended as to

prevent a purchaser of the land subject to the mortgage from setting up the statute of limitations as a bar to an action to foreclose the mortgage, even though the mortgage debt is neither discharged nor barred as against the debtor, and though the land passed to the purchaser's grantor subject to the mortgage. *Colonial, etc., Mtg. Co. v. Northwestern Thresher Co.* (N. Dak.), 8-1160.

f. Attorney's fees.

Effect of stipulation for. — A provision in a mortgage that in the event of foreclosure the mortgagor shall be charged with a certain percentage of the mortgage debt as attorney's fees is not binding on the court, but it may, in its discretion, allow a less sum. *Matheson v. Rogers* (S. Car.), 19-1066.

g. Judgment.

Deficiency judgments. — There can be no deficiency judgment on foreclosure of a mortgage unless authorized by statute. *Bradley Engineering, etc., Co.* (Wash.), 18-1072.

Judgment on pleadings. — An admission in an answer filed after a demurrer to the bill is overruled that an amount less than that claimed in the complaint is due does not warrant the entry of a judgment for the amount claimed. *Chesney v. Chesney* (Utah), 14-835.

h. Appeal and error.

Property sold including homestead. — The appellate court will not declare a foreclosure sale of disconnected parcels of land to be void merely because the premises sold included the mortgagor's homestead, if the record does not show that the mortgagor requested or demanded that the property should be sold in separate parcels or in a manner other than it was. *Miller v. Trudgeon* (Okla.), 8-739.

i. Sale on foreclosure.

Sale en masse or in parcels. — The rule requiring the sale of disconnected parcels or pieces of land to be made separately on an execution or order of sale on a mortgage foreclosure is not an arbitrary one, but is enforced when necessary to protect the rights of the debtor and to insure the best prices that can be obtained for the property. *Miller v. Trudgeon* (Okla.), 8-739.

14. SALES FOR PAYMENT OF MORTGAGE DEBT.

a. Power of sale.

Effect of death of grantor. — The power of sale vested in a trustee in a trust deed is a power coupled with an interest and is not revocable by the death of the grantor. *Frank v. Colonial, etc., Mortgage Co.* (Miss.), 4-54.

Effect of usury. — The power of sale in a mortgage is not rendered void by reason of the fact that the debt sought to be secured is infected with usury. A sale under the power may be had for the purpose of collecting the

principal and lawful interest on the debt. *Payton v. McPhaul* (Ga.), 11-163.

Effect of invalid sale. — An invalid sale made by a substituted trustee under a trust deed before his substitution has been recorded, does not exhaust the power of such trustee or affect the validity of the contract in the trust deed. In such a case the trustee has full power to readvertise and sell again, as if the first sale had not occurred. *Polk v. Dale* (Miss.), 17-754.

b. Who may make.

Substituted trustee. — A sale by a substituted trustee under a trust deed, before his substitution as trustee has been recorded, is void. *Polk v. Dale* (Miss.), 17-754.

Attorney designated in other mortgage. — Where a first mortgage gives a power of sale to the mortgagee or his attorney, and a second mortgage of the same property to another person gives a power of sale to the mortgagee or his attorney, and the attorneys are designated in the respective mortgages and are different persons, the attorney designated in the second mortgage cannot sell under the first mortgage, though that mortgage has been assigned to the second mortgagee. *Stump v. Warfield* (Md.), 10-249.

c. Notice of sale.

By advertisement. — There being in Georgia no statute requiring notice to be given by the mortgagor to the mortgagee of the intention to exercise a power of sale in a mortgage, when the mortgage provides only for notice by advertisement in a given manner, no other notice than such advertisement is necessary to the validity of a sale under the power. *Garrett v. Crawford* (Ga.), 11-167.

d. Time and place of sale.

Regular day of public sales. — A sale under a power of sale in a mortgage should be made on a regular day of public sales, unless the instrument creating the power stipulates that the sale may be had at some other time. *Garrett v. Crawford* (Ga.), 11-167.

Conflict between statute and trust deed. — Where there is a conflict between the statutory place of sale and the place of sale designated in a trust deed, the land must be sold at the place designated by the statute. Such conflict, however, does not invalidate the trust deed as a whole, or affect any of its provisions other than that as to the place of sale. *Polk v. Dale* (Miss.), 17-754.

Effect of change of county seat. — Where the power of sale in a mortgage authorizes a sale "before the courthouse door in the town of Isabella, Ga.," and subsequently to the execution of the mortgage, the county site of the county is removed from the town of Isabella to the town of Sylvester, a sale before the courthouse door in Sylvester is a valid execution of the power. *Payton v. McPhaul* (Ga.), 11-163.

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e. Conveyance to purchaser.

Deed signed by mortgagee in his own name. — A deed by a mortgagee, signed in his own name, but purporting to be in the execution of the power of sale in the mortgage, is a good execution of the power, when the recitals of the deed are sufficient to indicate that it was the intention of the grantor to convey in behalf of the mortgagor, and not in his own behalf. *Payton v. McPhaul* (Ga.), 11-163.

Deed signed by attorney in fact in his own name. — A deed signed by an attorney in fact in his own name is a good execution of the power, if there appears upon the face of the deed sufficient recitals to indicate that it was the intention of the person signing the deed to execute the same in behalf of his principal and not in behalf of himself. *Garrett v. Crawford* (Ga.), 11-167.

f. Title of purchaser.

Holder of mortgage as purchaser. — A mortgagor cannot be heard in a court of equity to ask for cancellation of a sale under the mortgage on the ground that the property was purchased for the holder of the mortgage lien unless he first pays or offers to pay the obligation secured by the mortgage. *First National Bank v. Waddell* (Ark.), 4-818.

The general rule is that the mortgagee cannot be a purchaser at his own sale under the power in the mortgage, but a purchase by him is not absolutely void, but voidable only, at the instance of the mortgagor or the owner of the equity of redemption. A purchaser at an execution sale subsequently to the sale under the power, the execution being based on a judgment rendered after the execution and record of the mortgage, will not be allowed to impeach the purchase by the mortgagee at his own sale. *Payton v. McPhaul* (Ga.), 11-163.

Where power of sale has been extinguished. — While a power of sale in a mortgage is extinguished by the payment of the debt the mortgage was given to secure, if the mortgagor fails to have the satisfaction of the debt entered of record, and a sale is thereafter had under the power, one who purchases in good faith and for value at such sale, without notice of the fact of the satisfaction of the debt, will be protected in his title. The remedy of the mortgagor, under such circumstances, is by an action for damages against the mortgagee for the wrongful and unauthorized exercise of the power. *Garrett v. Crawford* (Ga.), 11-167.

Effect of statute. — A legislature has no power to pass a retroactive statute making a mortgage of a life estate cover the fee, and therefore where a sale under a mortgage, which is valid only as to the mortgagor's life estate, is made by the mortgagee's attorney, who is vested with the power of sale, the purchaser is not equitably entitled to have the sale treated as a sale under a prior mortgage covering the fee, which mortgage vested

the power of sale in a different attorney, and which was assigned by the senior mortgagee to the junior mortgagee before the sale, notwithstanding the fact that there is a statute validating sales under mortgages made by persons not named in the powers of sales. *Stump v. Warfield* (Md.), 10-249.

Correction of mistake. — Equity has jurisdiction to correct a mistake in the description of land sold under a foreclosure decree where the proof is clear and no laches is shown and the rights of innocent third persons have not intervened, even though the mistake runs through the entire proceedings. *Dillard v. Jones* (Ill.), 11-82.

15. ACTION AGAINST STRANGER FOR CAUSING LOSS OF LIEN.

What is not a defense. — It is no defense to an action by mortgagees against a stranger for causing the loss of their lien upon some of the mortgaged property that it still covers an amount sufficient to secure the payment of the mortgage debt. *Bank of Havelock v. Western Union Tel. Co.* (U. S.), 5-515.

MOTHER.

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1. REGULATION BY STATUTE OR ORDINANCE.

a. In general.

Prohibition of use within certain territory. — Regardless of whether the use of automobiles on the public highway is a nuisance, and even supposing that automobiles are of the utmost utility, there is in Canada some legislative authority which has power to prohibit the use of automobiles on the highways of Prince Edward Island. *In re Rogers* (Can.), 15-1167.

As the construction, repair, management,

and control of the highways of Prince Edward Island are matters of a "merely local or private nature," which are, under the British North America Act of 1867, assigned exclusively to the provincial legislature, the legislature of the province may prohibit the use of automobiles upon such highways. *In re Rogers* (Can.), 15-1167.

The fact that the preamble to a statute enacted by such legislature, prohibiting the use of automobiles upon such highways, declares that the prohibition is for the "public interest" and for the "safety of the traveling public," does not indicate that such statute trenches upon the criminal law, the power to legislate upon which is vested exclusively in the Dominion Parliament. *In re Rogers* (Can.), 15-1167.

Exclusion from certain highways. — In certain sections of Maine such as Mount Desert Island and the vicinity of Bar Harbor, public highways have been constructed along precipitous mountain sides, through circuitous defiles, over deep ravines, and on the very edges of ocean cliffs. The use on such ways of the powerful, swiftly moving, and dangerous automobile must necessarily endanger all who travel thereon, and especially those who ride in carriages drawn by horses. Presumably to safeguard the people against such dangerous conditions, the legislature decided that the ordinance in the case at bar might be made. It seems reasonable and expedient, but as to that the judgment of the legislature is conclusive. *State v. Mayo* (Me.), 20-512.

Applicability of ordinance regulating hacks. — An automobile used for hire is a vehicle within the meaning of an ordinance providing that "vehicles for hire, seeking employment, shall not stop or loiter upon any street," and therefore is a hack within the meaning of an ordinance providing that every licensed vehicle for conveyance of passengers shall be considered a hack. *Gassenheimer v. District of Columbia* (D. C.), 6-920.

b. Validity.

Justification under police power. — The Missouri statute regulating the operation of automobiles on the public highways of the state, fixing the amount of license, and prescribing penalties for violation of the same, is not a special law, because it deals only with automobiles and does not attempt to regulate all vehicles using the public highways, but is a valid police regulation. *State v. Swagerty* (Mo.), 11-725.

Where the town of Eden, under express legislative authority, passed an ordinance closing to the use of automobiles certain public streets in that town:—held that the legislative enactment which authorized the closing to the use of automobiles such streets, was not repugnant to any constitutional provision, and that the ordinance was constitutional. *State v. Mayo* (Me.), 20-512.

Right of city to regulate. — In the absence of state legislation covering the subject exclusively, expressly, or by implication,

an ordinance of the city of Philadelphia regulating the use of automobiles and similar conveyances within the city's limits is a valid exercise of the city's power to legislate in regard to the use of its streets for the protection and safety of its citizens. *Brazier v. Philadelphia* (Pa.), 7-548.

Conflict between statute and ordinance. — The Pennsylvania statute regulating the use of motor vehicles within the commonwealth is not so incompatible with an ordinance of the city of Philadelphia regulating the use of automobiles and similar conveyances within the city limits as to supersede and nullify the ordinance. *Brazier v. Philadelphia* (Pa.), 7-548.

Imposition speed limit. — The section of the Missouri statute regulating the operation of automobiles on the public highways of the state, which prohibits the running of automobiles at a greater rate of speed than nine miles an hour upon any public road or highway of the state, does not depend for its validity on the other sections of the act, and such section is not invalid because imposing on automobiles a speed limit which is unreasonable and which does not apply to any other vehicle. *State v. Swagerty* (Mo.), 11-725.

The Illinois statute regulating the speed of automobiles and other horseless conveyances upon the streets and highways is a police regulation and is not unconstitutional as class legislation. *Christy v. Elliott* (Ill.), 3-487.

A city ordinance limiting the speed at which automobiles may be run in certain portions of the city is not rendered invalid for uncertainty by the fact that it makes no provision for the erection of signs at the points where the areas of limited speed begin. *Eichman v. Buchheit* (Wis.), 8-435.

It cannot be said, as a matter of law, that a city ordinance limiting the speed of automobiles to six miles per hour on city streets between crossings, and to four miles per hour at crossings is unreasonable. *Eichman v. Buchheit* (Wis.), 8-435.

Reasonable regulations for the safety of the people while using the public streets are clearly within the police power of the state, and in the exercise of that power the state may regulate the speed and enact other reasonable rules and restrictions as to the use of automobiles upon the public streets. *State v. Mayo* (Me.), 20-512.

Requiring registration. — In the exercise of its power to render its streets safe for the traveling public, a city may pass a reasonable ordinance requiring that automobiles and other motor vehicles shall be registered and numbered. *People v. Schneider* (Mich.), 5-790.

Requiring display of number. — An ordinance requiring the owners of automobiles to register and number them and to pay license fees for the numbers furnished by the city is not unconstitutional either as compelling the automobile owner to testify against himself, or as depriving him of property rights without due process of law. Nor

does the requirement that the number shall be displayed constitute unreasonable search. *People v. Schneider* (Mich.), 5-790.

Imposing license fee. — An ordinance requiring the owners of automobiles to register and number them and to pay license fees for the numbers furnished by the city, is a valid exercise of the city's power to control and regulate the use of the streets, if the speed of automobiles cannot be regulated effectually otherwise, and the licenses are not imposed to raise revenue. *People v. Schneider* (Mich.), 5-790.

c. Construction.

Limiting speed at crossings. — In a city ordinance limiting the speed of automobiles on the "streets" of a city and at "crossings," the word "crossings" refers to street crossings. *Eichman v. Buchheit* (Wis.), 8-435.

Ordinance regulating standing for hire. — Where the owner of automobiles kept for hire permits them to stand in front of a hotel which he does not own, at a place which is not a public cab stand, he violates an ordinance providing that "vehicles for hire, seeking employment, shall not stop or loiter upon any street, except at the regular public stands," though he maintains an office in the hotel, and though he hires vehicles to the hotel guests as well as to the public generally. *Gassenheimer v. District of Columbia* (D. C.), 6-920.

Who may be punished for violation of ordinance. — Under an ordinance providing that vehicles for hire shall not stop or loiter upon any street, and forbidding the driver of any such vehicle to solicit passengers upon the streets, either the owner or the driver of an automobile kept for hire may be punished for its stoppage or loitering. *Gassenheimer v. District of Columbia* (D. C.), 6-920.

Motor cycles. — A motor cycle is a motor vehicle within the meaning of the Michigan statute which requires motor vehicles to display registration seals and numbers, and defines the term "motor vehicles" to mean all vehicles propelled by power other than muscular power, except traction engines and such motor vehicles as run only upon rails or tracks. *People v. Smith* (Mich.), 16-607.

2. RIGHTS AND DUTIES IN USE OF HIGHWAYS.

a. In general.

Character as dangerous machine. — An automobile is not *per se* a dangerous machine. *Steffen v. McNaughton* (Wis.), 19-1227.

Right to use highway. — The owner of an automobile has the right to use the highways of a state provided he exercises reasonable care and caution for the safety of others and does not violate the law of the state. *Christy v. Elliott* (Ill.), 3-487.

The employment of an automobile on the highway as a means of transportation is a lawful use of the road; and if it results in

an injury to one traveling by another mode the driver of the machine cannot be held liable for injury, unless it is made to appear that he used the machine at a time, or in a manner, or under circumstances inconsistent with a proper regard for the rights of others. *McIntyre v. Orner* (Ind.), 8-1087.

It cannot be said that as a matter of law it is negligence *per se* for a person to use an automobile as a means of conveyance on the highway. *Indiana Springs Co. v. Brown* (Ind.), 6-656.

Duty to exercise care and caution. — One who operates an automobile on the highway owes to other travelers the duty of controlling and driving it carefully so as to avoid causing needless injury, and in the performance of that duty is bound to take all precautions which reasonable care requires under all the circumstances. *Indiana Springs Co. v. Brown* (Ind.), 6-656.

While the owners of automobiles have, subject to statutory restrictions, equal rights with the owners of other vehicles to use the highways, this equality of right imposes a reciprocal duty of managing the machine with care and caution to avoid causing injury to others having equal rights. *McIntyre v. Orner* (Ind.), 8-1087.

Duty to regard rights of others. — The owners of automobiles have the same rights in highways as the drivers of horses and those traveling by other vehicles, but they must use that means of locomotion with due regard for the rights of others, and the speed of the machine, its size, appearance, manner of movement, noise, and the like may be taken into consideration in determining the degree of care required of the operator of the automobile. *House v. Cramer* (Iowa), 13-461.

Duty of pedestrian to look and listen. — A pedestrian when lawfully using the public ways is not required to be continuously looking or listening to ascertain whether automobiles are approaching, under the penalty of being presumed negligent if injured. *Hennessey v. Taylor* (Mass.), 4-396.

Equal rights of other vehicles. — The driver of a horse and the driver of an automobile have equal rights in the use of the highway, and each is bound to use ordinary care to avoid receiving or inflicting injury, the question as to what constitutes such care being dependent upon the circumstances of each particular case. *Indiana Springs Co. v. Brown* (Ind.), 6-656.

b. When horse shows fright.

In general. — It is incumbent upon a person driving an automobile along the highway to take notice that motor cars are, as yet, usually strange objects to horses and are likely to startle the animals when driven up in front of them at a rapid rate. *McIntyre v. Orner* (Ind.), 8-1087.

Liability for ordinary noises. — There can be no recovery for an injury resulting from the ordinary noises or from the appearance of an automobile which was not being

run at an excessive rate of speed. *Eichman v. Buchheit* (Wis.), 8-435.

Duty to notice horse.—It is no justification for a failure of the driver of an automobile to look ahead and observe the fright of the horse drawing an approaching carriage that it is necessary for him to keep his eyes and attention fixed on the track of the road to enable him to guide the machine by the carriage safely and to avoid chuck holes and other obstacles. *McIntyre v. Orner* (Ind.), 8-1087.

Duty to stop or slow down.—When it becomes evident to the driver of an automobile that his machine is frightening the horses hitched to an approaching carriage, and that his further progress will increase the peril of the persons in the carriage, it is his duty to stop or at least check up, irrespective of whether the occupants of the carriage are guilty of negligence. *McIntyre v. Orner* (Ind.), 8-1087.

Where a driver of an automobile on the highway sees, or by the exercise of reasonable caution could see, that the horses drawing an approaching carriage are unmistakably frightened and are forcibly crowding off of the road, ordinary care requires him to slow up, stop his machine, or do whatever is reasonably required to relieve the persons in the carriage from their perilous situation. *McIntyre v. Orner* (Ind.), 8-1087.

Under the Illinois statute requiring the driver of an automobile to stop a machine whenever it appears that a horse is about to become frightened, it is not necessary that the driver of the horse signal to have the automobile stop. *Christy v. Elliott* (Ill.), 3-487.

The requirement of section 2 of the Illinois statute regulating the speed of automobiles that an automobile shall be brought to a stop whenever it shall appear that any horse is about to become frightened makes it the duty of an automobile driver to stop a machine whenever it may appear to him, by the exercise of reasonable diligence upon his part, that a horse is about to become frightened. *Christy v. Elliott* (Ill.), 3-487.

It is the duty of the driver of an automobile on the highway to stop or slow down when he sees that is the only way in which he can avoid injury to another traveler whose horse has taken fright at his automobile. *Indiana Springs Co. v. Brown* (Ind.), 6-656.

Duty to stop engine.—The driver of an automobile propelled by an explosive engine is not guilty of negligence causing the runaway of a team of horses by reason of the fact that he stops his automobile near where the team is hitched, without stopping the engine, if the evidence shows that the team escaped almost immediately upon the stoppage of the automobile, and it does not appear that he saw or could have seen the team in time to have stopped the explosions of the engine in time to have avoided the accident. *House v. Cramer* (Iowa), 13-461.

The Michigan statute providing that the operator of any automobile or motor vehicle

on any public highway "when signaled by the driver of any vehicle propelled by horses shall stop" said automobile or motor vehicle until the other vehicle shall have passed, does not impose upon the driver or operator of an automobile on a public road or street the absolute duty, upon signal, to stop the motive power of this vehicle, in addition to stopping the vehicle itself. Whether the failure to stop the motive power of the vehicle is negligence must be determined by the circumstances of each case. *Mahoney v. Maxfield* (Minn.), 12-289.

3. LIABILITY FOR ACTS OF CHAUFFEUR.

Acts in course of employment.—

Where, in an action against the owner of an automobile to recover for injuries inflicted upon the plaintiff by being struck by the machine, it appears that the defendant's chauffeur received permission to use his master's car for a few minutes to take some things to the house of a fellow servant and at the request of the daughters of the latter took them for a ride, and in doing so struck and injured the plaintiff, a finding by the jury that the chauffeur was acting within the general scope of his employment at the time of the accident, and that the defendant has not proved that the accident did not happen through the chauffeur's negligence, is sufficiently supported by the evidence, in view of a statute regulating the speed and operation of motor vehicles, making the owner liable for any violation of the act, and casting on him the burden of relieving himself of liability for an accident occasioned by his machine. *Mattei v. Gillies* (Ont.), 12-970.

Acts not in course of employment.—

In an action against the owner of an automobile for injuries caused by the running of the machine, it is essential to a recovery that it shall be made to appear that the accident occurred while the person in charge of the automobile was using it in the course of his employment and on his master's business. Proof that the plaintiff was run down by the automobile in a frequented street of the city after nightfall, that the machine was at the time occupied by four persons, one being the driver whose identity was established, and that the machine was registered in the name of the defendant as the owner, does not make out a case sufficient to warrant a recovery. *Lotz v. Hanlon* (Pa.), 10-731.

4. CIVIL ACTIONS FOR INJURIES BY AUTOMOBILES.

Burden of proof.—Under section 18 of the Ontario Motor Vehicles Act, where any loss or damage has been incurred or sustained by a person by reason of a motor vehicle on a highway, the onus is imposed on the owner or driver of proving that the loss or damage did not arise through his negligence. *McIntyre v. Coote* (Can.), 16-395.

Charge of court as to burden of proof.—In the absence of a request for a more specific charge as to the burden of prov-

ing negligence on the part of the defendant and due care on the part of the plaintiff in an action for personal injuries caused by the reckless operation of an automobile in violation of the statute, it is sufficient for the court to charge the jury as follows: "A failure to comply with the statutory provision, from which injury results, gives a cause of action to the person injured, if his own negligence did not materially contribute to his injuries. . . . The elements in such cause of action are a finding by you: (1) that there has been proved a breach of some one of those statutory requirements on the part of the defendant . . . ; (2) that such breach of the requirements of the statute resulted proximately, directly, in the accident to the plaintiff; (3) that the plaintiff's own negligence did not essentially or materially contribute to the accident." *Wolfe v. Ives* (Conn.), 19-752.

Competency of witness as to speed. — An adult person of reasonable intelligence and ordinary experience in life, who just before an accident observed the passing automobile, the rapid speed of which is claimed to have caused the accident, is presumably capable, without proof of further qualification, to express an opinion as to how fast such automobile was going. *Wolfe v. Ives* (Conn.), 19-752.

Contributory negligence. — In an action to recover damages for personal injuries sustained by a plaintiff in consequence of the frightening of his horses by the defendant's automobile, an averment in the declaration that an earlier hour on the day of the accident the defendant's automobile had passed the plaintiff's carriage and greatly frightened his horse does not justify the court in presuming that it was contributory negligence for the plaintiff to fail to jump out of his carriage upon the second approach of the automobile. *McIntyre v. Orner* (Ind.), 8-1087.

Questions for the jury. — In an action against a city and the participants in an automobile race to recover damages for personal injuries sustained by the plaintiff while witnessing a race, where it appears that the race was held in a city street by virtue of express permission granted by the city without lawful authority, it is for the jury to determine whether the contest as conducted was so dangerous as to be in fact a nuisance within the meaning of the statute defining nuisances, whether the defendants, or any of them, were guilty of negligence in the management of the race, and whether the plaintiff was guilty of contributory negligence. *Johnson v. New York* (N. Y.), 9-824.

In an action to recover damages for injuries to person and property, alleged to have resulted from negligence, where the evidence shows that the defendant, the owner of a bright red automobile, was driving to a village, intending to stop at a hotel there and have dinner; that on arriving at the foot of a hill he found it impracticable to mount the same in his car, owing to the condition of the road, and so drew the car up at the side of the road, about two feet

from the traveled part, and locked it, as required by the Ontario Motor Vehicles Act, and took the key with him, and went to the hotel, remaining there about three hours; that while the car was in such position, the plaintiff drove down the hill, and when he was about twenty rods from the car his horse caught sight of it and showed signs of fright; that the plaintiff, notwithstanding his horse's actions, drove him on about a rod, when he again showed fright; that the plaintiff still urged him on, and when within a rod and a half of the car he showed an inclination to leave the road, and, on the plaintiff pulling him back, wheeled round and upset the carriage; and where there is also evidence that the car could have been driven to a yard of another hotel some six hundred feet away, the question of defendant's negligence is unreasonably obstructing the highway is properly submitted to the jury, and, therefore, a finding by the jury in the plaintiff's favor will not be disturbed. *McIntyre v. Coote* (Can.), 16-395.

5. CRIMINAL LIABILITY FOR INJURIES BY AUTOMOBILES.

Death caused by negligent operation as manslaughter. — One who wilfully drives an automobile in a public street at a rate of speed or in a manner expressly forbidden by statute, and thereby causes the death of another, or one who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another, is guilty of criminal homicide. *State v. Campbell* (Conn.), 18-237.

Instructions. — There is no prejudicial error in charging, in a prosecution for manslaughter by the negligent running of an automobile, that "on a public and traveled highway no traveler has a right to assume, at any time or under any conditions, that others are not also abroad, as justification for a line of conduct that would amount to recklessness, if he had knowledge that another was approaching," where it is clear that under the circumstances of the case the defendant could not have assumed that there would be no one on the highway at the time and place of the accident. *State v. Campbell* (Conn.), 18-237.

6. ACTIONS FOR INJURIES TO AUTOMOBILES.

Failure to register as defense. — The owner of an automobile may recover for injuries to it caused by defects in a highway, though he has not registered the automobile as required by the Connecticut statute (Pub. Acts 1907, c. 221) which prescribes a penalty as the only consequence of violating its provisions. *Hemming v. New Haven* (Conn.), 18-240.

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- Right to enforce contract for location of railroad machine shops, see **RAILROADS**, 4 d.
- Right to maintain wharf in navigable waters, see **WHARVES**.
- Right to plead statute of limitations, see **LIMITATION OF ACTIONS**, 6 a (1).
- School district as municipal corporation, see **SCHOOLS**, 1.
- Singleness of subject of statute granting municipal charter, see **STATUTES**, 3 b.
- Special limitation of actions against municipalities for personal injuries, see **LIMITATION OF ACTIONS**, 3.
- Specific performance of contracts of municipality, see **SPECIFIC PERFORMANCE**, 3 f (14).
- Statute of limitations as applicable to municipality, see **LIMITATION OF ACTIONS**, 6 a (1), 6 b.
- Summary convictions for violating ordinances, see **JURY**, 1 b (3).
- Taxation of municipal bonds, see **TAXATION**, 2 a.
- Title of municipality in streets, see **STREETS AND HIGHWAYS**, 5 a.
- Uniform operation of ordinances, see **CONSTITUTIONAL LAW**, 18.
- Validity of license tax ordinances, see **LICENSES**, 2 b.
- Validity of ordinances regulating places of public amusement, see **THEATRES AND PUBLIC RESORTS**.
- Venue of action against municipality, see **VENUE**, 1.
- Violation of ordinances as negligence, see **NEGLIGENCE**, 5.

1. NATURE, CREATION, AND DISSOLUTION.

Nature. — A municipality is a mere political division of the state. It is a public corporation, having for its object the administration of a portion of the powers of government delegated to it for that purpose. *Penick v. Foster* (Ga.), 12-346.

De facto corporations. — Sound principles of public policy require that the state

should be precluded from attacking the franchise of a village which has been permitted to exercise the functions of a village *de facto* for a period of twenty years and has been recognized as an existing village by legislative enactment. *State ex rel. Young v. Harris* (Minn.), 12-260.

Dissolution. — A municipal corporation is not dissolved by a nonuser of its charter, but only by legislative act. *Beale v. Pankey* (Va.), 12-1134.

2. CHARTER.

Consistency with political code of state. — The provisions of the political code of California providing a general form of government for cities and vesting the legislative power of cities in a common council is not a general law with which the provisions of a freeholders' charter like that of the city of Los Angeles must be consistent, it being sufficient if such charter is consistent with the constitution. *In re Pfahler* (Cal.), 11-911.

Framing by city. — Under the California constitution, article XI, section 8, authorizing every city containing more than three thousand five hundred inhabitants to frame "a charter for its own government," which, when ratified by the electors and approved by the legislature by concurrent resolution, "shall become the organic law" of the city, the city is authorized to make, subject to the approval of the legislature, such provision as it deems best for the exercise of the power confided to it, except that such provision must not be a violation of the constitution of the state. *In re Pfahler* (Cal.), 11-911.

Initiative and referendum. — Section 4 of article IV. of the Constitution of the United States, providing that "the United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion," is not violated by a provision in a municipal charter for a direct exercise of legislative power in local affairs by the people of the municipality instead of by their representatives elected or appointed for that purpose, such exercise of power by the people not being inconsistent with the republican form of government guaranteed by this provision of the constitution. *In re Pfahler* (Cal.), 11-911.

The charter provisions of the city of Los Angeles, California, authorizing the electors of the city to participate directly in the enactment of local laws, both by determining at the ballot box whether a measure proposed by the city council shall become a law, and by directly enacting such local legislation as they may deem expedient where the council declines to enact the same, is not in conflict with any provision of the constitution of the state. *In re Pfahler* (Cal.), 11-911.

Such charter provision is not invalid on the ground that under the provision of the constitution limiting the amount of indebtedness the city shall incur, except as authorized by two-thirds of the qualified voters,

the proper exercise of the police power of the city may be prevented by the absence of sufficient funds, the presumption being that the municipality will provide funds necessary for the administration of its government. *In re Pfahler* (Cal.), 11-911.

Such charter provision is not invalid as a delegation of legislative power to a "special commission" in violation of the provision of the constitution that "the legislature shall not delegate to any special commission," etc., any power to control or interfere with municipal functions. *In re Pfahler* (Cal.), 11-911.

Such charter provision is not invalid on the ground that the constitutional provision applicable to charters of this character, in using the words "legislative authority," indicates an intent that no legislative power shall be exercised except by some representative body such as a council. *In re Pfahler* (Cal.), 11-911.

The extent to which the people of a municipality shall be allowed directly to participate in the governmental function of legislating in respect to municipal affairs is purely a question of state policy in the determination of which the state is not restricted by any provision of the Federal Constitution. *In re Pfahler* (Cal.), 11-911.

Amendment by adoption of state constitution. — The constitution of Virginia, section 117, providing that all municipal charters are thereby amended to conform to the provisions and restrictions of the constitution is self-executing so that an act of the general assembly passed in conformity with the provisions of the constitution and providing that in every town there shall be elected every two years a mayor and six councilmen who shall constitute the council of the town, effectually amends a town charter enacted prior to the constitution and making different provisions as to the number and election of town councilmen; and a mayor and council elected in accordance with the latter statute have power to levy municipal taxes within the limits prescribed by the charter. *Beale v. Pankey* (Va.), 12-1134.

Partial amendment by statute. — A statute authorizing municipal corporations to issue bonds to mature after the expiration of the municipal charter operates as an amendment of the charter to the extent of continuing the period of corporate existence with respect to such bonds until their maturity and payment. *Black v. Fishburne* (S. C.), 19-1104.

3. TERRITORIAL LIMITS.

Annexation of territory. — A statute authorizing municipal corporations to enlarge their corporate areas by the annexation of territory is, to that extent, one for the organization of such corporations. *Topeka v. Dwyer* (Kan.), 3-239.

A general municipal ordinance limiting the speed of street railway cars becomes effective in territory subsequently brought within the municipal limits, and is admissible in evidence on the question of the negligence of the street railway company in colliding with a

vehicle at a place not within the municipal limits at the time the ordinance was adopted. *Deneen v. Houghton County St. R. Co.* (Mich.), 13-134.

Consolidation of city and town. — The annexation and consolidation of a town with a city under the provisions of the Indiana Act of 1903 is the creation of a corporation within the meaning of the Indiana constitution providing that a corporation shall not be created by special act, and as said Act of 1903 is special, it violates the constitution and is void. *Longview v. Crawfordsville* (Ind.), 3-496.

The Indiana statute providing for the extension of the corporation boundaries of cities by the annexation of territory, and for the consolidation of such cities and incorporated towns within the territory annexed, is not a mere regulation of the exercise of the power already possessed by cities, but confers upon cities of a certain class a power not hitherto possessed by them; and such classification of cities being arbitrary and without reason, the act is special and local legislation. *Longview v. Crawfordsville*, (Ind.), 3-496.

Collateral attack on annexation proceedings. — The constitutionality of a statute for the enlargement of the corporate area of cities, apparently regular in form and fairly indicative of the legislative will, cannot be attacked collaterally in a prosecution for the enforcement of a city ordinance within the territory annexed. *Topeka v. Dwyer* (Kan.), 3-239.

Completed proceedings for the enlargement of the corporate area of a city, authorized by statute, are not open to collateral attack in a prosecution for enforcement of an ordinance of a city within the annexed territory, so far as mere defects, informalities, and irregularities, questions of good faith and good judgment, the finding of necessary facts, the determination of disputes of fact, and like matters are concerned. *Topeka v. Dwyer* (Kan.), 3-239.

4. POWERS AND DUTIES.

a. In general.

Legislative regulation and control. — Municipal corporations are created by the legislature as proper and convenient agencies in the work of government. Their powers, duties, and liabilities, in so far as they relate to governmental matters, are subject to legislative regulation and control. *Schigley v. Waseca* (Minn.), 16-169.

Doubt as to existence of power. — Municipal corporations possess only such powers as are conferred upon them, either expressly or by necessary implications, and when a fair and reasonable doubt exists as to the existence of a power claimed it will be resolved against the municipality, and the power denied. *Richmond v. Richmond Natural Gas Co.* (Ind.), 11-746.

Municipal corporations possess and can exercise such powers only as are granted in express words, or as are necessarily or fairly

implied from or incident to those expressly granted, or as are indispensable to the declared objects and purposes of the municipality. *Pennsylvania R. Co.'s Case* (Pa.), 5-299.

b. Classes of powers.

In general. — Municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office, the other business or proprietary, in the exercise of which they are governed by the same rules as individuals or private corporations. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

Business or proprietary power. — A city exercises its business or proprietary power in purchasing waterworks or contracting for their construction or operation. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

Power to regulate or fix rates. — The power of a city to regulate or fix the rates which a water, gas, or railway company may collect of private consumers partakes of the nature of a governmental power and also of the nature of a business power. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

c. Territorial limitations.

In general. — A municipal corporation is, as a general rule, restricted to its corporate limits in the exercise of its corporate powers. *Donable v. Harrisonburg* (Va.), 7-519.

In the absence of authority, express or implied, conferred by statute, a municipal corporation cannot exercise its powers beyond its own limits. *Farwell v. Seattle* (Wash.), 10-130.

The duty of a municipal corporation to keep its streets in repair gives the corporation no implied power to operate a rock quarry outside its corporate limits. *Donable v. Harrisonburg* (Va.), 7-519.

Exercise of police power beyond municipal limits. — The legislature may delegate to a municipal corporation the right to exercise police power beyond and within a prescribed distance of the municipal limits. *Jordan v. Evansville* (Ind.), 2-90.

Contract to supply another city with water. — Under a statute and charter authorizing a city to maintain waterworks "to supply said city and its inhabitants with water," a city has no right to make a contract to supply water to another city. *Farwell v. Seattle* (Wash.), 10-130.

The Washington statute authorizing any incorporated city or town to operate waterworks "for the purpose of furnishing such city or town, and the inhabitants thereof, and any other persons," with a supply of water, does not authorize a city to contract to supply another city with water, as under the rule of *ejusdem generis* the words "any other persons" must be construed as applying only to transient persons within the corporate limits. *Farwell v. Seattle* (Wash.), 10-130.

d. Police power.

As to the invalidity of a contract abdicating the police power, see *infra* 7 d.

(1) Delegation to municipal corporations.

In general. — The general rule is that the legislative power delegated to a legislature cannot be delegated by that body to other persons or bodies; but this rule is subject to the implied exception that the legislature may delegate to municipal corporations certain police and other powers of a local nature which have always been exercised by municipal corporations. *Territory ex rel. Oahu v. Whitney* (Hawaii), 7-737.

By state constitution. — By the California constitution, article XI., section 11, providing that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," the people of the state have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes, and the manner in which such power is to be exercised is left to be provided for in the charter of the city, and is not controlled by any constitutional provision. Such constitutional grant of local legislative power to any "county, city, town," etc., is a grant to the municipal corporation itself, and not to some board or certain officers of the city. *In re Pfahler* (Cal.), 11-911.

(2) How exercised.

Boards or inspectors. — The city council may exercise its police power through the agency of boards or inspectors. *New Orleans v. Charouleau* (La.), 15-46.

Reasonableness of ordinance. — When a municipal corporation is expressly authorized by legislation to enact a certain ordinance in execution of the police power, such ordinance stands on the same basis as a statute, and its reasonableness or unreasonableness is not a matter for the courts except as such question would bear on the constitutionality of a statute of the same nature. *In re Anderson* (Neb.), 5-421.

(3) Particular instances of exercise of power.

Smoke ordinances. — An ordinance prohibiting the emission of dense smoke within the corporate limits of a city is a valid exercise of the police power. *St. Paul v. Haugbro* (Minn.), 2-580.

A municipal ordinance, enacted in pursuance of legislative authority, providing that "the emission of dense black or gray smoke from any smokestack or chimney" used in connection with any steam boiler, locomotive, furnace, or in any factory or building used for purposes of trade or for any purpose whatever except as a private residence, is, as applied to a populous city, a reasonable and valid regulation. *Bowers v. Indianapolis* (Ind.), 13-1198.

The fact that a municipal ordinance making "the emission of dense black or gray smoke from any smokestack or chimney" a public nuisance, exempts private residences from its operation, does not render the ordinance invalid as making an unreasonable classification. *Bowers v. Indianapolis* (Ind.), 13-1198.

Establishment of building lines. — The Virginia statute authorizing cities and towns to establish building lines so that buildings shall be at least a certain distance from the street line (Acts 1908, p. 623) is a valid exercise of the police power. *Eubank v. Richmond* (Va.), 19-186.

Building permits. — A municipal ordinance requiring a permit from the city to build a house in the municipal limits is a valid exercise of the police power under a charter provision giving the municipality power to control the construction and repair of buildings and to determine the distance they shall be built from any street or alley, and to adopt all needful ordinances; and such ordinance is not repugnant to the Federal Constitution. *Fellows v. Charleston* (W. Va.), 13-1185.

Discharge of firearms. — A municipal ordinance prohibiting the discharge of firearms in a city without a special permit therefor from the mayor and superintendent of police is valid, though it commits to the superintendent of police a discretion which may in some instances be arbitrarily exercised. *District of Columbia v. Lewis* (D. C.), 6-1014.

A municipal ordinance prohibiting the discharge of firearms in the city without a special permit therefor from the mayor and superintendent of police is not void as attempting to delegate legislative power to the superintendent of police. *District of Columbia v. Lewis* (D. C.), 6-1014.

Cotton gins. — The erection of cotton gins in an incorporated town not being a nuisance *per se*, an ordinance prohibiting their erection is not a valid exercise of the police power. *Swaim v. Morris* (Ark.), 20-930.

While the Arkansas statute (Kirb. Dig., § 5439) empowering municipal corporations to regulate the building of houses and to make regulations to guard against fire authorizes a town to regulate the building of cotton gin houses so as to prevent accidents by fire, it does not authorize the town to prohibit absolutely the erection of gin houses in the town. *Swaim v. Morris* (Ark.), 20-930.

Pool rooms and pool tables. — A prohibitive ordinance enacted pursuant to legislative authority is not invalid because it suppresses pool tables theretofore conducted in a quiet and orderly manner. *Burlingame v. Thompson* (Kan.), 11-64.

The legislature may authorize cities of the third class in Kansas to prohibit the maintenance and operation of pool tables for hire within the city limits. *Burlingame v. Thompson* (Kan.), 11-64.

The state has the power to regulate the business of conducting pool rooms and a turf

exchange, and a municipality to which such power of regulation is delegated may confine such business within the prescribed territorial limits. *Shreveport v. Schulsinger* (La.), 2-69.

Keeping of poultry. — A municipal corporation may regulate the keeping of poultry within its limits for the purpose of protecting the public health and preventing the creation of nuisances in other respects. *District of Columbia v. Keen* (D. C.), 14-1002.

A municipal regulation providing that "no persons shall keep any kind of live fowls or pigeons in any square or block which has seventy-five per cent. of its territory improved . . . without having obtained the consent of seventy-five per cent. of the residents within a radius of one hundred feet from the boundaries of the premises upon which fowls or pigeons are to be kept," is too indefinite to be enforceable. *District of Columbia v. Keen* (D. C.), 14-1002.

Keeping of hogs. — When the keeping of hogs within the corporate limits of a municipality becomes a nuisance, no matter where they may be kept therein, it is the duty of the municipality to abate the nuisance. *Comfort v. Kosciusko* (Miss.), 9-178.

A municipal ordinance which provides generally that hogs shall not be kept within the corporate limits of a municipality, without reference to whether they are a nuisance, is too broad and sweeping in its provisions, and cannot be upheld. *Comfort v. Kosciusko* (Miss.), 9-178.

Removal of garbage. — A city ordinance creating a crematory department, and making it unlawful for any person other than the employees of such department to convey garbage, etc., through the streets, is a lawful exercise of the police power in the interest of the public health, though it destroys the business of persons who had previously been engaged hauling garbage. *Smith v. Spokane* (Wash.), 19-1220.

e. Miscellaneous powers.

Erection of public hall. — The erection of a commodious and convenient hall in which the citizens of a municipality may exercise their right of assembling and of discussing public affairs is a public purpose and a legitimate object for the expenditure of the funds of the municipality, even though the hall may be used occasionally for private purposes and though the municipality already has a city hall with sufficient accommodations for its officers and boards. *Wheelock v. Lowell* (Mass.), 12-1109.

Subscription to stock in private corporation. — A statute permitting a municipality to subscribe to the stock of a water company does not authorize it to purchase stock in a water and light company. *Voss v. Waterloo Water Co.* (Ind.), 2-978.

Establishment of ice plant. — The act of the General Assembly (Acts 1907, p. 505) chartering the city of Camilla provided in the 28th paragraph of section 21 that the city should have the power "to acquire by purchase or otherwise, own, and equip ice

plants and cold-storage plants, in connection with waterworks system of said city or otherwise, and to do and perform all acts in connection with ownership and operation of and conduct of same, ordinarily incident to the operation and conduct of the same, and to issue bonds of said city, for the purpose of acquiring, owning, and equipping or operating said plants." An ordinance passed by the municipal authorities, calling an election for the purpose of having determined the question whether or not bonds of the municipality should be issued, provided: "Said bonds to be issued for the purpose of procuring the sum of \$12,000, which sum is to be used as follows: The same to be used in acquiring, equipping, enlarging, and repairing the electric and waterworks plant and system, and acquiring additional real estate upon which to locate and operate said plant; and in acquiring, establishing, equipping, and operating an ice plant in connection with the waterworks and electric lights and other public utilities of the city of Camilla." Held: The operation of an ice plant by the municipal authorities of the city of Camilla, in connection with the electric-light and waterworks plant, for the purpose of furnishing ice to the inhabitants of the city, is not in violation of paragraph 2, section 1, article 1, or of paragraph 3, section 1, article 1, or of paragraph 25, section 1, article 1, of the constitution of this state, or otherwise illegal; and the issuance of bonds by such municipality to raise money to establish and operate such ice plant was not illegal where the assent of two-third of the qualified voters of the city had been obtained at an election held for the purpose of determining whether or not such bonds should be issued. *Holton v. Camilla* (Ga.), 20-199.

Prohibition of skating rinks. — A statute authorizing municipalities "to regulate, suppress, and impose a privilege tax on all . . . skating rinks" does not give power to prohibit skating rinks, but only to suppress such as may be nuisances. *Johnson v. Philadelphia* (Miss.), 19-103.

Acceptance of dedication. — The city of Atlantic City, as trustee for the public, has a right to accept a deed for a grant to the public of a right of way over lands on the ocean front for the purpose of a boardwalk, the deed containing a negative covenant granting in effect also a right of light, air, and view over and across the oceanward land from the boardwalk, notwithstanding this latter right is limited by a reservation to the donors of the privilege of placing thereon a certain kind of structure, when the use to which such structure shall be confined is defined for the purpose of regulating the kind of structure and the number of structures which could, and would likely be, erected. *Atlantic City v. Associated Realities Corp.* (N. J.), 17-743.

The North Dakota statute (Rev. Codes 1905, § 3016) which authorizes and empowers cities and villages to receive, by gift or devise, real estate for purposes of parks or public grounds, is not exclusive in its operation, and lands or easements therein may be

acquired for such purposes by a common-law dedication thereof. *Cole v. Minnesota Loan, etc., Co. (N. Dak.)*, 17-304.

5. ORDINANCES AND RESOLUTIONS.

a. When resolution is sufficient.

Ordering street improvements. — Under the Missouri statutes, the power to order a street improvement for a city of the third class, to contract therefor and to levy an assessment therefor, is vested in the city, which can act in this regard by ordinance only, not by resolution. *Sedalia v. Donohue (Mo.)*, 4-89.

Requirement that council shall act by vote or otherwise. — While it is the general rule under the Iowa statutes that the method of the exercise of power conferred upon a municipality by the legislature should be by ordinance, yet where it is simply required that the council shall act by vote or otherwise in accordance with a method pointed out by statute or by general ordinance, a resolution is sufficient. *Martin v. Oskaloosa (Iowa)*, 3-651.

b. Nature and adoption.

Nature. — An ordinance adopted by a municipality under a power granted it by the state legislature is to be regarded as in effect a statute of the state, and hence an act of the state within the Fourteenth Amendment to the Federal Constitution. *North American Cold Storage Co. v. Chicago (U. S.)*, 15-276.

Effect of petition for referendum. — An ordinance having been passed and published, and thereafter a petition for referendum filed with the mayor of Kingfisher, and afterwards said relator being convicted in said municipal court for an alleged violation after the filing of said petition, he is not entitled to be discharged from said conviction. *Ex p. Wagner (Okla.)*, 18-197.

Veto power of mayor. — A statute providing in effect that an ordinance, order, or resolution of the common council shall not become a law if it is vetoed by the mayor, does not empower the mayor to veto a resolution of the common council appointing a person to fill a vacancy in the office of councilman, such appointment being an executive act. *State ex rel. Walker v. Wagner (Ind.)*, 15-1063.

Publication and taking effect. — Where the revised ordinances of a city of the first class are published in a book by authority of the city, an ordinance embraced in such book in which it is provided that it shall take effect upon such publication is sufficiently published, and will take effect accordingly, if more than fifty copies of such books are issued. *Topeka v. Crawford (Kan.)*, 16-403.

c. Evidence.

Original record of ordinance. — The contents of an ordinance as well as its passage by the council may be proved by the

introduction in evidence of the original record of such ordinance properly identified as such. *Grafton v. St. Paul, etc., R. Co. (N. Dak.)*, 15-10.

d. Actions to test validity.

Appeals. — Under the Kentucky statutes of 1903 the validity of an ordinance of a city may be tested by either party by appeal from the police court to the circuit court, and by appeal from that court to the court of appeals. *Commonwealth v. Price (Ky.)*, 13-489.

e. Applicability to state.

General prohibitions. — General prohibitions in a city ordinance, made pursuant to general charter authority, apply to all private persons but are not rules of conduct for the state. *Milwaukee v. McGregor (Wis.)*, 17-1002.

Building permits. — In case of the construction of a building by a state board for state purposes under state authority, the matter is wholly of state concern, and the provisions of a city charter, and ordinances duly adopted pursuant thereto regulating the construction of buildings in the city and requiring a building permit to be obtained, have no application. *Milwaukee v. McGregor (Wis.)*, 17-1002.

f. Validity.

(1) In general.

Ordinance must prescribe a general rule. — A city ordinance providing that no person shall set up or operate a steam engine, a planing mill or planing machine, foundry, blacksmith shop, cotton gin, bakery, an establishment for boiling soap, or any similar establishment within the city, without first obtaining the consent of the council is invalid and unconstitutional, in that it does not prescribe a general, uniform rule, to which all citizens similarly situated must conform, but reserves to the city council the right to grant or withhold at its pleasure the privilege of conducting the named business. *Montgomery v. West (Ala.)*, 13-651.

Title of ordinance. — The title of a milk-inspection ordinance held not to be objectionable as not clearly expressing the subject-matter of the ordinance. *St. Louis v. Liesing (Mo.)*, 4-112.

Containing more than one subject. — A milk-inspection ordinance held not unconstitutional as containing more than one subject. *St. Louis v. Leissing (Mo.)*, 4-112.

Validity in part. — An ordinance may be valid in part and void in part, and the valid part may be carried into effect if what remains after the invalid part is eliminated contains the essential elements of a complete ordinance. *State v. Robb (Me.)*, 4-275.

An ordinance imposing a fine or imprisonment may stand, even if the part relating to the imprisonment is void as not being authorized by the statute under which the ordinance was passed. *Territory ex rel. Oahu v. Whitney (Hawaii)*, 7-737.

Where the void portion of a city ordinance requiring the stationing of a flagman at a railroad crossing is inseparable from the valid portion, the entire ordinance will be void. *Southern Indiana R. Co. v. Bedford* (Ind.), 6-509.

What is not a delegation of legislative power. — A city ordinance does not delegate the functions of the city council to the committee on streets in providing that such committee shall establish a building line not less than five feet nor more than thirty feet from the street line "whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line." *Eubank v. Richmond* (Va.), 19-186.

Necessity and advisability. — Under the charter of the city of New York the board of aldermen are the judges as to what ordinances they will pass to carry out and preserve the interests of the municipality, and unless an ordinance passed by them is wholly arbitrary and unreasonable it should be upheld. The necessity and advisability of an ordinance are for the legislative power to determine, and the presumption is in favor of its validity. *Fifth Ave. Coach Co. v. New York* (N. Y.), 16-695.

Reasonableness. — Where a municipal ordinance was not made under a general law authorizing municipalities to make reasonable regulations for the safety and welfare of the people, but was made under a special legislative enactment authorizing such ordinance: Held, that the legislature by its enactment had determined the question of the reasonableness of the proposed ordinance, and its decision was conclusive. *State v. Mayo* (Me.), 20-512.

Where a municipal corporation has been given, in specific and defined language, the power to enact a particular ordinance in a prescribed manner, courts may not adjudge the ordinance to be invalid merely because it is unreasonable; but where the power has been given in general terms, or where the method of its exercise has not been prescribed, courts may declare the ordinance to be invalid if it is unreasonable, even though it does not contravene any specific constitutional provision. *Munson v. Colorado Springs* (Colo.), 9-970.

A city ordinance which prohibits the establishment or maintenance of any building, place, or lot for the buying, selling, or storing of junk within a certain limited district of the city, but which exempts from its operation all junk shops which are being conducted or maintained in the prohibited territory at the time of its enactment, is both unreasonable and unlawfully discriminating and therefore invalid. Inasmuch as such ordinance has no tendency to facilitate police supervision by confining the business to a limited territory in the city, it cannot be upheld as a valid exercise of the police power. *Weadock v. Judge of Recorder's Court* (Mich.), 16-720.

Who may question validity. — A

person whose business of hauling garbage has been destroyed by an ordinance regulating the removal of garbage cannot question the constitutionality of the ordinance on the ground that it delegates to a city board the power to fix the price for the removal of garbage. *Smith v. Spokane* (Wash.), 19-1220.

Ordinance relating to different subjects. — A provision of a municipal ordinance is not invalid because the ordinance relates to different subjects of legislation. *Bowers v. Indianapolis* (Ind.), 13-1198.

Whatever is germane, incidental, or necessary to the main or general subject of an ordinance may properly be included therein, and does not render the ordinance obnoxious to the statutory provision that an ordinance shall contain but one subject, which shall be expressed in its title. *Carlson v. Helena* (Mont.), 17-1233.

Prohibition of acts prohibited by statute. — To maintain a place where persons are allowed to bet on races is an act prohibited by the Georgia penal code, and such act cannot, in the absence of express legislative authority, properly be made penal by a municipal ordinance. *Thrower v. Atlanta* (Ga.), 4-1.

Motives in enactment of ordinance. — The motives of city officials in enacting an ordinance prohibiting pool tables and in prosecuting an offender against it cannot be investigated by the supreme court in an appeal from a conviction under the ordinance. *Burlingame v. Thompson* (Kan.), 11-64.

(2) Miscellaneous cases.

Ordinance fixing telephone rates. — The prohibitions of the Federal Constitution against the impairment of the obligation of contracts and the taking of property without due process of law are directed at state aggression only, and no federal question of which the United States courts have jurisdiction is presented under these prohibitions by a bill complaining of a municipal ordinance as fixing telephone rates so low as to be confiscatory and in violation of contract where the bill further avers that no power to pass the ordinance has been delegated to the municipality by the state. *Louisville v. Cumberland Tel., etc., Co.* (U. S.), 12-500.

If such a case, the jurisdiction cannot be sustained on the theory that the averment that the municipality had no authority from the state to pass the ordinance in question is a mistaken averment of law and that the municipality by claiming power to pass the ordinance acted under color of authority so as to save the jurisdiction. When jurisdiction depends upon the case being one arising under the Constitution or laws of the United States, the facts necessary to make such a case must be plainly shown on the record and it is not enough that the question may or may not arise. *Louisville v. Cumberland Tel., etc., Co.* (U. S.), 12-500.

Regulating railroad crossings. — In the absence of authority expressly or impliedly conferred upon it by the legislature,

a borough has no power to pass an ordinance requiring a railroad company to erect, maintain, and operate safety gates at a point where the company's tracks cross a certain street in the borough. Such power is not conferred by a statute giving general authority to pass such ordinances as may be deemed necessary "for the good order and government of the borough." *Pennsylvania R. Co.'s Case (Pa.)*, 5-299.

An ordinance requiring a railroad company to station a flagman at a railroad crossing held unreasonable and void to the extent that it requires the stationing of a flagman at times when the track is not being used. *Southern Indiana R. Co. v. Bedford (Ind.)*, 6-509.

Where a statute confers upon cities the power to provide by ordinance for the security of citizens and others from the running of trains, but does not prescribe the mode in which the power shall be exercised, a city ordinance requiring a railroad company to maintain a flagman at a crossing will be declared invalid unless it is reasonable, fair, and impartial, and not arbitrary or oppressive. *Southern Indiana R. Co. v. Bedford (Ind.)*, 6-509.

Street car fenders. — A municipal ordinance making it unlawful to run any street car which is not equipped with a fender of a specified make "or some other fender equally as good, to be approved by the common council or its street committee," is invalid as vesting in the common council and the street committee an arbitrary discretion to approve and disapprove of fenders instead of prescribing a uniform rule of action. *Elkhart v. Murray (Ind.)*, 6-748.

Advertising trucks on city streets. — Under the charter of the city of New York, the board of aldermen has power to enact an ordinance excluding advertising trucks, vans, or wagons from the public streets, but excepting ordinary business wagons carrying business notices, so long as such wagons are engaged in the usual business or work of the owner and are not used merely or mainly for advertising. Such an ordinance is not arbitrary or unreasonable, but may be defended as a proper regulation tending to prevent congestion upon the public streets of the city. *Fifth Ave. Coach Co. v. New York (N. Y.)*, 16-695.

Coaches or omnibuses intended principally for the transportation of passengers and parcels for hire, but which carry general advertising signs upon their exterior, are within the prohibition of the New York city ordinance excluding advertising trucks, vans, or wagons from the public streets, but excepting ordinary business wagons carrying business notices, so long as the same are engaged in the usual business or work of the owner and not used merely or mainly for advertising. Such ordinance was not intended to refer exclusively to wagons wholly used for the display of advertisements, but was intended to prohibit general advertising on wagons used for any purpose. *Fifth Ave. Coach Co. v. New York (N. Y.)*, 16-695.

A franchise granted to a stage company to run a line of stages or carriages for the transportation of passengers and parcels for hire between certain points in a city does not include, either expressly or by implication, the right to use the public streets mentioned therein for advertising purposes, or to carry or maintain exterior advertisements on the company's vehicles. *Fifth Ave. Coach Co. v. New York (N. Y.)*, 16-695.

Billboards. — A city ordinance which requires all billboards to be placed and kept at a distance of at least two feet more than the height of the billboard from the outer edge of the sidewalk of the street is invalid as an unnecessary restriction of private right. While a city may prohibit the erection of insecure billboards or other structures along the edge of the public streets, or so near thereto as to be a menace, and require the owners to maintain all structures so erected in a secure condition, and provide for inspection and removal at the owner's expense if the structure is condemned as dangerous, it cannot prohibit the erection of any such structures upon or near the lot line, irrespective of their security. *State v. Whitlock (N. Car.)*, 16-765.

Sale of street car transfers. — The ordinance of the city of Chicago prohibiting the sale or gift of street railway transfers is not unreasonable and oppressive as prohibiting the selling or giving away of transfer tickets without any limitation or restriction, and therefore penalizing the selling or giving away of the tickets at any time, even after the right to use them has expired, or at any place however distant, the ordinance being subject to a reasonable interpretation in this respect in accordance with the purpose of its enactment. *Chicago v. Openheim (Ill.)*, 11-554.

The ordinance of the city of Chicago prohibiting, under penalties, any person from selling, purchasing, giving away, or receiving a street railway transfer ticket issued by a street railway company within the city, is not in conflict with the provision of the constitution that no person shall be deprived of property without due process of law. *Chicago v. Openheim (Ill.)*, 11-554.

Labor regulations. — A municipal ordinance requiring all work of dressing rock or stone under municipal contracts to be done within the territorial limits of the state is not void as an attempted regulation of commerce between the several states. *Allen v. Labsap (Mo.)*, 3-306.

Licensing of plumbers. — The ordinance of the city of Atlanta in regard to licensing persons who engage in or work at the business of plumbing provides as follows: "No person, firm, or corporation engaged in or working at the business of plumbing shall engage in or work at said business in the city of Atlanta, either as master, employing, or journeyman plumber, unless such person, firm, or corporation first receives a license therefor, in accordance with the provisions of this ordinance. Any person desiring to work at or engage in the business of plumb-

ing, either as master, employing, or journeyman plumber, in the city of Atlanta shall be required to submit to an examination before a board of examiners, as hereinafter provided, as to his experience and qualifications in such trade, business, or calling. In the case of a firm or corporation, the examination or licensing of any one member of a firm or the manager of the corporation shall satisfy the requirements of this ordinance." This ordinance, in case of a firm or corporation, where one member of the firm or corporation, where one member of the firm or the manager of the corporation has been licensed, permits others than the member or manager so licensed, by virtue of such license, to engage in or do the work of plumbing in the city of Atlanta without standing an examination as to fitness and obtaining a license, but does not permit a like privilege to persons other than those referred to in the two instances above stated. The ordinance is discriminatory in character, and is therefore unconstitutional. *Henry v. Campbell* (Ga.), 18-178.

Licensing of ticket brokers. — The Colorado statute conferring upon municipalities the general power to license ticket brokers does not give a municipality power to pass an ordinance requiring every applicant for a license to file with the city clerk a certificate of membership in some reputable ticket broker's association; and an ordinance containing such a requirement is void as being unreasonable. *Munson v. Colorado Springs* (Colo.), 9-970.

Removal of snow and ice from sidewalks. — A city ordinance providing a remedy against an occupant of premises who shall fail to remove ice and snow from the sidewalk is not inconsistent with a power given the city to require the owners of premises to keep the adjoining sidewalks free from snow. *Helena v. Kent* (Mont.), 4-235.

A city ordinance providing that an occupant of premises shall keep the sidewalks in front thereof free from ice and snow, and providing that every person who shall fail to do so shall be deemed guilty of committing a nuisance is within a grant of power to the city to define and abate nuisances. *Helena v. Kent* (Mont.), 4-235.

Under a clause of a city charter providing that the city council "shall have power to make laws, ordinances, and regulations for the government of said city relative to . . . the streets, sidewalks, and highways of said city, and to the ordering the same to be made and to mending, paving, cleaning, and lighting the same," the council has authority to pass an ordinance requiring the owner or occupant or person having the care of any building or lot bordering on a street, square, or public place in the city, to remove the snow from the sidewalk adjoining said building or lot of land within the first four hours of daylight after the ceasing to fall of any snow, and that each and every hour after the expiration of the four hours that the snow remains on the sidewalk shall be deemed a

separate violation of the ordinance. *State v. McCrillis* (R. I.), 13-701.

Such ordinance is not repugnant to the provisions of the constitution of Rhode Island that all laws "shall be made for the good of the whole; and that the burdens of the state ought to be fairly distributed among its citizens," and that "private property shall not be taken for public uses, without just compensation," but is a valid police regulation based upon the peculiar relation which an abutting owner bears to the public service required to be performed. *State v. McCrillis* (R. I.), 13-701.

Such ordinance does not violate the Fourteenth Amendment of the Constitution of the United States providing that "no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *State v. McCrillis* (R. I.), 13-701.

Nuisances. — Under a statute giving cities power "to declare what shall constitute a nuisance," enacted at a time when a statute is in force prohibiting cities from making an act punishable by ordinance which constitutes an offense against the state, a city is authorized to exercise a legislative power in the denouncement as public nuisance of some things not within the purview of the general legislation of the state, and while a city is not authorized under such grant to condemn as a nuisance that which is clearly not of such nature, yet if that which the municipality prohibits as a nuisance lies on the border line of a public nuisance, so as fairly to invoke the legislative judgment in determining whether the thing should be prohibited, the municipal ordinance will be accorded the same respect as a statute by the general assembly, and will not be declared invalid unless there is a palpable invasion of private rights. *Bowers v. Indianapolis* (Ind.), 13-1198.

Junk shops. — As the storing or keeping of junk is a necessary incident of the business of buying and selling the same, a city charter which expressly empowers the common council to regulate and license the keepers of junk shops and to regulate the buying and selling of junk must be held to authorize the council to regulate the storage of junk by proper ordinance. *Weadock v. Judge of Recorder's Court* (Mich.), 16-720.

Removal of garbage. — An ordinance making it unlawful for any persons except employees of the city crematory department to convey garbage, etc., through the streets does not conflict with a statute providing that the owner or occupant of any private property must remove any source of filth therefrom on twenty-four hours' notice from certain officers. *Smith v. Spokane* (Wash.), 19-1220.

Distribution of handbills. — An ordinance making it unlawful to circulate or distribute printed or written dodgers, handbills, or circulars upon the public streets or grounds of a municipality does not contravene a provision of the Nebraska constitution

which guarantees the right of free speech. *In re Anderson* (Neb.), 5-421.

g. Construction.

In civil action to which city is not party. — In a civil action to which the city is not a party, where a breach of an ordinance imposing a license tax upon the business of "real estate" is invoked for the purpose of avoiding a contract between the parties, the ordinance will be strictly construed. *Manker v. Tough* (Kan.), 17-208.

Rule of construction where language is unambiguous. — The rule that contemporaneous, long, uniform, and practical construction of a statute by administrative officers will be followed by the courts in doubtful cases does not apply where the language of an ordinance is unambiguous and where no such construction is shown. *J. Burton Co. v. Chicago* (Ill.), 15-965.

"Patrolman" synonymous with "policeman." — "Policeman" and "patrolman" are synonymous terms as used in a city ordinance providing that the police force shall consist of a chief of police, one police captain, etc., and such number of "policemen or patrolmen" as the council may designate, and that the number of "policemen" other than the officers previously enumerated shall be nine, all to hold office during good behavior. *State v. Edwards* (Mont.), 20-239.

h. Prosecution for violation.

Necessity of written complaint. — The defendant in a prosecution for the violation of a municipal ordinance is entitled to be apprised of the nature and character of the proceeding against him by a written complaint, upon demand therefor, inasmuch as there is a constitutional right to such complaint in criminal cases, and a statutory right in civil cases, and a common-law right in cases neither criminal nor civil but partaking of the nature of both. *Birmingham v. O'Hearn* (Ala.), 13-1131.

Entries on judge's docket as sufficient complaint. — In a prosecution for the violation of a municipal ordinance a statement entered upon the docket of a police judge showing that the alleged offense is that of violating a certain section of the municipal code, and an oral statement of the judge that the section named defines the offense of vagrancy and provides for its punishment, do not perform the office of a written complaint. *Birmingham v. O'Hearn* (Ala.), 13-1131.

Supplying want of complaint on appeal. — Upon appeal from a conviction in a police court for the violation of a municipal ordinance, the want of a written complaint in the police court cannot be supplied by a statement of the cause of the complaint filed by the attorney for the municipality with the appellate court. *Birmingham v. O'Hearn* (Ala.), 13-1131.

Right to sentence offender to labor under municipal control. — To punish an offender convicted of violating a municipal ordinance by confining him at labor under

municipal control is not obnoxious to the constitutional inhibition against involuntary servitude save as a punishment for crime after legal conviction therefor. *Loeb v. Jennings* (Ga.), 18-376.

A sentence imposed on one convicted of violating a municipal ordinance, which requires him to pay a fine and also to work on the streets or other public places of the city, is not violative of the provisions contained in the Fourteenth Amendment of the Constitution of the United States that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." *Loeb v. Jennings* (Ga.), 18-376.

Where duly authorized by the municipal charter and ordinances, a sentence by a recorder which requires the person convicted of a violation of a penal ordinance to work on the streets or other public works of a city is not void or illegal on the ground that it is violative of the provision of the Georgia constitution (Civil Code, § 5706), which declares that excessive fines shall not be imposed or cruel and unusual punishments inflicted. *Loeb v. Jennings* (Ga.), 18-376.

Costs on discharge of defendant. — In discharging a defendant charged with the violation of a municipal ordinance it is error to tax the municipality with the costs and award execution against it. *Birmingham v. O'Hearn* (Ala.), 13-1131.

6. APPROPRIATIONS.

Appropriations by order. — In the absence of any ordinance or rule to the contrary, an appropriation of money by a city council is not invalid because made by order and not by ordinance or resolution, or because made without the observance of parliamentary rules. *Wheelock v. Lowell* (Mass.), 12-1109.

Public purpose necessary. — The legislature cannot authorize the expenditure of public funds by a municipal subdivision of the state except for a public purpose. *Castner v. Minneapolis* (Minn.), 1-934.

The reimbursement by the city council of a defeated candidate for expenses of an election contest is an expenditure of public funds for a private purpose and illegal. *Castner v. Minneapolis* (Minn.), 1-934.

Reimbursement of police officer. — In the absence of prohibitive charter provisions, a municipality has power to reimburse a police officer for expenses and attorney's fees incurred in defense of an action for false imprisonment, it appearing that the officer was acting in good faith in the exercise of his official duties. *Moorhead v. Murphy* (Minn.), 3-434.

Mandamus to compel payment. — Although a city council has power to make an appropriation of money for the commemoration of an event of public interest in such a manner as to promote the general welfare of the city, the money so appropriated must be expended and accounted for according to

law, and mandamus cannot be maintained against the city controller by the treasurer of a committee of private citizens to whom such money is directed to be paid, to compel the controller to countersign the warrant for payment, while no expenses have been incurred and no vouchers have been filed to enable the controller to pass upon the correctness of the claims presented. *Stegmaier v. Goeringer* (Pa.), 11-973.

7. MUNICIPAL CONTRACTS.

a. Validity in general.

Delegation of authority to contract.

— Municipal functions which are purely executive, administrative, or ministerial may be delegated to a committee. It is only such functions as are governmental, legislative, or discretionary which cannot be delegated. *Biddeford v. Yates* (Me.), 15-1091.

A purely ministerial function of a municipality is one as to which nothing is left to discretion. Judicial acts involve the exercise of discretionary power or judgment. Judicial acts are not confined to the jurisdiction of judges. *Biddeford v. Yates* (Me.), 15-1091.

Contract extending through term of years. — The provision in a city's charter requiring that expenditures shall be within the annual revenue does not prohibit the city from making a fair and reasonable contract for a reasonable number of years for the removal and disposition of garbage, though the annual payments to be made for the service exceed in the aggregate the city's revenue for a single year, if each of the annual payments stipulated for will be within the revenue of the city for the year in which it is to be made. *Toomey v. Bridgeport* (Conn.), 7-148.

Effect of statutory restrictions. — A municipality is not bound by either an express or implied contract in defiance of express statutory restrictions upon the powers of the corporate agents through whose instrumentality the contract is sought to be derived. *Jersey City Supply Co. v. Jersey City* (N. J.), 2-507.

Contract fixing rates to be charged by water company. — Power granted to a city to contract for the construction and operation of waterworks "on such terms and under such regulations as may be agreed on" constitutes authority to the municipality to agree with the contractor upon the rates which he may collect of private consumers during a reasonable term of years. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

Neither the power of a municipality to contract with a third person for the construction and operation of waterworks, street railways, or other public utilities, nor the right of such a third person under such a contract, constitutes a special privilege or immunity within the meaning of those terms in a provision of the constitution of Nebraska which prohibits the legislature from "making any irrevocable grant of special privilege or immunities." *Omaha Water Co. v. Omaha* (U. S.), 8-614.

Contract to pay interest. — Where a city, which is empowered by its charter to pass ordinances not inconsistent with the constitution and laws of the state and of the United States, passed an ordinance agreeing to pay the interest on its warrants from the date that they are presented and indorsed "not paid for want of funds," the ordinance constitutes a valid contract to pay the interest. *State ex rel. Strahorn v. Stout* (Wash.), 10-208.

Provisions not invalidating paving contract. — A contract by a municipality for the paving of its streets is not rendered invalid by provisions requiring the contractor to meet all loss or damage arising out of the nature of the work done; to repair or replace, and leave in as good a condition as when found, all permanent sidewalks, streets, alleys, etc.; to indemnify the city against all suits or claims growing out of injury or damage to persons or property by reason of the work to be done; to pay for all injuries done to water, gas, or sewer pipes; and to keep the pavement in repair for the space of one year. *Diver v. Keokuk Sav. Bank* (Iowa), 3-669.

Estoppel to deny validity. — Where a municipal corporation has entered into a contract with an individual under an unconstitutional statute, and the subject-matter of the contract is not *ultra vires*, illegal, or *malum prohibitum*, and the facts are such as would estop an individual from setting up the invalidity of the statute as a defense, the municipal corporation will also be estopped. *Mt. Vernon v. State ex rel. Berry* (Ohio), 2-399.

b. Leases of municipal property.

Delegation of authority to lease. — Whether a city government can delegate authority to a committee to let city property, depends entirely upon whether the delegation of such authority invests the committee with judicial or ministerial powers. *Biddeford v. Yates* (Me.), 15-1091.

Authority may by ordinance be delegated to a committee to let such city buildings for a definite period upon "such terms and conditions as they may deem expedient," such authority involving simply the ministerial acts, such as negotiating the various details, which are necessary to perform the act of leasing. *Biddeford v. Yates* (Me.), 15-1091.

Lease for racing purposes. — A lease by a city of public property for racing purposes held not to be illegal. *Bryant v. Logan* (W. Va.), 3-1011.

Lease for private purposes. — Under a municipal charter authorizing the city council to let such of the municipal buildings as may be legally let, and under an ordinance providing for the leasing of any part of such buildings not already under lease or appropriated to any branch of the city government, a municipality may let for private purposes a hall which is not appropriated to the use of the city, especially if the lessee is required to permit the use of the hall, when not otherwise engaged, for any public pur-

pose upon payment of the running expenses. Such lease may be made to commence upon the expiration of an existing lease of the hall, the purpose of the phrase "not already under lease" being to prevent the making of a lease covering the same property for the same period of time. *Biddeford v. Yates* (Me.), 15-1091.

Lease to take effect in future. — The validity of such lease, made under the authority of the city council, is not affected by the fact that it is to take effect at a time when, because of a coming election, the personnel of such council may be changed. *Biddeford v. Yates* (Me.), 15-1091.

Lease of unused school property. — Under the charter of the city of Baltimore, which gives the mayor and city council power to rent, for fixed and limited terms, with the approval of the commissioners of finance, property owned by the city but not needed for public purposes, the officials named have power to lease a building erected for use as a school, but no longer needed for school purposes, to the field officers of a regiment of the national guard for armory purposes. *Gottlieb-Knabe Co. v. Macklin* (Md.), 16-1092.

Lease of property for concerts, etc. — Where all of the property so leased is not needed for armory purposes, the city authorities and the lessees, acting in conjunction, may properly rent the building for a single evening, or for any number of evenings, to third parties for concerts, exhibitions, and public meetings, under contracts providing for a division of the proceeds of such renting between the city and the original lessees. *Gottlieb-Knabe Co. v. Macklin* (Md.), 16-1092.

Such temporary, casual, and incidental use of unused public property, for the purpose of public economy, does not amount to an unconstitutional invasion of the rights of citizens, who are using their own property in the same line of business, so as to entitle the latter to an injunction. *Gottlieb-Knabe Co. v. Macklin* (Md.), 16-1092.

c. Incidents of municipal contracts.

Rights of foreclosure purchaser. — Under a mortgage of the property and rights of a water company and the foreclosure thereof, the foreclosure purchaser succeeds to the mortgagor's contract right to collect rates specified in a contract between it and a city. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

d. Contracts abridging or restricting municipal powers.

Contract abdicating police power. — A contract whereby a city attempts to abdicate its police power forever is *ultra vires* and void. *State ex rel. Minneapolis v. St. Paul, etc., R. Co.* (Minn.), 8-1047.

As to the police power generally see section 4 d above.

Suspension of power to regulate rates. — Agreement and grants regarding the suspension of the power to regulate rates and regarding other public franchises will

not be raised by mere implication, will be construed favorably to public rights if ambiguous, and will be protected and enforced if clear. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

The legislature of a state, unless prohibited by its constitution, may empower a city to suspend by contract, and the city may suspend in that way for a reasonable term of years, its power to fix or regulate the rates which a third person may collect of private consumers. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

The making of a municipal contract to suspend for twenty-five years the power of the city to regulate the rates which a water company shall collect from private consumers in consideration of the construction and operation of waterworks, is not an unreasonable exercise of the power to contract therefor. *Omaha Water Co. v. Omaha* (U. S.), 8-614.

Contract not to compete with water company. — A city has the right to make a contract excluding itself for a definite period from competition with a waterworks company to which it grants the right to supply water in the city. *Vicksburg v. Vicksburg Waterworks Co.* (U. S.), 6-253.

e. Awarding of contracts.

(1) In general.

Control by courts. — Where the awarding of a contract for a public improvement has been committed to a board of public works, in the absence of fraud or collusion, its decision is final and conclusive, and cannot be controlled by the courts by mandamus or otherwise. *Maryland Pavement Co. v. Mahool* (Md.), 17-649.

Failure to comply with specifications.

— Where a bidder for a municipal contract for the paving and curbing of a street fails to comply with a provision of the specifications for the work requiring each bidder to deposit with his proposal a sample granite block, stating at what quarry it was manufactured and agreeing, if the contract is awarded to him, to use only blocks made at said quarry and equal to the sample, such failure on his part justifies the board of awards in rejecting his bid, even though it is the lowest bid presented. *Maryland Pavement Co. v. Mahool* (Md.), 17-649.

Effect of requirement that contract be let to lowest bidder. — Where a city, in conformity with a charter requirement that it shall by ordinance adopt a uniform system to regulate the construction of streets and sidewalks, has passed an ordinance requiring every contract for street improvement to be let to the lowest bidder, such ordinance so long as it remains in force is as binding upon the city as though it were an express charter provision. *Fineran v. Central Bitulithic Paving Co.* (Ky.), 3-741.

Effect on contract calling for products of certain manufacturer. — Under the provisions of a municipal charter that all city improvements shall be let by contract to the lowest bidder, a contract for street paving entered into in pursuance of an ordi-

nance requiring the paving to be done with vitrified brick made by a certain manufacturer, although there are other manufacturers of similar brick, is invalid as encouraging a monopoly and restricting competitive bidding, and furnishes a defense to an action on special tax bills issued for the cost of the improvement. *Curtice v. Schmidt* (Mo.), 10-702.

Effect of ordinance regulating dressing stone. — A municipal ordinance requiring all work of dressing rock or stone under municipal contracts to be done within the territorial limits of a state is not void as tending to restrict competition and to impair the right of the citizen to have a contract let to the lowest bidder, unless it appear in reference to a particular contract that the right of competition has been restricted or the price of the improvements increased thereby. *Allen v. Labsap* (Mo.), 3-306.

(2) Advertisements for bids.

Language of publication. — The English language is the official or ordinary language of the state of Maryland, and a direction in a statute of that state that an advertisement shall be published in a certain number of newspapers must be construed as requiring publication in newspapers printed in the English language in the absence of a statutory direction to the contrary. *Bennett v. Baltimore* (Md.), 14-419.

Section 14 of the charter of the city of Baltimore, requiring that all proposals for bids for public work for the city of Baltimore to cost over five hundred dollars be advertised "in two or more daily newspapers published in Baltimore city, for not less than ten nor more than twenty days," etc., requires publication in at least two such newspapers printed in the English language. *Bennett v. Baltimore* (Md.), 14-419.

Statute providing that municipality "may" advertise. — It cannot be said that a statute providing that a municipality "may" advertise for competitive bids in letting public contracts discloses a clear intention on the part of the legislature to make it the imperative duty of the municipality to advertise for competitive bids, where the statute is one superseding a former statute which used the word "shall" instead of "may." *Dillingham v. Spartanburg* (S. Car.), 9-829.

Contract let without advertising. — A statute which makes it the duty of a municipality to advertise for competitive bids in letting public contracts, but which does not make the power to contract dependent upon compliance with the terms of the statute, does not avoid a contract let by the municipality without advertising. *Dillingham v. Spartanburg* (S. Car.), 9-829.

(3) Contracts calling for use of patented articles.

Statute not requiring advertisement for bids. — A statute permitting but not requiring municipalities to advertise for

competitive bids in letting public contracts does not invalidate a contract made pursuant to an advertisement requiring the use of a patented article. *Dillingham v. Spartanburg* (S. Car.), 9-829.

Effect of requirement of competitive bidding. — Under the charter of the city of Milwaukee, one essential of the scheme for paving the streets at the expense of abutting owners is competitive bidding, and this essential is not dispensed with by the provisions in the charter authorizing the municipality to contract with a patentee to use a patented article for the city. *Allen v. Milwaukee* (Wis.), 8-392.

Where a city's charter gives it the power to impose upon the property of abutting owners, by a special assessment, the cost of a street improvement done pursuant to competitive bidding, the city has no power to adopt a patented pavement which is so controlled by monopoly that there can be no competition, in the fair and reasonable meaning of the word. *Allen v. Milwaukee* (Wis.), 8-392.

Where a city's charter empowers it, in making local improvements, to acquire from the patentee the right to use any patented article or process, but requires that the actual work shall be let to the lowest bidder, the city has no power to make a noncompetitive contract for street paving which provides that about two-thirds of the cost of the paving shall go to the patentee and that the patentee shall do much of the actual work of paving, especially if the city does not acquire under the contract the right to "use" the patented material in resurfacing or otherwise repairing the streets to be paved under the contract. *Allen v. Milwaukee* (Wis.), 8-392.

Requirement that contract be let to lowest and best bidder. — Where a city is required by law to let every contract for street improvements to the lowest and best bidder, an ordinance seeking bids for street paving which restricts the material to be used to a patented article controlled by but one person is void. *Fineran v. Central Bitulithic Paving Co.* (Ky.), 3-741.

A charter and ordinance requirement that municipal contracts be let to the lowest bidder is not satisfied where the city council, in asking for bids for the reconstruction of a street, specifies certain material to be used, with knowledge that such material is patented, and but two bids are submitted, one being made by the patentee and the other by a person unable to furnish such material but who has collusively agreed with the patentee to make a higher bid as a matter of form. *Fineran v. Central Bitulithic Paving Co.* (Ky.), 3-741.

Under the Illinois statute requiring all contracts for the making of a public improvement to be let to the lowest bidder, a city ordinance seeking bids for street paving, which restricts the material to be used to a patented article which can be obtained from but one person, is invalid as restricting competitive bidding, notwithstanding the fact that the owner of the patent offers to fur-

nish the material at a specified price to any bidder. *Siegel v. Chicago* (Ill.), 7-104.

f. Injunction restraining performance.

What plaintiff must show. — In a suit by a taxpayer to enjoin the performance of a public contract let by a municipality, it is incumbent upon him to show some injury threatened to him as a taxpayer by the contract in question; and he is not entitled to the relief sought where the evidence shows that the municipality, after rejecting all bids, entered into further negotiations with the lowest two bidders and let the contract to one of such bidders at a figure substantially lower than the lowest original bid, instead of reopening the matter to full competition among all the bidders. *Dillingham v. Spartanburg* (S. Car.), 9-829.

What is not ground for injunction. — It is no ground for enjoining the performance of a municipal contract at the suit of a taxpayer that the calls for bids contained a provision requiring the successful bidder to furnish an indemnity bond in a large sum, or a provision requiring such bidder to guarantee his work and to keep it in repair for one year, or a provision giving the municipality the right to retain for one year ten per cent. of the total amount of the contract price. *Dillingham v. Spartanburg* (S. Car.), 9-829.

Injunction against payment of money. — A city taxpayer may enjoin the city officers from paying the city's money out under an invalid contract. *Allen v. Milwaukee* (Wis.), 8-392.

Injunction against special assessment. — An abutting owner, who brings his action before any work is done under a municipal contract, is entitled to an injunction restraining the making of a special assessment for local improvements, where the contract for the work is invalid because not let in the manner prescribed by law and the invalidity is of a character highly likely to prejudice the plaintiff in manner and degree not readily separable from the burdens which might be lawfully imposed upon him. *Allen v. Milwaukee* (Wis.), 8-392.

g. Actions by inhabitants.

No right of action. — A municipal corporation and the inhabitants of its territory are, in law, distinct, separate persons, and the corporation is not the mandatory of the inhabitants individually for entering into contracts for them individually. From the fact that the inhabitants are interested that the obligations of contractors towards the municipal corporation should be faithfully complied with, or from the fact that they, as taxpayers, contribute the money with which the payments under the contracts of the municipality have to be made, it does not follow that the inhabitants are principals in the contracts entered into by the corporation, and as such have a right of action thereon. *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.* (La.), 2-471.

8. INDEBTEDNESS.

a. Power to incur in general.

Delegation of power to borrow in charter. — A municipal corporation may borrow money to be used for the purposes of government, or for such other purposes as may be authorized by the constitution and laws, when the power to borrow is delegated in the charter. *Penick v. Foster* (Ga.), 12-346.

Implied authority to contract debts. — In the absence of an express grant of authority, a municipal corporation has no power to borrow money for corporate purposes except where duties are imposed or powers are conferred upon it which manifestly cannot be performed or exercised at all without the borrowing of money. *Luther v. Wheeler* (S. Car.), 6-754.

Municipal authorities have implied authority to contract debts to those who are employed to do things requisite to the conduct of the municipality's affairs, such as the erection of buildings to be used for municipal purposes; but the exercise of this power should be restricted to such debts as the authorities can reasonably expect, and in good faith do expect, to pay from the ordinary revenue of the municipality for the current municipal fiscal year. *Luther v. Wheeler* (S. Car.), 6-754.

Power to complete work begun although revenue is insufficient. — Where a municipality contracts debts for the construction of a necessary public building in a reasonable belief that its revenue for the current year will be sufficient to pay the debt, but after considerable expense is incurred it becomes apparent that the revenue will be insufficient, it may nevertheless prosecute the work to completion and incur a valid indebtedness in so doing. *Luther v. Wheeler* (S. Car.), 6-754.

Legal obligation to repay money borrowed without authority. — There is nothing in either the constitution or the statutes of South Carolina to alter the rule that a town, irrespective of its population, is under a legal obligation to repay, as money had and received, money which it has borrowed without authority, but which it has applied to the construction of a public improvement impliedly authorized by its charter. *Luther v. Wheeler* (S. Car.), 6-754.

Establishment of ice plant. — As to the power of a municipality, authorized by its charter to establish an ice plant to raise money by the issuance of bonds for that purpose, see *Holton v. Camilla* (Ga.), 20-199.

Estoppel to deny indebtedness. — In a suit by taxpayers to enjoin a municipal corporation from repaying money borrowed without authority, relief will not be denied on the ground of estoppel if there is no evidence of participation or active assent by the plaintiffs to the borrowing of the money or the incurring of the debt. *Luther v. Wheeler* (S. Car.), 6-754.

b. Constitutional and statutory limitations.

Purpose of incurring debt immaterial. — The language of article 13 of the Indiana constitution, providing that no political or municipal corporation in that state "shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum of the value of the taxable property within such corporation," is positive and imperative, and it is wholly immaterial for what purpose an indebtedness, in excess of the constitutional limit, is incurred. It falls within the prohibition if the amount thereof exceeds the current revenues of the municipality. *Logansport v. Jordan* (Ind.), 17-415.

It is no justification for a violation of the above constitutional provision by a city, that the excessive indebtedness has been incurred in the construction of a sewer, which is necessary in order to dispose of storm water and thereby prevent suits against the city for damages. The prohibition of the constitution operates upon the indebtedness coming within it, without regard to the necessity therefor, and without regard to its form or the manner or method by which it is evidenced. *Logansport v. Jordan* (Ind.), 17-415.

Time of estimating indebtedness. — The indebtedness of a city for its share of the cost of a sewer is incurred at the time when the work of constructing the sewer is completed by the contractor and the sewer is accepted by the city, and if, at that time, the city is already indebted beyond the constitutional limit, and there is no provision for the payment of any part of its indebtedness for the construction of the sewer, such indebtedness is void for its entirety, and the city may be enjoined, at the suit of a taxpayer, from paying or providing for the payment of any part of the same. In such a case, the fact that the city's share of the cost of the improvement does not become due and payable until its amount has been determined by the final assessment of special benefits, made by the board of public works, is immaterial. The question is, when the city's share of the indebtedness comes into existence, and not when it becomes due and payable. *Logansport v. Jordan* (Ind.), 17-415.

Inclusion of interest in estimating debt. — In determining whether a proposed issuance of municipal bonds will create an indebtedness in excess of the constitutional and statutory limit imposed upon municipal corporations, the principal only, and not the interest on the proposed bonds, is to be taken into account. *Carlson v. Helena* (Mont.), 17-1233.

Aside from the general rule above stated, that the interest on municipal bonds is not to be taken into account in estimating the indebtedness of a municipality with regard to the constitutional and statutory debt limit, the statutory provision that a yearly tax must be levied to pay the interest on water and sewer bonds issued by a municipality, evinces a clear intent on the part of the legislature that the interest on those classes of bonds at least should not be taken into ac-

count in estimating the indebtedness of the municipality. *Carlson v. Helena* (Mont.), 17-1233.

Duty of purchasers of bonds to ascertain legality. — When the validity of bonds issued by a municipal corporation is conditioned by the constitution of the state upon the assessed value of the taxable property of the municipality and the amount of its indebtedness, the purchasers of the bonds are bound to ascertain at their peril from the public records the assessed valuation of the property within the municipality, and if the bonds disclose upon their face a total indebtedness in excess of the percentage of such assessed valuation permitted by the constitution, recitals therein to the effect that the constitutional limit has not been exceeded, afforded no protection to the holders. Thus where a bond of the value of \$500, issued by a township, states upon its face that it "is one of a series numbered from 1 to 23 inclusive, of like tenor and state," the purchaser is affected with notice that the total amount of the issue is \$11,500, and if that amount is in excess of the constitutional limit, no recital in the bond can protect the holder or estop the township from denying the validity of the obligation. *St. Lawrence Township v. Furman* (U. S.), 17-1244.

Evasion of limitation by means of dummy corporation. — Where a town is unable to contract directly for the construction of a water and light plant without violating a constitutional provision restricting its power to become indebted, it has no power to accomplish the same end indirectly through a dummy corporation which is formed for the express purpose of constructing such a plant, which is owned, controlled and managed by the town as the subscriber to practically all of its capital stock, and which makes contracts and incurs liabilities which the town is prohibited by such constitutional provision from making or incurring in its own name, *Voss v. Waterloo Water Co.* (Ind.), 2-978.

c. Elections authorizing creation of debt.

General statute authorizing election. — Under the provision of section 6, article XIII., of the Montana constitution, that the legislative assembly may extend the debt limit mentioned in that section by authorizing municipal corporations to submit the question of extension to a vote of the taxpayers affected thereby, when the increase is necessary to construct a sewerage system or to procure a supply of water, the question whether a necessity exists in a given case for an extension of the debt limit of a city for the purposes mentioned, is to be determined by the taxpayers of the city, and not by the legislative assembly, and it is not necessary that a special act of the legislature be passed in each case, authorizing a submission of such question to the taxpayers, the matter having been regulated by a general statute. *Carlson v. Helena* (Mont.), 17-1233.

Course of procedure. — Under the Montana statute authorizing a municipal corporation to submit to its taxpayers the ques-

tion whether its debt limit shall be extended, and an indebtedness incurred, for the purpose of procuring a water supply, the orderly course of procedure is to submit the question generally whether the indebtedness, not in excess of a definite amount within the statutory limit, shall be incurred, and to defer the selection of any particular source of water supply until the vote on the proposition has been taken. The submission to the voters of the question whether a particular source of supply shall be acquired, before any steps have been taken to ascertain whether its acquirement is possible, or what it will cost, is a fatal irregularity which invalidates the whole proceeding. *Carlson v. Helena (Mont.)*, 17-1233.

Application of referendum law. — The referendum law of Montana applies only to matters of general legislation in which all electors without distinction may take an active interest, and has no application to a proposition submitted to the taxpayers of a city as to whether the city shall extend its debt limit for the purpose of acquiring a water supply. *Carlson v. Helena (Mont.)*, 17-1233.

Effect of completion of new assessment roll. — Although the constitution provides that the question whether a municipal debt for a certain purpose shall be incurred, must be submitted to the taxpayers "to be affected thereby," authority given to a city by the taxpayers at an election, to incur such debt, does not lapse upon the completion of the assessment-roll for the following year, even though there may have been changes in the body of the taxpayers in the meantime. All that is required is that the city shall proceed with reasonable promptness to exercise the authority given to it at the election, and if this is done, the fact that the body of the taxpayers may have changed since the election was held does not affect the validity of the bonds issued as security for the debt. *Carlson v. Helena (Mont.)*, 17-1233.

Effect of judgment confirming issuance of bonds. — After a judgment was rendered confirming and validating the issuance of the bonds in proceedings had under the validation Act of 1897 (Acts 1897, p. 82), citizens and taxpayers of the municipality could not for the first time attack the judgment on the ground that the money to be raised from a sale of the bonds was to be used for different purposes, and "neither said ordinance, nor the published notice of the election published in pursuance thereof, provided or gave the voters of said city any opportunity to vote for or against the bonds for each of said specified purposes separately; and hence said ordinance and said notice did not call and give notice of respectively as to each of said debts and purposes of an election 'for that purpose,' as required by the constitution of the state of Georgia, embodied in Code, § 5893." *Holton v. Camilla (Ga.)*, 20-199.

d. Bills and notes.

Not validated by indorsement or sale. — A note given for borrowed money by a municipal corporation which has no power to borrow is void from the beginning and is not validated by its indorsement or sale by the original holder. *Luther v. Wheeler (S. Car.)*, 6-754.

Recognition of void note. — Where money borrowed by a municipal corporation without authority has been expended by it on an authorized public improvement, the note evidencing the transaction, though it is void notwithstanding several renewals, should be so far recognized as a symbol of the debt contracted by the corporation that its indorsement by its holder will operate as a transfer of the debt. *Luther v. Wheeler (S. Car.)*, 6-754.

Recovery in action for money had and received. — Though a note given by a municipal corporation for borrowed money is void for the corporation's want of authority to borrow, the holder may recover from the corporation as money had and received a sum advanced on the note, where the money has been expended for a public improvement impliedly authorized by the corporation's charter, and the corporation has received full benefit for the entire amount expended, and the municipal authorities had reason to believe, and did believe, at the time the improvement was commenced and until it was almost completed, that the entire debt could and would be repaid from the regular income of the municipality for the current fiscal year. *Luther v. Wheeler (S. Car.)*, 6-754.

e. Bonds.

(1) In general.

Absence of statutory authority. — Where a statute authorizing a municipal corporation to donate a depot site to a railroad company makes no provision for the issuance of bonds or for the collection of an additional tax to meet any obligations which may be incurred for the site, the city has no authority to issue negotiable bonds to pay for a site, whether or not it may issue warrants or other non-negotiable instruments payable out of its general or incidental funds. *Swanson v. Ottumwa (Iowa)*, 9-1117.

Issuance in excess of amount authorized. — Bonds issued by a municipality by authority of statute for an amount in excess of the amount prescribed by the statute are void only to the extent of the excessive issue. *Schmitz v. Zeh (Minn.)*, 1-322.

Separate election on issuance of bonds. — Under the Montana statute, the power of a municipal corporation to issue bonds is expressly included in the power to incur an indebtedness, and where a city has been authorized by its taxpayers, at an election, to incur a debt for a certain purpose, no separate election to authorize the issuance of bonds is necessary. *Carlson v. Helena (Mont.)*, 17-1233.

Effect on illegal bonds of power to fund indebtedness. — Where a municipal corporation has issued bonds for a purpose for which it was at most only authorized to issue warrants, the bonds are void, and the fact that the municipality is authorized by statute to fund its indebtedness and issue bonds therefor, affords no reason why the illegal bonds should be vitalized. *Swanson v. Ottumwa* (Iowa), 9-1117.

Enforcement of void bonds as warrants. — Where municipal bonds have been executed without authority they are void, and a court cannot disregard the words of negotiability and enforce the bonds as if they were warrants issued by the city. *Swanson v. Ottumwa* (Iowa), 9-1117.

Dissolution of municipality. — The dissolution of a municipal corporation and its reincorporation under a new charter does not affect the validity of outstanding bonds of the original corporation, but the debt attaches to the new corporation. *Black v. Fishburne* (S. C.), 19-1104.

Collection of tax to pay railway aid bonds. — Under the Illinois statute relating to railroad and improvement aid bonds issued by municipal corporations, there is a distinction between a tax collected for the payment of the principal and interest of the registered bonds and a tax collected to compensate the state for the costs incurred by it in collecting and disbursing the fund for the payment of such bonds. The money raised by means of the latter tax belongs to the state and not to the municipality, and it is the duty of the state treasurer to keep such money safely and not to appropriate or convert it to his own use. *Whitemore v. People* (Ill.), 10-44.

(2) Contents and terms.

Date. — The date printed or written on municipal bonds is not conclusive of the date of the issue. Such bonds are not "issued" until sold and actually or constructively delivered. *Black v. Fishburne* (S. C.), 19-1104.

Expiration of charter before maturity. — Bonds issued by a municipality to run for a period not exceeding that authorized by statute are not invalid because the municipal charter will expire before the maturity of the bonds. *Black v. Fishburne* (S. C.), 19-1104.

Provision for redemption before maturity. — Under the Montana statute regulating the issuance of bonds by municipalities for the purpose of acquiring a water supply, bonds so issued must be made redeemable at the option of the city council at a time prior to their maturity, and where no clause providing for such redemption is inserted in the bonds, or contained in the ordinance authorizing their issuance, they are void. *Carlson v. Helena* (Mont.), 17-1233.

Provision for payment of interest semi-annually. — Where the proposition submitted to the taxpayers of a city in regard to the issuance of water bonds describes the bonds proposed to be issued as bearing in-

terest at the rate of five per cent. per annum, the insertion of a clause in the bond subsequently issued, making the interest thereon payable semi-annually, does not invalidate 1233.

the bonds. *Carlson v. Helena* (Mont.), 17-

Provision for payment in gold. — Where a statute authorizing the issuance of water bonds by a city is silent as to the particular kind of money in which they shall be made payable, the insertion in the bonds of a clause making them payable in "gold coin of the United States of America, of the present standard of weight and fineness," does not render them invalid. *Carlson v. Helena* (Mont.), 17-1233.

(3) Provisions for payment.

Special tax for payment. — The provision in the Montana constitution that the revenue derived by a city from its water supply shall be devoted to the payment of the indebtedness incurred in acquiring such supply, does not limit the city to such revenue for the payment of bonds issued by it to procure the supply, or prevent the levy of a special tax for the payment of the principal and interest of the bonds. *Carlson v. Helena* (Mont.), 17-1233.

Effect of levy of illegal tax. — The validity of bonds issued by a municipality under the express statutory authority cannot be affected by the fact that in providing for their payment the municipal authorities may have imposed an illegal tax upon the people of the municipality, and, consequently, the question whether the tax so imposed is legal or illegal cannot be determined in an action to enjoin the issuance of the bonds. *Carlson v. Helena* (Mont.), 17-1233.

(4) Rights of transferees.

Bonds not negotiable. — Where a municipality issues bonds under a statute authorizing it only to issue bonds payable out of a special fund, the bonds are not negotiable, though made payable to the bearer; and a subsequent purchaser of such bonds takes them subject to all the defenses that might have been set up against the original holder. *Northern Trust Co. v. Wilmette* (Ill.), 5-193.

Where a municipality, under a statute authorizing it to issue bonds payable out of a special fund, issues to the contractor in payment for a public improvement bonds payable to the bearer, and the contractor fraudulently fails to do the work according to the contract, whereupon the assessment for the special fund is declared by the courts to be uncollectible, subsequent purchasers of the bonds are not entitled to a mandamus to compel the municipality to reconstruct the improvement out of its general funds and pay the bonds. *Northern Trust Co. v. Wilmette* (Ill.), 5-193.

Purchasers chargeable with notice of municipality's power. — Where a municipality which is authorized by statute to donate depot grounds to a railroad company

issues bonds without authority of law, and donates them to the company, and the company sells the bonds, the purchasers are not innocent holders, as they are chargeable with notice of the power conferred on the municipality by the statute. *Swanson v. Ottumwa* (Iowa), 9-1117.

Recovery by purchasers on common counts. — Where a municipality which is authorized by statute to donate depot grounds to a railway company issues bonds without authority of law and donates them to the company, and the company sells the bonds and purchases and pays for depot grounds out of the proceeds of the sale, the purchasers of the bonds cannot, in an action against the city, recover on the common counts as for benefits conferred upon the city. *Swanson v. Ottumwa* (Iowa), 9-1117.

Estoppel to deny validity in hands of bona fide purchaser. — Where municipal bonds are issued under the authority of a statute and the validity is not questioned for a number of years and the interest has been paid upon them and they have come into the hands of *bona fide* purchasers, an action by a taxpayer to restrain the payment will not lie, the plaintiff being estopped by laches, at least where a total lack of authority to issue the bonds in the first instance is not shown. *Schmitz v. Zeb* (Minn.), 1-322.

9. MUNICIPAL TORTS.

a. Public or governmental functions or duties.

General rule. — Municipal corporations are not liable in damages for the manner in which they exercise in good faith their discretionary powers of a public, legislative, or quasi-judicial character. *Claussen v. Luverne* (Minn.), 14-673.

In the absence of any special rights conferred or liabilities imposed by legislative charter, towns and cities act in a dual capacity, the one corporate, the other governmental. To the former belong the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately inuring to the benefit of the public, such as the ownership and management of real estate, the making of contracts and the right to sue and be sued; to the latter belong the discharge of duties imposed upon them by the legislature for the public benefit, such as the support of the poor, the maintenance of schools, the construction and maintenance of highways and bridges, and the assessment and collection of taxes. *Libby v. Portland* (Me.), 18-547.

Maintenance of building for public purpose. — A municipality as proprietor is not to be confounded with the municipality as a legislator or custodian of the public welfare. If a building is maintained solely for a public purpose no liability on the part of the municipality arises for accidents in connection therewith. *Libby v. Portland* (Me.), 18-547.

Maintenance of police building. — A city, in managing and maintaining a police building, exercises a public governmental function as distinguished from a municipal function, and is not liable for injuries caused a workman engaged in repairing the roof of such building by the negligence of one of the city's employees in leaving open the door of an elevator shaft. *Wilcox v. Rochester* (N. Y.), 13-759.

In such an action, the contention that the city is exercising a governmental function in operating the building, and therefore is not liable for injuries caused by the negligence of an employee, is purely a legal objection to the plaintiff's right to recover which it is not necessary to plead. *Wilcox v. Rochester* (N. Y.), 13-759.

Maintenance of jail or lockup. — A municipal corporation is not liable in damages for negligently causing the death by suffocation resulting from smoke, of a person confined in its lockup, as the maintenance of a lockup is the exercise of a governmental function. *Carty v. Winooski* (Vt.), 6-436.

The maintenance of a prison is the exercise of a purely governmental power, and a municipal corporation is not liable for injuries caused by negligence or omission of duty on the part of its officers or agents respecting its prison or persons confined therein. *Shaw v. Charleston* (W. Va.), 4-515.

A municipal corporation is not liable for an injury to a person occasioned by the unsanitary condition of its prison while he is confined therein for the violation of a city ordinance. *Shaw v. Charleston* (W. Va.), 4-515.

A municipal corporation in maintaining a jail or "lockup" is not exercising a corporate power for the benefit of the inhabitants in their local interests, but is performing a public service entrusted to it in the interest of general government, and is not liable for the negligence of police officers in charge of a "lockup" in causing the illness of a prisoner by a lack of proper heating. *Nettleton v. Prescott* (Ont.), 12-790.

Acts of constable in charge of lockup. — A constable in charge of a municipal "lockup," though appointed by the municipality, is not to be regarded as the servant or agent of the corporation, but as a public official for whose acts or decisions civil responsibility does not attach to the municipality. *Nettleton v. Prescott* (Ont.), 12-790.

Maintenance of fire department. — A municipal corporation acts in a governmental capacity in furnishing fire apparatus and operating its fire department, and therefore it is not liable to a fireman who is injured by reason of defects in such apparatus. *Long v. Birmingham* (Ala.), 18-507.

A municipal corporation, in maintaining a fire station, is liable for injuries to the employees resulting from its neglect to furnish them a safe place to work. *Bowden v. Kansas City* (Kan.), 1-955.

Furnishing water for fire protection. — A municipality is not liable in damages for failure to furnish water for protecting

the property within its corporate limits from fire, and hence no duty rests upon it to impose such liability upon a contractor stepping into its shoes for performing such duty. *Allen, etc., Mfg. Co. v. Shreveport Waterworks Co. (La.)*, 2-471.

A municipality has no authority to hire some one to assume liability to the inhabitants thereof for a failure to furnish water for the protection of their property against fire. *Allen, etc., Mfg. Co. v. Shreveport Waterworks Co. (La.)*, 2-471.

Failure to abate private nuisance. — The power given to a municipality to prevent injury or annoyance from anything offensive or unwholesome, and to cause any nuisance to be abated, is governmental, and a municipality is not liable for damages from a private nuisance resulting from its omission to exercise the power by the adoption of resolutions or ordinances, or for damages from such nuisance occasioned by the failure of its officers to enforce the resolutions or ordinances adopted in the exercise of that power. *Mansfield v. Bristol (Ohio)*, 10-767.

Where a drain laid by the property owners in a public street, under permission from the city, empties into a natural stream, and, without an express license from the city, is used as a sewer to discharge sewage into the stream to the injury of a lower riparian owner, the drain is a nuisance, and the city is liable for negligence in not abating it. *Mansfield v. Bristol (Ohio)*, 10-767.

Acts of board of health. — A municipal corporation is not liable for the acts of a board of health created by public statute for the public benefit, even though its members are appointed by the municipal authorities. *Valentine v. Englewood (N. J.)*, 16-731.

Searching stream for dead body. — A municipal corporation in searching a stream of water for a dead body supposed to be therein, either for the purpose of tracing crime or for the purpose of maintaining or safeguarding the public health and welfare, is engaged in the discharge of a public or governmental function, and, in the absence of a special statute, cannot be held liable for damage done by its police officers and others to adjacent property in making the search, although their acts are wilful, malicious, or negligent. *Gilmor v. Salt Lake City (Utah)*, 13-1016.

b. Private, local, or corporate functions or duties.

(1) In general.

General rule. — Where a municipal corporation acts in its proprietary and private, as distinguished from its governmental, capacity, its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations. *Davoust v. Alameda (Cal.)*, 9-847.

Effect of adoption of approved plans. — Where a city in the erection of a public work exercises reasonable care and judgment, and adopts plans approved and recommended by engineers having all the knowledge that

skill and experience in such work would naturally give them, the city is not liable in damages on account of an alleged defect in the plan, unless the construction is so manifestly dangerous that all reasonable minds must agree that it was unsafe. *Watters v. Omaha (Neb.)*, 14-750.

Construction and operation of water works. — A city which acquires property and constructs and operates a system of waterworks for purposes other than fire protection, with a view to deriving profit therefrom, is not acting in a governmental capacity, and is liable for injuries resulting from the negligent maintenance of such waterworks. *Brown v. Salt Lake City (Utah)*, 14-1004.

A municipality maintaining a system of waterworks for the purpose of deriving profit therefrom is liable for injuries resulting from the negligent maintenance of a conduit which is not part of the waterworks system used in the distribution of water to the inhabitants for pay, but is used for irrigation purposes without charge to the users. *Brown v. Salt Lake City (Utah)*, 14-1004.

In an action to recover damages from a municipal corporation for the drowning of the plaintiff's child while playing in a conduit used as part of the municipal waterworks system, on the ground that the city permitted a space in the inclosure of the entrance to such conduit to remain open for several years and that children played therein to the knowledge of the city council, evidence examined and held that the trial court was justified in submitting to the jury the question of the defendant's negligence. *Brown v. Salt Lake City (Utah)*, 14-1004.

Operation of electric light plant. — A municipal corporation, in maintaining and operating an electric light plant, exercises its proprietary and private rights, and not its governmental functions, and therefore is liable for personal injuries caused by the negligent manner in which the plant is maintained or operated. *Davoust v. Alameda (Cal.)*, 9-847.

A city cannot escape liability for personal injuries caused by the negligent operation of its electric light plant on the ground that the grant of authority to maintain the plant is given to "the board of trustees of such city," and not in terms to the city, as a "city," being a mere intangible thing, existing only in legal contemplation, cannot itself use the franchise, but can only act through its governing body, the board of trustees. *Davoust v. Alameda (Cal.)*, 9-847.

Construction of rapid transit subway. — The city of New York acts in a proprietary and not a governmental character in constructing a rapid transit subway under city streets, where it is permitted but not required to construct such subway, and is authorized either to operate or to lease it. *In re Rapid Transit R. Com'rs (N. Y.)*, 18-366.

Operation of lift bridge. — A city is liable to one of its employees who is lawfully upon a lift bridge which forms part of one of its public streets for injuries sus-

tained by him through the negligence of the persons operating the bridge with the knowledge and consent of the city. *Gathman v. Chicago (Ill.)*, 15-830.

Where a municipal bridge tender does not personally perform his duties, but, with the knowledge and consent of the city, employs other persons to operate the bridge, the city is liable for injuries to one of its employees resulting from the negligent acts of such persons to the same extent that it would be liable for the negligent acts of the bridge tender, notwithstanding the fact that such persons are paid by the bridge tender instead of by the city. *Gathman v. Chicago (Ill.)*, 15-830.

Condition of building occupied as school. — A municipal corporation by reason of its ownership of premises which it permits public school authorities to use for a public school, is not liable for personal injuries to a pupil caused by the defective condition of the premises. *Ernst v. West Covington (Ky.)*, 3-882.

Operation of farm. — In an action on the case against a municipal corporation to recover damages for personal injuries sustained by reason of the alleged defective conditions of a basement step of a building owned by the defendant municipal corporation, the writ contained two counts, the first count alleging in substance that the defendant municipal corporation was the lawful owner and in lawful possession, control, and management of a certain farm with the buildings thereon which it was operating in the usual method of husbandry, and that "all said buildings, land, and other property were then and there used by the said defendant for its own emolument, profit, and advantage," but it nowhere alleged or even intimated that the farm was a poor farm and that the building where the injury was received was a city almshouse. The second count alleged that the defendant municipal corporation was the owner of an almshouse, in the maintenance of which negligence was charged. The defendant filed a general demurrer to each count. The ground for the demurrer to the first count was that the negligence alleged therein appeared to have resulted from the performance of *ultra vires* acts and that a municipal corporation cannot be held liable for the performance of such acts. Held, that while a municipal corporation cannot raise money by taxation for the purchase of a farm for other than municipal purposes yet it may lawfully own, control, and manage such farm and the buildings thereon, disconnected from any public use, and for its own emolument, profit, and advantage, and in the absence of prohibiting statutes it may receive and hold in its corporate capacity, gifts of either real or personal estate; that a municipal corporation holding property for its profit or gain is liable for negligence in the management thereof to the same extent that business corporations or individuals would be; and that as the demurrer to the first count admitted as true the facts therein alleged, and as the facts therein alleged were sufficient,

if true, to constitute a cause of action, the first count in the writ was good. *Libby v. Portland (Me.)*, 18-547.

(2) Construction, maintenance, and repair of sewers.

Injuries caused by defects in plan. —

A city having by its governing body duly adopted a plan for a sewerage system and executed the same, it is not liable for injuries caused thereby to private property, not involving an unconstitutional taking thereof, produced by defects in such plan. But if the city constructs a sewerage system not according to any plan adopted in the manner aforesaid, the rule does not apply. *Hart v. Neillsville (Wis.)*, 4-1085.

If, by reason of defects in the plan of sewerage contemplating that private property will, as a matter of right, be connected therewith, such property is injured because of water accumulated in a sewer flowing therefrom through such a connection with the property, the injury is direct and the municipality is responsible in damages for failure to exercise ordinary care to prevent such injury. *Hart v. Neillsville (Wis.)*, 4-1085.

Effect of knowledge of defects in plan. — Though a city is not liable for damages to private property caused by mere defects in the plan of its duly adopted and executed sewerage system, if it acquires knowledge of the defects and that unless they are remedied they will produce direct injury to private rights, it should exercise ordinary care to prevent such a result, and is responsible for damage caused by failure in that regard. *Hart v. Neillsville (Wis.)*, 4-1085.

Effect of construction of private drain. — Where as a matter of right a private drain is constructed connecting private property with the main sewer through an opening left by the city therefor, and damages result to such property by accumulated sewage flowing from such sewer to such property, the mere circumstances that without the private drain no such result would have happened will not save the municipality from liability for damages. *Hart v. Neillsville (Wis.)*, 4-1085.

Sufficiency of sewer. — Where a municipal corporation has provided a sewer which is capable of carrying off a rainfall of one and one-half inches an hour, which is considered as meeting the requirements of good engineering and is the standard adopted by all the cities of that region, the corporation is not liable in damages for the flooding of premises by water backed up from the sewer after a rainfall of three inches per hour for nine minutes, as such an extraordinary rainfall is not one which could reasonably be expected or for which the corporation is required to provide. *Faulkner v. Ottawa (Can.)*, 14-166.

In an action against a municipal corporation for damages for the flooding of premises by water backed up from a city sewer, evidence examined and held to show that the sewer was capable of carrying off a rainfall

of one and one-half inches per hour. *Faulkner v. Ottawa* (Can.), 14-166.

Obstruction of sewers. — A city having, by its charter, exclusive power to lay out, construct, and alter public sewers, and whose board is under a duty to cause the prompt completion of all necessary repairs of public sewers, is not liable for any injury to an adjacent owner whose premises are flooded by sewage by reason of an obstruction in a public sewer, where the city is not guilty of negligence in causing the obstruction or permitting the same to remain. The mere fact that the obstruction in the sewer exists and causes damage does not constitute negligence on the part of the city or render it liable. *Katzenstein v. Hartford* (Conn.), 13-469.

Where, in an action against a city for an injury to property caused by the stoppage of a sewer and the flooding of the premises, the complaint does not allege that the defendant failed to perform any duty prior to the time that it was notified of the existence of the obstruction, but only that after notice of the stoppage the defendant for a long period of time took no means to relieve the plaintiff of the nuisance and injuries resulting therefrom, no recovery can be had except for damages and expenses resulting from the negligent failure of the defendant to remove the obstruction after it received or became chargeable with notice of the obstruction, and upon failure to prove such negligence the plaintiff cannot recover even for expenses incurred by him, at the request of the city, in trying to ascertain whether the stoppage was in the main sewer or the lateral drain. *Katzenstein v. Hartford* (Conn.), 13-469.

Evidence in action for injuries caused by obstruction of sewer. — In an action for injuries to property caused by an obstructed sewer, where it is not claimed that the sewer was insufficient or defective, evidence of other obstructions is inadmissible. *Katzenstein v. Hartford* (Conn.), 13-469.

In such an action, evidence of the character of the obstruction is admissible in so far as it tends to show that the defendant was not negligent as alleged. *Katzenstein v. Hartford* (Conn.), 13-469.

Discharge of sewage into stream. — Where a municipal corporation discharges sewage into a river or creek, polluting the water of the stream, causing it to become foul, and impregnated with noxious and poisonous substances, rendering it unfit for domestic or other uses, and thereby creating and maintaining a nuisance, which is detrimental to the health, comfort, and repose of a lower riparian owner and diminishes the value of his land, such municipal corporation is liable for damages arising from the maintenance of such nuisances. *Markwardt v. Guthrie* (Okla.), 11-581.

c. Torts of officers, agents, employees, and servants.

General rule. — A municipal corporation, when exercising governmental functions as

the agent of the sovereign power, is not liable for damages resulting from the negligence of its employees, unless it is expressly made liable by statute; but this rule applies only when a municipality is acting in its governmental, political, or public capacity, as an instrumentality intrusted by the state with the subordinate control of some public affair. *Davoust v. Alameda* (Cal.), 9-847.

Neglect of officials in enforcement of laws. — A municipal corporation is not liable for the neglect of its officials in the enforcement of laws in reference to public or police duties. *Dudley v. Flemingsburg* (Ky.), 1-958.

A municipality is not liable for the failure of its officials to prevent coasting or other unlawful use of the streets. *Dudley v. Flemingsburg* (Ky.), 1-958.

Negligence of park commissioners. — The fact that the park commissioners of a city have been appointed under authority of the legislature does not enable the city to escape liability for their negligent acts within the scope of their authority, on the ground that though the commissioners have the control and management of a city's public parks they are not strictly municipal, but are public or state, officers. *Denver v. Spencer* (Colo.), 7-1042.

A city is liable for personal injuries resulting from the negligence of its park commissioners in the construction of a stand in the city park. *Denver v. Spencer* (Colo.), 7-1042.

In an action against a city to recover damages for personal injuries resulting from the negligence of its park commissioners, it is erroneous to instruct the jury that the mere happening of the accident is presumptive evidence of the negligence charged. *Denver v. Spencer* (Colo.), 7-1042.

Negligence of firemen. — In the absence of a statute to the contrary, the rule that a municipality is not liable for the negligence of its officers and agents in the performance of governmental functions precludes the municipality from being held liable for an injury resulting from the negligence of the members of its fire department, though the injury consists of a trespass committed on private property by a fire engine horse. *Cunningham v. Seattle* (Wash.), 7-805.

d. Liability for damage done by mobs.

Liability at common law. — At common law a municipal corporation is not liable for damages done by a mob within its limits to either person or property. *Long v. Neenah* (Wis.), 8-463.

Constitutionality of statute. — The Illinois statute imposing liability on cities and counties for the destruction therein of property by mobs is not special legislation on the ground that the statute does not impose similar liability on villages and towns. *Dawson Soap Co. v. Chicago* (Ill.), 14-1131.

The Kansas statute providing for the recovery of damages against cities on account of the acts of mobs is not obnoxious to the constitutional prohibition against depriving

any person of property without due process of law. *Iola v. Birnbaum* (Kan.), 6-267.

Construction of statute. — The Kansas statute providing for the recovery of damages against cities on account of the acts of mobs, "whether such damages shall be loss of property or injury to life or limb," applies to all bodily injuries and is not limited to such as result in death or loss of a limb. *Iola v. Birnbaum* (Kan.), 6-267.

Charge of court as to meaning of "mob." — In an action under the statute making cities liable for injuries done by mobs, an instruction that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," is not erroneous because it makes no reference to a determination on the part of those composing the assemblage to resist opposition. *Cherryvale v. Hawman* (Kan.), 18-149.

Charivari party. — Where the members of a charivari party forcibly place a bride and groom in a wagon against their will, and draw them up and down the streets of a city, such party constitutes a mob, and the city is liable, under the statute, for injuries resulting from its acts. The fact that the members of the party are good natured and intend no serious harm to any one does not absolve the city from liability. *Cherryvale v. Hawman* (Kan.), 18-149.

What is not a mob or riot. — No recovery can be had under a statute making a city or county "liable to a person whose property is destroyed or injured therein by a mob or riot," where it appears that the injury complained of was the destruction of an unoccupied and somewhat dilapidated building by a crowd of young men and boys who tore off pieces of the building and carried them away to another place for the supposed purpose of building a bonfire, without making any disturbance except such as was naturally incidental to such a proceeding, and without manifesting any purpose to accomplish the destruction of the building in spite of any resistance which might be offered, but, on the other hand, running away when a policeman appeared; since such a trespass cannot be regarded as the act of a mob or riot within the meaning of the statute. *Adamson v. New York* (N. Y.), 11-183.

Notice of threatened injury. — Under the Wisconsin statute making a city liable for personal injuries caused by a mob, a person claiming damage is only required to notify the mayor of any threat or attempt of the mob to do him personal harm or injury, after he has been apprised thereof. *Long v. Neenah* (Wis.), 8-463.

Under the Wisconsin statute making a city liable for personal injuries caused by a mob, but providing that no person shall recover under the statute unless he "shall have immediately notified the mayor of the city, . . . after being apprised of any threat or attempt . . . to do harm or injury to his person by any such mob," the required notice must be given by or on behalf of the person claiming the damage, and a notice given by

his employer does not inure to his benefit. *Long v. Neenah* (Wis.), 8-463.

Evidence reviewed, in an action under the Wisconsin statute making a city liable for personal injuries caused by a mob, and held insufficient to show that the plaintiff had been "apprised of any threat or attempt . . . to do harm or injury to his person" by the mob which inflicted the injury upon him. *Long v. Neenah* (Wis.), 8-463.

Inability of city to prevent injury. — It is no defense to an action brought under the Kansas statute providing for the recovery of damages against cities on account of the acts of mobs that the city was unable to prevent the injury. *Iola v. Birnbaum* (Kan.), 6-267.

e. Ultra vires acts.

Operation of quarry. — In the absence of express or implied authorization, the operation of a rock quarry by a municipal corporation outside of its corporate limits is an *ultra vires* undertaking, and therefore the corporation is not liable for personal injuries resulting from such operation. *Donable v. Harrisonburg* (Va.), 7-519.

f. Notice of claim.

Requirement of valid. — The provisions of a municipal charter that "all claims for damages founded upon alleged negligence of the city shall be presented to the common council, in writing, within thirty days after the occurrence causing such damages," and that "the omission to present any claim in the manner, or within the time . . . provided shall be a bar to an action against the city therefor," is a reasonable and valid requirement, and compliance therewith, or a valid excuse for noncompliance, is a fact which must be alleged and proved in a negligence action against the city, like any other condition precedent to the existence of an obligation. *Winter v. Niagara Falls* (N. Y.), 13-486.

Requirement of binding on minor. — Such a provision is not suspended by reason of the infancy of the claimant, who is eighteen years old and presumably able to cause a claim to be filed. *Winter v. Niagara Falls* (N. Y.), 13-486.

Waiver of requirement. — Assuming that compliance with a charter provision of a municipality requiring a claim against the city for damages for negligence to be filed within thirty days after the occurrence can be waived by the municipal authorities, no such waiver is shown by a pleading which alleges merely that the mayor of the city called on the claimant and sympathized with him, and that the city paid his hospital expenses, and that the corporation counsel summoned and examined the claimant in regard to his claim, as he was required by statute to do. *Winter v. Niagara Falls* (N. Y.), 13-486.

10. CRIMINAL LIABILITY.

Failure to abate nuisance. — A municipal corporation is not criminally liable for its failure to abate a nuisance or to pun-

ish individuals creating and suffering the same on their private property. *Georgetown v. Com.* (Ky.), 1-961.

11. ESTOPPEL OF MUNICIPALITY.

Issuance of permit. — The issuance by a municipal officer of a permit to excavate under the surface of an alley contrary to an ordinance, prohibiting the issuance of such a permit, and the making of contracts and the expenditure of money in reliance thereon, does not prevent the municipality, in the absence of circumstances amounting to an estoppel on its part, from denying the validity of the permit. *J. Burton Co. v. Chicago* (Ill.), 15-965.

12. COUNCILS.

a. In general.

Changes in personnel. — Although the personnel of a city government may change, the tribunal itself is a continuous body. *Biddeford v. Yates* (Me.), 15-1091.

Right to act on measure before it. — The fact that one city government composed of one set of individuals might, upon a given question, do precisely the reverse of another city government composed of a different set of individuals, does not affect the right of the tribunal as city government to act upon any measure properly before it. *Biddeford v. Yates* (Me.), 15-1091.

A municipal government represented by its city council should be regarded as a business institution with reference to the transactions or matters permitted by the terms of its charter, and when not limited to a prescribed method it should be permitted to act with the same business foresight that is accorded to other business institutions. *Biddeford v. Yates* (Me.), 15-1091.

Effect of disqualification of member.

— The judicial action of a common council of a city, participated in by a member disqualified to sit in the controversy, is voidable, although the decision reached does not depend on the vote of the disqualifying member. *Rollins v. Connor* (N. H.), 13-334.

Appointments to offices. — Although the appointment to office is in its nature an executive act, the power to make appointments to city and town officers need not be vested in the executive officer of such city or town, but may be vested in the common council thereof. *State ex rel. Walker v. Wagner* (Ind.), 15-1063.

b. Membership.

Right of candidate refused recognition by members. — Where the council of a city is by statute made the judge of the election and qualifications of its members, a person elected thereto, who is refused recognition by the members who have met to organize on the ground that he is disqualified, is not in possession of the office or entitled to an injunction to enable him to exercise its functions. *Holbrook v. Smedley* (Ohio), 16-155.

Disqualification of contestant. — The action of the common council of a city in determining an election contest according to the weight of conflicting evidence is judicial in its nature, and a contestant is disqualified to sit as a member of the council in the determination of the contest. *Rollins v. Connor* (N. H.), 13-334.

Jurisdiction in quo warranto proceedings. — Although a city council may be the exclusive judge of the qualifications of its members, the court may, in a *quo warranto* proceeding, determine whether in law the facts constitute a disqualification. *Holbrook v. Smedley* (Ohio), 16-155.

Right of city council to determine fact of disqualification. — The provision of the Ohio revised statutes that no member of the council, board, officer, or commissioner of a municipal corporation shall "have any interest in the expenditure of money on the part of the corporation other than his fixed compensation; and a violation of any provision of this section shall disqualify the party violating it from holding any office of trust or profit in the corporation, and render him liable to the corporation for all sums of money or other things he may receive contrary to the provisions of this section, and if in office he shall be dismissed therefrom," does not constitute one of the qualifications of a member of a municipal council of which the council is by the Ohio revised statutes made the judge, and the city council is without authority to determine the fact of such disqualification and upon a finding of such fact to declare a member's seat vacant, and to proceed to fill the vacancy; but the court will not, in a proceeding in *quo warranto* instituted by the person so deprived of his office, oust the person selected to fill the vacancy and restore the relator to the office when in his petition he admits the fact of such disqualification. *Holbrook v. Smedley* (Ohio), 16-155.

Filling of vacancies. — Where a statute conferring the power upon the common council to fill a vacancy in the office of councilman does not describe the method or manner of the appointment, such appointment may be made by ballot, *viva voce* vote, motion, or resolution. *State ex rel. Walker v. Wagner* (Ind.), 15-1063.

c. Compensation of members.

Time of fixing. — Section 197, Municipal code, as amended in 1904 (90 O. L. 118) fixes the compensation of a member of council of a village at two dollars for each meeting, not to exceed twenty-four meetings in any one year, and it is not necessary that it should have been fixed by an ordinance passed before the commencement of his term of office, but the council may authorize its payment by a resolution passed after the services have been rendered. *Walker v. Dillonvale* (Ohio), 19-773.

d. Meetings.

Right to attend. — In a municipal borough, neither the public nor the burgesses nor

reporters for newspapers have the right to attend the meetings of the borough council without the consent of the council, expressed or implied. *Tenby v. Mason* (Eng.), 13-403.

13. OFFICERS AND EMPLOYEES.

As to civil service regulations of appointment and removal see section 13 below.

Creation of office. — The city of New Bedford had power, under its charter, to create the office of assistant city auditor. *Attorney-General v. Tillinghast* (Mass.), 17-449.

An ordinance creating a municipal office is not ineffectual in that respect because it provides an illegal method for the appointment of an incumbent. *People v. McCann* (Ill.), 20-496.

The city of Lowell, Massachusetts, which is empowered by statute to create commissions or boards and to transfer duties to them, has the power to create, by ordinance of its city council, a board of citizens who shall acquire a site and build a city hall for public assemblage, and to ordain that such board shall be elected by the city board of aldermen and common council in joint convention, since the members of such board do not belong to the class of city officers whose election is governed by any general or special law. *Wheeler v. Lowell* (Mass.), 12-1109.

Appointment of officer. — Where a municipality has the power to provide for the appointment of certain officials, it may declare by ordinance what method of appointment shall be followed, but it cannot adopt rules of procedure in reference to the particular method selected which are in derogation of the common or statute law. *Murdoch v. Strange* (Md.), 3-66.

In Arkansas the governor has no power to make an appointment to fill a vacancy in the office of mayor of a city, since the constitution makes no provision for filling the office, and under the statutes the only mode for filling a vacancy in the office is by special election. *Hogins v. Bullock* (Ark.), 19-822.

Eligibility of person living in territory annexed after election. — Where the district in which a person lives is annexed to a city prior to his election as police commissioner of the city, but the annexation is declared void by the courts, a subsequent valid annexation made after his election, but before his term of office begins, does not render him eligible to service, under the Alabama statute (Code 1907, § 1231) providing that no person shall hold the office of police commissioner, except a resident of the city at the time of his election. *Seals v. State* (Ala.), 20-991.

Eligibility of person disqualified at time of election who removes disqualification. — Under the Indiana statute providing that no officer, employee, agent, or servant of any corporation having any contract with a city shall be eligible to hold any office in such city, the right of a claimant to an office is not affected by the fact that at the time of his election he was ineligible, provided he removes his disqualification before

his term of office begins. *Hoy v. State ex rel. Buchanan* (Ind.), 11-944.

Voters for a candidate for office who is disqualified to hold the office by reason of being an officer of a certain corporation, have a right to assume that the candidate, by offering himself for election, will free himself from his disability before the commencement of his term of office, and are not guilty of obstinacy or misconduct in voting for him. *Hoy v. State ex rel. Buchanan* (Ind.), 11-944.

The electors of a city are not bound to take notice that a candidate for a city office is an officer of a private corporation and therefore ineligible to hold a city office. Assuming that they have such knowledge, it is presumed that they also know the time of the beginning of the term of office, which is some time subsequent to the election. *Hoy v. State ex rel. Buchanan* (Ind.), 11-944.

Removal of officer. — In the absence of statute the voters of a town at a town meeting have no authority to remove from office town officers whose term of office is prescribed by the legislature. *Attorney-General ex rel. Cole v. Stratton* (Mass.), 10-883.

Under the new municipal code of Ohio the mayor has authority to remove an officer or appointee in the police department, upon inquiry into the cause of suspension, by the chief of police, of such officer or appointee; but he is without original jurisdiction to inquire into charges against such an officer (other than the chief of police), or appointee, and upon such an inquiry he is without authority to remove an officer or appointee. *State ex rel. Mayor v. Baldwin* (Ohio), 12-10.

A village treasurer appointed to hold "until the next election for city or village officers," is an officer appointed for a fixed term and is therefore not subject to removal without notice and hearing. *Kendrick v. Nelson* (Idaho), 12-993.

Under the Idaho statute regulating the organization, government, and powers of cities and villages, and providing that if the village treasurer "neglect or fail for the space of ten days from the end of each and every month to render the said account, the office shall be declared vacant, and the city council or board of trustees shall fill the vacancy by appointment until the next election for city or village officers," the board of village trustees must first find as a fact that the treasurer has failed or neglected to make reports as required by law before they can declare the office vacant, or proceed to the appointment of a successor in office. *Kendrick v. Nelson* (Idaho), 12-933.

Abolition of office. — The power conferred on a municipality of creating an office and appointing an incumbent thereof implies the power of abolishing the office and thus removing the incumbent. *State v. Edwards* (Mont.), 20-239.

Fixing salary at amount amounting to abolition of office. — A municipal board to which the legislature has delegated the power of fixing the compensation of a municipal officer, but not to abolish the office, must fix a reasonable compensation; but the question what is a reasonable compensation

is to be determined by the board, and such determination is, in the absence of fraud or bad faith, not subject to judicial review, unless the salary of the officer is fixed at so low a figure that no competent person will accept the office, thereby effecting its practical abolition. *De Merritt v. Weldon* (Cal.), 16-955.

Where the marshal of a town of eighteen hundred inhabitants is given control of the department of police, is required to execute such process as is delivered to him for execution, has charge of the town prison if there is such a prison, and would be required to take charge of any chain gang that might be established by the trustees of the town, but his principal duty is to collect the town taxes and licenses, and it does not appear that he is required to devote all his time to the duties of his office or that the proper discharge of those duties would occupy all his time, the court cannot say that the act of the trustees of the town in reducing his salary from sixty dollars to ten dollars a month is tantamount to a destruction of the office of marshal in that no competent person would perform the duties for such an amount. *De Merritt v. Weldon* (Cal.), 16-955.

The fact that on the same day that such reduction was made an ordinance was adopted by the board of trustees creating the office of executive officer, and prescribing for such office duties which, with the exception of the duty to collect license fees and taxes imposed by statute on the marshal, the board of trustees had the power to annex thereto, does not show that the motive of the board was to destroy the office of marshal and to devolve its duties upon the executive officer. *De Merritt v. Weldon* (Cal.), 16-955.

Individual liability. — The public officers who perform the physical acts required to make a public improvement, which, though irregularly made, is performed pursuant to the direction of the municipality, and is one which it is within the authority of the municipality to order, are not trespassers or personal wrongdoers. *Wallenberg v. Minneapolis* (Minn.), 20-873.

Liability for act of subordinates. — The chief of police of a city is not liable for the acts of a dog catcher legally appointed by him pursuant to a city ordinance unless he personally co-operates in the acts complained of or fails to exercise reasonable care in the selection of the appointee. *Casey v. Scott* (Ark.), 12-184.

14. CIVIL SERVICE RULES.

Constitutionality. — The Iowa Veterans' Preference Law is not violative of the Fourteenth Amendment to the Federal Constitution as abridging the privileges or immunities of the citizens of the United States. *Shaw v. Marshalltown* (Iowa), 9-1039.

The Iowa Veterans' Preference Law is not violative of the provisions of the state constitution that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all, as the

right of appointment to a minor municipal office is not a privilege within the meaning of the constitution. *Shaw v. Marshalltown* (Iowa), 9-1039.

Purpose. — The manifest purpose of the Massachusetts Veterans' Preference Law is to secure the employment of veterans in the labor service of the commonwealth and its cities and towns, in preference to all other persons except women, if the veterans are competent to perform the labor; and it is within the power of the legislature to make this preference. *Ransom v. Boston* (Mass.), 7-733.

Rules of commissioners. — The Massachusetts Veterans' Preference Law makes it the duty of civil service commissioners to establish rules to accomplish the purpose of the statute; and its rules, when duly approved, have the force of law. *Ransom v. Boston* (Mass.), 7-733.

Rights of veteran to employment. — The Massachusetts Veterans' Preference Law makes no distinction, at least as to the right to continued employment, between the case of a veteran who has been duly registered, certified, and employed in the labor service of a city or town, and the case of a veteran who has been duly examined, registered, and employed as a public officer. *Ransom v. Boston* (Mass.), 7-733.

Under the Massachusetts Veterans' Preference Law and the rules adopted by the civil service commissioners for the purpose of making the statute operative, a veteran who has been duly registered, certified, and employed in the labor service of a city has the right to continuous employment in preference to laborers who are not veterans, so long as there is work to be done of the kind for which he has been employed, provided he is competent to perform that work. *Ransom v. Boston* (Mass.), 7-733.

Mandamus to compel appointment to office. — A veteran who is entitled to be appointed to an office under the provisions of the Iowa Veterans' Preference Law may maintain a writ of mandamus to compel the appointing power to make the appointment. *Shaw v. Marshalltown* (Iowa), 9-1039.

Right of action for breach of contract. — A veteran employed as a laborer by a city under the provisions of the Massachusetts Veterans' Preference Law and of the civil service rules adopted in pursuance thereof is employed under a contract. The statute and the civil service rules enter into the contract and constitute a part of the terms of the veterans' employment, and for any breach of these terms he may maintain an action of contract. *Ransom v. Boston* (Mass.), 7-733.

The fact that the Massachusetts Veterans' Preference Law imposes a penalty for any breach of its provisions does not deprive a veteran, who has been wrongfully deprived of his employment under a contract entered into by virtue of the statute, of his right to maintain an action for breach of contract. *Ransom v. Boston* (Mass.), 7-733.

Measure of damages for breach of contract. — In an action by a veteran against

a city for breach of his contract of employment under the Massachusetts Veterans' Preference Law, the only liability of the defendant is for not having given the plaintiff preference over others, not veterans, to which he was entitled while there was work to be done which he was competent to do, and as in the ordinary case of a breach of a contract of employment, the measure of damages is the pay the plaintiff would have earned under his contract less what he has earned, or in the exercise of proper diligence might have earned elsewhere. *Ransom v. Boston* (Mass.), 7-733.

Exemptions. — A council cannot evade the civil service law and exempt a mere employee from the civil service rules, by providing that he shall be elected or confirmed by the city council. *Attorney-General v. Tillinghast* (Mass.), 17-449.

Removal by abolition of office. — A civil service statute forbidding the discharge of a policeman except after trial does not abrogate the power of a city in good faith to reduce the number of policemen on the force when the public interests require such action; but it does forbid the abolition of offices for purely personal or political reasons in order to effect the removal of certain members of the force, leaving the way open to recreate the offices and to fill them with other persons more acceptable to the appointing power. *State v. Edwards* (Mont.), 20-239.

15. FIRES AND FIRE DEPARTMENTS.

Legislative control. — The management of the fire department of a municipal corporation is a local governmental function belonging, under the constitution, to the municipality, and the state legislature has no power to vest the management of a municipal fire department in a board appointed by the governor of the state, although persons living outside the municipality but visiting it or having property within its limits may be affected by the efficiency of such fire department. *Davidson v. Hine* (Mich.), 14-352.

Right of city to prescribe character of buildings in fire limits. — A municipality, acting pursuant to delegated authority to fix fire limits and to direct the manner of constructing buildings within such limits with respect to protection against fire, may, by ordinance, prescribe the manner in which buildings shall be constructed, and provide that a building not so constructed shall be deemed a nuisance and may be abated as such. *Micks v. Mason* (Mich.), 9-291.

Right to destroy building as nuisance. — A municipality has the right to raze a building constructed within its fire limits in violation of its ordinance prescribing the character of buildings which may be constructed within such limits, where the ordinance provides that a building constructed in defiance of its terms shall be deemed a nuisance, and authorizes the enforcement of the ordinance by the destruction of an unlawful building. *Micks v. Mason* (Mich.), 9-291.

Moving wooden building to location within limits. — Under a city ordinance establishing fire limits and declaring it un-

lawful for any person "to erect or attempt to erect within the above-described fire limits any wooden building," the moving of an already constructed wooden building from a point outside to a location within such fire limits is within the prohibition of the ordinance. *Red Lake Falls Milling Co. v. Thief River Falls* (Minn.), 18-182.

16. LEGISLATIVE CONTROL OF MUNICIPAL CORPORATIONS.

Statute affecting police. — The Rhode Island legislature has the right to "control police," though the duties of the police are confined to a certain locality, and it also has the right to provide for the payment of the expenses of the local police department out of the local funds of the municipality. *Horton v. Newport* (R. I.), 8-1097.

The Rhode Island statute creating a police commission for the city of Newport, and providing that the commissioners shall be appointed by the government and that their salaries shall be paid by the city, does not conflict with any provision of the first section of the Fourteenth Amendment to the Federal Constitution. *Horton v. Newport* (R. I.), 8-1097.

The Rhode Island statute creating a police commission for the city of Newport, which provides that the commissioners shall be appointed by the government, and that their salaries shall be paid by the city, is a valid exercise of the legislative power, and is not unconstitutional as interfering with the right of the city to local self-government. *Horton v. Newport* (R. I.), 8-1097.

The Rhode Island statute creating a police commission for the city of Newport and providing that the commissioners shall be appointed by the government and that their salaries shall be paid by the city is not violative of a provision of the Rhode Island constitution that "the general assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited in this constitution." *Horton v. Newport* (R. I.), 8-1097.

Effect of constitutional prohibition of special laws. — A provision of the Washington constitution prohibiting the legislature from enacting any private or special laws for granting corporate powers or privileges applies to municipal as well as to private corporations. *Terry v. King County* (Wash.), 9-1170.

The Washington statute providing for the construction of armories in certain cities, and giving such cities and the counties in which they are located the power to issue and sell bonds for the purchase of armory sites and the construction of armories, is a special law conferring corporate powers, and therefore is violative of a provision of the state constitution prohibiting such laws. *Terry v. King County* (Wash.), 9-1170.

17. ACTIONS AGAINST MUNICIPALITIES.

Statute requiring presentment of claims. — A claim for damages on account of the death of a relative killed through the

negligence of a municipality is not within the provisions of the Utah statute requiring certain claims against cities and towns to be presented within ninety days from the happening of the injury or damage. *Brown v. Salt Lake City (Utah)*, 14-1004.

The provisions of section 2263 of the revised codes, requiring that an itemized statement of a claim against a city or village, duly verified by the oath of the claimant, must be presented to the city or village authorities before suit is commenced thereon, do not apply to an action in tort for a personal injury sustained on account of defective streets or sidewalks. *Miller v. Mullan (Idaho)*, 19-1107.

Who may sue for injunction. — A suit in equity to enjoin a city from increasing the water rates is one which the plaintiffs, consumers of the water, may bring and maintain in behalf of themselves and all other persons in the same situation. *Grafton v. Holt (W. Va.)*, 6-403.

Power to issue mandatory injunction. — A court has no power to issue a mandatory injunction requiring a city to construct a sewer irrespective of the exercise of the discretion vested by law in municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and like matters. *Vicksburg v. Vicksburg Waterworks Co. (U. S.)*, 6-253.

Village clerk as party to action. — The clerk of a village, being merely a recording officer and without any administrative functions, is not a necessary or proper party to an action against the village. *State Board of Health v. St. Johnsbury (Vt.)*, 18-496.

Service on village trustees. — Service of a notice on the trustees of a village is notice to the village. *State Board of Health v. St. Johnsbury (Vt.)*, 18-496.

Submission to arbitration. — A municipal corporation has power, as an incident to its right to sue and be sued, to submit a disputed claim to arbitration. *McKennie v. Charlottesville, etc., R. Co. (Va.)*, 18-1027.

Taxpayer's action to recover money illegally expended. — In the absence of statutory regulation a taxpayer may maintain an action, on behalf of himself and other taxpayers, to recover money illegally paid out of the public treasury; and in such action may unite as defendants all against whom any relief is asked, and whose right will be affected by the determination of the subject of the action. *Walker v. Dillonvale (Ohio)*, 19-773.

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Principle of idem sonans. — In an action by a state hospital for the insane to recover the cost of maintaining an insane person, the court is, under the doctrine of *idem sonans*, justified in concluding after hearing the pronunciation of the name "Dasso" by the witnesses in the case, that though incorrectly spelled "Tasso" in the order of commitment, the latter name, when pronounced, conveys to the ear the same sound as would be conveyed by the pronunciation of the name if it had been correctly written "Dasso." *Napa State Hospital v. Dasso* (Cal.), 15-910.

Change of name. — A person may, at common law, change his name in good faith

and for an honest purpose, by adopting a new name and transacting his business and holding himself out under the new name, with the acquiescence and recognition of his friends and acquaintances, and this right is not abrogated by a statute authorizing a change of name by judicial proceedings. *Smith v. U. S. Casualty Co.* (N. Y.), 18-701.

Suit in other than customary name. — If, in the country of the plaintiff's nativity a child bears the family name both of his father and his mother, he may sue in this country in his full name, though he has borne in this country only the paternal family name, and notwithstanding that the suit is for a divorce and he was married under the paternal family name alone. *De Renzes v. His Wife* (La.), 5-893.

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Good moral character. — The word "character" as used in the phrase "a man of good moral character" in the Federal Naturalization Act is not synonymous with reputation. It refers to what a person really is, and not to what he is supposed to be. *United States v. Hraskey* (Ill.), 16-279.

An applicant for naturalization who has habitually, knowingly, and wilfully violated the law prohibiting the sale of intoxicating liquor on Sunday, and who states that he intends, if naturalized, to continue to violate that law, is not "a man of good moral character," and one who is "well disposed to the good order" of the country within the meaning of the Federal Naturalization Law. *United States v. Hraskey* (Ill.), 16-279.

Discretion of court and review. — A court having jurisdiction to naturalize aliens as citizens has discretion to determine whether a particular alien is fit for admission. But such discretion means sound judicial discretion, and is subject to review. *United States v. Hasky* (Ill.), 16-279.

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1. ACTIONABLE NEGLIGENCE.

Elements of.—Negligence presupposes the existence of a duty to protect from injury, and failure to perform that duty, from which an injury results. *St. Louis, etc., R. Co. v. Rhoden* (Ark.), 20-915.

Actionable negligence consists of three elements, each of which is essential to its existence, namely, the existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains, a failure by the defendant to perform that duty, and an injury to the plaintiff from such failure of the defendant. *Indiana, etc., Coal Co. v. Neal* (Ind.), 9-424.

In order to constitute actionable negligence there must exist three essential elements, namely: A duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. Not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof of any of them is fatal to a recovery. *Means v. Southern Cal. R. Co.* (Cal.), 1-206.

Test of.—An act of omission may be in itself clearly negligent, or clearly free of negligence, so that no evidence can change its character. But if its character is doubtful, the best test of actionable negligence, where available, is the degree of care which persons of ordinary intelligence and prudence commonly exercise in the same circumstances. If the care exercised in such a case rises to or above that standard, there is no actionable negligence; if it falls below that standard, there is such negligence. *Chicago Great Western R. Co. v. Minneapolis, etc., R. Co.* (U. S.), 20-1200.

Knowledge or belief as to danger.—In an action for negligence it is not erroneous to charge that the defendant's liability depends on whether he knew or by the exercise of ordinary care could have known that the accident might happen unless he took precautions against it, instead of predicating such liability on belief or reasonable grounds of belief. *Bruner v. Seelbach Hotel Co.* (Ky.), 19-217.

Liability for negligence where relation is contractual.—Where the only re-

lation between parties is contractual, liability in an action of tort for negligence must be based upon some positive duty which the law imposes because of the relationship between the parties or because of the negligent manner in which some act provided for by the contract is done. *Dustin v. Curtis* (N. H.), 13-169.

2. CARE AND PRUDENCE REQUIRED IN GENERAL.

Natural or probable consequence of act or omission. — The liability of a person charged with negligence does not depend on whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of, he being liable for anything which, after the injury is complete, appears to have been a natural or probable consequence of his act or omission. *Woodson v. Metropolitan St. R. Co.* (Mo.), 20-1039.

Liability for negligence does not depend upon the question whether the result of the alleged negligent act might reasonably have been foreseen. It is sufficient if the result of the act is the natural, though not the necessary or inevitable, thing to be expected. *Haase v. Morton* (Ia.), 16-350.

Consequences which ought to have been apprehended. — A person is responsible for such consequences of his acts as ought to have been apprehended according to the usual experience of mankind. *Currier v. McKee* (Me.), 3-57.

Anticipation of injury not necessary. — In order to hold a person liable for negligence, it is not necessary to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. *Mize v. Rocky Mountain Bell Tel. Co.* (Mont.), 16-1189.

Failure of owner of building to provide fire escapes. — At common law, where a building was properly constructed for its intended use and purpose, and the building was not particularly exposed to the danger of fire from the character of the work to be carried on in it, the owner was not required to construct fire escapes for the purpose of protecting his employees or tenants from the remote danger of fire, the ordinary means of escape by stairs, halls, doorways, and windows being deemed sufficient. *Yall v. Snow* (Mo.), 9-1161.

Duty of owner to prevent fall of building. — The degree of care required of the owner of a building to prevent it from falling into the street or on his neighbor's land depends on the circumstances of each case. *Earl v. Reid* (Can.), 18-1.

Duty of owner of building to employees of contractor. — Where a contractor is employed to remove a metal smoke-stack which has fallen on a roof constructed of boards covered over with tar paper, and which has broken a hole in the roof not visible to its whole extent by reason of the fact that immediately adjoining the hole the tar paper remains intact while the boards underneath are splintered and broken, it is

the duty of the owner, knowing of the hidden danger, to notify the contractor's workmen of such danger, and for failure to do so he is liable in damages for the death of a workman killed by falling through such hole. *Calvert v. Springfield Electric Light, etc., Co.* (Ill.), 12-423.

Negligence of driver of dray. — The fact that the driver of a dray in bright daylight handles his team so that the hub of the dray strikes and injures a person who has just passed in front of the team and is standing upon the running board of a street car justifies a finding of negligence on the driver's part. *Sibley v. Nason* (Mass.), 12-938.

Personal injuries caused by crowd in department store. — The owner of a department store is not liable for personal injuries resulting to a customer, or to the child of a customer, from being pushed down a flight of stairs in the store by the sudden movement of a crowd of customers attracted to another portion of the store by the announcement that goods are there being disposed of at a bargain, provided the stairs upon which the accident occurs are properly constructed and safe for use under ordinary circumstances. The proprietor of a store is under no obligation to foresee and provide against such an occurrence. *Lord v. Sherer Dry Goods Co.* (Mass.), 18-41.

3. PERSONS TO WHOM DUTY OF CARE IS DUE.

One lawfully on premises of another.

— The owner of premises is bound to exercise reasonable care under the circumstances to see that the premises are in a safe condition so as not to expose one lawfully entering thereon to injury. *Means v. Southern Cal. R. Co.* (Cal.), 1-206.

An owner or occupant of land who by invitation, express or implied, induces others to go upon the premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches if such condition was known to him and not to them. *Calvert v. Springfield Electric Light, etc., Co.* (Ill.), 12-423.

A person who goes upon the premises of another by the latter's invitation and for the latter's purposes or convenience is not a bare licensee, but an invitee, and it is the duty of the owner of the premises to take ordinary care to prevent injury to him. *Glaser v. Rothschild* (Mo.), 17-576.

The license of an invitee upon the premises of another does not give him the right, without further invitation, to roam at will to out-of-the-way places on the premises, wholly disconnected from and in no way pertaining to the business in hand, and if he is injured while so roaming about the premises, by some defect therein, the owner is not liable. It is otherwise, however, where the invitee goes to a portion of the premises not connected with the primary object of his visit, by invitation of the owner. Thus where a person who has called at a mercantile establishment by express invitation of the proprietor, and who has been requested to wait a few minutes until the proprietor can talk

with him, asks permission to use the toilet, and is given the key to the same and directed where to find it, there is an implied guarantee that the way to the toilet is reasonably safe, and if it is not, and the invitee is injured thereby, the owner of the building is liable. *Glaser v. Rothschild* (Mo.), 17-576.

One who is mere licensee. — A newsboy who goes into a quarry during working hours to sell papers to the men working there, though on the invitation of the foreman, is a mere licensee, because such an act of the foreman could have no tendency to promote the interests of his employer; and therefore the proprietor of the quarry is not liable for the death of the boy caused by the fall of a derrick while he is so on the premises. *Norris v. Hugh Nawn Contracting Co.* (Mass.), 19-424.

Trespassing children. — A landowner is not liable to trespassers, even when those trespassers are children of tender years, for maintaining upon his land an unfenced or unguarded pond, the existence of which is apparent and well known. *Sullivan v. Huidekoper* (D. C.), 7-196.

An owner of land who makes changes on it in the course of its beneficial use, which tend to attract children and to expose them to danger, is under no duty to take special precautions for their safety. *Thompson v. Baltimore, etc., R. Co.* (Pa.), 11-894.

It is not the duty of an occupier of land to exercise care to make it safe for infant children who come upon it without invitation but merely by sufferance. *Wheeling, etc., R. Co. v. Harvey* (Ohio), 11-981.

The doctrine of the turntable cases should be applied to all uncommon artificial objects which are inherently dangerous and which are attractive and alluring to children of immature judgment and discretion, provided such objects can be guarded without serious inconvenience and great expense to the owner. *Brown v. Salt Lake City* (Utah), 14-1004.

Where plaintiff and defendant are both trespassers. — In an action against a municipal corporation to recover for the death of the plaintiff's intestate caused by the defendant's negligent operation of its electric light plant, where it appears that the deceased, while walking along a beaten footpath across a vacant uninclosed lot belonging to a third person, which had been used as a passageway for several years by residents in the neighborhood, was killed by coming in contact with a live wire of the defendant's electric plant which had been negligently allowed to lie across the path, the defendant cannot escape liability on the ground that the deceased was a trespasser, for the reason that the defendant, being itself a trespasser, is in no position to raise the question that the deceased was a trespasser, and for the further reason that the deceased was a licensee, and not a mere trespasser. *Davoust v. Alameda* (Cal.), 9-847.

Persons suffering remote consequences. — One who is guilty of negligence is liable for the loss resulting therefrom to those to whom he owed the duty to use care, and not to those who suffer the remote con-

sequence of the breach of such duty. *Eshleman v. Union Stock Yards Co.* (Pa.), 15-098.

Liability of contractor to employees of other party. — One who contracts to keep in repair vans owned by a firm is under no duty to the latter's driver and is not liable in damages to the driver for a failure to inspect and repair a van. *Earl v. Lubbock* (Eng.), 1-753.

4. PROXIMATE CAUSE.

General rule. — The rule is general that a person is not to be held responsible in damages for remote consequences of his act, or indeed for any but those which are proximate and natural. *Woodstock Iron Works v. Stockdale* (Ala.), 5-578.

In an action for damages for personal injuries no recovery can be had unless the negligence of the defendant is proven to have been the proximate cause of the injuries complained of. *Tailon v. Mears* (Mont.), 1-613.

Definition of proximate cause. — An instruction is erroneous which defines proximate cause as "the efficient cause from which the injury follows in unbroken sequence without any intervening cause to break the continuity." *Eichman v. Buchheit* (Wis.), 8-435.

The proximate cause is that which originates and sets in motion the dominating agency that necessarily proceeds through other causes as mere instruments or vehicles in a natural line of causation to the result. *New York, etc., R. Co. v. Hamlin* (Ind.), 15-988.

The proximate cause of an injury is that which in a natural and continuous sequence unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred. *Mize v. Rocky Mountain Bell Tel. Co.* (Mont.), 16-1189.

Negligence concurring with accident. — In an action for negligence the defendant is liable where the injury occurred to a person using due care, and the cause of the injury was the negligence of the defendant concurring with an accident without which the injury would not have occurred. *Illinois Cent. R. Co. v. Siler* (Ill.), 11-368.

Anticipation of particular injury not essential to liability. — A person is liable for any injury approximately resulting from his negligent act or omission, if in the exercise of ordinary care he ought to have anticipated that it was likely to cause an injury to others, though he may not have anticipated the particular injury which was actually inflicted. *Foster v. Chicago, etc., R. Co.* (Ia.), 4-150.

Effect of other cause operating concurrently. — Where a person has been guilty of negligence, the mere fact that some other cause operated concurrently in the production of the injury does not relieve him from liability. *Haase v. Morton* (Ia.), 16-350.

Effect of intervening cause. — Where a telephone pole, which has fallen across a highway by reason of the negligence of the

telephone company, is placed back in position by a traveler having no connection with the company, who insecurely props the pole up with a stick procured nearby, and in less than an hour thereafter the pole falls upon a traveler on the road without any cause other than the inherent weakness in the support, the original negligence of the company is not the proximate cause of the accident, but the act of the person propping up the pole is an intervening cause relieving the company from liability for the accident and the resulting injury. *Harton v. Forest City Tel. Co.* (N. Car.), 14-390.

Effect of intervention of innocent acts. — The law looks to the proximate and not to the remote cause of an injury; but if the original act was wrongful and would naturally according to the ordinary cause of human events prove injurious to some person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury is referred to the wrongful cause passing by those which are innocent. It is not the lawful but the wrongful or negligent act of a third party intervening, which breaks the chain of causation and relieves the original wrongdoer of the consequences of his wrongful act. A person is responsible for such consequences of his acts as ought to have been apprehended according to the usual experience of mankind. *Currier v. McKee* (Me.), 3-57.

Effect of intervening cause aggravating injury. — A person is not relieved of liability for personal injuries caused by his negligence by the fact that the injuries have been increased by the negligence of an attending physician, or by the fact that the injured person has settled a claim against the attending physician for malpractice. *Vion v. Brooks-Scanlon Lumber Co.* (Minn.), 9-318.

Effect of negligence of third persons. — A defendant charged with negligence cannot relieve himself of liability by showing negligent acts committed by third persons and with which the plaintiff is not connected. *Barnes v. Western Union Tel. Co.* (Nev.), 1-346.

Escape of oil into river. — The escape of oil into a river, the current of which must inevitably carry such oil down the stream, is a proximate cause of an injury resulting therefrom to property located along the banks of the river at a lower point. *Brennan Construction Co. v. Cumberland* (D. C.), 10-865.

5. VIOLATION OF STATUTE OR ORDINANCE.

Purpose of statute or ordinance and class protected. — An action for negligence which is based upon a violation of a statute or ordinance cannot be maintained, where it appears that the statute or ordinance was enacted or ordained for a wholly different purpose than to prevent the injury complained of, or that the plaintiff does not belong to the class that the law was designed to protect. *Indiana, etc., Coal Co. v. Neal* (Ind.), 9-424.

The violation of a statutory duty is the foundation of an action for negligence in

favor of such persons only as belong to the class intended by the legislature to be protected by the statute. *Everett v. Great Northern R. Co.* (Minn.), 10-294.

The provisions of section 5 of the Missouri statute of 1891 relating to manufacturing, mechanical, mercantile, and other establishments and places, and the employment, safety, health, and work hours of employees, which require the openings of all hatchways, elevators, and well-holes in manufacturing, mechanical, mercantile, or public buildings to be protected by trap doors, self-closing hatches, safety catches, or guard rails, in the manner therein prescribed, and to be kept closed at all times except when in actual use, are intended for the protection and safety of employees in the buildings mentioned, and not for the protection of other persons; and, consequently, in an action to recover damages for personal injuries received by falling into an elevator pit in the basement of a mercantile establishment, where it appears that the person injured was not an employee in such establishment, but merely an invitee upon the premises, a refusal by the court to charge the jury that it was the duty of the defendant to protect the elevator pit in the manner prescribed by the act of 1891, and that the plaintiff had a right to presume that the statute had been complied with, does not constitute error. *Glaser v. Rothschild* (Mo.), 17-576.

Failure to comply with the provisions of a municipal ordinance intended for the protection of private persons from injury constitutes negligence *per se*. *Cragg v. Los Angeles Trust Co.* (Cal.), 16-1061.

Ordinance must have application to defendant. — In an action against a street railroad company for personal injuries alleged to have been caused by running the defendant's car at an unlawful rate of speed, evidence of an ordinance limiting the rate of speed of street cars is irrelevant, unless it appears that the car in question was operated subject to the provisions of the ordinance. *Dale v. Denver City Tramway Co.* (U. S.), 19-1223.

6. NECESSITY FOR RESULTANT DAMAGES.

Proof of pecuniary loss. — It is contrary to the policy of Illinois as evidenced by the acts of its legislature to permit a recovery of damages on mere proof of neglect or default of the defendant without proof that the plaintiff has suffered pecuniary loss. *Raisor v. Chicago, etc., R. Co.* (Ill.), 2-802.

7. CONTRIBUTORY NEGLIGENCE.

a. In general.

Inference of negligence. — Contributory negligence on the part of the plaintiff implies the existence of negligence on the part of the defendant. *Linforth v. San Francisco Gas, etc., Co.* (Cal.), 19-1230.

Where defendant acts wantonly or wilfully. — Contributory negligence is not available as a defense where the injuries complained of were caused by the wanton or

wilful misconduct of the defendant. *Birmingham R., etc., Co. v. Jung* (Ala.), 18-557.

Contributory negligence not a direct contributory cause. — An action to recover damages for an injury caused by the negligence of the defendant is not barred by the negligence of the plaintiff at the time of the injury, unless the plaintiff's negligence was a direct contributing cause to the injury, as distinguished from a mere condition, in the absence of which the injury would not have occurred. *Black v. New York, etc., R. Co.* (Mass.), 9-485.

Contributory negligence remotely connected with accident. — Where a plaintiff's negligence or wrongdoing has placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury, as the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct, and proximate cause of it. *Black v. New York, etc., R. Co.* (Mass.), 9-485.

Acts in emergencies. — One who does an act under an impulse or upon a belief created by a sudden danger which is attributable to another's negligence is not to be regarded as guilty of contributory negligence, even though the act would be regarded as a negligent one if it was done under circumstances not indicating sudden peril. *McIntyre v. Orner* (Ind.), 8-1087.

Illegal conduct. — The right to maintain an action for damages resulting from the omission of the defendant to perform a public duty is not taken away because the person injured is at the time disobeying a statute, where the unlawful act or conduct in no way contributes to the accident. *Hemming v. New Haven* (Conn.), 18-240.

Violation of municipal ordinance. — In an action for negligently running into and killing a horse in a public street, it will not be held as a matter of law that the owner was guilty of contributory negligence in allowing the horse to run at large in the street in violation of a municipal ordinance. *Ensley Mercantile Co. v. Otwell* (Ala.), 4-512.

Effect of blindness or deafness of person injured. — A person whose sight or hearing is defective is bound to exercise the same degree of care to protect himself from injury that would be exercised in the same situation by a reasonably prudent person in possession of the ordinary senses; and if he places himself in a position requiring the exercise of care for his safety, he must make up for his defective sense by being more vigilant in the use of his unimpaired senses. *Toledo, etc., R. Co. v. Hammett* (Ill.), 5-73.

b. Doctrine of last clear chance.

Statement of rule. — In an action founded on negligence, the plaintiff is entitled to recover notwithstanding his own negligence, if the defendant saw the danger in

time to avoid the accident, but failed to do so. *Belle Alliance Co. v. Texas, etc., R. Co.* (La.), 19-1143.

What rule does not require. — Where the motorman of an electric car sees a person on the track at a place where the car is plainly visible, he has the right to assume that such person will use his senses and get off the track in time to avoid injury. The doctrine of "last clear chance," under such circumstances, does not require the motorman to exercise care and diligence to ascertain whether such person, when first seen on the track, is so intoxicated that he will fail to use his senses and to avoid obvious danger. *Little Rock R., etc., Co. v. Billings* (U. S.), 19-1173.

Collision between street car and buggy. — The doctrine of the last clear chance is applicable in an action for injuries caused by a collision at a street crossing between the defendant's street car and a buggy in which the plaintiff's intestate was driving, where the evidence shows that the motorman saw and appreciated the danger when the car was forty feet from the crossing, and the motorman testifies that at that time the car was moving at the rate of eight miles an hour, and there is evidence that at such rate of speed the car could have been stopped within twenty feet. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

Contributory negligence proximately causing injury. — A plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part, cannot recover damages therefor, although the defendant ought to have discovered (but did not in fact discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort. *Dyerson v. Union Pacific R. Co.* (Kan.), 11-207.

c. Contributory negligence of minors.

General rule. — An infant, so far as he is personally concerned, is held to such care and prudence as is usual among children of the same age; and if his own act directly brings an injury upon him, while the negligence of another person is only such as exposes the infant to the possibility of an injury, the infant cannot recover from such other person. *Baker v. Seaboard Air Line R. Co.* (N. Car.), 17-351.

In an action for injuries to a boy alleged to have been occasioned by a defective sidewalk, an instruction to the jury that "it is a question for you to determine whether the plaintiff used such care as boys of his age and discretion usually exercise on like occasions, and such care and discretion as you think he ought to use in going along there," is not objectionable as leaving it for the jury to find that the degree of care required was such as boys of his age usually exercise, and as excluding from the jury the consideration

that this boy was a boy of unusual intelligence, and that the proper standard should have been that degree of care which boys of his intelligence would use. *Beaudin v. City of Bay City (Mich.)*, 4-248.

In an action by a minor to recover damages for negligence, where the defense is contributory negligence and the testimony is conflicting as to the latter, it is a question for the jury whether the minor used the care and prudence which an ordinarily prudent person of his age would be expected to exercise, it not being for the court to determine as a matter of law that the minor was an adult to all intents and purposes notwithstanding his minority. *Dubiver v. City, etc., R. Co. (Oregon)*, 1-889.

The care and discretion required of minors and for which they must be held chargeable must be proportioned to their age and capacity, and while it must be ordinary care it is not the ordinary care required of an adult under the same circumstances. *Dubiver v. City, etc., R. Co. (Oregon)*, 1-889.

In Oregon, where contributory negligence is a matter of defense and the burden of maintaining it is on the defendant, it must be assumed until otherwise shown that a minor plaintiff has exercised the care to be expected of one of his years of discretion, and the court cannot say as a matter of law that because he is *sui juris* he should have exercised the same degree of prudence as an adult. *Dubiver v. City, etc., R. Co. (Oregon)*, 1-889.

Child under twelve years of age. — A child under twelve years of age is presumed to be incapable of so understanding and appreciating the danger from a negligent act, or from conditions produced by others, as to make him guilty of contributory negligence. *Rolin v. R. J. Reynolds Tobacco Co. (N. Car.)*, 8-638.

Plaintiff fourteen years of age at time of accident. — An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger and to have power to avoid it, and this presumption will stand until rebuttal by clear proof of the absence of such discretion as is usual with infants of that age. If evidence in rebuttal of such presumption is offered, its weight and value are for the jury to estimate. *Baker v. Seaboard Air Line R. Co. (N. Car.)*, 17-351.

Plaintiff seventeen years of age at time of accident. — In an action for damages for personal injuries where there is no evidence that the plaintiff was less able than an ordinary person to look out for his safety, except the fact that he was seventeen years of age at the time of the accident, it is error to instruct the jury that the age and experience of the plaintiff are proper matters to be considered in determining whether he was guilty of contributory negligence. *Doggett v. Chicago, etc., R. Co. (Iowa)*, 13-588.

d. Attempt to save life or property.

Attempt to save human life. — The rule stated as to the care required of a person in attempting to save human life. *Mobile, etc., R. Co. v. Ridley (Tenn.)*, 4-925.

Evidence held sufficient to justify a verdict for the plaintiff in an action for death by wrongful act, the death having been incurred in an attempt to save human life. *Mobile, etc., R. Co. v. Ridley (Tenn.)*, 4-925.

When rule does not apply. — The rule that going into a place of danger in an attempt to save human life is not contributory negligence is applicable only where the party to be rescued is at the time in imminent danger caused by the negligence of the defendant, and therefore it does not apply where a woman is struck by a passing freight train while she is standing on the railroad track in front of the train, waving to the engineer to stop, in order to prevent an accident to her mother who, knowing that the train is approaching, is walking towards the track with the evident purpose of crossing it, and who, without looking to see how near the train is, steps on the track immediately in front of the locomotive and is killed. *Wright v. Atlantic Coast Line R. Co. (Va.)*, 19-439.

Attempt to save property. — Where an employer's property is set on fire by the negligence of another, and an employee in attempting to extinguish the fire is burned to death, there can be no recovery from the party by whose negligence the fire was started, unless the employee acts with such care and caution as a reasonably prudent man would exercise. *Pegram v. Seaboard Air Line Ry. (N. Car.)*, 4-214.

In an action for damages brought by the administrator of an employee burned to death while attempting to rescue the master's property, a charge by the court that the only limitation of the rule that an employee or servant or other person may incur risk to save property is that one must not recklessly expose himself to danger, is erroneous as implying that any conduct falling short of recklessness would not bar recovery. *Pegram v. Seaboard Air Line Ry. (N. Car.)*, 4-214.

e. Imputable contributory negligence.

(1) Negligence of parent.

In general. — In an action by an infant of tender years, in its own right, for personal injuries arising from the negligence of a railway company, the fault or negligence of its mother or a third party, if any, contributing to such injury cannot be imputed to the child. *Atchison, etc., R. Co. v. Calhoun (Okla.)*, 11-681.

The contributory negligence of parents in permitting a child, four years and one month old, to go without a caretaker upon the streets of a city upon which electric cars are operated cannot be imputed to the child in an action by him to recover damages for personal injuries sustained by him in consequence of the negligent operation of the electric car. *Jack-sonville Electric Co. v. Adams (Fla.)*, 7-241.

Distinction between actions by child and parent. — In an action by a child of tender years to recover damages for personal injuries, the contributory negligence of his parent will not be imputed to him. The negligence of the parent will bar an action by him

for loss of services but will not bar an action by the child. *Mattson v. Minnesota, etc., R. Co. (Minn.)*, 5-498.

Negligence of a parent cannot be imputed to a child to support a plea of contributory negligence when the action is for the benefit of the child, but the rule is different when the action is by the parent or the parent is the real beneficiary of the action. *Davis v. Seaboard Air Line Ry. (N. Car.)*, 1-214.

(2) Negligence of driver of vehicle.

Imputability to person riding by invitation. — Where a person is riding with another as the latter's guest or companion, and is injured by the negligence of the third person, the contributory negligence of the driver is not imputable to the injured person unless the latter is in a position to exercise authority or control over the driver, or fails to exercise due care under the particular circumstances to protect himself. *Colorado etc., R. Co. v. Thomas (Colo.)*, 3-700.

An adult who, while riding in a vehicle as a guest of the driver, is injured through the negligence of a third person, is entitled to recover damages from such third person if, in entering and continuing in the vehicle, he acted with reasonable caution, and had no ground to suspect incompetency and no cause to anticipate negligence on the part of the driver, and if the impending danger, although in part produced by the driver, was so sudden or was of such character as not to permit or require the guest to do any act for his own protection. *Shultz v. Old Colony St. R. Co. (Mass.)*, 9-402.

When an adult, possessing all his faculties and personally in the exercise of that degree of care which common prudence requires under all the attending circumstances, is injured through the negligence of a third person and the concurring negligence of the person with whom the adult is riding as a guest or companion, and the relation of master and servant, or principal and agent, or mutual responsibility in a common enterprise, does not in fact exist between the driver and the guest, the guest being at the time in no position to exercise authority or control over the driver, the negligence of the driver is not imputable to the guest, but the latter is entitled to recover damages from the third person whose negligence causes his injuries. *Shultz v. Old Colony St. R. Co. (Mass.)*, 9-402.

Duties of person riding by invitation. — Where an adult accepts an invitation to ride in a vehicle as a guest of the driver, the degree of care he should exercise in accepting the invitation to ride, or in observing and calling to the attention of the driver perils unnoticed by the latter, depends upon the circumstances existing at the time. *Shultz v. Old Colony St. R. Co. (Mass.)*, 9-402.

An adult who, while riding in a vehicle as a guest of the driver, has sustained personal injuries through the negligence of a third person and the concurring negligence of the driver, is not entitled to recover dam-

ages from the third person if, in the exercise of common prudence, he ought to have given some warning to the driver of carelessness on the part of the latter which he observed or might have observed in exercising due care for his own safety, or if he negligently abandoned the exercise of his own faculties and trusted entirely to the vigilance and care of the driver. *Shultz v. Old Colony St. R. Co. (Mass.)*, 9-402.

The primary duty of caring for the safety of a vehicle and its passengers rests upon the driver, and unless the danger is obvious or is known to the passenger, the latter may rely upon the assumption that the driver will exercise proper care and caution in approaching a place of danger. But if the passenger knows that the driver is incompetent or careless, or sees that the driver is not aware of the danger and is not taking proper precautions, it is his duty to notify him of the danger; and a failure to do so is negligence. *Cotton v. Willmar, etc., R. Co. (Minn.)*, 9-935.

Driver of livery team. — Where a person employs a livery team with a driver to carry him to a specified place, the relation of master and servant does not exist between the passenger and the driver. They are not engaged in a common employment or a joint enterprise, and the negligence of the driver, in driving upon a railway track without taking proper precautions to ascertain the approach of a train, is not imputable to the passenger. The latter, however, is responsible for his own personal negligence. *Cotton v. Willmar, etc., R. Co. (Minn.)*, 9-935.

Chauffeur driving automobile. — The negligence of the chauffeur driving an automobile is not imputable to a person riding in the automobile, but having no control over it. *Dale v. Denver City Tramway Co. (U. S.)*, 19-1223.

Driver of hose cart. — A fireman who rides to a fire on a hose carriage with the knowledge that the driver will not stop before crossing a railroad track assumes the risk of being injured by a railroad train as a consequence of the driver's negligent failure to stop. *Thompson v. Pennsylvania R. Co. (Pa.)*, 7-351.

(3) Negligence of locomotive engineer.

Imputability to conductor. — The contributory negligence of a locomotive engineer is not imputable to the conductor of his train who is killed in consequence of such negligence, unless the negligent act is done at the direction or with the assent of the conductor. *St. Louis, etc., R. Co. v. McFall (Ark.)*, 5-161.

8. ASSUMPTION OF RISK.

If with a clear chance to avoid the consequences of the defendant's negligence, the plaintiff voluntarily assumes the risk occasioned thereby, such conduct is not merely contributory negligence, but a failure to avoid danger, defeating the right to recovery. *Simmons v. Seaboard Air Line Ry. (Ga.)*, 1-777.

9. COMPARATIVE NEGLIGENCE.

In Illinois. — The doctrine of comparative negligence is abolished in Illinois and no distinction can be based on the different degrees of negligence except where the latter is wilful or intentional. *Chicago, etc., R. Co. v. Hamler* (Ill.), 3-42.

In Louisiana. — The doctrine of comparative negligence is not recognized in Louisiana, *Belle Alliance Co. v. Texas, etc., R. Co.* (La.), 19-1143.

In Michigan. — In instructing a jury on the law of gross negligence, it is error to use the terms "wanton," "wilful," and "reckless" without defining them, since the jury may consider them as words of emphasis, which, when so understood, give the charge the effect of defining the doctrine of comparative negligence, which does not obtain in Michigan. *Buxton v. Ainsworth* (Mich.), 5-146.

10. PROVINCE OF COURT AND JURY.

a. On questions of negligence.

When question of negligence is for jury. — Negligence in a particular case is for the jury to determine, where the facts are undisputed and different minds might honestly draw different conclusions therefrom as to whether reasonable care was exercised. *Williams v. Sleepy Hollow Mining Co.* (Colo.), 11-111.

In negligence cases where there is a doubt as to the inference to be drawn from the facts, or where the measure of duty is ordinary and reasonable care, and the degree of care varies with the circumstances, the question of negligence is necessarily for the jury. *Lehner v. Pittsburg R. Co.* (Pa.), 16-83.

In an action for negligence, where there is room for an honest difference of opinion among intelligent men as to whether the conduct of the defendant, as shown by the evidence, was that of an ordinarily prudent man, in view of all the facts and circumstances surrounding him, the question of negligence is for the jury, even though the facts are undisputed. *Long v. Louisville, etc., R. Co.* (Ky.), 16-673.

When question of negligence is for court. — The question of negligence is generally for the jury, and it is only where the evidence is without material conflict, and is such that all reasonable men must draw the same conclusion from it, that the question is one for the court. *O'Connor v. Armour Packing Co.* (U. S.), 14-66.

When the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence the question becomes one of law only when those facts or circumstances are so decisive one way or the other as to leave no reasonable doubt about it, and no room for opposing inferences. *Howrigan v. Bakersfield* (Vt.), 9-282.

On conflicting evidence. — In an action for personal injuries, where the evidence is conflicting, the question of negligence is one

for submission to the jury. *O'Neill v. James* (Mich.), 5-177.

Question whether accident could have been anticipated. — The question whether such an accident could have been anticipated by the defendant is properly submitted to the jury. *Gascoigne v. Metropolitan West Side El. R. Co.* (Ill.), 16-115.

b. On questions of contributory negligence.

General rule. — The question of contributory negligence is generally one of fact and not of law, and should not be decided by the court, unless the facts admitted be such that reasonable minds could not differ as to the negligent conduct of the plaintiff. *Cummings v. Wichita R., etc., Co.* (Kan.), 1-708.

Where the determination of the question of contributory negligence depends upon the inferences which may be drawn from facts and circumstances of a character that different minds may honestly draw different conclusions therefrom, the question is properly left to the jury. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

What amounts to a want of ordinary care on the part of the plaintiff in an action to recover for personal injuries is to be determined in each case by the facts and circumstances surrounding it. This question should be submitted to the jury, unless the facts admitted or established leave no room for doubt that he failed to exercise that degree of care which an ordinary prudent person would have exercised under like circumstances for his own safety. *Merchants Ice, etc., Co. v. Bargholt* (Ky.), 16-965.

When a question of law. — When the facts are undisputed and the inferences or conclusions therefrom are indisputable, the question of contributory negligence is one of law for the determination of the court. *Bridges v. Jackson Electric R., etc., Co.* (Miss.), 4-662.

In an action to recover damages for a personal injury, if it appears clearly from the evidence introduced by the plaintiff, after making all just inferences therefrom, that his contributory negligence was a proximate cause of the injury, the trial court should instruct the jury that the plaintiff cannot recover, though the defendant introduces no evidence in support of its plea of contributory negligence. *Bridges v. Jackson Electric R., etc., Co.* (Miss.), 4-662.

Effect of demurrer to plaintiff's evidence. — In an action based on negligence, where the defendant demurs to the plaintiff's evidence, the demurrer has the effect of withdrawing from the consideration of the jury the question of contributory negligence. *Southern R. Co. v. Patterson* (Va.), 8-440.

Walking into open elevator shaft. — It is not negligence as a matter of law for a person to walk into an open elevator shaft where he looks in the shaft and it appears to him in the dim light that there is a floor inside the open space resembling the floor of the car. *Beal-Doyle Dry Goods Co. v. Carr* (Ark.), 14-48.

In an action for injuries received by the plaintiff in falling down an elevator shaft, an instruction which declares it to have been the duty of the plaintiff, as a matter of law, to stop and see if the elevator was in position before attempting to enter it, is properly refused, since under such circumstances the plaintiff was bound only to exercise ordinary care for his safety, and whether it was proper or necessary for him to stop in order to do so is a question for the jury. *Beal-Doyle Dry Goods Co. v. Carr* (Ark.), 14-48.

Injury to workman repairing roof. — In an action by a workman against a city for damages for injuries received by him while engaged in repairing the roof of a building, managed and maintained by the city as a police building, the question of the contributory negligence of the plaintiff is held to be for the jury under the evidence. *Wilcox v. Rochester* (N. Y.), 13-759.

Falling of child into conduit. — Whether the plaintiff and her child in an action to recover damages from a municipal corporation for the drowning of the child while playing in a conduit used as part of the municipal water works system, were guilty of contributory negligence held to be a question for the determination of the jury. *Brown v. Salt Lake City* (Utah), 14-1004.

11. BURDEN OF PROOF.

Principle of *res ipsa loquitur*. — It is the duty of the owner of a building to take reasonable care that it shall not fall and injure others; and therefore the mere fact of the fall of a building, whereby a person lawfully on adjoining premises is injured, raises a presumption that the owner of the building has been negligent, the maxim *res ipsa loquitur* being applicable to such case. *Earl v. Reid* (Can.), 18-1.

Where the plaintiff was injured by the collapse of the defendant's building in consequence of the making of alterations therein consisting of the removal of a supporting wall and the substitution of iron columns, and no evidence to explain the accident is given by the defendant, it will be presumed that the building fell by reason of some defect in the plan of the alteration, or negligence in making it, and it is not incumbent on the plaintiff to show that the negligence was that found by the jury. *Earl v. Reid* (Can.), 18-1.

Where defendant defaults. — In an action to recover damages for the defendant's negligence, the effect of the admission by the defendant of the averments of the complaint by suffering a default is to impose upon it the burden of either disproving its alleged negligence or proving the plaintiff's contributory negligence. *Elwood v. Connecticut R., etc., Co.* (Conn.), 1-779.

Where, in an action to recover for the defendant's negligence, the defendant defaults and the court finds the facts which are proved and without deciding the question either of negligence or contributory negligence rules that by proof of these facts the burden placed upon the defendant by his default has not

been sustained, such judgment will stand unless the facts show as a matter of law either that the defendant was not negligent or that the plaintiff was guilty of contributory negligence. *Elwood v. Connecticut R., etc., Co.* (Conn.), 1-779.

Where complaint shows that proximate cause was plaintiff's act. — Where the complaint in an action by a passenger against a carrier to recover damages for a personal injury shows that the proximate cause thereof was the plaintiff's own act, the burden is upon the latter to prove actionable negligence on the part of the defendant and his own freedom from contributory negligence. *Taillon v. Mears* (Mont.), 1-613.

12. EVIDENCE.

Sufficiency. — Evidence considered and held sufficient to sustain a finding of negligence. *Floody v. Chicago, etc., R. Co.* (Minn.), 18-274.

Evidence in the case at bar examined and held sufficient to sustain the general verdict and the special findings of the jury. *Atchison, etc., R. Co. v. Calhoun* (Okla.), 11-681.

Evidence reviewed, in an action by a licensee against a landowner to recover damages for personal injuries sustained by the plaintiff, and held sufficient to justify the jury in finding that the defendant was chargeable with negligence and that the plaintiff was free from contributory negligence. *Boyd v. United States Mortgage, etc., Co.* (N. Y.), 10-146.

Evidence reviewed, in an action to recover damages for personal injuries sustained by the plaintiff in consequence of the negligent manner in which a derrick was raised, and held sufficient to show negligence on the part of the defendant, and insufficient to show, as a matter of law, that the plaintiff was a mere volunteer or licensee, that he was guilty of negligence, or that he assumed the risk of injury. *Pickwick v. McCauliff* (Mass.), 8-1041.

Evidence of custom of other persons.

— In the case of a doubtful act, the evidence of the ordinary practice and of the usual custom, if any, of ordinarily prudent and intelligent persons in the performance under the same or like circumstances of the same or like acts, is ordinarily competent on the issue of negligence in the performance or omission of the act. *Chicago Great Western R. Co. v. Minneapolis, etc., R. Co.* (U. S.), 20-1200.

Evidence of similar occurrences. —

In an action against a barber to recover damages for causing a patron, by the use of infected razors or other appliances, to contract barber's itch or ringworm, the plaintiff may, for the purpose of showing that the appliances in the defendant's shop were not properly cleansed, prove that during the previous months two other persons contracted a similar disease at the defendant's shop, it being evidence of negligence for a barber to use unclean razors or other appliances. *Hales v. Kerr* (Eng.), 15-448.

Fall of elevator as prima facie evidence of negligence. — The fall of a loaded

passenger elevator is *prima facie* evidence of negligence on the part of the person charged with the duty of operating the car. *Edwards v. Manufacturers' Bldg. Co.* (R. I.), 8-974.

Effect of evidence tending to show negligence. — Where there is evidence tending to show negligence, which has been properly submitted to the jury, the doctrine of *res ipsa loquitur* need not be considered by the appellate court. *Gascoigne v. Metropolitan West Side El. Co.* (Ill.), 16-115.

13. INSTRUCTIONS TO THE JURY.

Meaning of terms used. — In an action based on negligence where the issue of "ordinary care" or of "reasonable care" is submitted to the jury for their determination, the trial could should, when requested in proper language, tell the jury what is meant by those terms. *Denver, etc., R. Co. v. Norgate* (U. S.), 5-448.

In an action to recover damages for an injury caused by negligence, where the trial judge, after using the words "reasonable diligence" and "reasonable care" in an instruction, gives an instruction defining "ordinary care," he should tell the jury that reasonable diligence or reasonable care is ordinary care. *Greene v. Louisville R. Co.* (Ky.), 7-1126.

Definition of negligence and contributory negligence. — In an action to recover damages for an injury resulting from the negligent operation of an automobile, it is no objection to an instruction defining what constitutes negligence that it does not define what constitutes contributory negligence where there is another instruction covering the latter question. *McIntyre v. Orner* (Ind.), 8-1087.

Where facts constitute negligence or due care. — Where, under the rules of the law, a given class of facts, embodying all the controlling facts in evidence and the reasonable inferences arising therefrom, constitutes either negligence or due care, it is proper for the trial judge to tell the jury so for their guidance in returning their verdict. *McIntyre v. Orner* (Ind.), 8-1087.

Instruction ignoring last clear chance. — An instruction to the effect that if the plaintiff's intestate saw or by the exercise of ordinary care could have seen and avoided the danger, then the verdict should be for the defendant, is properly refused as ignoring the question of the defendant's negligence after discovering the peril of the intestate. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

Instruction stating doctrine of contributory negligence. — In an action to recover damages for personal injuries caused by the defendant's negligence, an instruction that if the jury shall believe from the evidence that the plaintiff's intestate, "by negligence on his part, so far contributed to his injury that, but for such negligence, he would not have been injured, the law is for the defendant," states the doctrine of contributory negligence and not that of comparative negligence, and therefore is not objectionable.

Kentucky, etc., *R. Co. v. Sydnor* (Ky.), 7-1177.

Where plaintiff has settled for aggravation of injuries. — In an action to recover damages for personal injuries sustained by the plaintiff by reason of the defendant's negligence, where it appears that the plaintiff's injuries were aggravated by the malpractice of his attending physician and that he has settled his claim against the physician for malpractice, the defendant cannot complain of an instruction which tells the jury that "the plaintiff having settled with his attending physician for alleged improper treatment, he cannot recover of the defendant for any aggravation of damages caused by the doctor's improper treatment;" that "the plaintiff can only recover such damages as actually and proximately resulted from the defendant's negligence aside from any aggravation of damages caused by the negligence of the attending physician;" and that "for any condition from which the plaintiff is now suffering and which is to be referred to improper treatment by his attending physician, he has received satisfaction and he cannot recover of this defendant therefor." *Viou v. Brooks-Scanlon Lumber Co.* (Minn.), 9-318.

Assuming negligence of plaintiff. — In an action to recover damages for personal injuries received by falling into an elevator pit in the basement of a building, an instruction which tells the jury, in substance, that if they believe that at the time of the injury the basement was sufficiently light to enable a person with average eyesight easily to see the pit into which the plaintiff fell, and if they further believe that had the plaintiff been in the exercise of ordinary care he would have detected the depression and would have avoided falling, their verdict must be for the defendant, is erroneous, since it assumes that the plaintiff did not exercise ordinary care to avoid falling into the pit, and is tantamount to a direction to find for the defendant. *Glaser v. Rothschild* (Mo.), 17-576.

14. PLEADING.

Complaint. — The complaint in an action for negligence must disclose the essential elements of the actionable negligence and the evidence must support them. *Means v. Southern Cal. R. Co.* (Cal.), 1-206.

A complaint for negligence against a railroad company must show by proper averments a violation of duty owing to the plaintiff by the company, or by some one for whose particular acts the company is responsible, and must distinctly set forth the facts claimed to create the duty that has been violated, so that the court may determine as a matter of law the existence or nonexistence of the duty. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

A complaint in an action to recover damages for negligence must state the act of negligence complained of, and the plaintiff must recover, if at all, upon the particular act of negligence stated in the complaint. *Hall v. Northern Pacific R. Co.* (N. Dak.), 14-960.

Demurrer. — A demurrer is not the proper method for eliminating improper items or special acts of alleged negligence, the declaration otherwise stating a cause of action. *Western Union Tel. Co. v. Wells* (Fla.), 7-531.

Construction of allegations of answer. — An allegation of an answer in an action brought by the father of an infant as administrator charging the "plaintiff" with contributory negligence should be construed to charge contributory negligence on the part of the father. *Davis v. Seaboard Air Line Ry.* (N. Car.), 1-214.

Necessity of pleading contributory negligence. — Although a defendant cannot show affirmatively that there was contributory negligence without having pleaded such negligence as a defense, yet where contributory negligence, such as precludes a recovery, appears from the evidence produced by the plaintiff, the defendant may avail himself thereof by demurring to the evidence. *Sissel v. St. Louis, etc., R. Co.* (Mo.), 15-429.

Variance. — Where several acts of negligence are sufficiently alleged in a complaint, a recovery upon the trial will be justified if it is proved that the injury complained of was the result of one or more of said acts of negligence. *Ft. Wayne, etc., Traction Co. v. Crosbie* (Ind.), 14-117.

Under a declaration alleging gross and wanton negligence the plaintiff may recover upon proof of ordinary negligence. *Groton v. Harmon* (Mich.), 15-461.

Where in an action for damages for personal injuries brought against a city and a bridge tender in its employ it is averred that the latter's negligence caused the injuries, and before the trial the plaintiff dismisses the case as against the bridge tender, the declaration thereafter charging the city with the negligent acts which caused the injuries, there is no variance between the allegations and the proof if it appears that at the time of the accident the bridge was operated by two of the bridge tender's employees who, to the knowledge of the city, were in control of the bridge. *Gathman v. Chicago* (Ill.), 15-830.

15. VERDICT OR FINDINGS.

Finding negating negligence. — In an action for damages for the death of the plaintiff's cows resulting from eating cottonseed hulls and meal with which nails, pieces of wire, and other foreign substances had become mixed in the mill during or after the process of manufacture, a special finding that the foreign matter got into the hulls and meal by accident negatives a claim for damages on the ground of negligence. *National Cotton Oil Co. v. Young* (Ark.), 4-1123.

NEGOTIABLE INSTRUMENTS.

See **BILLS AND NOTES; CHECKS.**

Bills of lading, see **CARRIERS**, 4 c.

Warehouse receipts, see **WAREHOUSES**, 2.

NEGOTIATIONS.

Preliminary negotiations as influencing construction of contracts, see **CONTRACTS**, 3 a.

NEGROES.

Charging white person to be a negro as libelous, see **LIBEL AND SLANDER**, 2 g.

Effect of litigation between white persons and negroes, see **CONSTITUTIONAL LAW**, 10.

"Improper and disreputable characters," within covenant against subletting, see **LANDLORD AND TENANT**, 5 b.

Marriage between negroes and white persons, see **MISCEGENATION**.

Race prejudice as evidence of bias, see **JURY**, 5 b.

Right to have negroes on jury, see **JURY**, 4 c.

Separation of white and colored passengers, see **CARRIERS**, 6 (b).

Separation of white and colored races in public schools, see **SCHOOLS**, 4 a.

NEW ACTIONS.

See **LIMITATION OF ACTIONS**, 4 b (2).

NEWLY DISCOVERED EVIDENCE.

Ground for new trial, see **NEW TRIAL**, 2.

NEW MATTER.

Averments of new matter in answer, see **PLEADING**, 4 a (2).

Reply to new matter in answer, see **PLEADING**, 8.

NEW PARTIES.

See **PARTIES TO ACTIONS**, 2.

NEW PLEADINGS.

Effect of filing new pleadings, see **PLEADING**, 11 c.

NEW PRINCIPLES.

Right to relief in case involving new principles, see **ACTIONS**, 1.

NEWS AGENTS.

As passengers, see **CARRIERS**, 6 d (12).

NEWSPAPERS.

Advertisements for bids for public work, see **MUNICIPAL CORPORATIONS**, 7 d.

Application of statute prohibiting obscene publications, see **OBSCENITY**.
 Contempt by newspaper publication, see **CONTEMPT**, 1 b.
 Contract to purchase editorial comment, see **CONTRACTS**, 4 h.
 Criminal liability for advertising obscene matter, see **OBSCENITY**.
 Enjoining designation of official newspaper, see **INJUNCTIONS**, 2 d.
 Liability of editor for libelous publication, see **LIBEL AND SLANDER**, 4 c.
 Newspaper account of arrest as element of damage for false imprisonment, see **FALSE IMPRISONMENT**, 6.
 Newspaper articles as false representations, see **FRAUD AND DECEIT**, 4.
 Opinions formed by jurors by reading newspapers, see **JURY**, 5 f.
 Publication concerning professional character of physician or clergyman as privileged, see **LIBEL AND SLANDER**, 3 a.
 Reading of newspapers by jurors, see **JURY**, 7 d (4).
 Title of comic section of paper as subject of trademark, see **TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION**, 1.
 Validity of statute prohibiting publication of details of execution of death sentence, see **CONSTITUTIONAL LAW**, 11.

What is a newspaper. — An eight-page publication, eighteen by twenty-three inches in size and having eight columns to the page, which is issued regularly every day, contains telegraphic, sporting, political, and theatrical news, together with advertisements, and an editorial column, and of which about one thousand copies are sold daily on the streets by newsboys, may properly be regarded as a newspaper in the popular acceptance of the term, although it has no regular subscription list, and notwithstanding the fact that it ordinarily contains some news which has appeared on the previous day in another paper issued by the same publishing company. *Times Printing Co. v. Star Pub. Co.* (Wash.), 16-414.

Newspaper of general circulation. — A newspaper published in a city of about 275,000 inhabitants, which has a daily circulation of about one thousand copies, sold on the streets by newsboys, but which has no regular subscription list and no circulation in the residence districts of the city, and which is rarely seen in business houses or in the offices of professional men, cannot be considered a newspaper of general circulation, within the meaning of a provision in the city charter requiring the designation of a newspaper of general circulation as the official newspaper of the city for the printing of all municipal legal notices. *Times Printing Co. v. Star Pub. Co.* (Wash.), 16-414.

Daily newspaper. — A newspaper which is printed and published five days in each week is a daily newspaper within the meaning of a provision in a city charter requiring all the legal advertisements of the city to be published in a daily newspaper. *Fairhaven Pub. Co. v. Bellingham* (Wash.), 16-420.

NEW TRIAL.

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 Misconduct of jurors as ground for new trial, see **JURY**, 7.
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 Power of judge respecting motion for new trial made before predecessor, see **JUDGES**, 3 d.
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 Review of order granting or refusing new trial, see **APPEAL AND ERROR**, 12 a, 13, 14 b.
 Right to new trial in distress proceedings, see **LANDLORD AND TENANT**, 6 c (1).
 Validity of new trial after appeal in criminal case, see **CRIMINAL LAW**, 5 b.

1. POWER OF COURT.

Where question has been determined on appeal. — A trial court has no power to set aside a verdict for the plaintiff on the same ground on which it formerly directed a verdict for the defendant, when on appeal from its former ruling the directed verdict for the defendant was set aside and the evidence held to be sufficient to go to the jury. *Hensley v. Davidson Bros. Co.* (Ia.), 14-62.
Power of trial court to act on its own motion. — The power of a trial court

to grant a new trial on its own motion should be exercised with great caution, and only in aggravated cases, especially where, in the same case, a directed verdict has been reversed on appeal and the evidence held to be such as to require the issues to be submitted to the jury. *Hensley v. Davidson Bros. Co.* (1a.), 14-62.

2. GROUNDS FOR NEW TRIAL.

a. In civil cases.

(1) Newly discovered evidence.

Discretion of trial court. — The granting of a new trial on the ground of newly discovered evidence is largely discretionary with the trial court, and the exercise of its discretion will not be disturbed except in a case of manifest abuse. *Linforth v. San Francisco Gas, etc., Co.* (Cal.), 19-1230.

When not a ground for new trial. — A refusal to grant a new trial in a proceeding to probate a will, applied for on the ground of newly discovered evidence, held not to be an abuse of discretion, there not being a sufficient showing of reasonable diligence to discover the evidence, and the newly discovered evidence not being such as necessarily to require a different verdict. *In re Colbert* (Mont.), 3-952.

A trial court does not abuse its sound discretion in denying a motion for a new trial on the ground of newly discovered evidence, where such evidence is of slight value or is inadmissible, or where there has been a lack of diligence in securing the same. *Estate of Dolbeer* (Cal.), 15-207.

In action involving disputed boundary. — A new trial on the ground of newly discovered evidence should be granted in a case involving a disputed boundary to land where the moving party shows that the government surveyor who made the original survey was absent at the time of the trial but has since returned, and that he will testify that the line was as claimed by the moving party, such testimony not being merely cumulative or going only to discredit or impeach a witness. *Kellogg v. Finn* (S. Dak.), 18-363.

(2) Verdict contrary to or not sustained by evidence.

Discretion of trial court. — It is within the discretion of a trial judge to grant a new trial if he is of opinion that the verdict is contrary to the evidence, and the exercise of this discretion will not be disturbed on appeal, in the absence of a clear showing of abuse. *Godfrey v. Godfrey* (Wis.), 7-176.

The granting of a new trial on the grounds of insufficiency of the evidence is addressed to the sound legal discretion of the trial court, and unless there be a clear abuse of such discretion the order will not be disturbed on appeal. *Wolfe v. Ridley* (Idaho), 20-39.

When a trial judge is satisfied that the verdict is against the weight of evidence and that substantial justice has not been done

between the parties, it is his duty to grant a new trial, and for a refusal to perform a clear duty in this regard the appellate court will reverse the judgment for an abuse of discretion. *Clark v. Great Northern R. Co.* (Wash.), 2-760.

Verdict in part contrary to evidence. — The order of a trial court setting aside an entire verdict because part of it is against the evidence is not rendered erroneous by the fact that a part of the verdict is supported by the evidence. *Dunning v. Crofutt* (Conn.), 14-337.

Effect of conflict of testimony. — Where a trial judge is convinced that a verdict is clearly against the weight of the evidence, it is his duty to grant a new trial on that ground though there is some conflict in the testimony; and his action in that regard will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Weisser v. Southern Pacific R. Co.* (Cal.), 7-636.

Verdict contrary to great preponderance of evidence. — A new trial will be granted when the court is satisfied that the great preponderance of the evidence was contrary to the finding of the jury, and a consideration of all the circumstances surrounding the transaction and which throw any light upon the question involved, show that the improbability of the defendant's position is so great that the court is forced to the conclusion that justice requires that the motion should be granted. *Phillips v. Laughlin* (Me.), 2-1.

Immaterial findings. — A new trial will not be granted because of the insufficiency of the evidence to sustain a finding that is immaterial and could not have affected the judgment. *Fagan v. Lentz* (Cal.), 20-221.

(3) Miscellaneous grounds.

Excessive or inadequate damages. — Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced where excessive, rests in the sound judicial discretion of the trial court, in reviewing which the appellate court will be guided by the general rules applicable to other discretionary orders. *Mohr v. Williams* (Minn.), 5-303.

Mistake in verdict. — It is within the discretion of the trial court to grant a new trial upon reasonable terms when it is established by the affidavits of the jurors that, through mistake, the writing filed as the verdict does not correctly express the verdict actually agreed upon. *Wolfgang v. Schoeppke* (Wis.), 3-398.

Refusal to require complaint to be made more certain. — A trial court's refusal to require a complaint to be made more certain is not a reason for which a new trial may be granted. *Knickerbocker Ice Co. v. Gray* (Ind.), 6-607.

Failure to furnish bill of particulars. — A refusal to dismiss a case because of the failure of the plaintiff to attach a bill of particulars does not afford ground for

the grant of a new trial. *Simpson v. Wicker* (Ga.), 1-542.

Withdrawal of appearance and answer by counsel. — On a petition by the defendant for a new trial after judgment against him in an action for damages for selling intoxicants to a minor, where the evidence warrants a finding that the defendant had made the sales, so that the plaintiff was entitled to the damages sustained thereby, the defendant has no right to a new trial because his attorney withdrew his appearance and answer, it being presumed, in the absence of a contrary showing, that the damages awarded were proper. *Kelly v. Cummins* (Ia.), 20-1283.

Where it appears on petition for a new trial, after judgment against the petitioner in a damage action for unlawfully selling intoxicants, that the petitioner's attorney had secured several continuances, and that all parties understood that the case was to be tried at the term of court in session; that the petitioner's attorney conferred with him about taking depositions for his defense, which the petitioner forbade, and refused to go to the courthouse to testify for himself; and that he told his attorney to let the plaintiff have judgment, if the case could not be further postponed; the petitioner is not entitled to a new trial because his attorney thereafter withdrew his appearance and answer. *Kelly v. Cummins* (Ia.), 20-1283.

Judgment procured on perjured testimony. — That a judgment was procured through false testimony is not of itself ground for a new trial. *Kelly v. Cummins* (Ia.), 20-1283.

Misconduct of party. — Where the successful party in a jury case declares, after the verdict has been rendered in his favor, that he never lost a jury case and never expects to, and then follows up the jurors and gives each of them five dollars, there is such misconduct on the part of the party and the jurors as requires the verdict to be set aside, especially where it also appears that the party had endeavored to strengthen his position in the litigation in question by attempting to bribe a public officer. *Merritt v. Bunting* (Va.), 12-954.

b. In criminal cases.

(1) Power of court.

Derivation of power. — The authority and jurisdiction of the District Courts to grant new trials in criminal cases are derived from the statute, to which resort must be had in determining the extent of their powers regarding the subject. *Hubbard v. State* (Neb.), 9-1034.

The provisions of the Nebraska statute regarding the granting of new trials in criminal cases on the ground of newly discovered evidence are the exclusive source of the power of the District Court to grant such new trials. *Hubbard v. State* (Neb.), 9-1034.

Interference by a court of equity. — A court of equity will not interfere for the

purpose of granting a new trial in a criminal case on the ground of newly discovered evidence. *Hubbard v. State* (Neb.), 9-1034.

(2) Newly discovered evidence.

What must appear to justify new trial. — In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative. *People v. Williams* (Ill.), 17-313.

Evidence which is merely cumulative. — A motion for a new trial upon the ground of newly discovered evidence is properly overruled where the affidavit in support thereof tenders merely cumulative evidence, and fails to show diligence to obtain it prior to the trial. *State v. O'Brien* (Mont.), 10-1006.

It is a general rule, applicable in capital as well as in other cases, that a new trial will not be granted on the ground of newly discovered evidence where such evidence would be cumulative merely. *Hamblin v. State* (Neb.), 16-569.

Evidence which is merely impeaching. — A new trial should not be granted upon the ground of newly discovered evidence which is merely impeaching. *State v. Sheltrey* (Minn.), 10-245.

In a prosecution for statutory rape, newly discovered evidence as to the prosecuting witness's associations with other men does not entitle the defendant to a new trial, where the only tendency of the evidence is to impeach the prosecuting witness. *State v. Danforth* (N. H.), 6-557.

Due diligence must be shown. — On an application by the defendant in a criminal case for a new trial on the ground of newly discovered evidence, affidavits examined and held insufficient to show proper diligence on the part of the moving party to obtain the evidence on the trial. *People v. Williams* (Ill.), 17-313.

Removal of incompetency of witness. — If after a defendant in a criminal case is tried and convicted, his codefendant is tried and acquitted, the incompetency of the latter as a witness being thus removed, his testimony constitutes newly discovered evidence which warrants the granting of a new trial to the convicted defendant, provided such testimony is of a character likely to change the result. *Gill v. State* (Tex.), 17-1164.

Credibility of witness whose incompetency is removed. — Where a person convicted of a crime moves for a new trial on the ground of newly discovered evidence, consisting of the testimony of his codefendant who has since been acquitted and thus become a competent witness, the motion cannot be defeated on the ground that the proposed witness is not shown to be a man of such character as to warrant the belief that he will testify truthfully, and that the jus-

tice of the verdict of acquittal in his favor is doubtful. The credibility of the proposed witness in such a case is for the jury on the new trial and cannot be determined by the court on the motion. *Gill v. State* (Tex.), 17-1164.

Failure to show discovery of evidence since trial. — A motion for a new trial on the ground of newly discovered evidence is properly overruled where the accused fails to show that the evidence was discovered since the trial and that he could not have discovered it before the trial by the exercise of due diligence. *Enson v. State* (Fla.), 18-940.

Facts forgotten at time of trial. — Facts known to the defendant in a criminal case before his trial, but which he claims to have forgotten until after the trial, do not constitute newly discovered evidence entitling him to a new trial. *People v. Williams* (Ill.), 17-313.

Affidavit setting forth evidence held sufficient. — On a motion for a new trial in a criminal case on the ground of newly discovered evidence, affidavit of proposed witness examined and held to make out a case for the granting of the motion, on the ground that the testimony of such witness would be likely to change the result. *Gill v. State* (Tex.), 17-1164.

Power of appellate court. — An appellate court will not grant a new trial in a criminal case on the ground of newly discovered evidence. *State v. Arthur* (N. Car.), 19-505.

(3) Miscellaneous cases.

Coercion of jury by judge. — The South Dakota statute authorizing a new trial in criminal cases "when the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of the jurors," includes a case of coercion of the jury by the judge in telling them that he will keep them together until they agree. *State v. Place* (S. Dak.), 11-1129.

Prejudging case by juror. — No error is committed in denying a motion for a new trial based on four affidavits that a certain juror prejudged the case and stated that he would like to hang the accused, where such affidavits are controverted by the affidavit of the juror and three others, and the affidavit of a fellow juror that the juror in question was very reluctant to affix the death penalty and that his reluctance was largely instrumental in delaying the return of the verdict for about eighteen hours. *Elias v. Territory* (Ariz.), 11-1153.

Loss or destruction of record. — Incidental to the power of the Wyoming Supreme Court, in aid of its appellate jurisdiction, to compel a correct record to be sent up or a bill of exceptions to be settled, is the power to order a new trial where the record has been lost or destroyed; and where it appears in a criminal case that solely on account of the failure of the official stenographer of the trial court to furnish upon the request a complete transcript of the evidence, rulings, and exceptions within the time al-

lowed for presenting a bill of exceptions for allowance, the accused was prevented from presenting with his bill all the evidence necessary to present his exceptions for review, and that a bill containing such evidence as was available was presented within the time allowed and was accepted by the trial judge, as a bill of exceptions, and was then delivered to said stenographer to complete the transcription of the evidence, and that such evidence together with the bill has been lost by said stenographer through no fault of the accused or his counsel and cannot be reproduced or duplicated, the Supreme Court will reverse the judgment and order a new trial. *Richardson v. State* (Wyo.), 12-1048.

Refusal of new trial because jury read newspaper comment on trial as abuse of discretion. — The trial court does not abuse its discretion in refusing to grant a motion for a new trial in a capital case because the jury, being allowed to separate, read the local daily newspapers with articles about the case, while the trial was in progress. *Holt v. U. S.* (U. S.), 20-1138.

Modification of order refusing new trial. — If it appears to the trial court, after overruling a motion for a new trial or a motion in arrest of judgment, that there was irregularity in obtaining the judgment, it may, of its own motion, modify or set aside its order overruling the motion for a new trial or the motion in arrest of judgment. This may be done at the term of the court at which the order was made; but after final judgment has been rendered, and the term has expired, there must be a substantial compliance with the statute, to give the court further jurisdiction. *Johnson v. State* (Okla.), 18-300.

3. MOTION FOR NEW TRIAL.

a. Time for.

After sentence. — The right of a defendant to make a motion for a new trial, within the time provided by law, is not forfeited by the fact that sentence had been pronounced upon the defendant prior to the making of such motion. *Tillman v. State* (Fla.), 19-91.

After affirmance of judgment on appeal. — It is no bar to a demand for a new trial on the ground of newly discovered evidence that an appeal has been taken from the judgment, or that the judgment has been collected upon execution after affirmance on appeal. *Chambliss v. Hass* (Iowa), 3-16.

At subsequent term. — The District Court possesses no inherent or common-law power to grant new trials in criminal cases, on the ground of newly discovered evidence, at a subsequent term to that at which a verdict of guilty was found. *Hubbard v. State* (Neb.), 9-1034.

The provisions of the Nebraska statute authorizing the granting of new trials in civil actions at a subsequent term to that at which the judgment was rendered on the ground of newly discovered evidence, are not applicable to the granting of new trials in crim-

inal cases. *Hubbard v. State* (Neb.), 9-1034.

b. Specification of errors.

Motion for new trial on bill of exceptions. — A motion for a new trial on a bill of exceptions need not contain the specification of errors required in a motion for a new trial upon a statement settled under the Montana Code. *Bond v. Hurd* (Mont.), 3-566.

Coercion of jury by court. — The South Dakota statute (Rev. Code Crim. Pro., § 430, subd. 4) authorizes a new trial in criminal cases "when the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of the jurors." Although the defendant fails to designate in the language of such statute his ground of objection to the coercion of the jury by the court, a specific statement of the objectionable means by which the verdict was secured, in his application for a new trial, sufficiently presents that question to the lower and appellate courts. *State v. Place* (S. Dak.), 11-1129.

Assignment of error failing to disclose contents of writing. — A ground of a motion for a new trial which assigns error upon the admission of merely designated documentary evidence, without disclosing the contents of the writing admitted, cannot be considered. *Yates v. State* (Ga.), 9-620.

c. Evidence in support of application.

Support by affidavits. — Applications for a new trial on the ground of newly discovered evidence should be supported by affidavits setting up all the necessary facts, as required by repeated decisions of this court. *Thompson v. State* (Fla.), 19-116.

Affidavits not made by witnesses relied on. — At the hearing of a motion for a new trial on the ground of newly discovered evidence, the moving party ought not to be allowed to prevail unless he furnishes the most convincing evidence that he can readily command, but affidavits showing the existence of newly discovered evidence, although not made by the witnesses themselves who would give the testimony if the new trial were granted, are admissible, as such affidavits are addressed only to the question whether there is such newly discovered evidence. *Sobel v. Boston Elevated R. Co.* (Mass.), 14-421.

Affidavits of jurors as to weight given testimony of witness not sworn.

— On motion for a new trial in a criminal action on the ground that the witness for the government was permitted to testify without having been sworn, it is proper for the courts to refuse to consider affidavits of the jurors to the effect that the testimony of the witness had great weight in securing a conviction, and the affidavit of one juror that his vote was for acquittal and that the only reason that he agreed to find a verdict of

guilty was because he was assured by the other members of the panel that the defendants would be certain to get a new trial because the witness had not been sworn. *Langford v. United States* (Ind. Ter.), 4-1021.

d. Concurrent appeal and motion for new trial.

Effect of failure to stay appellate proceedings. — The failure of an appellant to apply to the Appellate Court for a continuance or stay in the appellate proceedings pending his application for a new trial on the ground of newly discovered evidence will not debar him from insisting upon such application where the judgment appealed from is in no manner determinative of the rights of either party in the proceeding for a new trial. *Chambliss v. Hass* (Iowa), 3-16.

e. Decision of court on motion.

Specification of grounds of order. — It would be in the interest of good practice and the dispatch of business if trial courts when making orders granting new trials would specify the particular grounds on which such orders are made. *Wolfe v. Ridley* (Idaho), 20-39.

Trial judge must approve or disapprove the verdict. — Where a first application for a new trial is made on discretionary grounds, the trial judge must exercise his discretion in approval or disapproval of the verdict; and where the judge fails to do so, the new trial will be granted upon appeal, though such failure is not made a subject of special exception. *McIntyre v. McIntyre* (Ga.), 1-606.

Motion in arrest of judgment. — When the trial court grants a motion for a new trial upon the ground of irregularities in obtaining the verdict, it is not necessary for the court to pass upon a motion in arrest of judgment, and the case stands for trial, just as if no verdict had been rendered therein. *Johnson v. State* (Okla.), 18-300.

4. APPEALS.

Discretion of trial court. — The granting of a new trial is peculiarly within the discretion of the trial court and a decision will not be interfered with on appeal except in a clear case of abuse of discretion. *Chambliss v. Hass* (Iowa), 3-16.

The allowance or refusal of a new trial rests in the sound discretion of the trial court, and is not subject to review on a writ of error. *Holmgren v. United States* (U. S.), 19-778.

In the federal courts a motion for a new trial is addressed to the sound discretion of the court, and error cannot be assigned to the Circuit Court of Appeals for the denial of such motion. *Fidelity, etc., Co. v. Thompson* (U. S.), 12-181.

The rule in this state is that where the evidence submitted to the jury presents a substantial conflict and the trial court who saw and heard the witnesses and observed their demeanor and conduct, and saw and heard all that was said and done in the trial of the case, thereafter grants a new trial, his order will not be disturbed on appeal. *Wolfe v. Ridley* (Idaho), 20-39.

Judgment supported by substantial evidence. — A petition for a new trial being a proceeding at law, a judgment denying a new trial will not be disturbed on appeal, if it is supported by substantial evidence in so far as it depends on questions of fact. *Kelly v. Cummins* (Ia.), 20-1283.

5. COSTS AND IMPOSITION OF TERMS.

Failure to impose terms. — When a new trial is granted in the exercise of discretion, the trial court should impose reasonable terms as a condition, and failure to impose such terms is error. *Wolfram v. Schoepke* (Wis.), 3-398.

Requirement of payment of costs. — Where a new trial is granted on the ground that the verdict is contrary to the evidence, but the trial court does not regard the verdict as perverse, reasonable terms, such as the payment of costs, should be imposed upon the moving party. *Godfrey v. Godfrey* (Wis.), 7-176.

Where a trial court grants a new trial it is within the sound discretion of the court as to whether or not he will require the party in whose favor the order is made to pay a part or all of the costs incurred upon the previous trial. *Wolfe v. Ridley* (Idaho), 20-39.

NEXT FRIEND.

See INFANTS, 3.

NEXT OF KIN.

See DESCENT AND DISTRIBUTION.

Right to sue for property of decedent, see EXECUTORS AND ADMINISTRATORS, 6.

NOISE.

See NUISANCES.

Liability for noise in operation of automobile, see MOTOR VEHICLES, 2 b.

Liability of railroads for noise in operation of road, see RAILROADS, 7 b.

NOLLE PROSEQUI.

Effect of *nolle prosequi* in criminal proceedings, see CRIMINAL LAW, 5 b.

NOMINAL DAMAGES.

See DAMAGES, 2.

NOMINATIONS.

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1. WHAT CONSTITUTES NUISANCE.

a. In general.

Question of law or fact. — If the natural tendency of an act complained of is to create danger and to inflict injury upon person or property, it may properly be found to be a nuisance as a matter of fact; but if the act in its inherent nature is so hazardous

as to make the danger of injury so probable as to be almost a certainty, it is a nuisance as a matter of law. *Melker v. New York* (N. Y.), 13-544.

Nuisance per se. — A "nuisance *per se*" is an act, occupation, or structure which is a nuisance under all circumstances regardless of location or surroundings. *Swaim v. Morris* (Ark.), 20-930.

Reasonableness of user of property. — The reasonableness of a defendant's user of his own premises does not affect the plaintiff's rights. *Appleby v. Erie Tobacco Co.* (Can.), 20-731.

Effect of statute. — Where, by statute, an act is authorized to be done which, in the absence of statute, would constitute a public nuisance, such act is thereby made lawful and cannot legally be considered as a nuisance so far as the public is concerned, unless the legislature in enacting such statute has exceeded its powers. *Sopher v. State* (Ind.), 14-27.

Effect of decision of municipal corporation. — While a municipal corporation has no power to treat a thing as a nuisance which cannot be one, it has power to treat as a nuisance a thing that from its character, location, and surroundings may become such, and in a doubtful case the municipality's exercise of its judgment and discretion in determining whether a thing is a nuisance is conclusive of the question. *Nash v. District of Columbia* (D. C.), 8-815.

Negligence as an element. — One who maintains upon his premises tanks containing a large quantity of oil, which if permitted to escape is certain to injure others, must make good the damages occasioned by its escape, whether guilty of negligence or not. *Brennan Construction Co. v. Cumberland* (D. C.), 10-865.

Maxim, sic utere tuo ut alienum non laedas. — The principle that every person shall use and enjoy his own property, however absolute and unqualified his title, so that his use of it shall not be injurious to the equal enjoyment of others having an equal and like right to the employment of their property, or injurious to the equal rights of the public, must always be considered and applied in the light of the other principle that every man has a right to the natural use and enjoyment of his own property, and that if, while lawfully in the enjoyment of such use, without negligence or malice on his part, an unavoidable loss occurs to his neighbors, such loss is *damnum absque injuria*. The rightful use of one's own land may, in some instances, cause damage to another and yet constitute no legal wrong, and afford the damaged person no remedy. *Bellevue v. Daly* (Idaho), 14-1136.

Right of property owner to quiet enjoyment. — The owner of a dwelling house is not entitled to absolute quiet in the enjoyment of his property, but only to such a degree of quietness as is consistent with the standard of comfort prevailing in the locality. *Collins v. Wayne Iron Works* (Pa.), 19-991.

b. Specific nuisances.

Cemetery or burial ground. — Whether a cemetery is a nuisance is a question of fact, to be determined by the circumstances of each case. *Nelson v. Swedish, etc., Cem. Assoc.* (Minn.), 20-790.

Where it appears that a place of sepulture is so situated that the burial of the dead there will injure life or health, either by contaminating the surrounding atmosphere or the water of wells or springs, the court will grant an injunction to restrain such use of land. *Nelson v. Swedish, etc., Cem. Assoc.* (Minn.), 20-790.

A burial ground near dwellings is not necessarily a nuisance, and a court will interfere and enjoin its use only on clear and convincing proof of probable injury. *Braasch v. Cemetery Association* (Neb.), 5-132.

A court of equity will enjoin the use for cemetery purposes of a tract of land so situated that the burial of the dead there will injure life or health by corrupting either the surrounding atmosphere or the water of wells or springs. *Braasch v. Cemetery Association* (Neb.), 5-132.

Power house of electric railway. — While a power house is a necessary adjunct to an electric railway, it is an incident to the operation of the road with which the public has no concern, and if the operation of the power house results in diminishing the value or impairing the comfortable enjoyment of property in its vicinity by reason of the smoke, dust, cinders, sparks, and soot thrown out, and of the electric current permitted to escape, the railway company is liable, as for a nuisance, though the power house is operated in a proper and careful manner, and in pursuance of legislative and municipal authority conferred upon the company. *Townsend v. Norfolk R., etc., Co.* (Va.), 8-558.

Printing establishment. — The right to an injunction against the operation of a printing establishment as a nuisance. *Rushmer v. Polsue* (Eng.), 4-373.

Hospital for contagious diseases. — The erection and maintenance in a thickly populated section of a city of a private hospital for the treatment of contagious or infectious diseases is an actionable nuisance, and if there is well-grounded apprehension that the health of neighbors will be exposed to danger from such diseases, the erection of such hospital should be restrained until the final hearing. *Cherry v. Williams* (N. C.), 15-715.

A preliminary injunction issued in such a case is properly continued until the final hearing where there is direct, positive, and specific evidence on the part of the plaintiff that the maintenance of such hospital will be a source of real danger to the lives and health of a number of people in the vicinity, and where, though the defendant's affidavit makes specific response, a large part of the supporting evidence offered by him is very general in its terms, the statements not being made with reference to the particular

locality or to the manner in which the particular hospital is to be constructed and operated. *Cherry v. Williams* (N. Car.), 15-715.

Stable in residence district. — A stable may be kept in a residence district of a large city in such a manner that it would not be regarded as a nuisance. *Oehler v. Levy* (Ill.), 14-891.

Where it appears in an action to restrain the maintenance of a stable as a nuisance, that the manure and urine deposited in the stable by twenty horses kept therein are not removed at such times and in such manner as to prevent offensive odors from arising therefrom and penetrating the several flats in an adjoining flat building, contaminating the air therein and injuring the health of the tenants, and that horses and the men who care for and drive them, when in and about the stable, make much noise in the nighttime, thereby preventing the occupants of such adjoining flat building from sleeping, and greatly reducing the rental value of such building, the owner in possession of such stable will be held to be guilty of maintaining a nuisance upon his premises. *Oehler v. Levy* (Ill.), 14-891.

Tobacco factory. — Evidence examined and held sufficient to show that the odors from the defendant's tobacco factory caused material discomfort and annoyance and rendered the plaintiff's premises less fit for the ordinary purposes of life, even making all possible allowance for the local standard of the neighborhood, and therefore constituted a nuisance. *Appleby v. Erie Tobacco Co.* (Can.), 20-731.

Cotton gin. — The erection of cotton gins in an incorporated town is not a nuisance *per se*, because they may be operated at such places and in such manner as not to be a nuisance. *Swaim v. Morris* (Ark.), 20-930.

Fish market. — In an action to recover damages from the proprietor of a fish market conducted in such a manner that obnoxious odors permeated the building, causing injury to the business of an occupant of an upper story, evidence examined and held that the fish market as conducted by the defendant constituted a nuisance. *Asia v. Pool* (Wash.), 15-104.

Fertilizer and tallow plant. — Odors resulting from the operation of a fertilizer and tallow plant, which are a source of great discomfort to an adjacent resident and his family and impair their enjoyment of their home, may be a nuisance even though the odors do not impair their health or result in driving them from their home. *Perrin v. Crescent City Stockyard, etc., Co.* (La.), 12-903.

In a suit by a property owner to have a fertilizer and tallow plant carried on in the neighborhood at the defendant's abattoir declared a nuisance and abated there is a *prima facie* presumption that the plant complained of is a nuisance, and that presumption is held corroborated by the action of the police jury in prohibiting the carrying on of all such operations at that location and by the

evidence taken on the trial. *Perrin v. Crescent City Stockyard, etc., Co. (La.)*, 903.

Burning of soft coal. — The burning of soft coal for the generation of steam in a manufacturing plant situated in a country district suitable for homes, so as to cause dense black smoke of great volume to envelop and discolor a neighboring dwelling house, producing much discomfort and some financial loss to the occupants, constitutes a nuisance and an unreasonable use of the manufacturer's premises, where anthracite coal procurable at some higher cost and suitable for the operation of the plant can be used without injury to neighboring property. *McCarty v. Natural Carbonic Gas Co. (N. Y.)*, 12-840.

Escape of water rendering plaintiff's property damp. — In an action for damages for injury to property caused by the escaping water from an adjacent tank and pumping plant whereby the plaintiff's property is rendered damp and unhealthy, evidence examined and held to justify the refusal of a peremptory instruction for the defendant and to authorize a verdict for the plaintiff in the amount awarded. *Central Consumers Co. v. Pinkert (Ky.)*, 13-105.

Baseball grounds. — A baseball park in the residence portion of a city to which noisy and disorderly crowds habitually resort and where intoxicating liquors are sold in violation of law is a public nuisance which may be enjoined at the suit of adjacent property owners. *Alexander v. Tebeau (Ky.)*, 18-1092.

Skating rink. — A skating rink is not a nuisance *per se*. *Johnson v. Philadelphia (Miss.)*, 19-103.

Bull fighting. — The maintenance of an arena near the fair grounds during an exposition, where bull fighting is actually carried on between infuriated bulls and unarmed men who depend for safety upon more or less uncertain measures, and are sometimes injured, and where an excited and noisy crowd, composed in part of lawless and turbulent characters, assembles to witness the fight, constitutes a public nuisance. *State ex rel. Crow v. Canty (Mo.)*, 13-787.

Spring gun in store. — The owner of a storehouse in which goods are kept for sale is not liable to a person who, while attempting to enter the store with intent to steal goods therefrom is shot by a spring gun placed in the store to protect it from burglars. *Scheuerman v. Scharfenberg (Ala.)*, 19-937.

Barking of dogs. — Where the barking of dogs interrupts the sleep of persons living in the neighborhood, and seriously disturbs such persons in the reasonable use and enjoyment of their homes, it is a nuisance. *Herring v. Wilton (Va.)*, 10-66.

Intoxicating liquors. — The act of carrying intoxicating liquors into a county cannot be said to be a public nuisance *per se*, nor do such liquors when carried there become a public nuisance. *State v. Williams (N. Car.)*, 14-562.

Neither the sale of intoxicating liquors nor the keeping and maintaining in an orderly manner of tippling houses or other houses where intoxicating liquors are sold to be drunk on the premises constitutes a public offense or a public nuisance at common law. *Sopher v. State (Ind.)*, 14-27.

2. PUBLIC AND PRIVATE NUISANCES.

a. Distinction.

In general. — Acts amounting to a public nuisance *per se* must be unlawful and in violation of public as distinguished from private rights. *Sopher v. State (Ind.)*, 14-27.

Construction of statute referring to, but not defining, a "public nuisance." — In construing the Indiana statute making it a public offense "to keep or continue and maintain a public nuisance," but omitting to declare what particular acts shall constitute a public nuisance, resort must be had to the common law to discover whether certain acts charged to have been committed constitute a public nuisance within the statute. *Sopher v. State (Ind.)*, 14-27.

b. Individual right of action for public nuisance.

General rule. — To entitle a private individual to enjoin a public nuisance, the injury complained of must be peculiar in kind or nature, and not merely in degree, and not shared in common with the public at large, substantial, not fanciful nor evanescent, and the proximate result of the conduct complained of. *Nelson v. Swedish, etc., Cem. Assoc. (Minn.)*, 20-790.

Obstruction of streets. — Of the obstruction of a street not resulting in special injury to individuals, the public alone can complain. *Oehler v. Levy (Ill.)*, 14-891.

The obstruction of two city streets bounding on opposite sides of a block of land owned by a private individual, so that travel by his property is prevented, is a nuisance causing that special or peculiar injury to such individual which authorizes him to sue for the abatement thereof. *Sloss-Sheffield Steel, etc., Co. v. Johnson (Ala.)*, 11-285.

Obstruction of stream. — Although a dam in a stream may be a common or public nuisance, still, if it inflicts special damage on a private individual, he may sue for redress of the injury. *Ireland v. Bowman (Ky.)*, 17-786.

Indecent conduct. — Where a nearby property owner and those in his employ are compelled to witness indecent conduct of the inmates of a bawdy house, and to hear loud, boisterous, indecent, and annoying noises made by them and their dissolute companions, he thereby suffers a special injury different from that suffered by the general public, and is therefore entitled to enjoin the same, notwithstanding the maintenance of such place is a public nuisance. *Seifert v. Dillon (Neb.)*, 17-1126.

3. WHO LIABLE FOR NUISANCE.

Trustees of decedent's estate. — The trustees of the estate of a deceased person are liable for the maintenance of a public nuisance, such as a dam obstructing navigable waters, erected by the deceased on his property during his lifetime; and hence in an action by a private individual to enjoin such a nuisance, an answer by the defendants setting up the will of the decedent and alleging that they hold and operate the property only as trustees under the will, is demurrable. *Ireland v. Bowman* (Ky.), 17-786.

Purchaser of property. — A purchaser of premises on which a nuisance is maintained is, in the absence of evidence that he assumed the liability of the seller, not liable for the damages which accrued before the sale. *Karns v. Allen* (Wis.), 15-543.

The purchaser of property who continues a nuisance consisting of the operation of a pumping plant is liable for the injury occasioned to adjacent property, although the former owner operated the plant for a year or more, and no complaint was made. *Central Consumers Co. v. Pinkert* (Ky.), 13-105.

Seller of property. — Where it appears that persons who have created a nuisance upon their premises have sold such premises to a corporation, that the business of such corporation is conducted by the sellers, who are president and vice-president thereof, and that such corporation maintains the nuisance in substantially the same manner as before the sale, the liability of the sellers for the maintenance of the nuisance will be held to continue after the sale. *Karns v. Allen* (Wis.), 15-543.

4. DEFENSES.

a. In general.

Contributory wrong of plaintiff. — The doctrine of contributory negligence has no proper application to an action to recover damages for a nuisance, but if a person complaining of a nuisance has contributed thereto his act goes in mitigation of damages. *Bowman v. Humphrey* (Ia.), 11-131.

In an action for damages for nuisance, where it is contended on the part of the defendant that the plaintiff has helped to make the nuisance, the law as to joint tortfeasors which would prevent contribution or an apportionment of the damages between them is not applicable where the parties have acted independently and without concert or agreement, or where the acts of the plaintiff do not amount to a violation of a legal duty which he owes to others. *Bowman v. Humphrey* (Ia.), 11-131.

Existence of other nuisances. — The mere fact that other nuisances exist in the same locality which produce similar results to the one sought to be abated is no defense, if the nuisance complained of adds to the nuisance already existing to such an extent that the injury complained of is measurably traceable thereto. It is not necessary that all the injury should be the result of the

nuisance charged, if it is of such a character and produces such results that, standing alone, it is a nuisance to plaintiff. The fact that it is the principal, though not the sole, agent producing the injury, is sufficient. *Perrin v. Crescent City Stockyard, etc., Co.* (La.), 12-903.

Benefits derived from business. — In a suit by numerous landowners against several separate smelters to enjoin a nuisance caused by smoke and fumes, the court cannot take into consideration the fact that the defendant's business is lawful, furnishes profitable employment for many people, and is beneficial to the community at large as well as to the defendants who have invested large sums in the erection of their works, if their business is carried on in an unlawful manner so as to destroy the property of the complainants. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

Prescriptive right to maintain nuisance. — Without deciding whether the right to maintain a public nuisance, such as a dam obstructing a navigable stream, can be acquired by prescription as against the public, it must be held that such right can be acquired by prescription as against a private individual who sustains special damage from the nuisance, and, consequently, in an action by such an individual to enjoin an alleged public nuisance, an answer setting up a prescriptive right to maintain the nuisance is not demurrable. *Ireland v. Bowman* (Ky.), 17-786.

Public interest in continuation of business. — Where a carefully conducted electric power house is in fact a nuisance, it is no defense that to declare it to be such will check the prosperity of the people, and "practically debar the use of many of the most important and developing features of . . . modern growth." *Townsend v. Norfolk R., etc., Co.* (Va.), 8-558.

Convenient location and reasonable operation of plant. — It is no defense to a bill by landowners residing upon the land to enjoin an alleged nuisance caused by the operation of smelters that the smelters are located at a place which by reason of its relation to the railroads and mines is most convenient for smelting purposes, nor that the smelting is conducted in a proper and reasonable manner, employing the latest and best devices, where the evidence shows that when so conducted the smelting causes very great damage to the complainant's property and is a menace to health. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

b. Rights acquired with knowledge of existing nuisance.

General rule. — In the case of a continuing nuisance upon adjoining premises it is immaterial that the plaintiff in an action to abate purchased the property after the commencement of the nuisance. *Ingersoll v. Rousseau* (Wash.), 1-35.

The fact that a party is established in business in a particular portion of a growing

city does not protect him from a bill for an injunction for maintaining a nuisance, if he actually maintains such nuisance, at the suit of a party who subsequently enters the same territory. This is especially so where, after the latter purchases property in the vicinity of the nuisance, the owner of the premises on which the nuisance is maintained makes changes therein which make such premises more offensive than before to persons in the vicinity. *Oehler v. Levy* (Ill.), 14-891.

c. Estoppel.

Knowledge by plaintiff of nuisance.

— In an action by the owner of a mill on a navigable stream to enjoin as a nuisance the maintenance of a dam by an upper riparian owner, it is no defense that the plaintiff, before beginning the operation of his mill, knew of the existence of the dam in question, which was then owned and maintained by the defendant's predecessor in title, but failed to make any complaint that it constituted a nuisance. So long as the plaintiff was not operating a mill below the dam, he would have no occasion to complain of its maintenance, and, consequently, his failure to complain could not operate against him by way of estoppel. *Ireland v. Bowman* (Ky.), 17-786.

Plaintiff under no duty to object at time of construction. — In an action to recover damages for a permanent nuisance consisting of the pollution of a watercourse caused by the discharge of sewage from a permanent sewer, it is not erroneous to reject the defendant's plea that the plaintiff is estopped by his conduct and acquiescence in the construction of the sewer and in the pollution of the stream to bring an action, where the plea fails to allege any duty on the part of the plaintiff to have interposed an objection at the time of the construction of the sewer. *Virginia Hot Springs Co. v. McCray* (Va.), 10-179.

d. Legalization of nuisance.

What must appear. — Before it can be held that the legislature intended to legalize a nuisance caused by the operation of a railroad's machine and repair shops, it must appear that the statute either pointed out the place at which the objectionable structures and works were to be built and operated, or left the corporation the power to select arbitrarily the location. *Rainey v. Red River, etc., R. Co.* (Tex.), 13-580.

Effect of legislative authority of municipal council. — The rule that a municipal council cannot so license a nuisance as to prevent recovery by a person specially injured thereby does not apply where the council possesses legislative authority to determine the rights of the parties. *Indiana R. Co. v. Calvert* (Ind.), 11-635.

Acts not enumerated by statute. — The Utah statute declaring certain smelter uses to be public, and authorizing the exercise of the power of eminent domain for cer-

tain purposes among which are not enumerated particular acts done in the operation of a smelter, and sought to be enjoined as a nuisance, is not to be considered as legalizing such acts on condition that compensation be made. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

Railroad machine shops. — Under the Texas statutes providing that any railroad company unable to agree with the owner as to the purchase of real estate required for "depots, station buildings, machine and repair shops," etc., may acquire such property by condemnation, and that "every railroad corporation shall have the right to cause such examination and survey for its proposed railway to be made as may be necessary to the selection of the most advantageous route and for such purpose may enter upon the lands or waters of any person or corporation, but subject to all damage that may be occasioned thereby," gives a railroad company absolute power to select such right of way as it deems most advantageous to his enterprise, but the power to take property for machine and repair shops is not unlimited so as to authorize the railroad company to select a location for such shops without regard to the injury that may be inflicted upon others. *Rainey v. Red River, etc., R. Co.* (Tex.), 13-580.

Charter of electric railway, light, and power company. — A statute chartering an electric railway, light, and power company, which permits but does not require the company to generate and manufacture electricity for its own use and for sale and distribution to others, and to maintain the necessary plants for that purpose, does not in any way whatever confer statutory authority to commit a nuisance. *Townsend v. Norfolk R., etc., Co.* (Va.), 8-558.

Statutory regulation of mining. — The legislature is powerless to declare that the adoption by a mine owner, who conducts mining operations for his personal benefit, of certain precautions to prevent the obstruction of navigable streams by the discharge of mining debris therein, shall exonerate him from liability if, notwithstanding such precautions, injury is caused to other persons by such discharge of debris. *Sutter v. Nicols* (Cal.), 14-900.

The Act of Congress of March 1, 1893, creating the California Debris Commission and regulating hydraulic mining in the state of California, is intended to preserve and improve the navigability of rivers, and is not intended to exonerate owners of hydraulic mines, who conduct their operations in strict compliance with the provisions of the act, from liability to other persons for damage resulting from the discharge of mining debris into streams. *Sutter v. Nicols* (Cal.), 14-900.

e. Limitation of actions.

When statute begins to run. — Where the pollution of a watercourse, caused by the discharge of sewage from a sewer system which is in its nature, design, and use a permanent structure, results in an actual physical invasion of the property of another

person, and in the complete destruction of all the useful qualities of the water by substances discharged by the sewers, and the nuisance extends to the entire property of such other person and affects its use for all purposes for which it has previously been used, the nuisance is a permanent one for which all the damages are recoverable in a single action, and therefore the statute of limitations begins to run from the time of the erection of the nuisance. *Virginia Hot Springs Co. v. McCray* (Va.), 10-179.

Failure to discover cause and permanent character of injury. — An action to recover damages for a permanent injury to property resulting from a permanent nuisance is barred by limitation if not brought within the time prescribed by the statute, though the plaintiff failed to discover, not only the permanent character of the injury, but its cause, in time to bring an action for damages. *Virginia Hot Springs Co. v. McCray* (Va.), 10-179.

Effect of application of statute. — An action to recover damages for permanent injury to property resulting from a permanent nuisance consisting of the pollution of a watercourse by the discharge of sewage from a sewer is barred by limitation if not brought within the statutory period after the erection of the nuisance, and the plaintiff cannot avoid the bar of the statute by contending that to decide that the action is barred would be to decide that the defendant can continue the pollution, as the statute of limitations merely operates to extinguish the plaintiff's right of action and not his right. *Virginia Hot Springs Co. v. McCray* (Va.), 10-179.

5. ABATEMENT OF NUISANCE.

Degree of care required. — The interest of the person affected by a nuisance should govern in determining the degree of care to be observed in protecting from injury the objects constituting the nuisance during their removal by him. *Maryland Tel., etc., Co. v. Ruth* (Md.), 14-576.

Summary forfeiture of property. — Under the police power of the state, the legislature has power to declare property which may be used only for an unlawful purpose to be a public nuisance and to authorize the same to be abated summarily by public officers, but if property of a nature innocent in itself and susceptible of a beneficial use has been used for an unlawful purpose, the statutory provision subjecting it to summary forfeiture to the state as a penalty or punishment for the wrongful use, without affording the owner thereof opportunity for a hearing, deprives him of his property without due process of law. *McConnell v. McKillip* (Neb.), 8-898.

6. REMEDIES FOR NUISANCE.

a. Actions at law.

Who may maintain. — An action to recover special personal damages caused by a

public or private nuisance may be maintained by one having no property right in the premises injuriously affected. *Ft. Worth, etc., R. Co. v. Glenn* (Tex.), 1-270.

Where a temporary or abatable nuisance resulting from the operation of a manufacturing plant affects only the comfortable enjoyment and occupation of the leased premises during the possession and occupation of the tenant, the landlord cannot recover for diminution in the rental value of the premises, though the nuisance was in existence at the commencement of the tenancy, and the landlord in making successive renewals of the lease after the expiration of the original term has been compelled to reduce the rent. *Miller v. Edison Electric Illuminating Co.* (N. Y.), 6-146.

Harmless error in charge. — In an action for damages for a nuisance, where it is contended on the part of the defendant that the plaintiff has helped to make the nuisance, where the court instructs the jury, incorrectly, that if the plaintiff contributed in any material degree to the injury for which damages are demanded, he cannot recover, it will be assumed that the jury, in awarding damages to the plaintiff, observed the instruction and found that the plaintiff did not contribute to the injury, and the error is, therefore, harmless as to the defendant. *Bowman v. Humphrey* (Ia.), 11-131.

Questions of law or fact. — In an action to recover damages for injuries resulting from the maintenance of a nuisance, the question whether the injury is of a permanent character, resulting from a permanent structure, is a question of fact for the determination of the jury. *Virginia Hot Springs Co. v. McCray* (Va.), 10-179.

b. Bill in equity.

(1) Power and jurisdiction of court of equity.

Where damages are not adequate remedy. — Injunction is the proper remedy in the case of a nuisance which interferes with the comfort and enjoyment of property. Damages in such a case would not be an adequate remedy. *Appleby v. Erie Tobacco Co.* (Can.), 20-731.

The obstruction of two city streets bounding on opposite sides a block of land owned by a private individual, so that travel by his property is prevented, is a nuisance causing that special or peculiar injury to such individual which authorizes him to sue for the abatement thereof. Such a nuisance causes an individual injury for which there is no full, adequate, and complete remedy except by abatement in a court of equity. *Sloss-Sheffield Steel, etc., Co. v. Johnson* (Ala.), 11-285.

Where remedy at law would result in multiplicity of suits. — Where a large number of landowners who are injured in respect to their property by the fumes and gases coming from several smelters owned and operated by different parties, join in a

suit against all the smelters to enjoin the nuisance, the complainants will not be remitted to their remedy at law, as that would result in a multiplicity of suits, and, since each defendant would have to be sued separately, it would be impossible to determine the proportion of damages occasioned by any one of them. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

Injury incapable of measurement by pecuniary standard. — A nuisance consisting of fumes and gases produced in the operation of smelters and carried over the adjacent lands of numerous landowners to the injury and destruction of vegetation, live stock, and the health of the owners and their families, produces an injury which is incapable of measurement by any certain pecuniary standard and is therefore irreparable. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

Where no property rights are involved. — Equity will grant injunctive relief to abate a public nuisance although no property rights are involved in the litigation. *State ex rel. Crow v. Canty* (Mo.), 13-787.

Where injury is not per se a nuisance. — When a court of equity will not grant an injunctive relief against an injury not per se a nuisance. *West v. Ponca City Milling Co.* (Okla.), 2-249.

Absolute certainty of injury not essential. — A court of equity will not interfere, unless it clearly appears by competent evidence that a nuisance will be brought into existence by acts sought to be restrained, and that the parties complaining will be injured unless the injunction is granted; but this does not mean that there must be absolute certainty of injury in order that the injunction be issued. *Nelson v. Swedish, etc., Cem. Assoc.* (Minn.), 20-790.

Existence of remedy under municipal ordinance. — Where the barking of dogs interrupts the sleep of persons living in the neighborhood, and seriously disturbs such persons in the reasonable use and enjoyment of their homes, it is a nuisance; and a court of equity has jurisdiction to enjoin such nuisance, though the persons injured have an easy and expeditious remedy under a municipal ordinance. *Herring v. Wilton* (Va.), 10-66.

If an ordinance prohibiting the erection of cotton gins in a town and providing for a fine for its violation, and for the abatement of the nuisance, is valid, the legal remedy of abatement provided thereby is adequate, so that an injunction will not issue against the erection of a gin house in violation of the ordinance. *Swaim v. Morris* (Ark.), 20-930.

Existence of remedy under criminal laws. — A court of equity has jurisdiction to abate a public nuisance although the offenders are amenable to the criminal laws of the state. *State ex rel. Crow v. Canty* (Mo.), 13-787.

Effect of voluntary abatement of nuisance. — Where a court of equity has ac-

quired jurisdiction of an action to enjoin a nuisance and for damages, the facts that the nuisance has been abated voluntarily since the bringing of the action and that it is not likely to be renewed will not deprive the court of jurisdiction to retain the cause to award damages for the injury already done. *Miller v. Edison Electric Illuminating Co.* (N. Y.), 6-146.

Public nuisance injurious to public safety and morals. — Where a nuisance consisting in the maintenance of an arena and bull fighting therein as a public exhibition is, in its nature, both public and at the same time injurious to the public safety and good morals, a court of equity has full power and jurisdiction to abate the existing nuisance and to perpetually enjoin the owners of the property from maintaining or conducting the same in the future. *State ex rel. Crow v. Canty* (Mo.), 13-787.

Erection of lawful structure. — The erection of a lawful structure will not ordinarily be enjoined on the ground that it will be put to a use constituting a nuisance, but the complaining party will be left to assert his rights if the contemplated use shall prove a nuisance. *Swaim v. Morris* (Ark.), 20-930.

Illegal charging and taking of tolls. — A proceeding for injunction brought by the public prosecuting attorney *ex officio* is the proper remedy to abate an alleged public and continuing nuisance consisting of the charging and taking of tolls on a public highway by a corporation whose charter has expired. *State ex rel. Hines v. Scott County Macadamized Road Co.* (Mo.), 13-656.

Against owner of vacant lot to prevent playing of games. — Injunction will not lie to require the owner of vacant, unenclosed lots to prevent, by active interference, the use of such lots for baseball games by those who may see fit to engage in the games without the affirmative consent of the owner. *Spiker v. Eikenberry* (Ia.), 14-175.

Restraining use of land as cemetery. — Plaintiff, the owner of premises near land about to be used as a cemetery, applied for an injunction to restrain its use for that purpose. It is held that under the findings of the court, and under the circumstances proved, the injunction should be issued. *Nelson v. Swedish, etc., Cem. Assoc.* (Minn.), 20-790.

(2) Parties.

State as party plaintiff. — The state may maintain a suit in equity to abate a public nuisance in a city street. Inasmuch as the streets of a city are public highways for the use of the public generally and not of the inhabitants of the city alone, it must be held that the power of the municipality over its streets as to the abatement of nuisances is not exclusive. *Alabama Western R. Co. v. State* (Ala.), 16-485.

A suit to enjoin a public nuisance carried on in St. Louis county, Missouri, is properly brought in the Circuit Court of that county in the name of the state at the relation of

the attorney-general. *State ex rel. Crow v. Canty* (Mo.), 13-787.

County as party plaintiff. — A county which owns lands near a river and bridges across such river is entitled to relief from the discharge into such river of mining debris which causes the overflow of the river and the deposit of debris upon such lands, and threatens the destruction of such bridges. *Sutter v. Nicols* (Cal.), 14-900.

3. PRIOR ESTABLISHMENT OF RIGHT IN ACTION AT LAW.

When not necessary. — Where the legal right of a complainant in a bill for an injunction is clearly shown and the unlawful use of the defendant's property which injures the complainant's property is clearly established, the complainant will be granted relief without a prior determination in an action at law that the defendant's use of his property constitutes a nuisance. *Oehler v. Levy* (Ill.), 14-891.

In order to entitle the owners of a flat building to obtain equitable relief by way of injunction against the owner of an adjoining stable, it is not necessary that they shall establish in an action at law that the owner of such stable is maintaining a nuisance upon his premises. *Oehler v. Levy* (Ill.), 14-891.

(4) Preliminary injunction.

Use threatening health of thickly settled community. — Where the evidence shows that there is good reason to believe that an owner of property in a residential portion of a thickly settled vicinity is about to devote such property permanently to a use which involves a serious menace to the health of the owners and occupants of adjacent property, such use should be restrained until the facts on which the rights of the parties depend can be properly determined at the final hearing. *Cherry v. Williams* (N. Car.), 15-715.

Modification of preliminary order to permit erection. — If the defendant in an action to restrain the erection and maintenance of a hospital in a thickly populated section of a city desires to proceed with the construction of his hospital and risk the results of the trial, the preliminary restraining order may to that extent be modified, without permitting him to use the building for hospital purposes. *Cherry v. Williams* (N. Car.), 15-715.

(5) Decree.

Certainty in decree. — A decree enjoining a manufacturing company from "making noises" with its machinery "so as to render the premises of the plaintiff . . . unfit for use and enjoyment as a residence by a reasonable and normal person," does not indicate with sufficient definiteness the acts which the defendant is restrained from doing. *Collins v. Wayne Iron Works* (Pa.), 19-991.

Perpetual injunction. — In an action to enjoin what is found to be a public nuisance,

consisting of the giving of public bull fight performances in an arena prepared for that purpose, upon the premises of a certain realty company, a decree should be entered perpetually enjoining the realty company, its owners, and managers, from permitting bull fights on its premises. *State ex rel. Crow v. Canty* (Mo.), 13-787.

Scope of injunction. — Where the operation of noisy machinery by the defendant is a substantial disturbance to the plaintiff in the enjoyment of her residence only when the windows and doors are open, or when work is done outside the shop or at night, the defendant may be enjoined from operating such machinery by night or otherwise than in the shop with the doors and windows closed; but an injunction should not be granted which would entirely stop the operation of the defendant's machinery. *Collins v. Wayne Iron Works* (Pa.), 19-991.

Where business is not a nuisance per se. — Where a property owner is injured in the enjoyment of his property by the noise of a business which is not a nuisance *per se*, the court will not grant an injunction which will entirely stop the operation of the business, if it is possible to frame another form of decree which will give the plaintiff the relief to which he is entitled. *Collins v. Wayne Iron Works* (Pa.), 19-991.

Staying decree for limited period. — An injunction against the operation of a business so far as it constitutes a nuisance may be stayed for a limited period to enable the defendant to abate the nuisance if he can, or else to remove the objectionable part of the business. *Appleby v. Erie Tobacco Co.* (Can.), 20-731.

Where a decree enjoins smelters from "roasting or smelting sulphide ores carrying over ten per cent. sulphur, so as to discharge into the atmosphere the sulphur in the form of gas, and from further discharging into the atmosphere of arsenic," a contention by the defendants that by the erection of certain structures the escape of arsenic into the atmosphere can be fully arrested, and that the structures in question will necessitate much study and experiment, does not require the granting of additional time in which to conduct such study and experiments, where it appears that almost a year has elapsed since the decree for injunction appealed from was granted, and that more than a year will elapse before the mandate of the appellate court will reach the lower court, especially where it is not contended that the structures contemplated will prevent the escape of sulphur gases into the atmosphere. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

Refusal of injunction on giving bond for damages. — The Utah statute authorizing the court, where an injunction is sought, to refuse an injunction and require the defendant to give bond to pay the plaintiff all damages that may be recovered on account of the continuance of the condition complained of, does not apply to final hearings, but only prescribes a mode of procedure as to interlocutory or restraining orders,

and does not confer power on a court to perpetuate a nuisance upon the giving of bond to pay damages. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

Restraining burning of soft coal. — A decree unlimited as to time or circumstances enjoining a manufacturing plant from burning soft coal on its premises in the generation of steam, is too broad and will be modified so as to permit the defendant to burn soft coal upon proof of a change of facts making such use of the defendant's property no longer unreasonable. *McCarty v. Natural Carbonic Gas Co.* (N. Y.), 12-840.

Decree enjoining smelting of sulphur ores. — A decree enjoining smelters from creating a nuisance by smoke and fumes, which by its terms permits the smelters only to roast or smelt ore containing not to exceed ten per cent. of sulphur, should be amended so as to permit the smelting of sulphur ores containing more than ten per cent. of sulphur when mixed with silicious ores containing no sulphur provided the mixture does not contain more than ten per cent. of sulphur. *American Smelting, etc., Co. v. Godfrey* (U. S.), 14-8.

7. MEASURE OF DAMAGES.

Damages for permanent injury. — Where a water tank and pumping plant are of a permanent character and will probably continue to be used with injurious effect to adjacent property, damages for a permanent injury to the property, represented by the diminution in the market value of the property, are recoverable. *Central Consumers Co. v. Pinkert* (Ky.), 13-105.

Where precise amount of loss cannot be ascertained. — Notwithstanding the fact that the precise amount of trade lost by the plaintiff on account of a fish market conducted in such manner as to constitute a nuisance is necessarily unascertainable, the plaintiff is not remediless, but the court or jury should make such an award as under all the circumstances seems equitable and just without being excessive. *Asia v. Pool* (Wash.), 15-104.

NUL TIEL RECORD.

Effect of plea in scire facias to revive judgment, see JUDGMENTS, 14.

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Failure of jury commissioners to take oath of office, see JURY, 4 a.

Failure of special judge to take oath of office, see JUDGES, 5.

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Qualification of judges by taking oath of office, see JUDGES, 1.

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OBSCENITY.

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1. WHAT CONSTITUTES OBSCENE PUBLICATION.

In general. — No general rule can be laid down as to what constitutes a lewd, lascivious, or indecent publication. Each case must

be judged by the facts presented therein, and the question whether the matter complained of is within the meaning of the statute, considering all the circumstances of its publication, must be left to the common sense of the courts and juries. *Commonwealth v. Herald Pub. Co. (Ky.)*, 16-761.

Application of statute to newspapers. — While the statute against obscene publications applies to newspapers as well as to other publications, its provisions should not be applied with the same strictness to daily newspapers as to printed publications in the form of books or pamphlets that are wholly or in greater part devoted to the treatment of subjects that are lewd and scandalous, or to single or isolated articles designed to bring before the public the details of some indecent or disgusting transaction. *Commonwealth v. Herald Pub. Co. (Ky.)*, 16-761.

Publication of court proceedings. — Although greater latitude must necessarily be allowed in the publication of court proceedings than would be permitted in the publication of matters of a more private or personal character, it does not follow that a newspaper is privileged to publish all the filthy and disgusting details that may be developed by the evidence in such proceedings, without rendering itself liable under the statute against obscene publications. *Commonwealth v. Herald Pub. Co. (Ky.)*, 16-761.

On an indictment against certain newspapers, under the Kentucky statute relative to the selling of obscene publications for publishing extracts from the testimony on the Thaw trial, publications considered and held not to be within the prohibition of the statute. *Commonwealth v. Herald Pub. Co. (Ky.)*, 16-761.

Advertising obscene matter. — An editor who inserts in his newspaper advertisements offering for sale books and photographs which he knows to be of an obscene character, with the result of bringing about the sale of such publications, may be convicted under an indictment charging him with causing and procuring obscene books and photographs to be sold and published and to be sent by mail; and this is so though the advertisements are not obscene in themselves and though the advertisers are foreigners and reside abroad. *Rex v. De Marny (Eng.)*, 7-254.

Absence of tendency to excite lustful desire. — The New York statute making it a misdemeanor to sell, give away, or show any "obscene, lewd, lascivious, filthy, indecent, or disgusting book, paper, or picture," is not violated by an article which attacks the confessional of the Catholic Church in a vile and scurrilous manner, but which is not a lewd, lascivious, or obscene publication, the tendency of which is to excite lustful or lecherous desire. *People v. Eastman (N. Y.)*, 11-302.

2. POSTAL LAWS.

Person causing obscene matter to be printed in newspaper. — Within the mean-

ing of the federal statute prohibiting the use of the United States mails for the dissemination of obscene matter, a person who causes obscene matter written by him to be printed in a newspaper, intending thereby to bring it to the attention of the readers of the paper and knowing that the regular mode of transmitting the paper to its readers is by the use of the mails, knowingly causes the objectionable matter to be deposited in the mail, when in the regular course the paper with the objectionable matter printed therein is deposited in the post office for mailing and delivery. *Demolli v. United States (U. S.)*, 7-121.

Entire contents of paper need not be obscene. — It is not essential to the commission of the offense created by the federal statute prohibiting the use of the United States mails for the dissemination of obscene matter, that the entire contents of the newspaper or other parcel deposited in the mail shall be objectionable in character, or that the offender's responsibility for its being put in the mail shall extend to its entire contents. *Demolli v. United States (U. S.)*, 7-121.

Deposit of matter in mail. — It is not essential to the commission of the offense created by the federal statute prohibiting the use of the United States mails for the dissemination of obscene matter that the objectionable matter shall be deposited in the mail by the offender himself, or by another acting under his express direction, as he is liable under the statute if the matter is deposited in the mail as the natural and probable consequence of the act intentionally done by him with the knowledge that such will be its natural and probable effect. *Demolli v. United States (U. S.)*, 7-121.

3. SUFFICIENCY OF INDICTMENT OR INFORMATION.

Copy of alleged obscene matter. — An indictment for the violation of a statute prohibiting the possession or disposition of obscene matter held sufficient without containing a copy of the alleged obscene matter. *State v. Zurhorst (Ohio)*, 9-45.

OBSTRUCTING JUSTICE.

Acts obstructing justice as contempt of court, see CONTEMPT, 1 g.
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Mere spoken words indicating intention to resist arrest. — Under the Louisiana statute making it a crime to "oppose, resist, or assault any officer while attempting" to execute process, any conduct which places an officer executing a process in bodily fear renders the offender guilty; but mere spoken words, such as one saying that he would not be arrested and would die first, do not necessarily constitute a violation of the law. To constitute an offense it is neces-

sary that the words should be spoken under circumstances affording the officer reasonable ground to believe that he could not proceed with the arrest without incurring evident risk of serious injury. *State v. Scott* (La.), 17-400.

What necessary to establish offense of tampering with witness. — In order to establish the offense of tampering with a witness under the Washington statute, it is not necessary to show some act of physical intervention by the defendant, but it is sufficient to show that he endeavored to prevent the witness from testifying by threatening to blacken her good name. *State v. Bringgold* (Wash.), 5-716.

Tampering with witness not subpened. — A prosecution for tampering with a witness may be maintained under the Washington statute, though the person tampered with had not been actually subpoenaed at the time of the offense. *State v. Bringgold* (Wash.), 5-716.

Admissibility of evidence in prosecution for tampering with witness. — On the trial of a person charged with tampering with a prosecuting witness in a criminal prosecution, the record of such prosecution is admissible in evidence where it appears that the defendant knew that such cause was pending when he endeavored to prevent the prosecuting witness from appearing and giving evidence therein. *State v. Bringgold* (Wash.), 5-716.

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Failure to return order as indicating acceptance. — In an action against a railway company for breach of a contract obligating the company to honor orders for money, drawn by its employees in favor of the plaintiff, when "it appears that deduction can be made out of the wages due" the employees, but not requiring the company to return the orders when there is no money due the drawers, evidence of a custom on the part of the company to return the orders which it did not intend to pay is not of itself sufficient to establish that the failure to return a certain order indicated an intention on the part of the company to accept and pay it. *St. Louis Southwestern R. Co. v. James* (Ark.), 8-611.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 5.
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 Applicability to motor vehicles of ordinance regulating hacks, see MOTOR VEHICLES.
 Arrest without warrant for violating ordinance, see ARREST, 2 b.
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Hard labor as punishment for violating ordinance, see CRIMINAL LAW, 7 a (1).
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Element of intent to commit crime, see **CRIMINAL LAW**, 1.

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Liability for injuries to servant caused by overwork, see **MASTER AND SERVANT**, 3 a.

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PARDON, REPRIEVE, AND AMNESTY.

1. NATURE AND EXTENT OF PARDONING POWER, 1237.
2. OPERATION AND EFFECT OF PARDON, 1237.
 - a. Disabilities resulting from conviction, 1237.
 - b. Conditional pardons, 1237.
3. REVOCATION OF PARDON, 1238.

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Remission of fines, see **FINES**.

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1. NATURE AND EXTENT OF PARDONING POWER.

No power to increase punishment. — The board of pardons is a branch of the executive department of the state government and its powers and prerogatives, as such, are those of granting clemency to convicted prisoners, and it has no power to increase or extend the penalties or punishments pronounced by the sentence of the court. *In re Prout* (Idaho), 10-199.

Pardon before final conviction. — Under the Nebraska constitution the pardoning power of the executive is limited to cases where there has been a conviction of crime by the judgment of a court. The verdict of a jury, finding the accused guilty, is not a conviction within the meaning of the constitutional provision. *Campion v. Gillan* (Neb.), 16-319.

What is an impeachment. — A judgment removing a justice of the peace from office on conviction under an indictment for official misconduct is an impeachment proceeding within the meaning of the Tennessee constitution (art. 5, § 5) excepting "cases of impeachment" from the pardoning power. *State v. Parks* (Tenn.), 19-291.

Pardon for violation of municipal ordinance. — The governor of a state has no authority to pardon or to remit a fine imposed on one who has been convicted in a police court of violating a municipal ordinance. *Paris v. Hinton* (Ky.), 19-114.

Remission of civil liabilities. — The word "offenses" as used in the Nebraska constitution, empowering the governor to grant pardons, after conviction, for all offenses except treason and cases of impeachment, is equivalent to "crimes," and hence the pardoning power of the executive does not extend to the remission of civil liabilities, such as the liability of the father of an illegitimate child to contribute to its support, established by the judgment of the court in hasty proceedings. *Campion v. Gillan* (Neb.), 16-319.

2. OPERATION AND EFFECT OF PARDON.

a. Disabilities resulting from conviction.

Recital of restoration to full citizenship. — Where a person has been convicted of two separate felonies and has served both terms of imprisonment therefor, a pardon granted him by the governor which recites a conviction and sentence for but one offense is ineffective to remove his disability or restore his citizenship as to the other conviction, and therefore he is still incompetent as a witness, even though the pardon recites that it restores him to full citizenship and the right of suffrage. *Miller v. State* (Tex.), 3-645.

Reinstatement in forfeited office. — A pardon cannot restore one to an office which he has forfeited by virtue of his conviction of the crime pardoned. *State v. Parks* (Tenn.), 19-291.

b. Conditional pardons.

Power to attach conditions. — Where a criminal accepts a pardon, he accepts it subject to all its valid conditions and limitations, and will be held bound to a compliance therewith. *Alvarez v. State* (Fla.), 7-88.

The board of pardons has power to parole prisoners upon such terms and conditions as they may see fit, so long as those terms and conditions are neither immoral nor illegal. *In re Prout* (Idaho), 10-199.

A pardon is a mere act of grace, and the pardoning power may attach to it any condition precedent or subsequent that is not illegal, immoral, or impossible of performance, and a prisoner by accepting a pardon conditioned that he shall not violate any law of the United States, of the state, or of any municipality, becomes bound to a compliance with the conditions imposed and cannot claim that the pardon is absolute. *Ex parte Houghton* (Ore.), 13-1101.

Conditions to be performed after expiration of sentence. — The conditions attached to a parole or pardon by the board of pardons, that are to extend beyond or be performed after the expiration of the term for which the prisoner was sentenced, are illegal and cannot be enforced after the expiration of the term for which the prisoner was sentenced. *In re Prout* (Idaho), 10-199.

Effect of performance of condition. — Where a conditional pardon has been granted and accepted and the convict has fulfilled the conditions thereof, the effect of the pardon becomes the same as though it were by its terms full and absolute. *Alvarez v. State* (Fla.), 7-88.

Effect of violation of condition. — Where a prisoner has accepted a conditional pardon and has been released from imprisonment by virtue thereof, but has violated or failed to perform the conditions or any of them, the pardon in case of a condition precedent, does not take effect, and in case of a condition subsequent, becomes void, and the

criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or as much thereof as he had not suffered at the time of his release. *Alvarez v. State* (Fla.), 7-88.

Enforcement of condition. — Where a conditional pardon provides upon its face that the governor may summarily determine whether the conditions have been complied with, and if he finds that they have not may revoke the pardon and order the recommitment of the offender, such stipulation becomes binding upon the convict and authorizes his rearrest and commitment by executive order, and without any judicial determination. *Ex parte Houghton* (Ore.), 13-1101.

In the absence of a statute and unless the act constituting a violation of a condition in a pardon is in itself a criminal offense, the violation of the condition is not ground for a prosecution by indictment. *Alvarez v. State* (Fla.), 7-88.

Rearrest and recommitment of prisoner. — Where a conditional pardon expressly provides that, upon violation of the condition, the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original sentence, such stipulation, upon acceptance of the pardon, becomes binding upon the convict, and authorizes his rearrest and recommitment upon the terms imposed and in the manner and by or through the official authority stipulated in the pardon. *Alvarez v. State* (Fla.), 7-88.

Jurisdiction to recommit for violation of condition. — A proceeding to determine whether a convict released under a conditional pardon should be recommitted for violation of the condition is preferably to be had before the court that originally tried and convicted the offender, but may properly be had before any criminal court of competent jurisdiction. *Alvarez v. State* (Fla.), 7-88.

Procedure on rearrest of prisoner. — Where a convict has been released under a conditional pardon, his rearrest and recommitment to his original sentence cannot be had upon the mere order of the governor or board of pardons alone, unless such course is provided by statute, or by the express terms of the pardon. The convict, in the absence of a statute or of express provisions in the pardon to the contrary, is entitled to a hearing before some court of general criminal jurisdiction in order that he may show that he has performed the condition of the pardon, or that he had a legal excuse for not having done so, or that he is not the same person who was convicted; and on such a hearing the court may, in its discretion, take the verdict of a jury as to the facts involved. But the criminal is not entitled to a jury trial as a matter of right, except upon the question whether he is the same person who was convicted. *Alvarez v. State* (Fla.), 7-88.

Procedure to determine violation of condition. — The proper procedure in a

proceeding to determine whether there has been a violation of a conditional pardon set out in detail. *Alvarez v. State* (Fla.), 7-88.

Investigation in habeas corpus proceedings. — The question whether there has been a violation of a conditional pardon may be investigated and determined in habeas corpus proceedings brought by the convict himself to test the validity of his arrest and detention for an alleged violation of the conditions. *Alvarez v. State* (Fla.), 7-88.

Term of imprisonment on rearrest. — A prisoner who has been paroled by the board of pardons and thereafter rearrested and returned to the penitentiary for a violation of the conditions attached to the parole is entitled to his discharge at the expiration of the period of time for which he was sentenced by the court, and he cannot be lawfully detained under such sentence for the purpose of serving an additional term equaling the time he was out on parole. *In re Prout* (Idaho), 10-199.

3. REVOCATION OF PARDON.

Right to revoke. — Before delivery and acceptance a pardon may be revoked by the officer or body granting it; but if the pardon is not void in its inception, it cannot be revoked for any cause after its delivery and acceptance are complete, for then it has passed beyond the control of the officer or body granting it, and has become a valid and operative act, of the benefits of which its recipient can be deprived only in some appropriate legal proceeding. *Alvarez v. State* (Fla.), 7-88.

PARENT AND CHILD.

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 - a. Right to control, 1239.
 - b. Right of custody, 1239.
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Liability of parent for advising child to separate from husband or wife, see **HUSBAND AND WIFE**, 6 c.

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Loss of society of child as element of damage, see **DAMAGES**, 9 c.

Negligence of parent inpatient to child, see **NEGLIGENCE**, 7 e (1).

Power of parent to commit child to insane asylum, see **INSANITY**, 3.

Right of child to compensation for services to parent, see **WORK AND LABOR**.

Right of children to sue for death of parent, see **DEATH BY WRONGFUL ACT**, 6 c.

Right of mother to appoint testamentary guardian, see **GUARDIAN AND WARD**, 1.

Right of parent to sue for annulment of child's marriage, see **MARRIAGE**, 3 b.

Right of parent to sue for death of child, see **DEATH BY WRONGFUL ACT**.

Right to sue for abduction, see **ABDUCTION**.

Right to sue for injuries caused by intoxication of child, see **INTOXICATING LIQUORS**, 8 a.

Validity of note by parent to child without consideration, see **ADVANCEMENTS**, 1.

1. RIGHTS OF PARENT.

a. Right to control.

In matters relating to education of child. — At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. While the municipal laws took care to enforce these duties, yet it was presumed that the natural love and affection implanted by Providence in the breast of every parent had done so more effectually than any law. For this reason the parent, and especially the father, was vested with supreme control over the child, including its education. Except where modified by statute, that authority still exists. *School Board District v. Thompson (Okla.)*, 19-1188.

Right of father to determine religious education. — The father of infant children, where there is no sufficient cause for depriving him of the right, has the legal right to the custody and control of the children, and has the right to have them educated in any religious faith that he sees proper, whose tenets do not inculcate a violation of the laws of the land. *Hernandez v. Thomas (Fla.)*, 7-446.

b. Right of custody.

Natural right of parent. — While in awarding the custody of children the paramount consideration is the welfare of the child rather than the technical legal right of the parents, courts should not lightly and without good cause invade the natural right of a parent to the custody, care, and control of an infant child. *Hernandez v. Thomas (Fla.)*, 7-446.

Superior right of parent. — As between a parent and other persons, the right of the

former to the custody of a child is superior in so far as it accords with the best interest of the child. *Cormack v. Marshall (Ill.)*, 1-256.

Bad moral character of parent. — In order to establish a charge that a parent's bad moral character and low financial condition make him unfit for the custody of his children, it is necessary to show clearly that provision for ordinary comfort and contentment and for intellectual and moral development of the children is not to be expected at his hands. *Ex p. Reynolds (S. Car.)*, 6-936.

Consideration of wishes of child. — The wishes of children under the age of nurture, namely, fourteen years, as to their custody may be considered by a court against a claim of their parent, but such wishes are not binding on the court. *Ex p. Reynolds (S. Car.)*, 6-936.

Financial interests of child. — In determining what is for the best interest of a child in respect of custody and control, its financial interests are not controlling but are not to be disregarded. *Cormack v. Marshall (Ill.)*, 1-256.

Validity of contract transferring custody. — Ordinarily, a promise or agreement by a father to transfer the custody of his children to another person is against public policy, and therefore is not binding upon the father or enforceable against him. *Hernandez v. Thomas (Fla.)*, 7-446.

Where a widow with no means of support except her own earnings agrees to give up her natural right to the guardianship of her child and transfers the same to the latter's grandfather, who on his part agrees to educate and provide for the child and allow the mother to be with it as much as possible and also to pay an allowance to the mother for her own maintenance, the arrangement is not void as against public policy for involving a surrender of the mother's rights and duties to her child, and an action may be maintained by the mother for the allowance agreed to be paid to her. *Chisholm v. Chisholm (Can.)*, 11-213.

Parol gift of child. — A parent's right to the custody of his child cannot be defeated by evidence of a mere parol gift of the child to another, in the absence of a showing of a clear and definite parol agreement for unconditional surrender of the child by the parent, or of conduct on the part of the parent estopping him to claim custody. *Ex p. Reynolds (S. Car.)*, 6-936.

c. Right to child's services and earnings.

Where child lives apart from parent. — The father of an infant employee is entitled to recover from the employer on account of wages paid to the infant in disregard of the father's demand therefor only the excess over the amount expended by the infant for his necessary expenses, where he lives apart from his father without objection and supports himself. *McDaniel v. Rounds Bros. (Ky.)*, 19-326.

Deduction of value of necessities furnished to child. — Where a father sues

one who, without his consent, has employed his minor son, to recover the value of his son's services while employed by the defendant, basing his action upon a contract implied from the circumstances of the case, and it appears that the employer, while such minor was engaged in his service, supplied him with necessities for his support and maintenance, the recovery of the plaintiff should be limited to the reasonable value of the services, less the reasonable value of the necessities so furnished. *Culberson v. Alabama Construction Co. (Ga.)*, 9-507.

d. Right to recover for injury to child.

Right of parent to compromise. — A parent has no implied authority to compromise or settle the claim or cause of action of his infant child or to consent that a judgment may be rendered against him. *Missouri Pacific R. Co. v. Lasca (Kan.)*, 17-605.

Rights of father of infant servant. — Where an infant servant is injured in consequence of the negligence of the master, the servant's father has a right of action against the master to recover damages for his expense and loss of time in caring for his son, and for medical attendance for which he has made himself responsible, but not for loss resulting from the diminished earning capacity of the son in the future. *Great Northern R. Co. v. Couture (Que.)*, 7-190.

Right to recover for expulsion of child from school. — A father cannot maintain a suit for a wrong done to his minor child, unless he has incurred a direct pecuniary injury therefrom, by reason of loss of service or expenses necessarily consequent thereon. It follows that if a teacher of a public school is liable to any one for expelling a pupil therefrom, an action therefor will not lie in favor of the father of the pupil, when he has thereby suffered no direct pecuniary loss. *Sorrels v. Matthews (Ga.)*, 12-404.

2. DUTIES OF PARENTS.

Maintenance of children. — Both as regards third persons and as between husband and wife, the father is under a primary obligation to support his infant children, and the mother can compel the father to provide for the children to the relief of herself. *Alvey v. Hartwig (Md.)*, 14-250.

Implied agency to bind father. — Where it is made by statute the legal duty of a parent to maintain his children, there is an implied agency to bind the father for necessities, where there is a total abandonment of a minor child incapable of supporting himself. *Finn v. Adams (Mich.)*, 4-1186.

3. LIABILITIES OF PARENT.

a. To child for tort.

No civil remedy against parent for abuse. — The common-law rule as to the right of a father to control an infant child and to inflict moderate chastisement obtains

in this country, and in case of an abuse of parental power, a child has no civil remedy against the father for personal injuries but merely an appeal to the criminal law or a resort to habeas corpus. *McKelvey v. McKelvey (Tenn.)*, 1-130.

Action against stepmother. — Cruel treatment inflicted by a stepmother upon a child does not give the latter the right to recover civil damages, as in such case the father would be responsible singly or jointly with the stepmother if an action could be maintained. *McKelvey v. McKelvey (Tenn.)*, 1-130.

Action for damages for excessive punishment. — A parent, or one standing *in loco parentis*, is not liable either civilly or criminally for correcting a child by a moderate or reasonable punishment, but it is otherwise if the punishment is unreasonable or excessive. In an action to recover damages for excessive punishment, it is a question of fact to be determined by the jury whether the punishment inflicted was reasonable or excessive. *Clasen v. Pruhs (Neb.)*, 5-112.

Admissibility of evidence in action for damages. — The rulings of the trial court on the admission and exclusion of evidence in an action by a minor to recover damages for cruel treatment by a person *in loco parentis* examined and held not prejudicial to the defendant. *Clasen v. Pruhs (Neb.)*, 5-112.

Financial ability of parent. — In an action by an infant against one standing *in loco parentis* to recover damages for cruel treatment, where it is averred that the defendant had the necessary means to provide food and clothing for the plaintiff, but failed to do so, and such allegation is not admitted, it is proper to admit evidence of the financial ability of the parent so to provide, when such evidence is restricted by instruction to this purpose alone. *Clasen v. Pruhs (Neb.)*, 5-112.

Sufficiency of evidence in action for damages. — Evidence in an action by an infant against one standing *in loco parentis* to recover damages for cruel treatment examined and held sufficient to sustain the verdict. *Clasen v. Pruhs (Neb.)*, 5-112.

Charge of court in action for damages. — Instructions in an action by a child to recover damages for cruel treatment by a person *in loco parentis* examined and held not prejudicial to the defendant. *Clasen v. Pruhs (Neb.)*, 5-112.

Civil liability of father for rape of daughter. — Within the rule that a minor child cannot sue a parent for damages arising upon tort, a father who has been convicted of rape upon his minor daughter and sentenced to prison therefor is not civilly liable to her for damages. *Roller v. Roller (Wash.)*, 3-1.

b. To third person for tort of child.

Scope of minor's employment. — In an action against a father for damages resulting from the setting out of a fire by his minor sons it is not a sufficient allegation of the

parent's liability to allege that the sons, "while engaged in his [the father's] business, and for his benefit and working for him, purposely, carelessly, and negligently set out a fire." It is necessary to allege, in substance, if done in the absence of the father and without his direction, that the setting out of the fire was a service being rendered for the father or resulting from an act done in such service; in other words, that the fire was set out or caused by an act within the scope of the employment. *Mirick v. Suchy* (Kan.), 11-366.

4. LIABILITIES OF CHILD.

Common-law obligation to support parent. — At common law there was no legal obligation on the part of a child to support his parent. Such obligation depends entirely upon statutory provisions, and the procedure provided by statute for the enforcement of the obligation must be pursued. *Duffy v. Yordi* (Cal.), 9-1017.

Under California statute. — Under the California statute providing that "it is the duty of . . . the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability," a mother who is being supported by one child cannot maintain an action against another child for another support, whether or not the supporting child may maintain an action against the nonsupporting child to compel contribution to the mother's support. *Duffy v. Yordi* (Cal.), 9-1017.

5. TRANSACTIONS BETWEEN PARENT AND CHILD.

No presumption from relation of parent and child. — No presumption arises from the relation, merely, in respect to gifts and voluntary conveyances without consideration from parent to child, though some children are thereby favored to the exclusion of others, and though the beneficiary is the adviser of the parent, and has the control and management of his affairs. *Burton v. Burton* (Vt.), 17-984.

What must be shown to set aside voluntary conveyance. — To warrant the setting aside of a voluntary conveyance made by a parent to a child, imposition, fraud, importunity, duress, or something of that kind, in addition to the natural influence arising from the relationship between the parties, must be shown; and the burden of proof in that regard rests upon the party attacking the conveyance. *Burton v. Burton* (Vt.), 17-984.

Difference between relation of parent and child and other relations. — There is a distinction as regards probative force between evidence of confidential relations existing between parent and child, and evidence of similar relations existing between strangers, such as guardian and ward or attorney and client. The latter relations, in practical effect, change a permissible influence of fact as regards undue influence in the case of a child, to a necessary presump-

tion of such influence in the case of an attorney or guardian; or, in other words, change such permissible inference of fact from one that might, as matter of reasoning, show undue influence, to one that certainly, as matter of law, is *prima facie* proof of such influence. *Burton v. Burton* (Vt.), 17-984.

Sufficiency of evidence in action to set aside gift and conveyance. — In an action to set aside a deed of land from a parent to a child, and also the transfer of a savings bank deposit, on the ground of mental incapacity and undue influence, evidence examined and held insufficient to warrant a judgment in favor of the plaintiff. *Burton v. Burton* (Vt.), 17-984.

Deed to parent from child. — Where it appears that a deed of real estate was procured by a parent from his child, without consideration, the burden is on the parent to show that the transaction was fair and was entered into by the child fully understanding its rights and fully comprehending the nature and effect of the transaction, and that the transaction was for the benefit of the child. *Hays v. Feather* (Ill.), 18-538.

6. PERSONS IN LOCO PARENTIS; RIGHTS OF CHILD IN SUCH CASE.

Who is in loco parentis. — A person assuming the parental character and discharging parental duties to a minor child, received into his family as a child and not as a servant, stands *in loco parentis* to such child. *Howard v. Randolph* (Ga.), 20-392.

Right of child to recover wages in absence of contract. — Where a person assumes the relation of a parent to a child not of kin, which he takes from an orphanage at the tender age of three years, and faithfully discharges the duties of that relation by receiving such child into his family and educating and supporting her as if she had been his own child, and where there is no express agreement to pay wages to the child, she cannot maintain an action against the executors of the person who stood *in loco parentis*, for services rendered while a minor, although the value of the services may exceed the expenses of such education and support. *Howard v. Randolph* (Ga.), 20-392.

Proof of contract to pay for minor's services. — One who has been received in infancy as a child into a family not of kin to her, and remains in the household after her majority, and then seeks to recover for services rendered to such family after majority, has the burden of proof to show either an express contract, or circumstances from which a contract to compensate for such services may be implied. *Howard v. Randolph* (Ga.), 20-392.

In elucidating the question whether such services were rendered gratuitously or under an implied promise of compensation, evidence relating to the character and extent of the services, the declarations and conduct of the recipient, the value of the services, and corresponding benefits to the recipient, is admissible. *Howard v. Randolph* (Ga.), 20-392.

7. EMANCIPATION.

Definition. — The emancipation of a child is the relinquishment by a father of his right to the custody and service of the child, and the investiture of the child with the same rights, as regards the father, as if the child were of full age. *McDaniel v. Rounds Bros.* (Ky.), 19-326.

Emancipation of child by marriage. — The right of a wife to the society of her infant husband, and to support by him, even though in derogation of the original right of custody on the part of the husband's parents, is well settled; and, from the existence of this right on the part of the wife, it necessarily follows that the infant husband is entitled to his earnings, as against his father, so far at least as is necessary for the support of his family. *Cochran v. Cochran* (N. Y.), 17-782.

Express or implied emancipation. — The emancipation of a child by his parent may be either express or implied. *McDaniel v. Rounds Bros.* (Ky.), 19-326.

Implied assent to receipt of earnings by minor. — Where a minor son, without his father's consent, makes a contract for his services with a third person, and the father knows that the son is in the employment of such person, but neither makes any objection nor demands pay for his child's services from such employer, there is an implied assent by the father that the son shall receive his earnings in such employment. *Culberson v. Alabama Construction Co.* (Ga.), 9-507.

Revocation of express emancipation. — An express emancipation cannot be revoked by the parent. *McDaniel v. Rounds Bros.* (Ky.), 19-326.

Revocation of implied emancipation. — An implied emancipation of a child by his parent may be revoked by prompt action on the part of the parent. *McDaniel v. Rounds Bros.* (Ky.), 19-326.

In adjudicating on the right of a father to revoke an implied emancipation of his infant child, the court will not look exclusively to the rights of the parent, but will consider what is best for the child. *McDaniel v. Rounds Bros.* (Ky.), 19-326.

When revocation of implied emancipation will not be permitted. — Revocation of the emancipation of a child will not be permitted where the father of the child permitted him at the age of sixteen years, after he had been earning wages for four years, to leave home, and to receive his wages and support himself for two years, during which time the child prospered in his work, and proved himself to be sober, industrious, well behaved, and capable. *McDaniel v. Rounds Bros.* (Ky.), 19-326.

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Parties in equity, see EQUITY, 3.

Probate proceedings, see WILLS, 7 e.

Real parties in interest as affected by judgment, see JUDGMENTS, 6 a (2).

1. JOINDER OF PARTIES.

Representative parties. — The Colorado statute providing that a court may make an order permitting one or more persons to sue or defend for the benefit of all

the parties interested is not mandatory, and the overruling of a motion to strike the complaint from the files upon the ground that no such order has been made is not error. *Adams v. Clark* (Colo.), 10-774.

Joint action by insurer and insured.

— Where an insurance company pays to the insured a loss occasioned by the wrong of a third person and by subrogation takes an assignment of the claim against the wrongdoer for the damages to the extent of the amount so paid, which is less than the value of the property destroyed, the insurer and the insured may under the Oregon statute maintain jointly an action at law for the entire loss against the wrongdoer. *Fireman's Fund Ins. Co. v. Oregon R., etc., Co.* (Ore.), 2-360.

Accident insurance company which has paid loss as necessary party to action for negligence. — As an accident insurance company which has paid the amount stipulated in one of its policies for an injury to the insured is not thereby subrogated to the rights of the insured against a person whose negligence or wrongful act caused the injury, it follows that such company is not a necessary party to an action by the insured against such person for the recovery of damages. *Gatzweiler v. Milwaukee Electric R., etc., Co.* (Wis.), 16-633.

Use of name of necessary party as coplaintiff. — Under common-law procedure, where one of several owners of a joint interest refused to join as plaintiff, the other owners were permitted to use his name as a coplaintiff. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

Joinder of necessary party plaintiff as codefendant. — Under the Arkansas statute (Kirb. Dig., § 6007) providing that of the parties to an action, those united in interest must be joined as plaintiffs, but that when for any cause it may be necessary for the purpose of justice, a person who should have been joined as plaintiff may be made defendant, a partner who refused to join in an action to recover a claim of the firm may be made a party defendant. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

Where defendants acted in concert.

— In an action for trespass against the rights of the plaintiff, where the allegations show that the defendants acted in concert or by unity of action in permitting such wrong, there is no misjoinder of parties defendant. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Sufficiency of allegation of liability of defendants as joint tortfeasors.

— In an action for tort, a complaint alleging that the defendants negligently, wantonly, and with utter disregard of the safety of the various riders engaged in a speed contest, permitted a dog to go on the race track, alleges the liability of the defendants as joint tortfeasors, and the complaint is not subject to a demurrer for misjoinder of defendants. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Manner of raising question of defect of parties. — A defect of parties not appar-

ent upon the face of the complaint must be set up by a verified plea in abatement, filed and tried before answers in bar are pleaded. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co. (Ind.)*, 6-880.

The objection of the nonjoinder of a party, if not taken by demurrer, plea, or answer, will receive little favor from the courts, and will not be available unless it appears that the decree will have the effect of depriving the omitted party of his legal rights. *Pease v. Chicago Crayon Co. (Ill.)*, 14-263.

The question of a defect of parties plaintiff or defendant can be raised only by demurrer or answer. If not so raised, it is waived. *Budds v. Frey (Minn.)*, 15-24.

2. INTERVENTION OF PARTIES.

Right of intervention. — The fact that an intervenor has some other and adequate remedy for the protection of his property and rights is no bar to his right to intervene. If he has any interest in the matter in litigation, or in the success of either of the parties, he has a right to intervene. *Potlatch Lumber Co. v. Runkel (Idaho)*, 18-591.

Adding new parties. — Where there is a defect as to parties the court may at any time before or after judgment direct other persons to be made parties, to the end that justice be done. *Walker v. Miller (N. Car.)*, 4-601.

The Nebraska statute which provides for intervention before trial does not curtail the power of a court to bring other parties before it, when satisfied that their presence is necessary to a proper determination of the cause. *Brown v. Brown (Neb.)*, 8-632.

In action by substituted trustee where former trustee claims an interest. — Where a trustee brings an action against a bank to compel the issuance to him of a certificate of stock in the bank and the payment of dividends to him, and fails to make a former trustee a party to the action, and such former trustee notifies the bank that she claims an interest in the stock in question, the action should not be dismissed for defect of parties, but the court should require such former trustee to be brought before the court by constructive process if she is outside the jurisdiction of the court, and the court may then make such order as the proof warrants. *Letcher v. German Nat. Bank (Ky.)*, 20-815.

PARTITION.

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Land conveyed jointly to husband and wife, see *HUSBAND AND WIFE*, 2 g.

Mining rights, see *MINES AND MINERALS*, 6.

Partition of homestead after separation of husband and wife, see *HOMESTEAD*, 5.

Right of trustee in bankruptcy to sue for partition, see *BANKRUPTCY*, 13.

1. BY ACT OF PARTIES.

Effect of statute of frauds. — In consequence of the statute of frauds, no legal partition can be made between tenants in common without a deed or writing, and part performance will not prevent operation of the statute. *Rhea v. Craig (N. Car.)*, 8-400.

In a proceeding to partition land alleged to be held in common, where the defendant sets up adverse possession for more than twenty years under a parol partition, the mere circumstance that the defense originated in a parol agreement does not exclude evidence of the possession under the agreement, nor does it exclude evidence of the agreement itself and its attendant circumstances. *Rhea v. Craig (N. Car.)*, 8-400.

2. BY JUDICIAL PROCEEDINGS.

a. Jurisdiction.

Where land cannot be equitably divided. — Where land cannot be equitably divided in kind, either the probate or the chancery court may be resorted to for a sale. *Finch v. Smith (Ala.)*, 9-1026.

Where land can be equitably partitioned. — If land can be equitably partitioned in kind, and the remedy by allotment in the probate court is ineffectual to that end, the proceeding should be brought in the chancery court. *Finch v. Smith (Ala.)*, 9-1026.

Where probate court has obtained jurisdiction. — Where a probate court has obtained jurisdiction of a partition proceeding, it retains jurisdiction and proceeds according to its own mode of procedure and powers, unless the matter is removed to the chancery court on account of the existence of special equitable grounds. *Finch v. Smith (Ala.)*, 9-1026.

Effect of final decree of probate court. — A final decree of the probate court ordering a partition in kind or by sale is conclusive until it is reversed or appealed, and excludes the jurisdiction of the chancery court, unless there is some special equitable ground for the interposition of equity. *Finch v. Smith (Ala.)*, 9-1026.

b. Right to compel.

Tenant in common who has been dis-seized. — A tenant in common who has been dis-seized is not entitled to partition, but to prevent a tenant in common from having partition there must be an actual ouster. *Roll v. Everett* (N. J.), 17-1196.

Right of life tenant. — Under the Wisconsin statute tenants in common of a life estate may have partition. The action may be maintained by any person having an estate in possession and the owners of the reversion are proper parties defendant. Under such statute a life tenant bringing an action for partition to which the reversioners are defendants can have a partition of the life estate only and not of the fee belonging to the reversioners. *Plano Mfg. Co. v. Kind-schi* (Wis.), 11-1039.

Right of dowress. — A dowress to whom dower has been assigned by metes and bounds is not a "tenant in common, joint tenant, or coparcener" with the owner of the fee, and therefore is not entitled, under the Rhode Island statute (Gen. Laws 1909, c. 330, § 4), to maintain a proceeding for compulsory partition. *Newell v. Willmarth* (R. I.), 19-807.

Right barred by laches. — The right of heirs to partition is barred by laches where it appears that each took possession of a parcel of the land under a deed executed by their deceased father and remained in possession for about forty years without questioning or inquiring into the validity of the deeds, though they received the deeds after their father's death, knowing that they had not been recorded in his lifetime. *Ater v. Smith* (Ill.), 19-105.

Protection of beneficial owner. — Under the statutes of Florida, partition will be enforced only when required by the demands or the interests of a beneficial owner, or when shown to be necessary to protect the rights of those beneficially interested. *Hobbs v. Frazier* (Fla.), 16-558.

Exclusive possession of defendants. — Under the Florida statutes, a court of equity has authority to entertain a bill for partition filed by one who claims an undivided interest in the land sought to be partitioned under a conveyance from the defendants, even though the defendants are in exclusive possession, claiming that the deed to the complainant is merely a contract to convey and not a conveyance; and also has authority to adjudicate the rights and interests of the respective parties therein, even though the complainant has never had possession of any of the land. *Girtman v. Starbuck* (Fla.), 5-833.

Effect of parol partition. — Where land has been divided among tenants in common by a parol agreement, and the tenants have gone into possession of their several and respective shares in accordance with the agreement, and each has continued in sole and exclusive possession of his share for more than twenty years without having claim or demand made upon him by the other tenants

for rents, issues, or profits, and each of the tenants has recognized the other's possession to be of right and hostile, the law will presume an actual ouster and a supervening adverse possession as fully as if the possession had been of the whole instead of a part only. *Rhea v. Craig* (N. Car.), 8-400.

Effect of continuous and open possession of part of land. — In a proceeding to partition land alleged to be held in common, where the defendant sets up a parol partition and adverse possession thereunder, it is proper to refuse the plaintiff's request for an instruction which tells the jury that if they find that each of the tenants in common has been in continuous, open, and notorious possession of some part of the land, the statute of limitations has not run in favor of either of the tenants against the others, but the possession of each is presumed to have been in the interest of all the tenants and in support of the common title, if the instruction omits the important element of the length of the possession. *Rhea v. Craig* (N. Car.), 8-400.

Instruction as to continuity of adverse possession. — In a proceeding to partition land alleged to be held in common, where the defendant sets up a parol partition and adverse possession thereunder, it is proper to refuse the plaintiff's request for an instruction that possession within twenty years by one of the tenants in common of a portion of the land claimed by another tenant by adverse possession will break the continuity of the possession of the latter, if the instruction requested does not state whether the possession relied upon to break the continuity was adverse or permissive and does not state what was the nature of such possession or how long it lasted. *Rhea v. Craig* (N. Car.), 8-400.

c. What is subject to partition.

Effect of lease of part of land. — The existence of a lease on land is not a bar to a partition of the residue. *Finch v. Smith* (Ala.), 9-1026.

Cemetery lot. — A cemetery lot granted by a cemetery company whose rules provide that no single heir of the grantee shall have a right to the separate use or disposal of the lot, is not subject to partition at the suit of such an heir. *Love v. Robinson* (Pa.), 12-974.

d. Partition proceedings.

(1) Parties.

Intervention of one claiming interest. — The right to intervene given by C. L. 1897, § 3182, to one claiming an interest in the land, is insured by statute and the court has, when such right is seasonable asserted, no discretion to deny it. *Baca v. Anaya* (N. Mex.), 20-77.

Intervention by one not claiming under common title. — Under C. L. 1897, § 3182, providing that during the pendency of any partition suit any person claiming to be interested in the premises may appear and

assert his right by interpleader, the right to intervene is given to all persons claiming an interest in the land, whether under the common title sought to be partitioned or by title independent thereof. *Baca v. Anaya* (N. Mex.), 20-77.

Parties in possession of land claiming it under a Spanish grant made in 1760 were thus entitled to intervene to quiet their title in a partition suit, affecting the same land, pending between cotenants under a Spanish grant made in 1800. *Baca v. Anaya* (N. Mex.), 20-77.

(2) Notice of proceedings.

Failure of report to show notice to defendants. — Where the report of the commissioners appointed to make partition shows that they viewed, surveyed, and partitioned the premises on the second day after the entry of the decree for partition and the report is silent as to whether notice of the partition was given to the defendants, who did not appear in the action, it will be presumed that such notice was not given. *Robertson Consol. Land Co. v. Paul* (W. Va.), 15-775.

(3) Partition of several tracts in one action.

Complaint for partition of several tracts of land. — Where a complaint is filed for the partition of several tracts of land which may be partitioned in the same action, it states but one cause of action. *Middlecoff v. Cronise* (Cal.), 17-1159.

Tracts of land situated in different counties. — Partition may be had in one action of several tracts or parcels of land, and the fact that such tracts are situated in different counties does not prevent them from being included in a single action, the suit being maintainable, in such a case, in any county in which a part of the property is situated. *Middlecoff v. Cronise* (Cal.), 17-1159.

Necessity of ownership by same persons. — With one exception, hereafter stated, while two or more parcels of land may be the subject-matter of a single action for partition, even though the interest of each cotenant is not the same in each parcel, still in order to justify such union in one suit, each parcel of land must be owned by the same persons. *Middlecoff v. Cronise* (Cal.), 17-1159.

When ownership by same persons not essential. — The one exception to the rule that all the parcels of land included in a single action of partition must be owned by the same persons, is based on the doctrine that one cotenant cannot prejudice the rights of his cotenants by a conveyance of his interest in a portion of the property held in common, and applies in a case where the common source of title was a cotenancy as to all of the property involved in the action, but where one or more of the original cotenants have conveyed their interests in one or more of the parcels carved out of the original tract. In such a case, for all pur-

poses of partition, the whole property originally held in common by the cotenants, whether consisting of one or any number of parcels, continues to be a unit, and the subject-matter of a single action, just as if no change in the ownership of any interest therein had occurred, and in such an action the respective rights of all the parties interested, original cotenants and successors, may be determined; nor is it any objection, under such circumstances, that a defendant who is interested in one of the parcels is not interested in the others. *Middlecoff v. Cronise* (Cal.), 17-1159.

Misjoinder of causes of action. — Where a single action is brought to partition several parcels of land, and it appears that one of the defendants has no interest in one of the parcels sought to be partitioned, and that there is no common source of title to all of the parcels, the complaint is demurrable for misjoinder of causes of action. *Middlecoff v. Cronise* (Cal.), 17-1159.

Effect of California statute. — The above rule that several parcels of land cannot be included in a single action of partition where the cotenants of the several parcels are not the same, unless there is a common source of title to all of the parcels, is not affected by the California statute providing that the rights of adverse occupants of the land sought to be partitioned may be put in issue and tried and determined in an action of partition, or by any other provision of the statutes relative to that action. The real property referred to in section 752 of the Code of Civil Procedure, as to which an action for partition may be brought, is real property as to which such unity of title exists as authorizes a single action under the rules above stated. *Middlecoff v. Cronise* (Cal.), 17-1159.

Effect of demand for other relief. — Where a complaint in partition is demurrable for misjoinder of causes of action, because of the improper inclusion of several parcels in the same action, the objection on that ground is not obviated by allegations which go simply to the relief to be awarded as between the various parties in case partition is granted, and which are not sufficient to change the essential nature of the action as one for partition. *Middlecoff v. Cronise* (Cal.), 17-1159.

(4) Evidence.

Oral testimony. — The Alabama statute requiring that evidence in support of an application for partition must be taken as in chancery cases does not refer to the testimony introduced by the defendant, and therefore the defendant may introduce oral testimony. *Finch v. Smith* (Ala.), 9-1026.

(5) Issues.

Determination of issues of title. — Under the Code system merging courts of law and equity, the determination of issues of title arising in a partition suit does not necessitate additional and separate suits, but

such issues may all be determined in the same partition action. *Baca v. Anaya* (N. Mex.), 20-77.

(6) Actual division of property.

Powers of probate court. — Where both the chancery and the probate courts have jurisdiction to entertain partition proceedings, the two jurisdictions are distinct, and each court proceeds according to its powers and mode of proceeding, and the probate court can consider only its own powers in determining whether the property can be equitably divided. *Finch v. Smith* (Ala.), 9-1026.

(7) Attorney's fees.

Allowance of reasonable attorney's fees. — A partition proceeding is one for the benefit of all the parties in interest, and where such proceedings are amicable it is proper for the trial court to allow the attorneys conducting the proceedings reasonable attorneys' fees, and to require the payment of the same by the parties in proportion to their interests in the property involved. *Johnson v. Emerick* (Neb.), 12-851.

(8) Sales in partition.

Power of probate court. — Under the Alabama statute, a probate court cannot partition in kind except in the way pointed out by the statute, which is by lot, requiring the respective interests of several parties to be equal, and therefore where the interests are unequal the court may partition by sale. *Finch v. Smith* (Ala.), 9-1026.

Proof of jurisdictional averments. — In a petition to partition property by a sale, an averment that the property cannot be equitably divided is a jurisdictional one, and if the averment is not proved the petition should be dismissed. *Finch v. Smith* (Ala.), 9-1026.

Determination of question of sale. — The question whether land may be partitioned by sale on account of the fact that it cannot be equally divided *in specie* does not depend upon the efficiency or inefficiency of the mode of allotment in kind provided for by the Alabama statute, but depends upon whether the land can be equitably divided in kind by the probate or the chancery court. *Finch v. Smith* (Ala.), 9-1026.

PARTNERSHIP.

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Paying individual debt with partnership property as fraud on partnership creditors, see BANKRUPTCY, 10.

1. THE PARTNERSHIP RELATION.

a. Definition and creation of partnerships.

Definition of Partnership. — A partnership may be defined as the relationship existing between two or more persons who have agreed to carry on a business together and to share the profits thereof as joint owners of the business. *Herman Kahn Co. v. Bowden* (Ark.), 10-132.

Intention to create partnership. — A partnership is a relation arising out of a contract to do certain things, and exists only where the parties intend to enter into such a contract, and, unless they have estopped themselves by holding themselves out to the world as partners, their intentions, as derived from the contract, are decisive. *Citizens Nat. Bank v. Mitchell* (Okla.), 20-371.

What constitutes a partnership. — M. & C. entering into a contract, by which each is to have a one-half interest, one to perform certain duties relative thereto, and the other certain other duties, there being a joint ownership and a joint contribution of labor, and the joint bearing of the burdens and expenses, whatever they may be, as well as sharing jointly in the profits, constitutes a "partnership." *Citizens Nat. Bank v. Mitchell* (Okla.), 20-371.

Having money in business not essential. — An instruction is incorrect which tells the jury that a person cannot "be a partner without having money in the business," as a person may engage in business as a partner and furnish his services, or the use of a building, or the credit of his name, against the money furnished by his partner. *Herman Kahn Co. v. Bowden* (Ark.), 10-132.

Unincorporated joint stock company. — An unincorporated joint stock company organized for carrying on business in the District of Columbia is a partnership, and its members are each liable for all its debts. *Norwood v. Francis* (D. C.), 4-865.

Married woman as member of unincorporated joint stock company. — Under the Married Woman's Act of the District of Columbia, a wife has no authority to purchase shares in a joint stock company the members whereof are partners, where her husband also owns shares therein, and she is therefore not liable to a creditor of the company on its becoming insolvent; and particularly does no liability attach to her where it appears that her husband signed her name to the articles of association without her knowledge or authority, and she received no benefits and did not participate in the business of the company, and also received the shares prior to the passage of said act, and when she was disqualified from being a member of a partnership with her husband. *Norwood v. Francis* (D. C.), 4-865.

Arrangement between distributees and legatees of members of firm. — An arrangement between the distributees and legatees of the members of a partnership, entered into with the approval of the administrators, for the continuation of the firm's

business by the administrators under the old name, constitutes a new partnership, and contracts entered into by the partnership under the adopted name have the same force and effect as if made in the names of the living owners. *Walker v. Miller* (N. Car.), 4-601.

Promise to give interest in business. — A promise by the owner of a store and stock of goods to give a person employed by him an interest in the business when he can draw \$10,000 therefrom, besides keeping up the stock and paying personal and store expenses, does not immediately create a copartnership between the parties, but leaves the ownership and control of the business in the promisor, with the obligation to transfer an interest therein to the promisee at a future time. *Ott v. Boring* (Wis.), 11-857.

A promise by the owner of a store and stock of goods to give a person in his employ a share in the business when he can withdraw \$10,000 therefrom, besides keeping up the stock and paying personal and store expenses, must be construed as meaning that only when, consistently with the most effective promotion of the purpose of making the store the "greatest possible success," the promisor could withdraw such a sum from the business, would he be under obligation to perform his promise to give the promisee a share in the business. *Ott v. Boring* (Wis.), 11-857.

Where, in the business established under such contract, the promisor had full control as to the enlargement, management, and policy of the business, and this situation was manifestly in the contemplation of the parties, the contract will be construed to mean that not until the promisor, in the exercise of an honest and reasonable judgment, deemed that he was able to withdraw the sum of \$10,000 from the concern consistently with keeping up the most advisable volume of business, should the promisee have the right to demand the transfer of the promised share thereof. *Ott v. Boring* (Wis.), 11-857.

In such case, the fact that the promisor, after collecting a large amount of insurance money for the burning of a part of his stock, placed \$15,000 on demand loan with a business house from which he was accustomed to buy very largely the goods for his business, the credit being carried as an asset of the business and the interest applied on the payment of bills for goods purchased, does not show that the time had arrived when under the terms of the contract the promisee was entitled to demand an interest in the business. *Ott v. Boring* (Wis.), 11-857.

In such a case, where the promisor dies and the promisee brings an action against his estate on the contract, the relief to which he is entitled, is the recovery of the money value of the one-fourth interest in the net money worth of the business at the time of presenting his claim, less the amount which the deceased was entitled to withdraw, in that event, under the contract. *Ott v. Boring* (Wis.), 11-857.

b. Evidence of partnership.

In action against alleged partnership. — Less proof is requisite to establish a partnership in actions against alleged partners than is necessary in actions between the parties themselves. *Frankel v. Hillier* (N. Dak.), 15-265.

Intention of parties a question for the jury. — In an action against two defendants as copartners, the question whether the defendants are copartners as alleged in the complaint is a mixed question of law and fact, and where it appears that one of the defendants furnished the building and lot upon which the business was conducted under an agreement with his codefendant that he should receive one-half of the net profits of the business, it is for the jury to say what the intention of the parties was, such intention, when ascertained, being largely controlling. *Frankel v. Hillier* (N. Dak.), 15-265.

Mercantile reports and general reputation. — Mercantile agents' reports and general reputation are inadmissible in evidence to establish the existence of a partnership. *Marks v. Hardy* (Ky.), 4-814.

Admissions of party. — The fact that a certain person was a member of a partnership, and therefore liable for the partnership debts, at a specified time, may be proved by his admissions that he was a partner; and where the evidence as to the making of such admissions is conflicting, it is for the jury to determine whether the partnership existed. *Herman Kahn Co. v. Bowden* (Ark.), 10-132.

Declarations of party in his own interest. — It is erroneous to permit witnesses to testify to declarations made by a person in his own interest to the effect that he was not a partner in a business venture. *Marks v. Hardy* (Ky.), 4-814.

Declarations denying existence of firm recognized by paper signed by declarant. — When evidence is introduced to show the contents of a paper in order to establish the fact that the signer recognized the existence of a partnership, evidence is properly admitted to show that at the time of signing the signer denied the existence of a firm, and only signed the paper upon the assurance of his counsel that it was right so to do, and would not obligate or bind him as a partner. *Marks v. Hardy* (Ky.), 4-814.

Evidence of existence of relation at prior time held too remote. — In a suit by a depositor in the bank of an insolvent joint stock company against a former stockholder as a partner, to recover the amount of the deposit, on the ground that he made the deposit with knowledge that the defendant had once been a stockholder, and offer to show that at the trial of a case six years before the making of the deposit and three years before the withdrawal of the defendant as a stockholder, articles of agreement of the bank and the names of the signers, including that of the defendant, were read in evidence, such offer being made for the purpose of showing

that it was generally known at the time of such trial that the defendant was a stockholder in the company, is properly refused.

c. Existence of relation as affecting third persons.

Estoppel to deny partnership. — A person who has held himself out as a partner is estopped to deny that he was a partner, not only as to those to whom the representation was directly made, but as to all other persons who had knowledge of the holding out and in reliance thereon sold goods to the firm, provided such persons exercised due diligence in ascertaining the facts. *Herman Kahn Co. v. Bowden* (Ark.), 10-132.

The mere fact that a person has held himself out as a partner does not estop him from showing that he was not in fact such, except as to those who knew of such holding out and in reliance thereon sold goods to the firm. *Herman Kahn Co. v. Bowden* (Ark.), 10-132.

Where a person puts out a report that he is a partner, he is liable to all persons who sell goods to the firm on the faith and credit of such report. *Herman Kahn Co. v. Bowden* (Ark.), 10-132.

d. Duration of partnership.

Partnership agreement not specifying time. — The mere fact that no time is specified for the duration of a partnership does not render the contract or partnership void. In such a case the partnership will be construed as one to continue during the mutual will of the parties. *Johnson v. Jackson* (Ky.), 17-699.

Provision for termination "by mutual arrangement." — A partnership for the joint lives of the partners is created by a partnership agreement which provides that it shall be terminated "by mutual arrangement only;" and it is not a case in which dissolution may be effected by notice, as provided by the English Partnership Act, 1890, where "no fixed term" has been agreed on (§ 26, subs. 1) or where the partnership is "for an undefined time" (§ 32). *Moss v. Elphick* (Eng.), 19-382.

2. NAME OF PARTNERSHIP.

What is not a fictitious name. — A firm name showing the surname only of the partners is not a fictitious name, or a designation not showing the names of the partners, within the meaning of the Oklahoma statutes which provide that every partnership transacting business in the territory under a fictitious name, or a designation not showing the names of the persons interested, as partners, must file with the clerk of the District Court of the county or subdivision in which its principal place of business is situated, a certificate stating the names in full of all the members of such partnership, and their places of residence, and publish the same once a week for four successive weeks, in a newspaper published in the county, and that in case of the failure of such filing and publica-

tion of the certificate, such partnership shall not maintain any action on account of any contract made or transaction had with such firm in any court of the territory. *Patterson v. Byers* (Okla.), 10-810.

3. PARTNERSHIP PROPERTY.

Conveyance to partnership in firm name. — A deed conveying property to a partnership in the firm name as the grantee is valid, there being merely a latent ambiguity open to explanation by which the real party is disclosed, and the deed will be treated as if the names of the real grantees had been inserted. *Walker v. Miller* (N. Car.), 4-601.

A deed to a partnership by its firm name which does not include the name of any of the partners, though insufficient to pass the legal title, is good in equity, and may be reformed and enforced accordingly. *Spaulding Mfg. Co. v. Godbold* (Ark.), 19-947.

Sales and transfers. — In the absence of fraud, a partnership may sell and transfer its property, and the purchaser will take it free from any equities in favor of the simple creditors of the partnership. *Thorpe v. Pennock Mercantile Co.* (Minn.), 9-229.

The fact that a partnership transfers its property to a corporation organized by the partners for the purpose of carrying on the old business is not of itself evidence of fraud. *Thorpe v. Pennock Mercantile Co.* (Minn.), 9-229.

Conversion of real estate. — As between the heir and the personal representative of a deceased partner, a conversion of the partnership real estate will be regarded as having taken place when such was the intent of the partners as evidenced by express agreement or fairly deducible from the facts and circumstances. *Buckley v. Doig* (N. Y.), 11-263.

Where a partnership has carried on the business of dealing in real estate as a commodity, buying it absolutely for the purpose of improving and selling it, and either dividing the proceeds of the sale among the partners or reinvesting it in more real estate to be similarly dealt with, carrying it upon the firm books indiscriminately with personal property as part of the assets of the firm, and this course of conduct is in accordance with and confirmatory of an oral agreement for a copartnership and for a conversion of the real estate into personalty upon dissolution of the firm or disagreement of the partners, a trial court is justified in finding as a fact an implied intention and agreement by the partners that there shall be a conversion of their real estate happening to be undisposed of at the death of one of the partners, as between the heirs at law and personal representatives of the deceased partner. *Buckley v. Doig* (N. Y.), 11-263.

4. RIGHTS AND LIABILITIES OF PARTNERS INTER SE.

a. In general.

Compensation for services. — In the absence of a special agreement, a partner is

not entitled to compensation for his services to the firm in addition to his share of the profits. *Ruggles v. Buckley* (U. S.), 20-1057.

Where a partnership owns an undivided interest in lands the title to which is held in trust by one of the partners for the benefit of the firm and the other joint owners, and on the dissolution of the firm, the lands do not go to the receiver of the partnership, but are left under the control of such partner as trustee, and he continues to manage and control them as before, he is not entitled to compensation for such services from the assets of the firm in addition to his share of the profits. *Ruggles v. Buckley* (U. S.), 20-1057.

Consideration for conveyance of partner's interest. — The covenant of an insolvent partner to assume and pay the debts of an insolvent partnership is a valuable consideration sufficient to support a conveyance by another partner of his interest in the partnership property. *Sargent v. Blake* (U. S.), 15-58.

b. Actions between partners.

Action for share of profits in absence of settlement. — A partner cannot maintain an action at law against his copartner for a share of the profits of their joint venture in the purchase and sale of lands, unless there has been a settlement or an account stated between them. *Morgart v. Smouse* (Md.), 7-1140.

Action on note given by partner to firm. — A partnership or its assignee cannot sue at law on a note to the firm given by one of the partners for money advanced, where there has been no settlement between the partners so as to ascertain the share of the maker of the note in the profits of the concern. *Summerson v. Donovan* (Va.), 19-253.

After close of partnership for single venture. — Where a partnership for a single venture or special purpose has been closed, one partner may maintain an action against the copartner to recover his share of the proceeds of the venture. *Ledford v. Emerson* (N. Car.), 6-107.

For share of single item of partnership profits. — A partner's share of a single item of partnership profits, the result of a single transaction, may be recovered by an action at law of a copartner who is retaining it, if all the other partnership dealings are settled between the partners. *Dorwart v. Ball* (Neb.), 8-766.

In an action by a partner against his copartner to recover the plaintiff's share of a single item of partnership profits resulting from a single transaction, where the plaintiff pleads and his evidence tends to prove that all other partnership dealings have been settled between the partners, it is erroneous to instruct the jury to return a verdict for the defendant. *Dorwart v. Ball* (Neb.), 8-766.

Action to establish and enforce partnership agreement. — In an action to establish a partnership agreement and enforce its provisions, evidence examined, and held

to show that the defendant partners, in violation of the duty of good faith and fair dealing required between partners, had carried on negotiations behind the back of the complaining partner, withholding from him information of the gravest importance vitally affecting his interest, and that the complainant was entitled to the relief sought. *Miller v. Ferguson* (Va.), 13-138.

For failure to perform condition precedent to formation of partnership. — An action may be maintained by one partner against another to recover damages for the failure of the latter to comply with an agreement made by him as a condition precedent to the formation of the partnership. *Owen v. Meroney* (N. Car.), 1-834.

Parties to action. — Where A sells his interest in a partnership and the interest of his partner, B, to the remaining partner and a stranger in consideration of the purchasers' agreement to pay the partnership debts, and thereafter B ratifies the sale, B is not an indispensable party defendant to a bill subsequently filed by A to compel the purchasers to carry out their contract and pay the debts. *Tillis v. Folmar* (Ala.), 8-78.

Arrest of partner. — Where a partner is entitled to maintain a civil action against a copartner, he is also entitled to the ancillary remedy of arrest, if the cause of action is of such a nature that it is within the provisions of the statutes authorizing arrest and bail. *Ledford v. Emerson* (N. Car.), 6-107.

In an action by a partner against a copartner to recover the plaintiff's share of the profits arising from the sale of certain options on land, where the plaintiff alleges and proves fraud on the part of the defendant in having the options drawn in his own name and in concealing the facts of the sale, the North Carolina statute entitles the plaintiff to an order for the arrest of the defendant. *Ledford v. Emerson* (N. Car.), 6-107.

5. RIGHTS AND LIABILITIES OF PARTNERS AS AGAINST THIRD PERSONS.

a. Representation of firm by partner.

Promissory note under seal issued by one partner. — Under the Georgia statute providing that "all the partners are bound by the acts of any one, within the legitimate business of the partnership," and that "every partner has a right . . . to contract or otherwise bind the firm in matters connected with its business, and to execute any writing or bond in the course of the business," one member of a commercial partnership can bind it by signing its name to a promissory note under seal, in the course of the business of the partnership. *Merchants, etc., Bank v. Johnston* (Ga.), 14-546.

Extent of partner's authority under articles. — Articles of partnership may be enlarged by implication from a general usage and habit of the firm, acquiesced in by all the partners. But before such custom would become binding upon a partner not expressly authorizing it, circumstances would have to

be such as to indicate that he knew of such course of dealing in particular instances and contemplated and assented to a regular course of dealing with the public, rather than a departure from the partnership articles in the excepted cases. *Eady v. Newton Coal, etc., Co.* (Ga.), 3-148.

Liability of firm for negligence of partner. — Each partner is the agent of the firm while engaged in the prosecution of the partnership business, and the firm is liable for the negligence of each if committed within the scope of the agency. *Haase v. Morton* (Ia.), 16-350.

Authority of partner to sell good will of firm. — A sale of the good will of a firm business, together with an agreement not to enter into such business again, is an act tending to the termination of the firm business, and is within the powers which cannot be presumed to have been given to the individual partners. *Griffing v. Dunn* (S. D.), 20-579.

Insufficiency of authority to sell good will. — Evidence held to show neither that a contract of sale of the good will of a firm, together with an agreement of the partners not to enter into a similar business, was made by all the partners, nor that the partners making the contract had authority from a copartner, and therefore that the buyer could not rely on the contract in the absence of a ratification of it by the copartner. *Griffing v. Dunn* (S. D.), 20-579.

Under the South Dakota statute (Rev. Civ. Code, §§ 1277, 1278) providing that a person selling the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified territory and time, and section 1741, providing that a partner has no authority to dispose of the good will of the business, one claiming to have bought the good will of a firm business, together with an agreement not to enter into such business again, must show that the partners with whom he contracted, if less than all, either were authorized to enter into the contract, or that the other partners with full knowledge of the contract ratified it. *Griffing v. Dunn* (S. D.), 20-579.

Ratification of sale of good will. — Ratification by a partner of the act of his copartner in selling the good will of the firm business can be accomplished only by the partner accepting the benefits of the sale with full knowledge of all the circumstances. *Griffing v. Dunn* (S. D.), 20-579.

Evidence held not to show that a partner ratified a contract of sale of the good will of the firm made by the copartner. *Griffing v. Dunn* (S. D.), 20-579.

b. Rights of creditors in general.

Creditors' lien. — The creditors of a partnership have no lien on the partnership property. *Thrope v. Pennock Mercantile Co.* (Minn.), 9-229.

Effect of assumption of debts by one partner. — The assumption by one partner

of the payment of the partnership debts in consideration of an absolute conveyance to him of the other partner's interest in the partnership property creates no trust in and fastens no lien upon the property thus conveyed in favor of partnership creditors prior to any request for the interposition of a court to administer the partnership property. *Sargent v. Blake* (U. S.), 15-58.

Individual promissory note of partner to firm creditor.—An individual promissory note of a partner given for a partnership debt does not operate as a payment of such debt, and does not release the other partners therefrom, unless the creditor agrees to accept such note as a payment of the debt and to release the other partners. *Burdett v. Greer* (W. Va.), 15-935.

c. Application of assets to liabilities.

Agreement to set off debtor's claim against partner individually.—An agreement between a customer and a member of a partnership that its goods may be purchased and paid for by the customer in commodities furnished by him for the private use of the member of the firm is void. *Eady v. Newton Coal, etc., Co.* (Ga.), 3-148.

Payment of creditors of members of firm out of firm assets.—Until partnership property is placed in the custody of the law by some suit or act which invokes the interposition of a court to administer it, each partner has, with the consent of the others, the right and power to convert it into individual property, to apply it to the payment of individual in preference to partnership debts, or in good faith to make any other disposition of it which does not constitute a voidable preference. Insolvency does not destroy or diminish this right of disposition. The right of partnership creditors to be paid out of the partnership property in preference to individual creditors does not attach until an application is made to some court for the administration of the partnership property, and then only if one of the partners has such right at that time, for the preferential equity of the partners is merely the right to enforce the right of each partner to compel such a preference. Before partnership property is placed in *custodia legis*, it is not held in trust for the partnership creditors. *Sargent v. Blake* (U. S.), 15-58.

d. Actions by and against partnerships.

(1) Parties.

General rule where firm is plaintiff.

—In a suit for breach of contract made with a firm, all the partners have an interest in the subject-matter of the suit, and are necessary parties to the action. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

Nominal partner need not be joined.

—In an action on a partnership contract, a nominal partner need not be joined as a plaintiff, if his nonjoinder does not in any way injure the defendant. *Lasher v. Colton* (Ill.), 8-367.

(2) Service of process.

Service on one of several partners.—

In an action against a partnership, service of the writ on one or more of the partners will bind the firm assets, though to bind the individual assets of the partners service must be made on each of them. *Walsh v. Kirby* (Pa.), 20-1237.

Return of service.—In an action against two persons named, trading as a partnership, the return of service of process on one of the defendants, naming him, as "general manager and one of the defendants," is good, the words "general manager" being surplusage. *Walsh v. Kirby* (Pa.), 20-1237.

(3) Dismissal of action by partners.

Right of one partner to dismiss action.—Where partners are suing on a partnership claim, one of them has no right to dismiss the action against the objection of the other, unless the prosecution of the suit would result injuriously to him, and in the event that it might do so, the other partner may continue the action in the name of both on indemnifying him against loss if indemnity is demanded. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

Refusal to permit one partner to dismiss action.—In its sound discretion, a court may prevent the dismissal by one partner of a suit by the partnership, where the dismissal will injure the other partner; and where a suit is instituted in the firm name for the breach of a contract, and one of the partners seeks to dismiss the suit, but does not object to the ruling of the court refusing to do so, and does not ask to be indemnified against costs or loss, it cannot be said that the court abuses its discretion in refusing to dismiss. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

(4) Judgment.

Entry of judgment in firm name.—

Taking a judgment in the name of a partnership as plaintiff is a mere defect or irregularity which is waived if no objection is made thereto at the time. *Spaulding Mfg. Co. v. Godbold* (Ark.), 19-947.

Effect of refusal of one partner to claim damages.—

In a suit by a partnership for the breach of a contract, the fact that one of the partners makes no claim for damages will not limit the recovery in the suit to such an amount as the other partner is entitled to by his interest in the firm, since this interest can be asserted only as an adjustment of the partnership business, and neither partner has a right to recover his share separately. *Ingham Lumber Co. v. Ingersoll* (Ark.), 20-1002.

Judgment against one partner as a bar to action against others.—A recovery of a judgment against one member of a partnership in an action brought against him alone on a partnership obligation is a bar to any subsequent action against his co-partners, though the judgment is rendered

at a time when the partners not made parties to the action are nonresidents of the state and without the jurisdiction of the court. *Fleming v. Ross* (Ill.), 8-314.

(5) Execution.

Effect of death of member of plaintiff partnership. — Upon the death of one of the members of a partnership in whose favor a judgment has been recovered, the judgment becomes dormant, and no execution can issue thereon until the judgment is revived as provided by law. *Newhouse v. Heilbrun* (Kan.), 10-955.

6. RETIREMENT OF PARTNERS.

Notice of retirement of partner. — Evidence reviewed, in an action against a partnership on a promissory note, and held insufficient to show that at the time of the execution of the note the plaintiff had notice that one of the partners had retired from the partnership. *Bush v. W. A. McCarty Co.* (Ga.), 9-240.

Effect of retirement. — Where a person holding stock in an unincorporated joint stock company, organized and carrying on a banking business in the District of Columbia, complies with the articles of agreement of the company in withdrawing therefrom, he ceases to be a stockholder, although on account of his inability to obtain from the company the amount due him for his shares he sells them to a third person whom the company refused to recognize as a member, and he is not liable to a depositor who becomes such after the withdrawal and without knowledge that he had once been a stockholder. *Norwood v. Francis* (D. C.), 4-865.

Rights of remaining and retiring partners inter se. — Where two members of a partnership sell their interests to a third partner and a stranger in consideration of the purchasers' agreement to pay the debts of the partnership, the old firm is primarily liable to its creditors, but as between the sellers and the purchasers the latter are primarily liable to the creditors and the former are sureties for the payment of the debts. *Tillis v. Folmar* (Ala.), 8-78.

Effect of assumption of debts by remaining partner on rights of creditors.

— An agreement upon a dissolution of a partnership, by which the retiring partner transfers his interest in the partnership property to the remaining partner, and the latter agrees to pay the partnership debts, creates as between them the relation of surety and principal, but does not create that relation as to a creditor who has not assented to it, even though he had notice of it. As to him their obligation as joint debtors continues. *Dean v. Collins* (N. Dak.), 11-1027.

Where a partnership is dissolved by the retirement of a partner and the continuing partner assumes the debts, the retiring partner becomes a surety for his copartner. *Preston v. Garrard* (Ga.), 1-724.

Effect of extension of time of payment granted to continuing partner. —

Where a partnership is dissolved by the retirement of one partner and the continuing partner agrees to assume the debts, the creditor who extends the time of payment of the firm's indebtedness without the knowledge of the retiring partner, releases the latter as a surety. *Preston v. Garrard* (Ga.), 1-724.

7. RIGHTS, POWERS, AND LIABILITIES OF SURVIVING PARTNERS.

Power of surviving partner to mortgage firm property. — It is not only the right but the duty of a surviving partner to continue to carry on the business for the purpose of winding it up; and in so doing he may mortgage the partnership's real or personal property to secure a partnership debt. *In re Bourne* (Eng.), 6-33.

Where the surviving partner continues to carry on the business in the partnership name and continues the partnership banking account, which account was overdrawn at the deceased partner's death and continues overdrawn until the final winding up of the business, and the surviving partner, after paying certain sums into this account and drawing certain sums out, deposits with the bank the title deeds to certain partnership property to secure the then existing overdraft, in the absence of evidence to the contrary the bank is entitled to assume that the dealings with the account are for the purpose of winding up the partnership, and its mortgage is a valid security and takes priority over the lien of the deceased partner's executors. *In re Bourne* (Eng.), 6-33.

A surviving partner has the right to give a mortgage on partnership property to secure the payment of a debt which should be paid out of the partnership assets, and a mortgage so given creates a lien on the property which has priority over a subsequent execution levy for another debt owing by the partnership. *People's Nat. Bank v. Wilcox* (Mich.), 4-565.

Liability of surviving partner for interest. — In settling the accounts of a partnership dissolved by death, the surviving partner should not be charged with interest on money deposited in a bank to the credit of the partnership, which has not been used by the surviving partner and which has been left on deposit awaiting settlement of the partnership affairs, as to the terms of which settlement there has been a disagreement. *Condon v. Callahan* (Tenn.), 5-659.

Where a surviving partner, who is also the executor under the will of the deceased partner, misappropriates the partnership funds to his own use, he is chargeable with compound interest on the funds misappropriated. *Porter v. Long* (Mich.), 4-177.

Credits to which surviving partner is entitled. — In settling the affairs of a railroad construction partnership which has been dissolved by the death of the partner, it is not contrary to public policy to allow the surviving partner who has completed a contract unfinished at the death of the other partner, credit for sums paid for the services of an engineer in the employ of the railroad

for which the work was done, where it appears that the engineer was employed with the approval of the deceased partner, and the evidence fails to show a purpose to defraud the railroad company by the employment of its engineer, and it does not appear that the railroad company was ignorant of such employment. *Condon v. Callahan* (Tenn.), 5-659.

Right of surviving partner to compensation for services. — On the death of one member of a partnership formed to carry out a contract for certain railroad construction, the surviving partner is entitled to a reasonable compensation for his skill, service, and labor in completing the contract at a profit, where the contract is completed with the consent of the executrix of the deceased partner, though the partnership agreement provides that the services of each shall be compensated for by services of the other, and there is no stipulation as to the compensation of the survivor upon the death of one partner. The right of the surviving partner to recover compensation is not affected by his tentative and unaccepted offer to take a smaller sum based upon his services as "walking boss." *Condon v. Callahan* (Tenn.), 5-659.

Sale of partnership business by surviving partners. — The consent of the administratrix (widow) of a deceased partner to a sale of the partnership business by the surviving partners to a corporation in which they and others were interested will be inferred, and she will not be heard to complain that the good will of the firm should be accounted for, where there is no evidence of fraud or overreaching and it appears that she had a representative at the taking of the inventory on which the sale was based, and thereafter received without objection checks of the corporation for her dividends. *Didlake v. Roden Grocery Co.* (Ala.), 18-430.

8. DISSOLUTION.

a. How effected.

By death of partner. — The death of a partner, in the absence of a stipulation to the contrary, works an immediate dissolution of the partnership and the title to the personalty vests in the surviving partner impressed with a trust to close up the partnership business, pay the debts, and turn over to his personal representative the share of the deceased partner. *Walker v. Miller* (N. Car.), 4-601.

By decree of court on proof of fraud. — Where one is induced to form a partnership by the false representation of another, the court will, upon the prompt application of the injured party after the deceit becomes known, rescind the contract of partnership, and compel the repayment of whatever sum may have been improperly obtained. *Jones v. Weir* (Pa.), 10-692.

A bill in equity by a member of a partnership showing the exclusion of the complainant from the business of the firm by the

collusion of the copartners presents a sufficient cause for the dissolution of partnership. *Gillett v. Higgins* (Ala.), 4-459.

b. Notice of dissolution.

Necessity for notice of dissolution. — Under the Georgia statute, "the dissolution of a partnership by the retiring of an ostensible partner must be made known to the creditors and to the world." *Bush v. W. A. McCarty Co.* (Ga.), 9-240.

The Georgia statute providing that the dissolution of a partnership by the retiring of an ostensible partner must be made known to the creditors and to the world, requires that actual notice must be given to the creditors. *Bush v. W. A. McCarty Co.* (Ga.), 9-240.

Who entitled to notice. — As used in the Georgia statute providing that "the dissolution of a partnership by the retiring of an ostensible partner must be made known to the creditors and to the world," the word "creditors" is not limited to persons who are creditors at the time of the dissolution, but includes persons who have previously sold goods and given credit to the firm during its continuance, though at the time of the dissolution no indebtedness to such persons exists. *Bush v. W. A. McCarty Co.* (Ga.), 9-240.

Sufficiency of notice. — In construing the Georgia statute providing that the dissolution of a partnership by the retiring of an ostensible partner must be made known to the creditors and to the world, no inflexible rule can be laid down as to the notice which must be given to the world. Fair and reasonable publication in a public gazette circulated in the locality in which the business of the partnership has been conducted is generally sufficient; and any means of fairly publishing the fact of dissolution as widely as possible, in order to put the public on its guard, are proper to be considered on the question of such notice. *Bush v. W. A. McCarty Co.* (Ga.), 9-240.

General reputation of dissolution. — General reputation of the dissolution of a partnership in the community where the person sought to be charged with notice resides, or in the business community to which the parties belong, is admissible as tending to show notice. Such general reputation or notoriety is not itself notice, but is admissible for the consideration of the jury in determining whether there was notice. *Bush v. W. A. McCarty Co.* (Ga.), 9-240.

c. Rights, powers, and liabilities after dissolution.

Liability of liquidating partner. — Where, after the dissolution of a partnership, one partner has undertaken to collect debts due the partnership, he will be held for the amount of the same unless he accounts for his not having collected the same. *Chretien v. Giron* (La.), 5-845.

Right of liquidating partner to compensation. — Where, after the dissolution of a firm, a partner winding up the business en-

ters into a new business and assumes obligations and risks not imposed on him by the partnership agreement, and the new business is successful and the other partner or his representatives elect to share in the profits thereof; the partner conducting the new business under the firm name may properly be allowed compensation for his services. *Rugles v. Buckley* (U. S.), 20-1057.

Effect of dissolution on contracts of firm. — The dissolution of a partnership does not relieve the partners from their liability for the performance of contracts made before such dissolution. *Burdett v. Greer* (W. Va.), 15-935.

Admissions by partner after dissolution. — An admission by a partner of the existence of a debt against the firm, or a settlement with him finding a debt to be due from it, made after the dissolution of the firm and out of the presence of the other partners, does not bind the latter, and is not admissible against them. *Burdett v. Greer* (W. Va.), 15-935.

Rights of partner furnishing no capital. — Where one partner furnishes no capital to the partnership, but contributes merely his time, skill, and services to the business, the presumption, on dissolution of the partnership, is that he is not entitled to any part of the firm capital. *Johnson v. Jackson* (Ky.), 17-699.

In an action between former partners for a settlement of the partnership affairs, evidence examined and held insufficient to support the claim of the defendant, who furnished no capital, that he was entitled to share equally in the capital on dissolution. *Johnson v. Jackson* (Ky.), 17-699.

Profits made by partners individually. — In settling the accounts of a railroad construction partnership, which has been dissolved by the death of the partner, it is proper to charge the estate of the deceased partner with the profits made by him on a subcontract which was let to him under a provision of the partnership contract that either partner might take subcontracts upon the same terms as other subcontractors. *Condon v. Callahan* (Tenn.), 5-659.

d. Accounting.

Effect of illegality of partnership agreement. — Equity will not entertain a bill by a partner to compel his copartner to account where the partnership agreement was illegal. *Vandegrift v. Vandegrift* (Pa.), 18-404.

An accounting of the profits of a partnership must be refused on the ground of illegality, although the partnership arose out of a contract, of which only the other portions were illegal. *Citizens Nat. Bank v. Mitchell* (Okla.), 20-371.

Right of partner to account after sale of interest. — Where one partner sells his interest in a partnership to another partner or to a stranger, the sale, unless it is otherwise provided in the contract, works such a change in the position of the seller

that he no longer has a claim based on the partnership relation and cannot have an accounting in equity, his only remedy to recover the purchase price being an action at law. *Tillis v. Folmar* (Ala.), 8-78.

9. RECEIVERSHIPS.

Appointment of receiver. — On the dissolution of a partnership, when the parties cannot agree as to the distribution of the joint effects, the court will appoint a receiver of the partnership property, and will enjoin an interference with the partnership effects in the receiver's hands. *Jones v. Weir* (Pa.), 10-692.

Where a bill is filed seeking dissolution of a partnership, and it satisfactorily appears that the complainant will be entitled to a decree for dissolution, the receiver will be appointed of course. *Gillett v. Higgins* (Ala.), 4-459.

Notice of application for receiver. — A bill for the dissolution and settlement of a partnership and the appointment of a receiver charging that the defendant has sold out the firm's goods and turned over the business to strangers, the complainant being entirely excluded from the business of the firm, makes a *prima facie* case for the appointment of a receiver even without notice or application. *Gillett v. Higgins* (Ala.), 4-459.

10. MINING PARTNERSHIPS.

Control of majority in interest. — When the members of a mining partnership cannot agree in management, those having the majority interest control its management in all things necessary and proper for its operation. *Blackmarr v. Williamson* (W. Va.), 4-265.

Right of member to sell interest. — A member of a mining partnership may sell his interest therein to whomsoever he may without the knowledge or consent of the co-owners. *Blackmarr v. Williamson* (W. Va.), 4-265.

Effect of conveyance of interest of partner. — One of the partners in a mining partnership may convey an interest in a mine and business without dissolving the partnership. *Blackmarr v. Williamson* (W. Va.), 4-265.

Liability of partner for debts after conveyance of interest. — Although a mining partnership, unlike an ordinary partnership, is not dissolved by the sale of the interest of one of the partners, it does not follow, from the mere continuance of the partnership, that the mining partner who has sold his interest continues liable for all of the debts of the partnership subsequently incurred. *Kelley v. McNamee* (U. S.), 16-299.

Liability of retiring partner for wages of employees. — A former member of a mining partnership who has sold his interest therein to a third person, who, by the terms of the sale, assumed the amount of the seller's indebtedness to the miners then and theretofore working upon the claim, remains

liable for the wages of employees who commenced to work for the partnership before the sale and continued to work for it thereafter without notice of the sale; but he is not liable for the wages of employees who commenced to work for the partnership after the sale, or who, having commenced to work for it before the sale, continued to work for it thereafter either with actual notice of the sale or with knowledge of facts and circumstances sufficient to put a reasonably prudent person on inquiry without regard thereto. *Kelley v. McNamee* (U. S.), 16-299.

Bill to dissolve. — In order to dissolve a mining partnership by a decree in equity to sell the partnership property, a bill must allege a good and clear ground therefor. *Blackmarr v. Williamson* (W. Va.), 4-265.

11. RIGHTS AND LIABILITIES OF PARTNERS IN SALE OF LIQUORS.

Liability of partner under Civil Damage Act. — Under the Iowa statute creating a civil liability in favor of a wife for the sale of intoxicating liquor to her husband, a sale by a member of the partnership renders the partnership and each partner liable, whether the sale is made with or without their consent or knowledge. *Mathre v. Story City Drug Co.* (Iowa), 8-275.

Right of one partner to carry on business under license to two. — Under a license to sell intoxicating liquors issued to two named partners, one of the partners, who has become the owner of the share of the other partner by purchase from a third person to whom such other partner had transferred it, has authority to carry on the business during the period of the license. *Lynch v. State* (Ala.), 10-910.

Partnership agreement to engage in manufacture of liquors in name of one partner. — A partnership agreement to engage in the manufacture of spirituous liquors in the name of one of the partners only is not enforceable in equity because it is an illegal contract both under the Pennsylvania statute (Act June 9, 1891) which requires an applicant for a license as a distiller to state under oath that he "is the only person in any manner pecuniarily interested in the business," and under the Act of Congress (Rev. St., § 3259; 3 Fed. St. Ann. 636) requiring every firm, engaged or intending to be engaged in the business of a distiller, to give notice thereof in writing to the collector of the district, stating the name and residence of each member of the firm and of every person interested or to be interested in the business. *Vandegrift v. Vandegrift* (Pa.), 18-404.

PART PAYMENT.

Effect of accepting part payment, see PAYMENT, 3.

Effect of part payment of land sold under verbal agreement, see FRAUDS, STATUTE OF, 1 d (2).

Payment of part of purchase price of goods sold under verbal contract, see FRAUDS, STATUTE OF, 9 b (4).

Removal of bar of statute of limitations, see LIMITATION OF ACTIONS, 5 a.

PART PERFORMANCE.

Effect of part performance of contract, see FRAUDS, STATUTE OF, 1 d.

PARTY IN INTEREST.

Relationship of judge to party in interest, see JUDGES, 4 b (1).

PARTY WALLS.

1. DEFINITIONS.

2. RIGHTS AND LIABILITIES OF ADJOINING OWNERS.

3. RIGHTS AND LIABILITIES OF PURCHASERS.

1. DEFINITIONS.

Use of words "party wall" and "wall in common" in statute. — As used in the Iowa statute regulating the construction and use of party walls, the term "party wall" means a wall for the common benefit and convenience of two tenements which it separates, and the term "wall in common" has the same meaning. *Lederer v. Colonial Investment Co.* (Ia.), 8-317.

2. RIGHTS AND LIABILITIES OF ADJOINING OWNERS.

Liability for use of wall erected by adjoining owner. — A person who uses a wall erected by an adjacent owner on the dividing line between their land is, even in the absence of an express or implied agreement by him or his vendor to contribute, liable to such adjacent owner or the latter's vendee for the fair and reasonable value of the use thereof, such value being estimated as of the time when the wall is used. *Spaulding v. Grundy* (Ky.), 15-1105.

Where a party wall is built by one of the adjoining proprietors, under an agreement stating that the building of the wall is to the interest of each of the parties, and that the other party shall pay for half of the wall whenever he rebuilds or gets ready to build on his lot, a court will not undertake to say what benefit the nonbuilding party derives from the wall, or make his liability for half the cost depend on his joining his wall to the party wall. *Jebeles, etc., Confectionery Co. v. Brown* (Ala.), 11-525.

Right to use of wall acquired by prescription. — Where there is no evidence, either written or oral, as to the terms under which a division wall has been used, the extent of the right to use the wall, acquired by prescription, must be determined and

measured by the use actually made of the wall, and must be limited to the extent to which the wall has been used. *Bright v. Morgan* (Pa.), 11-626.

Limitations in use of wall. — Neither of the adjoining owners has the right so to weaken a party wall as to render it insufficient or unsafe for the other's use. *Lederer v. Colonial Investment Co. (Ia.)*, 8-317.

Extension of joists beyond centre of wall. — Under the Iowa statute regulating the construction and use of party walls, the adjoining owners do not own their party wall in common, and therefore neither is entitled to extend his joists or timbers into the wall beyond its centre. *Lederer v. Colonial Investment Co. (Ia.)*, 8-317.

Right of one owner to pull down his building. — The owner of one of two adjoining buildings may lawfully pull down and destroy his own building though the partition wall is thereby left unprotected and in an unsightly condition, and the adjoining owner cannot recover damages unless the act of tearing down is performed in a negligent or unskilful manner. *Fisher v. Seaboard Air Line R. Co. (Va.)*, 1-622.

Action in equity on agreement to pay for use of wall. — An agreement whereby one of two adjoining owners binds himself that whenever he uses a party wall built by the other he will pay one-half the price or value thereof, becomes, when the promisor begins to use the wall, a charge in the nature of an equitable lien on the lot upon which the wall is erected, and is enforceable in equity. *Rugg v. Lemley (Ark.)*, 8-291.

A court of equity has jurisdiction to entertain a suit to enforce an agreement by one of two adjoining owners to pay part of the cost of a party wall built by the other, where the statement of facts in the complaint sets up the agreement, notwithstanding the fact that only a personal judgment against the defendant is prayed for and granted, as the statement of facts in the complaint and not the prayer for relief constitutes the cause of action, in so far as the question of jurisdiction is concerned. *Rugg v. Lemley (Ark.)*, 8-291.

3. RIGHTS AND LIABILITIES OF PURCHASERS.

Covenant to pay for use of wall running with land. — An agreement by one of two adjoining owners to pay for the use of a party wall built by the other is a covenant which runs with the land, and therefore the right to recover the agreed sum passes to the grantee of the original builder, and not to his assignee or personal representative. *Rugg v. Lemley (Ark.)*, 8-291.

Where an agreement for the construction of a party wall by one proprietor provides that the other shall be liable for half the cost whenever he shall build, and contains a distinct agreement that the "covenant shall run with the land and be binding on the present or future owners," the covenant does run with the land, and is binding on successive owners, of both covenantor and cove-

nantee. *Jebbles, etc., Confectionery Co. v. Brown (Ala.)*, 11-525.

Right to receive payment for use of wall. — Under an agreement between two adjoining owners that one of them shall build a party wall and that the other shall pay one-half of the cost thereof whenever he makes use of such wall, the agreement containing a provision that it shall run with the land and shall bind the heirs, legal representatives, and assignees of the respective parties, the right to receive payment for one-half of the cost of such wall belongs to the successor in title of the builder who happens to be the owner at the time the wall is used by the adjoining owner, and the incumbrance created by such agreement cannot be removed by payment to a prior owner. *Hoffman v. Dickson (Wash.)*, 15-173.

Specific performance of agreement of sale by owner of lot. — In an action for the specific performance of a contract of sale made by such adjoining owner to convey his lot by warranty deed, it is inequitable and impracticable for the court to ascertain the cost of the wall and to require the seller to deposit in court one-half of such cost to await the time when the wall will be used, but the seller should be required to deliver a deed containing a covenant of general warranty. *Hoffman v. Dickson (Wash.)*, 15-173.

PASS BOOKS.

Conclusiveness of by-laws shown by bank pass books, see **BANKS AND BANKING**, 5 b (1).

Presentation as condition precedent to payment of savings bank deposit, see **BANKS AND BANKING**, 8 a.

PASSAGE.

Final passage of bills, see **STATUTES**, 1 c.

PASSENGER RATES.

Regulation of, see **CARRIERS**, 2 b.

PASSENGERS.

See **CARRIERS**, 6 d.

PASSES.

Persons riding on free passes as passengers, see **CARRIERS**, 6 d (10).

PASSION.

Killing in heat of passion, see **HOMICIDE**, 4 a (2).

PATENTS.

1. PERSONS ENTITLED TO PATENTS, 1258.
2. TITLE CONVEYANCES AND CONTRACTS, 1258.
3. STATUTORY REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES, 1259.
 - a. Constitutionality of state statutes, 1259.
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Appointment of receiver in aid of execution against patentee, see **EXECUTIONS**, 12.

Liability of stockholders for infringement of patent by corporation, see **CORPORATIONS**, 8 g (3).

Right of proprietor of patented article to control price, see **MONOPOLIES AND CORPORATE TRUSTS**, 2 a.

1. PERSONS ENTITLED TO PATENTS.

Reduction of invention to practice.—

The reduction to practice of an invention by the original inventor cannot be taken as a reduction to practice by another, though the ownership of the claims of both has subsequently become vested in the same person or business. It is not enough to entitle the applicant to a patent that some one else, not his agent, has shown the practicability of the invention by reducing it to practice. *Robinson v. McCormick* (D. C.), 10-548.

As between inventor and one employed to put invention in practical form. — An inventor who employs another to embody his conception in practical form is entitled to any improvement therein due to the mechanical skill of the employee. The employee must invent something and not merely improve by the exercise of mechanical skill upon the conception which he has been employed to work out. *Robinson v. McCormick* (D. C.), 10-548.

Where an inventor employs another to embody his conception in a practical form, and the employee in doing the work assigned him goes further than mechanical skill enables him to do and makes an actual invention, he is entitled to the benefit of his invention. *Robinson v. McCormick* (D. C.), 10-548.

In order for an inventor to claim the benefit of his employee's skill and achievement, it is not sufficient for him to show that he had in mind the desired result and employed the employee to devise means for its accomplishment. He must show that he had an idea of the means to accomplish the particular result, which idea he communicated to the employee in such detail as to enable the latter to embody it in some practical form. *Robinson v. McCormick* (D. C.), 10-548.

Evidence reviewed, in a patent interference proceeding, and held sufficient to show that as between the general manager and the president of a corporation, the latter of

whom undertook to embody in a practical form an idea conceived by the former, the president was the inventor of the part of the article involved in the proceeding, whether he was an employee of the general manager or was his partner, or was a mere stockholder of the same corporation. *Robinson v. McCormick* (D. C.), 10-548.

2. TITLE CONVEYANCES AND CONTRACTS.

Effect of agreement to pay royalties.

— Where a manufacturer agrees to pay royalties to a patentee in consideration of a license to manufacture under the patent, and the parties by express or implied agreement or by their conduct treat an article as covered by the patent, the licensee is, so long as he acts under such patent, bound to pay royalties, and is precluded from defending a suit for the royalties which have accrued during that time on the ground that the article is not in fact covered by the patent. *Strong v. Carver Cotton Gin Co.* (Mass.), 14-1182.

If the article is in fact not covered by the patent, such licensee may avoid future liability for royalties by terminating the arrangement between him and the patentee, and ceasing to act or claim under the patent, and asserting or exercising his right to manufacture and sell thereafter adversely to the rights of the patentee. *Strong v. Carver Cotton Gin Co.* (Mass.), 14-1182.

Inclusion of articles not covered by patent in agreement for royalties. — In an action by a patentee to recover royalties from a licensee under an unambiguous written contract for the manufacture and sale of "automatic feed attachments" covered by the patent, the plaintiff cannot introduce evidence to the effect that "automatic feed attachments" which were not within the terms of the patent and not protected by it were included in the contract. *Strong v. Carver Cotton Gin Co.* (Mass.), 14-1182.

Void patent as consideration for note. — A promissory note given for a non-patentable invention or for a void patent is not enforceable by the original promisee. *Hathorn v. Wheelwright* (Me.), 2-428.

Implied warranty as to validity of patent. — In the absence of an express agreement or of special circumstances from which warranty may be implied, an assignment of "all the right, title, and interest" in a patent of invention does not import any warranty on the part of the assignor as to the validity of the patent. *Electric Fireproofing Co. of Canada v. Electric Fireproofing Co.* (Can.), 18-54.

Implied agreement from grant of exclusive license. — A grant of an exclusive license under a patent implies that the grantor shall do no affirmative act in derogation of the right granted. *Manning v. Galland-Henning, etc., Mfg. Co.* (Wis.), 18-976.

Duty of purchaser of patent right to investigate. — In an action on a promissory note given in payment for an interest

in a patent, it is erroneous for the trial court to refuse to instruct the jury that if the defendant had full opportunity to investigate the operation of the device covered by the patent, and there was no concealment or fraud on the part of the plaintiff, then it became the duty of the defendant to investigate and form his own opinion as to the value and utility of the device, and he could not rely upon mere expressions of opinion made by the plaintiff or his agent. *J. H. Clark & Co. v. Rice* (Wis.), 7-505.

Instruction of court as to utility of patent device. — In an action on a promissory note given in payment for an interest in a patent, an instruction on the question of the utility of the patent device is misleading which tells the jury that they must confine their "inquiry to the purposes named in the patent, and those only," but which fails to state the full purpose of the patent, even though the jury are allowed to take the patent to their room and construe it for themselves. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Number of witnesses on question of utility of patent device. — In an action on a promissory note given in payment for an interest in a patent, it is not an abuse of discretion for the trial court to limit the respective parties to fifteen witnesses on the question of the utility of the device covered by the patent. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Rescission of sale of patent right. — Where the purchaser of a patent right sold without compliance with the Kansas act regulating the sales of patent rights brings a suit to rescind the contract of a sale and to recover the consideration paid, and in the petition offers to return all the benefits received, and the defendant contests the rescission upon the ground that the statute is invalid, the plaintiff's right to the relief asked and to a judgment for costs is not affected by an omission to offer to restore the patent right before the commencement of the suit. *Allen v. Riley* (Kan.), 6-158.

Action by licensee in state court. — A patentee who sells the patented article in a territory for which he has granted an exclusive license, thereby breaks his contract with the licensee, and the licensee may sue for damages for the breach in a state court and join therewith causes of action for a share of money recovered by the patentee from infringers, as provided by the grant of the license, though the licensee has such an interest in the patent by virtue of the license as would entitle him to sue the patentee in a federal court for infringement by reason of such sales. *Manning v. Galland-Henning, etc., Mfg. Co.* (Wis.), 18-976.

3. STATUTORY REGULATION OF DEALINGS IN PATENT RIGHTS AND PATENTED ARTICLES.

a. Constitutionality of state statutes.

Right of state to make reasonable regulations. — In the absence of congress-

sional legislation upon the subject, a state, for the purpose of protecting its citizens from fraud, has the right to make reasonable regulations concerning the manner of making a sale or assignment of rights arising under a patent. *Allen v. Riley* (U. S.), 8-137.

Requirement of deposit of copy of patent in District Court. — The Kansas statute prohibiting the sale of patent rights unless copies of the letters patent and affidavits of their genuineness have been filed with the clerk of the District Court is not void as an attempt to restrict the rights conferred by the federal statutes on the holders of patents. *Allen v. Riley* (Kan.), 6-158.

Statute regulating promissory notes given for patent right or patented article. — The Arkansas statute requiring a promissory note executed in consideration of the sale of a patented article or patent right to show on its face for what it is executed is in the nature of a police regulation, and does not violate the Federal Constitution. *Woods v. Carl* (Ark.), 5-423.

The Arkansas statute providing that a promissory note given in payment for a patented article is void, even in the hands of an innocent purchaser, unless it is executed on a printed form showing on its face that it is given in payment for the patented article, is not a valid exercise of the state's police power, but is unconstitutional as discriminating unjustly against patented articles and in favor of articles of like character which are not patented. *Ozan Lumber Co. v. Union County National Bank* (U. S.), 7-390.

The Kansas statute prohibiting the sale of patent rights unless copies of the letters patent and affidavits of their genuineness have been filed with the District Court, and requiring that the note taken in payment for the patent right shall show on its face the consideration for which it is given, is a valid exercise of the state's police power, and is not void, either as violating the provision of the Federal Constitution granting Congress the power to provide for the issuance of patents, or as conflicting with the federal statute prescribing the manner in which patents or interests therein may be assigned. *Allen v. Riley* (U. S.), 8-137.

The Wisconsin statute requiring that every promissory note or other evidence of indebtedness taken or given for any patent, patent right, or interest therein, shall have written or printed thereon words showing the consideration for which it is given, is unconstitutional and void as an invasion of the federal statute authorizing the assignment of the patents and interests therein. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

b. Construction and application of statutes.

What is a sale of a "patent right." — A conveyance of an interest in the right to sell a patented article in a given territory is a sale of a "patent right," within the

meaning of the Arkansas statute regulating the form of notes given in payment for patent rights. *Woods v. Carl* (Ark.), 5-423.

A sale of the exclusive right to manufacture and sell a patented invention in a specified territory for a fixed period carries an interest in the patent right itself and constitutes a sale of the patent right within the meaning of the act relating thereto. *Pinney v. First Nat. Bank* (Kan.), 1-331.

Promissory note in consideration of sale of patent right. — A promissory note executed in consideration of the sale of a patented article or patent right, which does not show upon its face for what it was executed, does not conform to the provisions of the Arkansas statute. *Woods v. Carl* (Ark.), 5-423.

The taking of a promissory note for the sale of a patent right without inserting therein "given for a patent right" is a misdemeanor and no recovery can be had thereon by one who violates the statute or by the transferee with knowledge. *Pinney v. First Nat. Bank* (Kan.), 1-331.

4. INFRINGEMENT.

Infringement by government. — The chief of ordnance of the United States army may be enjoined from manufacturing field guns and gun carriages in infringement of letters patent issued by the United States government, notwithstanding the fact that such infringement may inure to the benefit of the government. *Fried. Krupp Aktiengesellschaft v. Crozier* (D. C.), 15-1108.

What constitutes use or vending of invention within the realm. — An English commission agent, who in pursuance of a contract made in England delivers an article protected by the English patent laws to an English importer at a foreign port from whence it is subsequently imported into England by the purchaser, does not "make, use, exercise, or vend" the protected invention within the realm in violation of the statutory rights of the patentee. *Badische Anilin und Soda Fabrik v. Hickson* (Eng.), 3-850.

Sales under a contract made in England of goods manufactured in a foreign country in accordance with an invention protected by a British patent, which sale is consummated by a delivery in such foreign country in accordance with the terms of the contract, is not a "vending" of the invention within the meaning of the British patent, though both parties to the contract are residents of England. *Badische Anilin und Soda Fabrik v. Hickson* (Eng.), 5-669.

Sale of patented article by one who has manufactured it before issue of patent. — Under the Canadian Patent Act, a person who has, without a license of the inventor, constructed a specific article prior to the issue of the patent therefor, though subsequent to an application for the patent, may use and vend the article without being liable to the patentee. *Victor Sporting Goods Co. v. Harold A. Wilson Co.* (Ont.), 1-545.

5. EXPIRATION OF PATENT RIGHTS.

Passing of right to the public. — On the expiration of a patent, the right to manufacture the patented article passes to the public, the same as if no patent had obtained. *Westcott Chuck Co. v. Oneida Nat. Chuck Co.* (N. Y.), 20-858.

PATERNITY.

Exhibition of child to prove paternity, see RAPE, 2 g.

Proof of paternity by declarations of deceased, see EVIDENCE, 10 a.

Proof of paternity generally, see BASTARDY; EVIDENCE, 7.

Exhibition of child to jury to prove paternity, see RAPE, 2 d (2).

PATIENTS.

Privileged communications between physician and patient, see WITNESSES, 3 d (2).

PAUPERS.

See POOR AND POOR LAWS.

PAVING.

Paving of street, see STREETS AND HIGHWAYS, 3.

PAWNBROKERS.

See also PLEDGE AND COLLATERAL SECURITY.

Possession of pawn ticket for stolen goods, see BURGLARY, 4.

Who are pawnbrokers. — A person who maintains an office or place of business for the loaning of money on real estate and personal property mortgages and other security, including jewels and jewelry, at a usurious rate of interest "carries on the business of a pawnbroker" within the meaning of a statute, although he confines his operations in personal property to jewels and jewelry, and conducts at the same time and place business of a different character. The fact that such person requires of the pledgor or pawnor the execution of a promissory note and chattel mortgage in connection with the transaction does not make such person any the less a pawnbroker, the very fact of his taking possession of the property as a pledge and relying upon his possession as a pledge, negating the conception of a chattel mortgage. *Levinson v. Boas* (Cal.), 11-661.

Effect of illegality of contract on lien. — Where a person carrying on business in a manner which makes him a pawnbroker within the meaning of the statute has neither procured the license required by law nor observed the regulations prescribed by statute

and municipal ordinance for the regulation of the business of pawnbrokers, his contracts of pledge are illegal in substance and void, and he has no lien upon the property pledged. *Levinson v. Boas* (Cal.), 11-661.

PAY.

Compensation of judges, see JUDGES, 2.

PAYMENT.

1. MODE, MEDIUM, AND TIME OF PAYMENT, 1261.
2. PROOF OF PAYMENT, 1262.
 - a. Admissibility of evidence, 1262.
 - b. Presumptions with regard to payment, 1262.
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 - a. Voluntary payments, 1263.
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Action to recover money paid, see MONEY LOANED, PAID, OR RECEIVED.

Agent's authority to receive payment, see AGENCY, 3 a (2).

Application of payments in action on building contract, see CONTRACTS, 7 f.

Application of payments to principal and interest, see INTEREST, 1.

Authority of broker to receive payment, see BROKERS, 2.

Burden of proving agent's authority to receive payment, see AGENCY, 3 b (1).

Burden of proving payment, see BILLS AND NOTES, 10.

Effect of legacy to creditor, see WILLS, 10 h.

Effect of part payment of price of land sold under verbal contract, see FRAUDS, STATUTES OF, 1 d (2).

Effect of payment of debt and discharge of mortgage, see MORTGAGES AND DEEDS OF TRUST, 10 a.

Extension of time of payment by agent, see AGENCY, 3 a (2).

Medium of payment of municipal bonds, see MUNICIPAL CORPORATIONS, 8 e (2).

Part payment as reviving debt discharged in bankruptcy, see BANKRUPTCY, 16.

Part payment of debt as removing bar of limitation, see LIMITATION OF ACTIONS, 5 a.

Payment into court as tender, see TENDER.

Payment of bills and notes, see BILLS AND NOTES, 10.

Payment of legacies, see WILLS, 10 b.

Payment of premiums as waiver of breach of conditions in policy, see INSURANCE, 3 c (4).

Payment of taxes, see TAXATION, 6.

Payment to contractor as affecting right to mechanic's lien, see MECHANICS' LIENS, 7 a.

Power of guardian *ad litem* to receive payment of judgment in favor of infant, see INFANTS, 3 f (4).

Presumption of authority to receive payment, see BILLS AND NOTES, 10.

Recovery of excessive irrigation rates paid under protest, see IRRIGATION.

Recovery of money paid under illegal contract, see CONTRACTS, 4 q.

Recovery of money paid under verbal contract for sale of land, see FRAUDS, STATUTE OF, 1 d (4).

Recovery of payment induced by fraud, see INSURANCE, 5 n.

Recovery of payment on forged checks, see PENSIONS.

Recovery of taxes paid under illegal assessment, see TAXATION, 9.

Recovery of usurious interest paid, see USURY, 2 b.

Statutory regulation of payment of wages, see MASTER AND SERVANT, 2 a.

Stopping payment of checks, see CHECKS, 4.

Tender of payment, see TENDER.

Transfer of merchandise in payment of debt as within sales in bulk acts, see FRAUDULENT CONVEYANCES, 3 b.

Transmission of money by telegraph, see TELEGRAPHS AND TELEPHONES, 8.

Validity of payment made on Sunday, see SUNDAYS AND HOLIDAYS, 2.

1. MODE, MEDIUM, AND TIME OF PAYMENT.

General rule. — The general rule under both the common and the civil law is that in the absence of a stipulation to the contrary, the character of money which is current at the time fixed for performance of a contract is the medium in which payment may be made. *San Juan v. St. Johns Gas Co.* (U. S.), 1-796.

Payment by check. — Where a check on a bank is delivered to and accepted by a person to whom a payment is due, the transaction is in the nature of a conditional payment, which becomes complete when the amount due on the check is actually paid by the bank, and such final payment relates back to the time of the delivery of the check. *Jacobson v. Bentzler* (Wis.), 7-633.

The giving of a bank check by a debtor for the amount of his indebtedness to the payee is not, in the absence of an express or implied agreement to that effect, a payment or discharge of the debt, the presumption being that the check is accepted upon condition that it shall be paid. *First National Bank v. McConnell* (Minn.), 14-396.

Payment by negotiable paper. — Drafts for the amount of a loss under a fire insurance policy, drawn on the insurer by its adjuster and given to the assured, do not operate as a payment of the loss unless the assured agrees to receive them as such. *American Ins. Co. v. McGehee Liquor Co.* (Ark.), 20-855.

Where negotiable paper given for the amount of an antecedent debt is not accepted as a satisfaction of the debt, the creditor may sue either on such paper or on the origi-

inal debt, but he cannot sue on both. *American Ins. Co. v. McGehee Liquor Co. (Ark.)*, 20-855.

Where default is made in the payment of a draft given for the amount of an antecedent debt, the creditor cannot recover on the original debt without surrendering the draft. *American Ins. Co. v. McGehee Liquor Co. (Ark.)*, 20-855.

Payment by note of third person. — A note taken by a judgment creditor in consideration of his judgment, although made by a person not bound by the judgment, will not extinguish the judgment without an agreement by the creditor that the note is to operate as a payment. *Sullivan v. Saunders (W. Va.)*, 19-480.

Payment before maturity of debt. — In the absence of any waiver by the creditor of his right to insist on strict compliance with the contract, a debtor has no right to pay his debt before maturity. *Pyross v. Fraser (S. Car.)*, 17-150.

Effect of payment to third person. — Where money due to one person is paid by the debtor to another person who claims the right to the fund, the creditor cannot recover the amount from the claimant as a trustee of the fund, as the remedy of the creditor against the debtor is not affected or postponed by such payment. *Finn v. Adams (Mich.)*, 4-1186.

2. PROOF OF PAYMENT.

a. Admissibility of evidence.

Evidence as to financial standing of debtor. — In an action for services rendered, it is within the reasonable discretion of the trial court to admit evidence as to the financial standing and business habits of the debtor, as it has a bearing upon the credibility of the creditor's testimony that he has not been paid; but the action of the trial court in excluding such evidence as being too remote will not be disturbed on appeal, in the absence of a showing of abuse of discretion. *Coulter v. Goulding (Minn.)*, 8-778.

Evidence of payment of bills by defendant. — In an action of debt, the testimony of witnesses that the defendant, during his periodical visits to the community in which they lived, paid his hotel bills, drug bills, and other incidental expenses, is not admissible to establish his general reputation in the community for financial standing and promptness in paying his debts. *Allison v. Wood (Va.)*, 7-721.

Evidence of defendant's ability to pay. — In an action on promissory notes where the defense is payment, and the plaintiff has sought to meet that defense by proof of the defendant's inability to pay, it is competent for the defendant to prove the possession of sufficient moneys wherewith to make payment. *Dick v. Marvin (N. Y.)*, 11-109.

b. Presumptions with regard to payment.

Evidence to rebut presumption. — For the purpose of rebutting the presumption of

payment arising from lapse of time, it is competent for the plaintiff to introduce in evidence the record of an action at law brought by him on his claim prior to the ripening of presumption, though the judgment in such action was void for want of legal service of process; and error in excluding such evidence is not cured by the admission of testimony showing that an execution issued on the void judgment was levied upon property belonging to the defendant. *Allison v. Wood (Va.)*, 7-721.

Presumption arising from possession of mortgage. — The fact that a mortgage which the wife of the mortgagor claims by assignment to her, was found in a safe deposit box to which both husband and wife had a key and to which both had access, raises no presumption that the mortgage has been paid, and in view of the relation of the parties such presumption would not arise even if it did not appear that the wife had access to the box containing the mortgage. *Glymer v. Groff (Pa.)*, 14-256.

3. APPLICATION AND EFFECT OF PAYMENTS.

General rule in absence of contrary agreement. — In the absence of an agreement or instruction to the contrary, payments and credits should be applied to the extinguishment of those items or claims which are earliest in point of time. *Ida County Savings Bank v. Seidensticker (Iowa)*, 5-945.

Application by creditor of undirected general payments. — A creditor who holds two notes, one of which is an individual note and the other of which is a joint note of the same debtor, may apply to either note, as suits his pleasure, an undirected general payment made by the debtor. *McBride v. Noble (Colo.)*, 13-1202.

Application of payments to illegal or unenforceable demands. — The application of payments is to be made to such debts as the debtor is legally bound to pay, and a creditor foreign corporation has no right, without the debtor's consent, to apply payments to its demands which are illegal and unenforceable because of noncompliance with the conditions upon which a foreign corporation is allowed to do business in the state. *Armour Packing Co. v. Vinegar Bend Lumber Co. (Ala.)*, 13-951.

Effect of acceptance of part payment. — The action of a creditor in accepting part payment of his debt before its maturity, does not amount to a waiver of his right to hold the balance of his investment until maturity. *Pyross v. Fraser (S. Car.)*, 17-150.

Part payment with receipt in full. — A fully executed agreement to discharge a debt by the payment of a smaller sum, which is evidenced by a written receipt for the lesser sum in full satisfaction of the greater sum, is a valid and irrevocable release. *S. G. Dreyfus & Co. v. Roberts (Ark.)*, 5-521.

Partial payment accepted in full by agent. — A principal to whose agent the principal's debtor makes a part payment in

full discharge of his liability cannot repudiate as unauthorized the act of the agent in receiving the money, and apply the money as a payment on the debt, but must accept the payment according to the intention of the parties, or reject it entirely. *Cashmar-King Supply Co. v. Dowd* (N. Car.), 14-211.

Part payment in settlement of bona fide dispute. — The rule that where a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such for want of consideration, has no application where the parties have agreed, in settlement of a *bona fide* dispute between them, that the lesser sum shall extinguish the greater. *San Juan v. St. John's Gas Co.* (U. S.), 1-796.

Where it appears in an action of assumpsit that there was an honest dispute between the parties as to the terms of the contract and the amount due thereunder, that the defendant sent his check for the amount he was willing to pay in compromise, intending it as a liquidation of the plaintiff's claim against him, and that the plaintiff, when he accepted and cashed the check, understood, or from the circumstances should have understood, the condition on which it was sent, the transaction will be held to constitute an accord and satisfaction. *Andrews v. Haller Wall Paper Co.* (D. C.), 16-192.

4. RECOVERY OF PAYMENTS.

a. Voluntary payments.

Voluntary payments under mistake or ignorance of law. — Payments of all kinds, including taxes, licenses, and claims, made with a full knowledge of the facts, are voluntary payments and cannot be recovered. Mistake or ignorance of law gives no right to recover. *American Brewing Co. v. St. Louis* (Mo.), 2-821.

Payment under assumption of fact known to be doubtful. — Where money is paid under an assumption of fact known by the parties to be doubtful, the rule that a payment made under a mutual mistake of fact may be recovered back is not applicable. *New York Life Ins. Co. v. Chittenden* (Iowa), 13-408.

Payment through forgetfulness of fact. — A payment made through forgetfulness of the fact that the amount has already been paid is a payment under mistake of fact, and may be recovered. *Simms v. Vick* (N. C.), 18-669.

Payment under mistake of fact with means of knowledge. — It is not sufficient to preclude a person from recovering money paid by him under a mistake of fact that he had the means of knowledge of the fact, unless he paid it intentionally, not choosing to investigate the fact. *Simms v. Vick* (N. C.), 18-669.

Payment of forged commercial paper. — The rule that a person who has made a payment upon forged commercial paper must, upon discovery of the forgery, give prompt notice thereof to the person receiving the

payment, and that delay in giving such notice is fatal to a recovery of the money paid, is limited to cases where the person making the payment is charged with knowledge of the genuine signature of the person whose name is forged, and, therefore, is presumed to have been negligent in making the payment. *United States v. National Exchange Bank* (U. S.), 16-1184.

b. Involuntary payments.

Payment of illegal charges under fear of injury to business. — Payments of illegal charges or exactions under fear of injury to the business are payments under duress, and may be recovered though made with knowledge of the facts. *American Brewing Co. v. St. Louis* (Mo.), 2-821.

Payment by state on certificate, in excess of legal amount. — Money paid to a state printer on the certificate of the proper officer, in excess of the amount allowed by law for the particular work done, is not a voluntary payment but may be recovered back by the state. *State v. Young* (Iowa), 13-345.

Payment of judgment upon execution. — The payment of a judgment upon execution is not voluntary and does not operate as a waiver of the right of restitution. *Chambliss v. Hass* (Iowa), 3-16.

PEACEABLE ASSEMBLAGE.

See CONSTITUTIONAL LAW, 3.

PEACE OFFICERS.

Right to arrest without warrant, see ARREST, 2 b.

PECUNIARY INTEREST.

As affecting competency of jurors, see JURY, 5 c.

Disqualification of judge, see JUDGES, 4 a.

PEDDLERS.

See HAWKERS AND PEDDLERS.

PEDESTRIANS.

Duty of pedestrians in use of streets, see STREETS AND HIGHWAYS, 7 f.

Duty to look and listen for automobiles in highway, see MOTOR VEHICLES, 2 a.

Injuries to pedestrians by street cars, see STREET RAILWAYS, 8 c.

PENAL STATUTES.

Constitutionality of penal statutes, see CONSTITUTIONAL LAW, 25 d.

PENALTIES AND PENAL ACTIONS.**1. PENAL STATUTES.****2. ACTIONS TO RECOVER PENALTIES.**

See FINES.

Action to recover penalty as civil action, see ACTIONS.

Delay by railroad company in paying damages for injuries to animals, see ANIMALS, 3 b.

Delay in transportation of live stock, see CARRIERS, 5 a (1).

Duty of carrier to pay claims, see CARRIERS.

Excessive penalties for violating railroad rate law, see CARRIERS, 2 j.

Excessiveness as vitiating penalty, see GAS AND GAS COMPANIES, 4 a.

Failure to pay local assessment, see SPECIAL OR LOCAL ASSESSMENTS, 8.

Law governing enforcement of penalties, see CONFLICT OF LAWS, 7.

Limitation of actions to recover penalties, see LIMITATION OF ACTIONS, 3.

Nonpayment of taxes, see TAXATION, 7.

Pleading statute of limitations in actions for penalty, see LIMITATION OF ACTIONS, 8 b (1).

Recovery of penalty prescribed by criminal statute, see CRIMINAL LAW, 5 a.

Refusal of carrier to receive goods, see CARRIERS, 2 a, 4 j (3).

Violation of by-laws of beneficial associations, see BENEVOLENT OR BENEFICIAL ASSOCIATIONS, 5 b.

1. PENAL STATUTES.

Effect of failure to fix maximum penalty. — A statute fixing a penalty is not invalid because it prescribes only the minimum penalty and fails to prescribe the maximum. *Western Union Tel. Co. v. State (Ark.)*, 12-82.

Repeal of statute after violation. — By statute in Arkansas a forfeiture incurred in violation of an existing penal statute may be enforced, although such penal statute has been repealed. *Western Union Tel. Co. v. State (Ark.)*, 12-82.

2. ACTIONS TO RECOVER PENALTIES.

Recovery in civil action. — Unless the statute by which the penalty is imposed contemplates recovery by a criminal proceeding only, a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by a civil action, even if it may also be recovered by an action which is technically criminal. *Hepner v. United States (U. S.)*, 16-960.

Power of court to direct verdict. — Where in a civil action to recover a statutory penalty the evidence is undisputed that the defendant by his acts incurred the penalty for the offense out of which the cause of action arose, the court may direct a verdict in favor of the plaintiff. *Hepner v. United States (U. S.)*, 16-960.

Recovery of penalty imposed by federal immigration law. — The provisions of the federal immigration law of 1903 to the effect that the penalty of one thousand dollars imposed for every violation of the act may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name, and for his own benefit, as debts of like amount are now recovered in the courts of the United States, that separate suits may be brought for every alien illegally imported, and that the district attorney shall prosecute every such suit when brought by the United States, plainly indicate that a civil action is the appropriate mode of proceeding for the recovery of such penalty. *Hepner v. United States (U. S.)*, 16-960.

Reduction of penalty on appeal. — Where the trial judge has assessed the penalty for a continuing offense at more than the minimum fixed by the statute, under the impression that the statute was still in force, when in fact it had been repealed four years before, this furnishes a consideration that will constrain an appellate court to reduce the penalty to the minimum fixed by the statute. *Western Union Tel. Co. v. State (Ark.)*, 12-82.

PENDENCY OF SUIT.

See LIS PENDENS.

PENDENTE LITE.

Allowance of alimony, see ALIMONY AND SUIT MONEY, 3.

PENETRATION.

Necessity to constitute incest, see INCEST, 1 b.

PENITENTIARY.

See CONVICTS; CRIMINAL LAW, 7 b (8).

Power to sentence to county jail under statute providing for penitentiary sentence, see CRIMINAL LAW, 7 b (7).

Sentence to penitentiary as suspending civil rights, see CRIMINAL LAW, 7 b (6) (c).

PENSIONS.

Exemption of pension money from execution, see EXECUTIONS, 5 c.

Power of pension officials. — The power stated of a board of trustees of a firemen's pension and relief fund, under the Louisiana statute, to determine the persons entitled to relief from the fund. *State ex rel. Lynch v. Board of Trustees (La.)*, 8-945.

Recovery back of payments on pension checks bearing forged indorse-

ments. — Assuming, without deciding, that pension checks drawn by a pension agent upon the assistant treasurer of the United States, are negotiable commercial paper, and not merely official warrants, and also that the government is bound by the laches of its authorized agents, the rule which precludes the recovery of payments made upon forged commercial paper where prompt notice of the forgery has not been given to the person receiving the payment, has no application to payments made by the government upon pension checks bearing forged indorsements of the payees, since the government is not charged with knowledge of the signatures of its pensioners. Where the government has paid such forged pension checks to the bank which cashed them, it is entitled to recover the payments so made, and its right in this regard is not conditioned upon either demand or the giving of notice of the forgery to the bank. As between the bank and the government, in such a case, the duty of discovering the forgery rests upon the former, and by presenting the checks to the government for payment it warrants that they are genuine. *United States v. National Exchange Bank (U. S.)*, 16-1184.

PEONAGE.

Effect of statute making breach of contract of employment a crime, see *MASTER AND SERVANT*, 2 c.

PERCOLATION.

Injury by percolation of water, see *WATERS AND WATERCOURSES*, 1.

PEREMPTORY CHALLENGES.

See *JURY*, 6.

PEREMPTORY WRIT.

See *MANDAMUS*, 3 e.

PERFORMANCE.

Contracts generally, see *CONTRACTS*.

Contracts of employment, see *MASTER AND SERVANT*, 1 e.

Contract to be performed in several jurisdictions, see *CONFLICT OF LAWS*, 3 a.

Part performance of contract, see *FRAUDS, STATUTE OF*, 1 d.

Validation of antenuptial contract, see *HUSBAND AND WIFE*, 2 a (3).

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PERJURY.

1. *STATUTES PROHIBITING AND PUNISHING*, 1265.
2. *MATERIALITY OF FALSE STATEMENT*, 1265.
3. *SUBORNATION OF PERJURY*, 1266.
4. *DEFENSES*, 1266.
5. *JURISDICTION*, 1266.
6. *INDICTMENT*, 1266.
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 - a. *Admissibility*, 1267.
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False swearing avoiding insurance policy, see *INSURANCE*, 3 c. (3).

Ground for vacating judgment, see *JUDGMENTS*, 9 d.

Perjured testimony as ground for new trial, see *NEW TRIAL*, 2 a (3).

1. STATUTES PROHIBITING AND PUNISHING.

Effect of statute denouncing "false swearing." — The Louisiana statute denouncing "false swearing" held not to repeal the statute relating to perjury. *State v. Coleman (La.)*, 8-880.

2. MATERIALITY OF FALSE STATEMENT.

Materiality of false testimony an essential element. — From time immemorial the common law has made the materiality of false testimony an essential ingredient of the crime of perjury, and the statutes of New York have always embodied that rule. *People v. Teal (N. Y.)*, 17-1176.

Testimony immaterial to issue. — In an action for an absolute divorce, where the complaint alleges but a single act of adultery by the defendant, at a specified time and place, testimony tending to show that the defendant was guilty of another act of adultery, at another time and another place, would be immaterial to the issue tendered by the pleading. The giving of such testimony, therefore, would not render the witness giving it guilty of perjury, even though the testimony was false, and, consequently, an attempt to procure false testimony to that effect could not constitute attempted subornation of perjury. Nor can a conviction of attempting to suborn perjury in such a case be sustained upon the theory that the false testimony, although immaterial when solicited, might have become material by a subsequent amendment of the complaint. If the charge of perjury could not have been sustained, in case the false testimony had actually been given, under the complaint as it then stood, no subsequent change in the pleading or issue could relate back to the time when the act was committed. *People v. Teal (N. Y.)*, 17-1176.

Testimony relevant to issue. — Any testimony which is relevant in the trial of a given case is so far material to the issue as to render a witness who knowingly and wilfully falsifies in giving it guilty of perjury. *State v. Miller* (R. I.), 3-943.

Statements which may have influenced jury. — False statements by a witness are sufficiently material to the issue to sustain a prosecution for perjury where the statements may properly have influenced the jury in reaching their conclusion. *State v. Sargood* (Vt.), 13-367.

Knowledge of materiality of false testimony. — Knowledge by the witness of the materiality of his false statements is not an essential element of the crime of perjury. *State v. Sargood* (Vt.), 13-367.

Testimony in proceeding to set time for proving will. — A conviction cannot be sustained on a charge that the petitioner in a proceeding to set a time for proving a will testified falsely that she had not found any money or valuable articles in the house of the testatrix, where neither the information nor the evidence shows that the false testimony related to any matter material to such proceeding. *Shevalier v. State* (Neb.), 19-361.

Rule under Rhode Island statute. — Under the Rhode Island statute any wilfully false swearing in judicial proceedings constitutes perjury, regardless of the question of its materiality to the issue. *State v. Miller* (R. I.), 3-943.

3. SUBORNATION OF PERJURY.

Where person subornated could not have been convicted of perjury. — A person cannot be convicted of an attempt at subornation of perjury where the person sought to be suborned could not have been convicted of perjury, if the false testimony attempted to be procured had been actually given under oath. *People v. Teal* (N. Y.), 17-1176.

4. DEFENSES.

Irregularities in original proceeding not ousting jurisdiction of court. — While perjury cannot be assigned upon an oath administered in proceedings wholly void, mere irregularities or informalities not ousting the jurisdiction of the court constitute no defense to a charge of perjury. *Manning v. State* (Tex.), 3-867.

Where in proceedings to take depositions the parties waive the issuance of a commission, the fact that no commission is issued does not render the proceedings void and therefore a charge of perjury may be based on false testimony given in such proceedings. *Manning v. State* (Tex.), 3-867.

Failure to file deposition with clerk. — Perjury may be based on false testimony in proceedings to take depositions, though the deposition was not filed with the clerk. *Manning v. State* (Tex.), 3-867.

Acquittal in proceeding in which perjury is alleged to have been committed. — A party cannot, after securing an

acquittal by perjury, successfully plead such acquittal in bar of a prosecution for the perjury so committed. *State v. Beville* (Kan.), 17-753.

The acquittal of a defendant charged with criminal conspiracy is not a bar to his prosecution for perjury in having testified falsely at the first prosecution, though the material facts in issue be substantially the same in each case. *State v. Vandemark* (Conn.), 1-161.

5. JURISDICTION.

Prosecution in federal court for perjury committed in state court. — False swearing in a naturalization proceeding in a state court may be prosecuted in a federal court under the federal statute (Rev. St., § 5395, 5 Fed. St. Ann. 210) providing for the punishment of any one who knowingly makes a false oath or affidavit "under or by virtue of any law relating to the naturalization of aliens." *Holmgren v. United States* (U. S.), 19-778.

6. INDICTMENT.

Formal requisites of indictment. — Instead of saying merely that the accused was "sworn as a witness," etc., the indictment for perjury should allege at least that he was "duly sworn," or "in due form of law sworn," or words of equivalent import, especially where the indictment does not attempt to set forth the words of the oath. *Fudge v. State* (Fla.), 17-919.

Allegations negating truth of alleged false testimony. — That part of the indictment for perjury which expressly alleges the falsity of the testimony given by the accused is technically called the assignment. This is the gist of the offense, not mere inducement; consequently the allegation must be direct and specific, not in terms of uncertain meaning, or by way of implication. *Fudge v. State* (Fla.), 17-919.

It is necessary in an indictment for perjury to negative expressly and positively the truth of the alleged false swearing, by stating the facts by way of antithesis. A general allegation that the testimony in question was false is not sufficient. In addition to an averment that the testimony of the accused was false, the indictment should also set forth the truth in regard to the matter at issue. Thus, after stating the substance of what was sworn to, the indictment proceeds: "Whereas in truth and in fact," adding wherein such matter was false. *Fudge v. State* (Fla.), 17-919.

The requirement that, in an indictment for perjury, it is necessary to make direct and specific allegations negating the truth of the alleged false testimony by setting forth the true facts by way of antithesis is not a mere matter of form, but is the very essence of the indictment, and necessary in order to inform the accused of the nature and cause of the accusation against him by setting out wherein or in what regard his testimony was claimed to be false. *Fudge v. State* (Fla.), 17-919.

Construction of remedial statute. —

The Iowa statute providing that "in an indictment for perjury . . . it is sufficient to set forth . . . in what court or before whom the oath alleged to be false was taken and that the court or person before whom it was taken had authority to administer the same" should not be given a strict interpretation, but should be given effect as a remedial statute relieving the prosecution from undue technical requirements. *State v. Harter* (Ia.), 9-764.

Averments as to jurisdiction of court. —

In a prosecution for perjury alleged to have been committed by the defendant while testifying in the corporation court of a certain city in a criminal prosecution for gambling, the indictment is fatally defective and subject to be quashed where it alleges merely that the gambling occurred in the county, and does not allege that it was played within the city in which the corporation court was held, for under the Texas statute the corporation court would have been without jurisdiction unless the gambling had taken place within the city, and the alleged false testimony would therefore not have been material. In such a prosecution testimony tending to show that the gambling occurred beyond the territorial limits of the city, and that therefore the court in which the alleged perjury occurred was without jurisdiction, is erroneously excluded. *Moss v. State* (Tex.), 11-710.

Charging name or authority of person administering oath. — Under the Iowa statute relating to indictments for perjury, an indictment alleging that the defendant appeared as a witness on the trial of a criminal prosecution in the District Court of a specified county, "and was then and there duly sworn before the duly authorized clerk of said court," is not open to the objection that it does not properly charge the name or authority of the person by whom the oath was administered. *State v. Harter* (Ia.), 9-764.

Although an indictment for perjury fails to set forth by what court, magistrate, or person the oath to the accused was administered on the occasion when the crime is alleged to have been committed, it is sufficient if it follows the statutory form. *State v. Sargood* (Vt.), 13-367.

Indictment held sufficient. — An indictment for perjury held sufficient under the Rhode Island statute. *State v. Miller* (R. I.), 3-943.

7. EVIDENCE.**a. Admissibility.**

Testimony given in former proceeding. — In a prosecution for perjury in having testified falsely on a former prosecution for conspiracy, evidence of the testimony given on the former prosecution is admissible solely to show the materiality of the false testimony alleged to have been given by the accused. *State v. Vandemark* (Conn.), 1-161.

Judgment of acquittal in former proceeding. — In a prosecution for perjury the judgment of acquittal in the cause in which the perjury was committed is not admissible to prove the defendant's innocence. *State v. Beville* (Kan.), 17-753.

b. Quantum of proof.

General rule. — In order to support a conviction for perjury, the charge must be established by the testimony of at least two witnesses or by the testimony of one witness with proof of corroborating circumstances. *Cook v. United States* (D. C.), 6-810.

Testimony of single witness. — The testimony of a single witness, which, when taken in connection with corroborating circumstances, will support a conviction for perjury, must contradict in positive terms the statement of the accused, and in order to determine whether it is of that character the answers elicited on cross-examination, as well as on direct examination, must be considered. *Cook v. United States* (D. C.), 6-810.

Corroboration of single witness. — The corroboration of a single witness for the prosecution which will support a conviction for perjury must be by proof of independent and material facts and circumstances tending directly to corroborate the testimony of the witness, and must be of a strong character and not merely corroborative in slight particulars. *Cook v. United States* (D. C.), 6-810.

Proof of proceeding in which offense was committed. — On a trial for perjury, where the offense is alleged to have been committed in a proceeding before a police magistrate commenced by information, such proceeding should be proved by the production of the information. The testimony of the magistrate and of the stenographer who took down the testimony adduced before the magistrate, is insufficient for that purpose, and if the information is not produced it is proper for the judge to withdraw the case against the defendant from the jury, even though objection is not taken to the defect in the proof until the close of the case for the crown. *Rex v. Farrell* (Can.), 17-261.

Contradictory sworn statements of defendant. — A conviction for perjury cannot be sustained merely upon the contradictory sworn statements of the defendant, but the state must prove which of the two statements is false and must show that statement to be false by other evidence than the contradictory statement. *Billingsley v. State* (Tex.), 13-730.

In a prosecution for perjury in having denied seeing another shoot a pistol, evidence of contradictory statements by the accused, and the testimony of the person who fired the pistol that he and the accused left a certain town together the night of the shooting, and that at the time the pistol was fired the accused was somewhere behind him, is insufficient to support a conviction, there being no evidence as to the proximity of the accused at the time the pistol was fired or that he

saw it fired. *Billingsley v. State* (Tex.), 13-730.

Record of conviction for act which accused denies. — The record of his conviction for an act which the accused testifies he did not commit is not conclusive proof against him in a subsequent prosecution for perjury in so denying his guilt. *State v. Sargood* (Vt.), 13-367.

Evidence held insufficient. — Evidence reviewed, in a prosecution for perjury, and held insufficient to support a conviction. *Cook v. United States* (D. C.), 6-810.

8. CIVIL ACTION FOR DAMAGES.

Cannot be maintained while judgment remains in force. — A party against whom a judgment has been obtained by the perjury of the adverse party, committed in testifying on the trial of the action wherein the judgment was rendered, cannot, while the judgment remains in force, maintain an action against such adverse party for damages alleged to have been suffered because of the perjury. *Horner v. Schinstock* (Kan.), 18-21.

PERMITS.

Requirement of building permit, see MUNICIPAL CORPORATIONS, 4 d (3).

PERPETUAL SUCCESSION.

See CORPORATIONS, 2 b.

Corporate existence of insurance company, see INSURANCE, 1 a.

PERPETUITIES AND TRUSTS FOR ACCUMULATION.

1. PERPETUITIES.

2. TRUSTS FOR ACCUMULATION.

Accumulation of income, see CHARITIES, 6.

Time of vesting of remainders, see REMAINDERS.

Trust for care of burial lot as perpetuity, see CHARITIES, 1.

1. PERPETUITIES.

Absence of perpetuity in first taker.

— A residuary bequest to trustees with the direction that they shall manage the estate until it shall reach a specified sum and shall use such sum for the establishment and support of a free school for boys, which provides that if the trustees are unable to carry out the provisions in regard to the school after the fund has reached the prescribed sum they shall pay the fund over to the trustees of a specified school, does not offend against the rule of perpetuities, because of perpetuity in the first taker, and is not void for remoteness. *Tincher v. Arnold* (U. S.), 8-917.

Where will creates a trust to terminate at discretion of trustees. — The rule against perpetuities is not violated by a

bequest of a part of the testator's stock in a corporation in trust for each of two of his sons, and another part to another son absolutely where the will provides that the trusts are to terminate at the discretion of the trustees, and they are authorized at their discretion to sell any portion of the stock held by them in trust and pay over the proceeds to the beneficiaries, though the will recites as the reason for the bequest that it is the testator's "earnest wish and desire" that his holdings in the corporation may be kept intact by his sons after his death. *Wagner v. Wagner* (Ill.), 18-490.

Bequest to children of unborn children of daughter, where daughter is fifty-five years old. — The rule against perpetuities is violated by a bequest in trust for the testator's daughter for life and after her death to pay the income to her children, without right of alienation, except that at the death of any of such grandchildren an aliquot part of the property shall pass to the grandchildren's descendants *per stirpes*, and in default of descendants living at the death of each of such grandchildren, to pass according to the law of descent. The reason of this is that in legal contemplation grandchildren entitled to take may be born after the testator's death, though the daughter of the testator is fifty-five years old at the time of his death. *U. S. Fidelity, etc., Co. v. Douglas* (Ky.), 20-993.

Creation of trust without direction as to payment of income. — A provision in a will that the share of the testatrix's estate devised to a certain person shall be invested for his benefit during his natural life, and for the benefit of his wife and his issue after his death, is not rendered ineffective to create a valid trust by the fact that it does not expressly provide that the rents and profits of the life tenant's share shall be collected and paid over to him, as the direction that such share shall be invested necessarily implies that the principal shall be kept intact, and the fact that no power of disposition is given to the life tenant implies that he shall get the benefit of the share thus invested by receiving the rents. *Mee v. Gordon* (N. Y.), 10-172.

Effect of violation of rule against perpetuities. — Under a will by which the corpus of the estate is devised to and vests in the husband of the testatrix as trustee, the income being given to the children of the testatrix for life and after their death to their spouses for life, and which provides that after the decease of the last of her immediate children and the lapse of ten years from the date when the youngest grandchild shall have become of age, the principal of the whole estate shall be equally divided among the grandchildren, the estate in the grandchildren is a contingent remainder. Such a devise constitutes a violation of the rule against perpetuities and causes the antecedent particular estate to fail and renders the heirs at law of the testatrix entitled to immediate possession. *Kountz's Estate* (Pa.), 5-427.

Limiting power of alienation beyond two lives in being. — A provision in a will that the share of the testatrix's estate devised to a certain person shall be invested for his benefit during his natural life, and for the benefit of his wife and his issue after his death, does not offend against the rule relating to the suspension of the power of alienation by continuing the trust during the lives of the remaindermen as well as during the life of the life tenant, as the will discloses an intention on the part of the testatrix that the investment shall be only secondarily for the benefit of the remaindermen and an intention that the remaindermen shall take an absolute remainder rather than a remainder in trust. *Mee v. Gordon* (N. Y.), 10-172.

Where an attempted testamentary disposition of lands provides in clear and unambiguous terms that the lands shall be held by the testator's trustee or executor for thirty years, during which time he is directed to collect and divide equally among the devisees the rents and profits, and at the expiration of the thirty years he shall sell the lands and divide the proceeds among the devisees, their heirs, or the survivors of them, the present right to the corpus being withheld from the devisees, and these provisions are neither irreconcilable with or repugnant to the general context of the will, but on the other hand the whole scheme as entertained by the testator and manifested by his will is harmonious in all of its parts, and the only vice in it is that it is obnoxious to the rule against perpetuities, a court is not authorized to give effect to the devise by mere construction and disregard the attempt to create the perpetuity. *Reid v. Voorhees* (Ill.), 3-946.

What does not constitute unlawful disposition in trust. — A will construed, and held not to be violative of the Minnesota statutes against uses and trusts. *Appleby v. Appleby* (Minn.), 10-563.

2. TRUSTS FOR ACCUMULATION.

Right to accumulated income. — A corporation directed by the testator's will to be formed is not entitled to the income accumulated between the testator's death and the formation of the corporation. *St. John v. Andrews Institute* (N. Y.), 14-708.

Persons entitled to income in absence of valid gift. — Under the New York real property law providing that when no valid direction for the accumulation of the income is given such income shall belong "to the persons presumptively entitled to the next eventual estate," the persons entitled to the next eventual estate are the persons entitled to the estate at the end of the period of accumulation. *St. John v. Andrews Institute* (N. Y.), 14-708.

Where the testator has failed to bequeath such income to a legatee capable of receiving it, such income passes to the next of kin under the statute of distributions. *St. John v. Andrews Institute* (N. Y.), 14-708.

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1. VALIDITY OF STATUTES.

a. Regulation of practice of medicine.

Prohibiting unlicensed person from practicing. — The Massachusetts statute forbidding the practice of medicine except by licensed persons of prescribed qualifications, and including midwifery as the practice of medicine, is a reasonable regulation, and does not contravene any provision of the state or federal constitution. *Commonwealth v. Porn* (Mass.), 13-569.

The Iowa statute prohibiting the practice of medicine, surgery, or obstetrics without first having obtained and filed for record a certificate from the state board of medical examiners is constitutional. *State v. Wilhite* (Ia.), 11-180.

Legislation prohibiting any one from treating a disease for a fee except such persons as

have the prescribed qualifications is constitutional. *State v. Marble* (Ohio), 2-898.

Requiring license of person practicing at time of enactment of statute. — A state statute prohibiting the practicing of medicine without a license applies to a physician who practices in a state before its passage and who, after an absence from the state, has returned to re-engage in practice; and when so applied the statute is not unconstitutional as depriving such physician of a vested right. *State v. Davis* (Mo.), 5-1000.

Prohibiting Christian Science treatment. — The Ohio statute making it a misdemeanor to give Christian Science treatment for a fee is constitutional. *State v. Marble* (Ohio), 2-898.

The Ohio statute regulating the practice of medicine is not void as discriminating against Christian Scientists in prescribing that any one possessing certain qualifications may practice osteopathy and in not making a special provision for those wishing to practice Christian Science. *State v. Marble* (Ohio), 2-898.

Forbidding soliciting of patients. — The Arkansas statute forbidding physicians and surgeons engaged in the practice of medicine to solicit patients by agents or drummers is a valid exercise of the state's police power, and is not unconstitutional as an unwarranted interference with the rights of those engaged in the practice of medicine. *Thompson v. Van Lear* (Ark.), 7-154.

Revocation of license for misconduct. — The Michigan statute giving the board of registration in medicine power to revoke the certificate of registration of any physician who inserts an advertisement in a newspaper relative to a venereal disease held constitutional. *Kennedy v. State Board* (Mich.), 9-125.

The provision of the California statute authorizing the state board of medical examiners to revoke the certificate of a physician for making "grossly improbable statements" in the advertisements of his medical business, but not defining what shall constitute such statements, is void as being unreasonable, uncertain, and indefinite. *Hewitt v. State Board* (Cal.), 7-750.

b. Regulation of practice of dentistry.

Power of state to regulate. — A state may regulate the practice of dentistry and prescribe regulations for admission to the practice of the profession. *Ex p. Whitley* (Cal.), 1-13.

A legislature may fix reasonable standards for determining the competency of an applicant for admission to the practice of dentistry. *Ex p. Whitley* (Cal.), 1-13.

Dentistry is an occupation reasonably falling within the legislative right of regulation. *Matter of Thompson* (Wash.), 2-149.

The practice of dentistry may properly be subjected to the police regulations of the state. *Johnson v. Great Falls* (Mont.), 16-974.

Exemption of dentists already practicing. — An exemption in favor of dentists practicing at the time of the passage of an act from the provision requiring dentists to obtain a license is not discriminatory legislation. *Ex p. Whitley* (Cal.), 1-13.

The right of the citizens of each state to all the privileges and immunities of the citizens in the several states (Const. U. S., art. 4, § 2) is not infringed by a state statute requiring the examination and licensing of dentists, and applying to citizens of the state as well as to others, except that persons practicing in the state at the time of the enactment of the statute are relieved from its provisions. *State v. Rosenkrans* (R. I.), 19-824.

A statute requiring all persons intending to practice dentistry in the state to be examined and licensed does not operate to deprive of property without due process of law one who, having been a practitioner in the state, removed therefrom before the passage of the statute and afterwards returned. Having abandoned his right to practice by leaving the state, he could reacquire it only by complying with the law, which did not deprive him of the right to practice, but merely required him to submit to an examination as to his qualifications. *State v. Rosenkrans* (R. I.), 19-824.

Statute requiring diploma. — The legislature, in the exercise of its police power, has authority, under the state and federal constitutions, to regulate the practice of dentistry within the state by reasonable rules, and a statute which requires an applicant for a dentist's certificate to be possessed of a diploma from some dental college in good standing, and to pass an examination by the dental board, cannot be held void for unreasonableness, even though there is no dental college in the state. *State v. Littooy* (Wash.), 17-292.

Delegation of power to examining board. — A statute permitting the state board of dental examiners to determine whether an applicant for the practice of dentistry has graduated from a reputable dental college is not a delegation of judicial power to an inferior board. *Ex p. Whitley* (Cal.), 1-13.

A statute providing for the examination by a board of applicants for a license to practice dentistry is not invalid because it authorizes the board to adopt rules for the conduct of the examinations and for determining as to the possession by the applicants of the necessary qualifications, nor is such an act unreasonable in requiring the applicant to be of good moral character and to be possessed of a diploma from some dental college in good standing. *Matter of Thompson* (Wash.), 2-149.

A statute requiring the examination and licensing of dentists by a board appointed for the purpose, without enacting any regulations or prescribing any standard of proficiency, does not violate the provision of the Rhode Island constitution (art. 4, § 2) vesting all legislative power in the general as-

sembly. *State v. Rosenkrans* (R. I.), 19-824.

2. CONSTRUCTION OF STATUTES.

In general. — The statute prohibiting physicians to practice without a license should not be so construed as to deprive people of the benefits intended by the act, but should be given such construction as will carry into effect the evident intention of the legislature. *State v. Yegge* (S. Dak.), 9-202.

The rule stated for the construction of the words "to practice medicine" in the Ontario statute making it unlawful for any person not registered to practice medicine for hire. *In re Ontario Medical Act* (Ont.), 7-369.

The intention and meaning of the Nebraska law requiring a license for the practice of medicine is that one who undertakes to judge the nature of disease, or to determine the proper remedy therefor, or to apply or direct the application of the remedy, must have the personal qualifications prescribed by statute. *State Electro-Medical Institute v. State* (Neb.), 12-673.

Application of statute to nonresident physician treating patient within state. — The Missouri statute prohibiting the practicing of medicine without a license applies to a nonresident physician who comes within the state to see patients and who diagnoses diseases and prescribes remedies within the state for pay, notwithstanding the fact that the patients have to send to another state for the remedies prescribed. *State v. Davis* (Mo.), 5-1000.

Applicability to physicians of statute requiring license to practice dentistry. — Under the Minnesota statute relative to the practice of dentistry, which provides that no person shall practice dentistry in the state without having complied with the provisions thereof, and which makes no exception in favor of licensed physicians and surgeons, a person who is licensed to practice medicine and surgery cannot, by virtue of such license, practice dentistry without obtaining a license as a dentist. *State v. Taylor* (Minn.), 16-487.

3. PROSECUTIONS FOR VIOLATION OF STATUTES.

a. What constitutes "practice of medicine."

In general. — The words "practice medicine" in the Ontario statute making it unlawful for a person not registered to practice medicine for hire should be given their primary and popular meaning, namely, practicing the art of healing the sick by means of medicines or drugs. *In re Ontario Medical Act* (Ont.), 7-369.

A person may always do his own diagnosing and buy and use upon himself what he chooses, except certain poisons. A patient may legally go, under such circumstances, not only to a druggist, but to a Christian Scientist, Osteopath, medical electrician, masseur, etc., and obtain and pay for treatment which these persons give, so long as he does

his own diagnosing and prescribing. *In re Ontario Medical Act (Ont.)*, 7-369.

Practice of ophthalmology.—A person who advertises that he is an ophthalmologist, and prefixes the title "Dr." to his name on his sign and in his advertisements, holds himself out as a physician and therefore comes within the provisions of the South Dakota statute prohibiting physicians to practice without a license and providing that any person who shall prefix the title "Dr. or Doctor" to his name shall be regarded as practicing within the meaning of the statute; and this is so though he claims that he is simply engaged in the business of fitting glasses to the eye. *State v. Yegge (S. Dak.)*, 9-202.

Practice of midwifery.—A woman holding herself out as a midwife and practicing midwifery for compensation, using obstetrical instruments on occasions and using a limited number of printed prescriptions or formulas in treating patients, may properly be found by a jury to be practicing medicine and holding herself out as a practitioner of medicine within the meaning of a statute prescribing the qualifications of those practicing medicine. *Commonwealth v. Porn (Mass.)*, 13-569.

Giving Christian Science treatment.—The giving of Christian Science treatment for a fee for the cure of a disease is practicing medicine within the Ohio statutes. *State v. Marble (Ohio)*, 2-898.

b. Indictment or information.

Sufficiency of information.—An information for practicing dentistry without a license, which charges the offense in the language of the statute, is sufficient, even though it does not set forth the specific nature of the disease treated by the defendant, or the nature of the treatment. *State v. Littooy (Wash.)*, 17-292.

Under the Iowa statute making it unlawful to practice medicine or surgery without a certificate from the state board of medical examiners, and declaring what persons shall be considered as practicing medicine or surgery within the meaning of the statute, an indictment specifically charging that the defendant practiced medicine or surgery without the required certificate by doing the various acts which the statute sets out as constituting the practice of medicine or surgery, is not insufficient as failing to state an offense or as being too indefinite or as charging distinct and separate offenses. *State v. Wilhite (Ia.)*, 11-180.

c. Defenses.

Fact that others are equally guilty as defense.—It is no defense to a prosecution for practicing medicine in violation of statute that there are others equally guilty and who ought to come beneath the ban of the law. *State v. Wilhite (Ia.)*, 11-180.

Solicitation by complaining witness as defense.—In a prosecution for practicing dentistry without a license it is no de-

fense that the complaining witness solicited the defendant to perform the operation charged in the information with a view to having him prosecuted therefor, and, consequently, a refusal by the trial court to charge that such fact constitutes a defense, is not erroneous. *State v. Littooy (Wash.)*, 17-292.

d. Evidence.

Admissibility of expert testimony to show what constitutes practice of medicine.—Upon the question whether a midwife is engaged in the "practice of medicine" within the meaning of a statute, where the nature of the practice by the midwife is shown by agreed facts, expert testimony to prove that such practice is not the practice of medicine is properly excluded. *Commonwealth v. Porn (Mass.)*, 13-569.

Cross-examination of complaining witness.—In a prosecution for practicing dentistry without a license, where the contention of the defendant is that the complaining witness solicited him to perform the operation charged in the information with a view to having him prosecuted therefor and he is permitted to ask such witness, on cross-examination, whether such was not his purpose, he cannot complain on appeal that he was unduly limited in his cross-examination of the witness in that regard. *State v. Littooy (Wash.)*, 17-292.

Proof of absence of authority to practice.—In such a case, the Washington statute (*Bal. Code*, § 3030; *P. C.*, § 4476) makes the certificate of the auditor of the county, to the effect that there is no certificate on file in his office, *prima facie* proof that the defendant is not entitled to practice dentistry in such county. The statutory method of proof, however, is not exclusive; but the deputy auditor may be permitted to testify that there is no certificate of record in favor of the defendant. *State v. Littooy (Wash.)*, 17-292.

Sufficiency of evidence to show practice.—In such a case, evidence that the defendant filled a cavity in the teeth of the complaining witness, and that he was occupied about twenty minutes in the work, is sufficient to sustain a conviction, so far as the fact of treatment by the defendant is concerned. *State v. Littooy (Wash.)*, 17-292.

Evidence in the case at bar examined and held to show that the defendant was guilty of practicing medicine in violation of statute. *State v. Wilhite (Ia.)*, 11-180.

4. COMPENSATION.

a. Right to compensation and persons liable.

Services rendered to person incapable of contracting.—A surgeon summoned by a spectator in an emergency to attend an injured and unconscious person may recover the reasonable value of his services from the estate of the patient although the patient dies without ever regaining consciousness. *Cotnam v. Wisdom (Ark.)*, 13-25.

Services rendered outside of state where licensed. — The right of a physician to recover for services is not affected by the fact that the services were rendered in a state in which he had not been licensed to practice, where he was duly licensed in the state of his domicile and went to such other state at the request of the patient. *Zeigler v. Illinois Trust, etc., Bank (Ill.), 19-127.*

Liability of father for services rendered adult son. — The mere fact that a father calls a physician to attend his son, who is of age and living by himself, does not create an implied contract on the part of the father for the services rendered, but the fact of that relationship in connection with attendant circumstances indicating to the physician that the father, on his own account, calls him to attend the son, may raise such an implied contract. *Morrell v. Lawrence (Mo.), 11-650.*

b. Actions.

Necessity of proving benefit from services. — A surgeon seeking to recover compensation for professional services rendered a person who dies as a result of the injuries treated does not have to prove, in addition to the value of the services, the benefit, if any, derived by the deceased from such services. *Cotnam v. Wisdom (Ark.), 13-25.*

Admissibility of evidence of physician's skill and reputation. — In an action by a physician for professional services, it is competent for the plaintiff to show that he is a physician of learning and skill, and that fact should be taken into consideration in estimating the value of the services rendered. *Morrell v. Lawrence (Mo.), 11-650.*

In an action by a physician for professional services, it is error to admit evidence of the plaintiff's general professional reputation, such reputation not having been drawn in question. Such evidence could properly be considered only if recovery was sought for loss of income by the plaintiff caused by his absence from home while rendering the services sued for. *Morrell v. Lawrence (Mo.), 11-650.*

Admissibility of evidence of financial standing of patient and family. — In an action by a physician for the value of professional services, it is error to admit proof for the plaintiff of the value of the estate and of the family connections of the person for whom the services were rendered, where the patient was continually unconscious and the action is sustained on the legal fiction of a contract in order to afford a remedy which the justice of the case requires. *Cotnam v. Wisdom (Ark.), 13-25.*

In an action by a physician against the father of his patient for medical services rendered, defendant is entitled to recover the reasonable value of the services rendered and no more, regardless of the question of the defendant's ability to pay, and the admission

of evidence that the defendant is a wealthy man, and a charge that the jury should take that fact into account in estimating the recovery, constitute error requiring a new trial. The financial condition of the defendant could be properly considered only in rebuttal of evidence that the plaintiff was accustomed to charge smaller fees than those sued for, and as showing that the smaller fees were charged because of the poverty of the patients. *Morrell v. Lawrence (Mo.), 11-650.*

In an action against a father for medical services rendered his son, it is error to exclude evidence that the defendant's son, with whom the plaintiff was well acquainted, was a man of considerable fortune and amply able to pay for the services, as that fact might have a bearing upon the question as to whether the plaintiff inferred that the father who called the plaintiff to perform the services intended to pay for them. *Morrell v. Lawrence (Mo.), 11-650.*

Instructions. — In an action by a physician for professional services, an instruction that "in determining what is the reasonable value of the services rendered by the plaintiff" certain matters should be considered, is objectionable as assuming that the jury would find for the plaintiff on the main issue, though not, in itself, a gross error. *Morrell v. Lawrence (Mo.), 11-650.*

In an action by a physician against the father of his patient for medical services rendered, an instruction that the jury, in estimating the value of the medical services rendered, should take into consideration the ability of the person liable therefor to pay, is not cured by an instruction that the evidence touching the financial ability of the defendant may be considered by the jury not to enhance the fees above a reasonable compensation, but solely to determine whether the defendant, if liable at all, is able to pay a just compensation for the services. *Morrell v. Lawrence (Mo.), 11-650.*

Question for jury. — In an action by a physician against the father of his patient for medical services rendered, where it appears that the plaintiff had formerly attended the son and had been paid by him, and on one occasion had attended the son on a trip to Europe, for which he attempted to hold the defendant responsible, but accepted from the son an amount considered inadequate, the defendant denying that the trip was taken and services rendered at his request, and where it further appears as to the services that are the subject of the action, that the defendant, residing in New York, telegraphed the plaintiff, residing in St. Louis, to come to New York to treat his son, saying, "We would like to have you come and treat him," and directing the plaintiff when to leave St. Louis, the question whether the defendant had reason to believe that the plaintiff would understand the telegram to imply an agreement to pay the plaintiff, and whether the plaintiff did so understand it, were questions properly submitted to the jury. *Morrell v. Lawrence (Mo.), 11-650.*

5. CONTRACTS BETWEEN PHYSICIAN AND PATIENT.

Burden of sustaining contract. — A physician asserting a claim under a contract with his patient has the burden of proving that the patient entered into the contract voluntarily and advisedly, but he is not required to show that the patient had independent and competent advice before executing the contract. *Zeigler v. Illinois Trust, etc., Vank (Ill.), 19-127.*

6. LIABILITY OF PHYSICIAN FOR MALPRACTICE.

a. In general.

Degree of care required. — The care and skill required of physicians in the treatment of a particular case is not that which would have been exercised by other physicians in the same community, but that exercised generally by physicians of ordinary care and skill in similar communities. *Burk v. Foster (Ky.), 1-304.*

A physician is required to exercise only that degree of care and skill which is exercised generally by physicians of ordinary care and skill in similar communities, and an instruction that ordinary care on the part of a physician is the exercise of his "best skill and ability" is erroneous. *Dorris v. Warford (Ky.), 14-602.*

In an action for damages for injuries caused by malpractice by a physician, the jury should be instructed that the defendant is not responsible for any injury suffered by the plaintiff that would have resulted notwithstanding ordinarily careful and skilful treatment, and that negligence on the part of the plaintiff is the want of ordinary care such as persons of ordinary prudence usually exercise under similar circumstances. *Dorris v. Warford (Ky.), 14-602.*

An instruction that makes malpractice on the part of a physician in treating an injury consist in the failure to have exercised ordinary care and skill in such treatment as the exigency of the case required, or such ordinary proper treatment as the physician might have discovered to have been necessary by the use of ordinary care and skill in the examination of the injury, is improper and should not be given. *Dorris v. Warford (Ky.), 14-602.*

Care required in using X-rays. — The rule of the liability for negligence and unskilfulness in using X-rays is the same as that applied in other actions for malpractice. *Henslin v. Wheaton (Minn.), 1-19.*

Liability of members of firm. — Where a firm of physicians assumes the duty of returning a patient, who has been operated upon in the operating room of a hospital, to his private room in the hospital, each member of the firm is the agent of the firm while performing that duty, and consequently the firm is liable for the negligence of either member thereof in its performance, resulting in injury to the patient. *Haase v. Morton (Ia.), 16-350.*

b. Performing operation without consent.

Performance as unlawful act. — A surgical operation upon the body of a patient is wrongful and unlawful where performed without the express or implied consent of the patient. Consent may be implied from the circumstances. *Mohr v. Williams (Minn.), 5-303.*

Ordinarily, a surgical operation should not be performed without the consent of the patient, where he is in full possession of all his mental faculties and is in such physical health as to be able to consult about his condition without the consultation itself being fraught with dangerous consequences to his health, and where no emergency exists making it impracticable to confer with him. *Pratt v. Davis (Ill.), 8-197.*

Estoppel of assertion of want of consent. — In an action to recover damages for a surgical operation performed upon the plaintiff, the plaintiff is not estopped to show that he did not consent to the operation by the fact that in a previous suit brought by him, which was disposed of without any determination of the rights of the parties, his declaration alleged that the operation had been performed with his consent. *Pratt v. Davis (Ill.), 8-197.*

c. Measure of damages.

Unauthorized operation. — In an action by a woman to recover damages for an unauthorized surgical operation consisting of the removal of her uterus, she may recover damages for her pain and sufferings without making direct proof thereof, as the law infers that pain and suffering follow such an operation. *Pratt v. Davis (Ill.), 8-197.*

Unskilful treatment. — The correct measure of damages for injuries caused by careless or unskilful treatment by a physician is reasonable compensation for the bodily pain and mental suffering, if any, endured by the patient, and the impairment of the plaintiff's ability to earn money; and an instruction which in effect directs a jury to find such damages as they believe from the evidence the patient suffered by reason of the negligent treatment is erroneous. *Dorris v. Warford (Ky.), 14-602.*

d. Actions to enforce liability.

(1) Pleadings.

Amendment of petition. — A cause of action against a surgeon for perforation of the plaintiff's bowels, with certain ill effects, caused by the alleged carelessness of the defendant in leaving a surgeon's sponge in the plaintiff's body after an abdominal operation, is not withdrawn by an amendment of the petition omitting the allegation that perforation of the bowels was caused by the sponge, and charging that the defendant cut and perforated the plaintiff's bowels, and that the sponge left in her body ulcerated her bowels "and left an opening therein." Such an amendment merely enlarges the case by permitting the plaintiff to show that the

defendant, while performing the operation, cut the plaintiff's bowels, or, on failure of such proof, that perforation was caused by the sponge. *Samuels v. Willis* (Ky.), 19-188.

(2) Evidence.

(a) Admissibility.

Opinions of expert as to degree of care. — In an action against a surgeon for alleged negligence in performing an operation, it is not competent for expert witnesses to testify that the manner in which the operation was performed was an ordinarily careful manner. *Samuels v. Willis* (Ky.), 19-188.

In an action for malpractice in the use of X-rays, a physician is not entitled to have the question of his care and skill determined by the opinions of physicians of his own school. *Henslin v. Wheaton* (Minn.), 1-19.

(b) Sufficiency.

In general. — The fact that the result of a physician's treatment of a patient is as good as is usually obtained in like cases similarly situated will not excuse a physician for failing to give the patient the benefit of the chances involved in a proper treatment. *Burk v. Foster* (Ky.), 1-304.

Negligence. — In an action against a surgeon for negligently sewing up a sponge in the plaintiff's body after an operation, the charge of negligence is not refuted by evidence that the best of surgeons sometimes do the same thing, because the fact that all men are careless at times does not relieve any one from liability for his own careless act. *Samuels v. Willis* (Ky.), 19-188.

In an action against a physician to recover damages for malpractice in failing properly to reduce a dislocation of the plaintiff's shoulder, evidence examined and held sufficient to sustain a verdict in favor of the plaintiff. *Burton v. Neill* (Ia.), 17-532.

In an action by a patient against a firm of physicians to recover damages for personal injuries alleged to have resulted from the negligence of a member of the firm, whereby a car or stretcher containing the plaintiff was precipitated down an open elevator shaft in a hospital, evidence examined and held sufficient to support a verdict in favor of the plaintiff. *Haase v. Morton* (Ia.), 16-350.

Evidence reviewed, in an action to recover damages for the negligent killing of the plaintiff's intestate by means of the administration of an anæsthetic preparatory to the performance of a surgical operation, and held to show that the defendant was not guilty of malpractice or want of skill in the operation. *Bakker v. Welsh* (Mich.), 8-195.

Connecting defendant with negligence. — Evidence in an action against a surgeon for malpractice examined and held sufficient to sustain a finding that a sponge sewed up in the plaintiff's body after an abdominal operation was left there by the defendant. *Samuels v. Willis* (Ky.), 19-188.

Performance of operation without consent. — Evidence considered in an action to recover damages for a surgical operation performed without the consent of the patient, and held that the surgeon had no authority to perform the operation without the patient's consent, that such consent was not expressly given, that whether it should be implied from the circumstances of the case was a question for the jury, and that if the operation was not authorized by the patient it was unlawful and constituted assault and battery. *Mohr v. Williams* (Minn.), 5-303.

Evidence reviewed, in an action by a married woman to recover damages for the performance of a surgical operation upon her without her consent, and held to show that the authority given by her husband to perform a prior operation was exhausted when the first operation was performed, and did not authorize the performance of a second operation. *Pratt v. Davis* (Ill.), 8-197.

Evidence reviewed, in an action by a father to recover damages for the negligent killing of his seventeen-year-old son by means of the administration of an anæsthetic preparatory to the performance of a surgical operation, and held insufficient to show that the defendant should be held liable because he did not obtain the consent of the father to the administration of the anæsthetic. *Bakker v. Welsh* (Mich.), 8-195.

(3) Appeal and error.

Harmless error. — In an action by a married woman to recover damages for the performance of a surgical operation upon her, where the declaration alleges that the operation was performed without the consent of the plaintiff or any one authorized to act for her, and the plea sets up leave and license, and the evidence shows the plaintiff did not consent and does not tend to show that her husband consented, an instruction that the burden of proof is upon the defendant to show leave and license is harmless, whether or not it is erroneous. *Pratt v. Davis* (Ill.), 8-197.

PICKETING.

See LABOR COMBINATIONS, 8.

PICTURES.

See COPYRIGHT; PHOTOGRAPHS.

PIERS.

Right to erect piers in navigable waters, see WATERS AND WATERCOURSES, 3 b (4).

PIGS.

Keeping pigs within municipal limits, see MUNICIPAL CORPORATIONS, 4 d (3).

PIKES.

See TURNPIKES AND TOLL ROADS.

PILOTS.

Respective duties of master and pilot. — A master should not interfere with the navigation of the vessel while it is in charge of the pilot, unless the pilot is manifestly incapable; but it is the duty of the master to render the pilot active assistance by pressing upon his attention such a matter as the nature of the lights of another vessel, about which the pilot has apparently formed a mistaken opinion involving the possible risk. *The Tactician* (Eng.), 10-378.

Liability of pilot for negligence. — A licensed pilot, enjoying the emoluments of compulsory pilotage, is not in the class of an ordinary employee, and is liable to his employer for negligence and want of skill in handling the vessel. *Guy v. Donald* (U. S.), 13-947.

What conduct of pilot amounts to negligence. — Where the pilot of a steam vessel persists in keeping the vessel on her course at full speed and attempts to cross a schooner's bow when the risk of collision is manifest, and only orders the engines reversed when the vessels are three lengths apart and it is too late to avoid a collision with the schooner, which simply keeps her course and is at no fault whatever, the collision is directly the result of the neglect of the pilot to exercise proper caution. *Guy v. Donald* (U. S.), 13-947.

Action against pilot for reimbursement of damages paid for his negligence. — Where the owner of a vessel has settled without suit an amount of damages suffered by another vessel in collision with his own, and it is fully established that the collision was due to the negligence of his pilot, and that the amount paid was not excessive, it is no defense to an action by the owner against the pilot for reimbursement that the pilot had no notice of the settlement and that there has been some nonprejudicial delay in entering suit against him. *Guy v. Donald* (U. S.), 13-947.

PIPE LINES.

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PIPES.

Liability of abutting owners to defray expenses of laying water pipes in street, see SPECIAL AND LOCAL ASSESSMENTS, 2.

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Right to lay gas pipes in streets and highways, see GAS AND GAS COMPANIES, 7.

PISTOLS.

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PLACE.

Averment of place of larceny, see LARCENY, 5 d.

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Verification in admiralty suit, see ADMIRALTY.

1. IN GENERAL.

Necessity of pleading facts pleaded by other party. — The facts alleged by one party need not be pleaded by the other. *Maryland Casualty Co. v. Hudgins* (Tex.), 1-252.

Manner of pleading judgments. — In pleading a judgment it is not necessary to allege that the judgment remains in full force, because it is presumed to remain in full force unless the contrary appears. *Murphy v. Citizens' Bank* (Ark.), 12-535.

Alleging contradictory facts in same pleading. — Contradictory facts may be alleged in different paragraphs of either the complaint or the answer, but it is not permissible to set up a conflicting state of facts in the same paragraph. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

Necessity of pleading non est factum in action on instrument. — The execution of an instrument sued on need not be proved when no plea of *non est factum* is filed, and this is true though the paragraph of the petition alleging due execution of the instrument be denied in an answer not sworn to. *Anderson v. Blair* (Ga.), 2-165.

Objection to irrelevant or redundant matter. — A motion to strike out is a proper remedy for disposing of irrelevant or redundant matter contained in the pleading. *Tittle v. Kennedy* (S. Car.), 4-68.

Overruling plea on personal knowledge of judge. — A court cannot of its own motion overrule a plea on facts within the personal knowledge of the judge, without

evidence properly produced before the court. *Coburn v. State* (Ala.), 15-249.

Application of Indiana code to special proceedings. — The modes of procedure and rules of practice prescribed by the Indiana Civil Code in civil actions are applicable to a special statutory proceeding for the enforcement of private rights, except where the statute regulating such special proceeding prescribes a different procedure of practice. *Campbell v. Fichter* (Ind.), 11-1089.

Application of Practice Act of Baltimore City. — Where the defendant in an action brought under the Maryland statute known as the Practice Act of Baltimore City complies with the requirements of the statute, the case is governed by the ordinary rules of procedure in actions *ex contractu*. The plaintiff is not confined to the cause of action originally filed with the declaration, and he and the defendant are not bound or prejudiced by the affidavits required by the statute except in so far as the averments therein may strengthen or weaken the other testimony of the affiant. *Williar v. Nagle* (Md.), 16-982.

Verification of pleading by corporation. — The verification of a pleading of a corporation may be made by a managing or local agent thereof. *Godwin v. Carolina Tel., etc., Co.* (N. Car.), 1-203.

2. CONSTRUCTION.

Rules applicable in general. — In their general nature, the rules of interpretation and construction applicable to pleadings are the same as those pertaining to other writings and documents. *Cameron v. Hicks* (W. Va.), 17-926.

Adopting favorable construction. — Where a pleading is open to construction, that reasonable meaning which will support it should be adopted rather than one which will defeat it. *Hart v. Neillsville* (Wis.), 4-1085.

Under an objection to a complaint as not stating a cause of action, made for the first time at the trial after a witness is sworn, the complaint will be liberally construed and all reasonable inferences from the facts stated will be indulged in to sustain the pleading. *Waldner v. Bowden State Bank* (N. Dak.), 3-847.

Terms of doubtful meaning. — If terms used in a declaration signify, in the abstract, something different from what they mean when read with the context or as a part of the whole instrument, they are to be taken in the latter sense. To vitiate a pleading, on the ground of repugnancy, the conflict or inconsistency must be irreconcilable. If the intent is clear, nice exceptions are ignored. *Cameron v. Hicks* (W. Va.), 17-926.

3. COMPLAINT, DECLARATION, OR PETITION.

a. In general.

Allegation of ultimate facts essential to recovery. — A complaint for dam-

ages which charges the ultimate facts necessary to be established for recovery is sufficient. *Carscallen v. Cœur D'Alene, etc., Transp. Co. (Idaho)*, 16-544.

It is incumbent upon a complainant to allege in his bill every fact, clearly and definitely, that is necessary to entitle him to relief; and if he omits essential facts therefrom, or states such facts therein as show that he is not entitled to relief in a court of equity, he must suffer the consequences of his pleading. *McClinton v. Chapin (Fla.)*, 14-365.

Treating words descriptive of defendant as surplusage. — Where, in an action to recover compensation for the services of attorneys employed by an administratrix in a former proceeding in behalf of the estate of the deceased defendant is referred to as administratrix in the caption, and also in the body of the petition, in connection with the employment of attorneys, as the claim set up in the petition is a personal and not an official liability of the defendant, the reference to her official character should be regarded as descriptive of the person and may be rejected as surplusage, and the petition held to state a cause of action against the defendant as an individual. *Brown v. Lewiston (Kan.)*, 18-290.

Necessity of pleading demand in action ex delicto. — In actions *ex delicto* it is not necessary, as a prerequisite to a right to sue, that the plaintiff should allege a demand against the wrongdoer. *Crowe v. Charles Town (W. Va.)*, 13-1110.

Allegations not applicable to all defendants. — If there is joint liability on the part of a defendant and others, in respect to a duty, but, for some reason, disclosed by the declaration, a separate right of action against him, allegations, applicable to all, concerning the duty, and others, applicable to the defendant only, pertaining to the remedy, are neither inconsistent nor objectionable on demurrer. *Cameron v. Hicks (W. Va.)*, 17-926.

Necessity of pleading municipal ordinance not relied on as negligence but as evidence of negligence. — It is the ultimate facts constituting a cause of action, and not the evidence of such facts, which should be pleaded, and consequently, in an action to recover damages for negligence, where the violation of a municipal ordinance by the defendant does not constitute the cause of action sued upon, but is simply relied upon as evidence of negligence, such ordinance is admissible in evidence, although not pleaded. *Cragg v. Los Angeles Trust Co. (Cal.)*, 16-1061.

Pleading legal conclusions. — A statement in a complaint that on a certain day and at a certain place the defendant was indebted to the plaintiff in a certain sum, is a mere legal conclusion, which can be neither admitted by demurrer nor denied by answer. *Chesney v. Chesney (Utah)*, 14-835.

Such defective statement is not remedied by other paragraphs of the complaint stating

that a certain sum is now due and owing from the defendant to the plaintiff, but containing no allegations showing any promise, obligation, or consideration. *Chesney v. Chesney (Utah)*, 14-835.

Manner of testing sufficiency. — The sufficiency of a complaint as against a general demurrer must be tested in the light of all the facts stated and the inferences naturally arising from those facts. *Bailey v. Leishman (Utah)*, 13-1116.

b. Pleading jurisdictional facts.

Action on note purchased on attachment sale. — In an action on a promissory note purchased at a sheriff's sale in an attachment proceeding, it is not necessary to allege that the court which rendered the judgment in such proceeding had jurisdiction. It is sufficient if there is an allegation that the court is one of general jurisdiction. But where the complaint undertakes to plead the jurisdictional facts, the omission of facts necessary to give such court jurisdiction is fatal to the cause of action. *Fishburn v. Londershausen (Ore.)*, 15-975.

Where it appears from such complaint that the judgment was entered upon service by publication and not upon proceedings according to the course of the common law, the failure to allege that a copy of the summons was immediately after the publication directed to the defendant at his last known address, as required by statute, without alleging that the defendant's residence was unknown to the plaintiff in the attachment proceeding and could not by the exercise of reasonable diligence have been ascertained by him, renders the complaint insufficient to show that the court had jurisdiction to enter the judgment or to order the sale. *Fishburn v. Londershausen (Ore.)*, 15-975.

The fact that it appears from such complaint that the defendant was a nonresident of the state is not an excuse for the failure to allege the mailing of such summons, where it is not alleged that the defendant's residence was unknown and that it could not have been ascertained by the exercise of reasonable diligence. *Fishburn v. Londershausen (Ore.)*, 15-975.

c. Separate counts for one cause of action.

Right to allege in separate counts. — Although the statute provides that a petition shall contain "a statement of the facts constituting the cause of action in ordinary and concise language, without repetition," a cause of action may be stated in more than one count when it appears that such pleading may be necessary to meet the possible proofs which will, for the first time, fully appear at the trial. *Vindicator Consol. Gold Min. Co. v. Firstbrook (Colo.)*, 10-1108.

Requiring separation. — Where all the damages sought to be recovered in an action arise out of a single contract, and all the acts complained of are breaches of that contract, the petition states but one cause of

action, and a motion that plaintiff be required separately to state and number his causes of action is properly denied. *Haurigan v. Chicago, etc., R. Co.* (Neb.), 16-450.

d. Duplicity.

What constitutes. — Duplicity in a declaration consists of the joinder, in one and the same count, of different grounds of action of different natures or of the same nature, to enforce a single right of recovery. *Henry v. Heldmaier* (Ill.), 9-150.

The petition in the case at bar held not open to attack by demurrer upon the grounds that it is multifarious, and that there is a misjoinder of parties. *Andrews Co. v. National Bank* (Ga.), 12-616.

Requiring plaintiff to elect. — Where causes of action for physical suffering and for death are improperly joined, but each is sufficiently pleaded, the proper practice is to require the plaintiff to elect which cause he will pursue, and it is erroneous to permit the defendant to select the cause to be stricken out. *Sutton v. Wood* (Ky.), 8-894.

e. Reference to exhibit.

Supplying omissions by reference. — In the absence of statutory authority, the omission of essential averments from a complaint cannot be supplied by reference to an exhibit attached to and made a part of the complaint. *Chesney v. Chesney* (Utah), 14-835.

f. Curing defects in complaint.

Where only part of count objectionable. — Where the averments of a part of a count in a complaint are defective but can be stricken out and still leave a good cause of action, the proper way to meet the defect is by a motion to strike, objection to the evidence, or by requests for instructions to the jury. *Woodstock Iron Works v. Stockdale* (Ala.), 5-578.

g. Prayer for relief.

Asking more relief than entitled to. — A petition which otherwise states a cause of action is not subject to a demurrer for the reason that it seeks to recover more or other relief than that to which plaintiff is entitled. *Updegraff v. Lucas* (Kan.), 13-860.

Asking impossible relief. — Inasmuch as pleadings relate to the cause of action, either to support or defeat it, and have nothing to do with the enforcement of the judgment after it is obtained, a plea that a judgment sought to be recovered should, when recovered, be adjudged as exempt from execution, has no place in the office of pleading. *Caldwell v. Ryan* (Mo.), 14-314.

h. Manner of raising question of sufficiency.

By motion to dismiss at trial. — The defendant in an action is not required to present by demurrer or answer the question whether the complaint states facts sufficient

to constitute a cause of action, but may raise the question by a motion to dismiss made at the trial. *Kelly v. Security Mut. Life Ins. Co.* (N. Y.), 9-661.

4. ANSWER AND CROSS-BILL.

a. Answer.

(1) General denial.

What available under general denial. — Under a plea of the general issue, a defendant may interpose an objection of non-joinder of parties plaintiffs. *Lasher v. Colton* (Ill.), 8-367.

Under a general denial in a replevin action the defendant may defeat a recovery by the plaintiff by showing that it is a foreign corporation without authority to carry on business in the state, and is not entitled to maintain that or any other action in the courts of the state. *Coleman Mfg. Co. v. Johnson* (Kan.), 20-296.

(2) New matter.

Pleading facts constituting total defense as partial defense. — Where a paragraph of answer alleges facts sufficient to constitute a defense to the action, it is not insufficient because purporting to be only a partial answer. *Board of Com'rs v. Davis* (Ind.), 1-282.

Pleading contract. — An answer exhibiting a contract relied upon as a defense is insufficient if it does not set out the tenor of the contract, or allege its effect upon the plaintiff's right to relief. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.* (Ind.), 6-880.

(3) Denial on information and belief.

Matters of record. — An unexplained denial on information and belief, of a matter of record, is insufficient where the means of information concerning the matter denied are within the control of the pleader, or are readily accessible. *Dahlstrom v. Gemunder* (N. Y.), 19-771.

Result of former action to which defendant was party. — A denial of knowledge or information sufficient to form a belief as to the result of another action terminated two years previously, to which the pleader was a party, is insufficient without some explanation of the denial. *Dahlstrom v. Gemunder* (N. Y.), 19-771.

(4) Admissions.

Necessity of proving admitted facts. — Facts admitted by the answer need not be proved. *Patrick v. Kirkland* (Fla.), 12-540.

Allegations admitted by failure to deny. — An allegation that a party is the owner of real property "under a valid and legal deed of conveyance duly executed" describes no written instrument whose execution is admitted unless denied under oath. *O'Keefe v. Behrens* (Kan.), 9-867.

The failure of a party to an action to deny

under oath the execution of an administrator's deed, set up and relied upon by the opposing party, does not admit the validity of the proceedings upon which it is based. *O'Keefe v. Behrens* (Kan.), 9-867.

(5) Confession and avoidance.

Setting up matters available under general issue. — The fact that a special plea of confession and avoidance sets up defenses which would be admissible in evidence under the general issue does not make the plea bad. *Baltimore Belt R. Co. v. Sattler* (Md.), 3-660.

(6) Election of defenses.

Requiring election of consistent defenses. — In an action to enjoin the collection of taxes on cattle on the ground of payment in another county, the answer considered and held that it was error to require the defendant to elect upon which defense he would rely, the defenses not being inconsistent. *Horton v. Driskell* (Wyo.), 3-561.

(7) Striking out defense.

When defendant not prejudiced. — A defendant is not prejudiced by the rejection of his specification of defense where the court allows evidence of the allegations therein contained to be introduced under the general issue. *Worrell, etc., v. Kinnear Mfg. Co.* (Va.), 2-997.

Presumptions in determining prejudice. — In an action to enjoin the collection of taxes on cattle on the ground of payment in another county, where the defendant's answer contains several defenses, it will not be presumed in determining whether the defendant was prejudiced in being required to strike out one defense that he had no evidence to support it. *Horton v. Driskell* (Wyo.), 3-561.

(8) Supplemental answer.

Right to require. — Under the Virginia statute, where a defendant's statement of his grounds of defense is insufficient, the trial court, upon objection by the plaintiff, should require a further and sufficient statement to be filed, and if such statement is not furnished should exclude evidence of any matter not described in the grounds of defense so plainly as to give the plaintiff notice of its character. *Chestnut v. Chestnut* (Va.), 7-802.

(9) Abandonment of answer.

By subsequent demurrer. — If a party answers and afterwards demurs, he is deemed to have withdrawn or abandoned his answer. *State v. Bright* (Mo.), 20-955.

b. Cross-bill.

By mere nominal party. — A decree sustaining a demurrer to and dismissing a cross-bill is proper, where no necessity for the cross-bill is shown and the cross-complainant is a mere nominal party to the orig-

inal bill, against whom no relief is prayed and who will obtain all that he is in equity entitled to if the prayer of the original bill is granted. *Dunbar v. American Tel., etc., Co.* (Ill.), 8-57.

5. DEMURRER.

a. In general.

Form of demurrer. — Under the Montana statute a demurrer must specify an objection to the complaint, or one or more of the separate causes of action stated therein, as a whole. A demurrer merely making special objections to the particular lines or paragraphs containing allegations deemed to be immaterial or unwarranted, is insufficient. *Plymouth Gold Mining Co. v. United States Fidelity, etc., Co.* (Mont.), 10-951.

Demurrer to pleading containing one good count. — A demurrer to a whole declaration must be overruled if there is one good count. *Alvey v. Hartwig* (Md.), 14-250.

Challenging single feature of declaration. — A so-called demurrer which does not challenge the plaintiff's right to an interest in the land sought to be recovered, but goes to his right to recover a particular interest therein, and is, in effect, a motion to strike certain objectionable clauses from the petition, should be treated as such a motion, and is improperly overruled. *Frazer v. Andrews* (Iowa), 13-556.

A demurrer is not the proper method of treating a single feature of a declaration. A motion to reform or to strike, or objections to testimony in support of the objectionable feature, or a charge by the court to the jury in regard thereto, affords the appropriate remedy. *Hall v. O'Neil Turpentine Co.* (Fla.), 16-738.

b. Demurrer for misjoinder.

Where a petition contains two or more causes of action which cannot be properly united in the same action, the fact that they are blended and commingled in one statement instead of being set forth in separate counts will not deprive the defendant of the right to demur for misjoinder. *Benson v. Battey* (Kan.), 3-283.

When the allegations of a complaint are appropriate to more than one cause of action, the remedy is not by demurrer, but by motion to compel the plaintiff to elect as to the cause of action upon which he will proceed to trial. *Welborn v. Dixon* (S. Car.), 3-407.

c. Demurrer on grounds *dehors* record.

Insufficiency. — A demurrer which sets up a ground *dehors* the record, or a ground which to be sustained requires reference to facts not appearing upon the face of the pleading thus attacked, is said to be a "speaking demurrer" and is bad. *Jeffries v. Fraternal Bankers' Reserve Soc.* (Iowa), 14-346.

d. Demurrer after answer.

Interposing in District Court after trial in County Court. — Where the defendant has answered and has gone to trial in the County Court, and, after the cause is ready for trial in the District Court, interposes a general demurrer to the complaint, the demurrer should be overruled unless the complaint fails substantially to state the facts that make up the plaintiff's cause of action. *Davie v. Lloyd* (Colo.), 12-75.

In nature of objection to introduction of evidence. — A general demurrer in the form of an objection to the introduction of any evidence because the facts alleged in the complaint do not constitute a cause of action may be interposed after the jury is impaneled. *Carpenter v. Sibley* (Cal.), 15-484.

e. Effect of demurrer.

Admission of facts well pleaded. — When a petition is attacked by a general demurrer, all the facts well pleaded and all inferences of fact fairly and reasonably to be drawn from the facts pleaded must be taken as true. *American Brewing Co. v. St. Louis* (Mo.), 2-821.

A demurrer by the plaintiff to an affirmative answer interposed by the defendant admits the facts alleged in such answer. *Mendenhall v. Davis* (Wash.), 17-179.

A demurrer admits only such facts as are sufficiently pleaded. *Caywood v. Supreme Lodge* (Ind.), 17-503.

Admission of facts merely recited and not well pleaded. — Facts merely recited are not well pleaded and will not be considered in determining the sufficiency of the pleading or demurrer. *Chicago, etc., R. Co. v. Barker* (Ind.), 14-375.

Admission of allegation of fraud in general terms. — While a demurrer to the whole bill operates as an admission that all the allegations in the bill which are well pleaded are true, an allegation of fraud in general terms, without stating the facts constituting it, is insufficient, and a demurrer to the bill is not a confession of the fraud. *McClinton v. Chapin* (Fla.), 14-365.

Admission of facts unnecessarily pleaded and contrary to judicial notice. — Those allegations of a pleading which are not necessary, and which are contrary to the facts of which judicial notice is taken, are not admitted by a demurrer, but are to be treated as a nullity. *French v. Senate* (Cal.), 2-756.

f. Effect of overruling demurrer.

As precluding finding of no cause of action after evidence taken. — The overruling of a demurrer does not prevent a finding, after the evidence has been taken, that there is no cause of action. *Sporer v. McDermott* (Neb.), 5-396.

g. Effect of sustaining demurrer.

Insufficient demurrer to bad pleading impossible of amendment. — In Ala-

bama a general demurrer cannot be considered, but it is harmless error to sustain such a demurrer where it plainly appears that the pleading demurred to cannot be amended so as to make it good. *De Leon v. Walters* (Ala.), 19-914.

h. Abandonment of demurrer.

By subsequent answer. — If a party demurs and afterwards answers, he is deemed to have withdrawn or abandoned his demurrer. *State v. Bright* (Mo.), 20-955.

6. PLEAS IN ABATEMENT OR IN BAR.

In general. — Matter which is available by plea in abatement cannot be made available by plea in bar. *Clayton v. Dinwoodey* (Utah), 14-926.

Premature institution of suit as ground for plea in abatement or bar. — The premature institution of a suit may be ground for a plea in abatement, which, if interposed, has the effect of defeating or suspending the suit for the time being; but it is not ground for a plea in bar, and cannot have the effect of altogether defeating the action. *Clayton v. Dinwoodey* (Utah), 14-926.

Time for filing plea in abatement. — A defendant having a right to file a plea in abatement must avail himself of it at the first opportunity and before or at the time of pleading to the merits, and if he does not do so he waives such right. *Clayton v. Dinwoodey* (Utah), 14-926.

It is not erroneous to strike from the files a plea of nonjoinder of parties plaintiffs which was filed by the defendant after the filing of a plea of the general issue. *Lasher v. Colton* (Ill.), 8-367.

Sufficiency of plea in abatement. — There is no error in sustaining a demurrer to a plea in abatement which, instead of making certain and distinct allegations of fact, consists of conclusions of law. *Thompson v. United States* (D. C.), 12-1004.

Disposition of issue of fact raised by plea. — Where a plea to the jurisdiction raises an issue of fact, the issue is an independent one and cannot be submitted to the jury for determination in connection with other issues by a general verdict, as the plea is merely in abatement, and does not go to the merits. *Kirven v. Virginia-Carolina Chemical Co.* (U. S.), 7-219.

7. BILL OF PARTICULARS.

Time for serving. — The provisions of section 4209 [Idaho], Revised Codes, requiring the adverse party to serve an itemized statement of the account sued on, within ten days after demand therefor, are not mandatory but are directory, and vest a discretion in the trial court as to whether or not it should inflict the extreme penalty, excluding evidence of such an account, where the party has failed to serve the statement within the time required. *Miller v. Mullan* (Idaho), 19-1107.

8. REPLY.

Form of denial of new matter. — A general denial of each and every allegation of the answer except such facts as are set forth in the complaint and are admitted by the answer is a proper form of denial, if the matters so accepted are sufficiently definite and certain to make the issue plain; and if the pleading as a whole leaves it doubtful or ambiguous as to what is denied, the remedy is by motion to make definite or to strike out. *Seffert v. Northern Pacific R. Co.* (Oregon), 13-883.

What facts deemed to be denied. — There is no error in instructing the jury that affirmative matter in the defendant's answer is not denied by the reply where the complaint makes the same allegation as that set up by the answer. *Charlton v. Kelly* (U. S.), 13-518.

Manner of testing sufficiency of reply. — Where a case has been tried in a Justice's Court, and when the issues are made up for the Circuit Court it is stipulated that the plaintiff's reply shall be "considered as the reply to the answer to the amended complaint," such reply, if defective, is not a nullity and must be questioned by motion or demurrer before trial. *Seffert v. Northern Pacific R. Co.* (Oregon), 13-883.

9. AMENDMENT OF PLEADINGS.

a. In general.

Relation back to commencement of suit. — An amendment to a complaint which is not a departure from the original pleading relates back to the commencement of the suit. *Birmingham R., etc., Co. v. Jung* (Ala.), 18-557.

When power to permit amendment exists. — Under the code, the power of the court to permit the amendment of a complaint exists in all cases except where there is a failure to state a cause of action. *Kitchen v. Southern Ry.* (S. Car.), 1-747.

Striking out amendment as irrelevant and frivolous. — The question being whether certain portions of an amended answer should have been stricken out as irrelevant, frivolous, and not defensive, it was held that the court was justified in striking out the amendment, for the reason that the facts pleaded were irrelevant, and not defensive, and not a compliance with the previous order of the court requiring names and places to be stated. *Lydiard v. Daily News Co.* (Minn.), 19-985.

b. Allowance of amendment.

Discretion of court. — It is within the discretion of the trial court to refuse to permit an answer to be amended, where leave is not asked until after the defendant has closed his evidence. *Kettering v. Eastlack* (Iowa), 8-357.

Under section 144 of the Nebraska code, providing that the court may, in furtherance of justice, and on such terms as may be

proper, permit the amendment of any pleading by inserting other allegations material to the case, the whole matter of amendment is within the discretion of the trial court, and its action will be reviewed only where an abuse of discretion is apparent. *Bliss v. Beck* (Neb.), 16-366.

The allowance of an amendment on trial to obviate an objection to evidence will not be disturbed on appeal, unless it appears that the court abused its discretion and that the party complaining was prejudiced thereby. *Benson v. Oregon Short Line R. Co.* (Utah), 19-803.

The action of the trial court in permitting an amendment of the petition, by the insertion of a new allegation therein, at the close of the trial, and refusing defendant's request for a continuance, is no showing on the part of the defendant that he was surprised by the new allegation inserted in the petition or that he was not as well prepared to meet the same at that time as he could hope to be at any future time. *Bliss v. Beck* (Neb.), 16-366.

Where the issues in an action have been made up for a year or more, and the defendant has died and the conduct of the defense is in the hands of his administrator, it is no abuse of judicial discretion to refuse permission to amend. *Marks v. Hardy* (Ky.), 4-814.

The granting of leave to amend a petition by setting up a new and distinct issue is, after the introduction of evidence in the case, addressed to the discretion of the trial court, and the refusal of the request is not an error requiring the reversal of a judgment entered for defendant. *Allen v. North Des Moines M. E. Church* (Iowa), 4-257.

c. What pleadings may be amended.

Plea in abatement. — A plea in abatement not made to the jurisdiction of the court over the person of the defendant is not amendable, and where an amendment to such a plea is erroneously allowed to be filed the court should strike it from the files, on motion, rather than dispose of it on demurrer, but the action of the court in refusing to treat it as a valid plea even on demurrer will be sustained. *Spencer v. Aetna Indemnity Co.* (Ill.), 12-323.

d. What amendments may be allowed.

Setting up statute of limitations. — Refusal of leave to amend an answer so as to plead the statute of limitations will not be regarded as an abuse of discretion unless the amendment would have been in furtherance of justice; and this is not established by showing the failure of the defendant's counsel, at the time of drawing and filing the original answer, to note that the statute had shortly before been so amended that the action was barred at that time. *Rudd v. Byrnes* (Cal.), 20-124.

Altering description of property sought to be recovered. — Under a statute permitting pleadings to be amended

either in form or substance, a complaint which apprises the defendant of what lands are sought to be recovered, and relates to the only cause of action that can exist in favor of the complainant, may be amended so as to give the true description of the property. *Gensler v. Nicholas* (Mich.), 14-452.

Striking out redundant matter. — Where the averments of a declaration do not bring the case within the provision of the Michigan statute relative to the recovery of treble damages, it is not error to permit the plaintiff to amend her declaration by striking therefrom all reference to such statute, such amendment being authorized by another Michigan statute. *McIntyre v. Murphy* (Mich.), 15-802.

Setting forth new criterion of damages. — In an action for damages for the incorrect transmission of a telegram, an amendment to the petition setting forth a new criterion of damages in accordance with a decision of the highest court of the state rendered after the petition was filed, does not change the cause of action or justify the striking of such amendment from the record. *Western Union Tel. Co. v. Corso* (Ky.), 11-1065.

Changing form of action. — A complaint in forcible entry and detainer may be amended so as to change the action to one for the recovery of real property, where the plaintiff is entitled to maintain either proceeding. *Denecke v. Miller* (Ia.), 19-949.

Introducing new cause of action. — Under a statute giving a trial court power to amend pleadings "when the amendment does not change substantially the claim or defense" no amendment of a complaint can be allowed after the commencement of the action which introduces into the case a new cause of action. *Patrick v. Whitely* (Ark.), 5-672.

A new cause of action is set up by an amended statement of claim, in an action for the death of the plaintiff's intestate caused by the negligent operation of the defendant's street car, where the original statement specified the negligence as running the car at an excessive rate of speed without a headlight and without sounding the gong, in consequence of which the intestate was run over while crossing the street, while the amended statement charges that the negligence consisted in starting the car suddenly while the intestate was in the act of entering it as a passenger, whereby he was thrown to the ground and run over; and such an amendment cannot be permitted after the statute of limitations has become a bar. *Martin v. Pittsburg R. Co.* (Pa.), 19-818.

e. When amendment may be allowed.

(1) On trial.

In general. — An application for leave to amend an answer, made when the case is called for trial, may properly be denied where it is not made to appear that the proposed amendments are material and the rea-

sonable necessity thereof is not shown. *Federal Betterment Co. v. Reeves* (Kan.), 15-796.

Verification of plea. — An unverified plea of *non est factum* filed at the appearance term may be amended at the trial by allowing the defendant to swear to its averments. It is also proper at the trial term to allow an amendment to a plea to meet objections which have been pointed out by special demurrer. *Patton v. Bank of La Fayette* (Ga.), 4-639.

Amendment to conform to proof. — Under the Indiana statute authorizing a court to amend the pleadings in an action at any time to conform to the facts proved, error in an instruction construing the theory of a pleading is harmless where it amounts to nothing more than a direction to amend to conform to the proof. *Indianapolis Traction, etc., Co. v. Lawson* (U. S.), 6-666.

(2) After trial.

In general. — When necessary to a proper determination of the cause, it is not error to permit an amendment to a pleading after trial, and to reopen the case for a trial of the issues tendered by such amendment. *Brown v. Brown* (Neb.), 8-632.

On appeal. — Though the Supreme Court of North Carolina has discretionary power "to amend by making proper parties in any case," it will not exercise that power where an objection for defect of parties has been made and overruled below. *West v. Aberdeen, etc., R. Co.* (N. Car.), 6-360.

After decision on appeal. — In a proper case a plaintiff may be permitted to amend his petition after reversal of a judgment in favor of the defendant, so as to include damages sustained since the suit was filed. *Long v. Louisville, etc., R. Co.* (Ky.), 16-673.

Where, in an action to recover damages for personal injuries resulting from negligence, a judgment for the plaintiff has been reversed and a new trial awarded, the plaintiff may obtain leave to amend his complaint on the new trial so as to state more clearly the grounds of negligence relied upon and to include a ground of negligence not pleaded originally. *Denver v. Spencer* (Colo.), 7-1042.

The plaintiff having attempted to plead a cause of action under sections 624, 626 (c. 13, art. 10, §§ 134, 136) Wilson's Rev. & Ann. St. 1903, but failing to allege, under the requirements of section 626, that he was the owner of lots within the corporate limits of such city, or within such addition; he having also pleaded in his petition facts constituting a cause of action under the common law, so as to entitle him to an injunction to abate a nuisance; the trial court having modified the temporary injunction so as not to allow him all the relief prayed for, and to which he would have been entitled had he not defectively stated his cause of action under the purview of said section 624 and 626, and having appealed same to the Supreme Court of the territory of Oklahoma, where it was af-

firmed — before final trial in the lower court it was within the discretion of the trial court to permit him to amend his original petition so as to bring such cause of action, as it appears from the pleadings it was so intended, within the purview of section 626, *supra*. *Kuchler v. Weaver* (Okla.), 18-462.

10. VARIANCE.

Between writ and declaration. — Advantage of a variance between the writ and declaration can be taken by plea in abatement only and after oyer. *Snyder v. Philadelphia Co.* (W. Va.), 1-225.

Between pleading and exhibit. — Although the general rule is that in case of a variance between the allegations of a pleading and an exhibit referred to therein, the exhibit controls the general averments of the pleading for the purpose of determining the sufficiency of the latter on demurrer, it does not follow that a plaintiff should be non-suited because of such a variance, where the defendant has neither demurred to the complaint nor moved for judgment of the pleadings, but has gone to trial on the merits, without objection. In such a case the court is justified in deciding the case on the merits, and, if necessary, in considering the pleadings as amended to conform to the proof. *Clark v. Cross* (Wash.), 489.

Between pleading and proof. — Where the variance between the pleading and the facts which the pleader seeks to prove is so slight that it is obvious that the opposing party could not have been misled by it in the preparation of his case for trial, it is the duty of the court to disregard it or permit an amendment making the pleading conform to the proof offered. *Derham v. Donohue* (U. S.), 12-372.

There is not a fatal variance between a complaint alleging that the services sued for were "at the instance and request of defendant," and proof that they were rendered "with the knowledge and consent of defendant." *Butterworth v. Teals* (Wash.), 18-854.

In an action for damages, held to be no variance between the allegation and proof as to the place of the injury. *Ensley Mercantile Co. v. Otwell* (Ala.), 4-512.

The plaintiff in an action for personal injuries cannot recover, where his petition alleges that the injury occurred in consequence of a projection on the west side of the defendant's railway while the plaintiff was in a car going south, and the evidence shows that at the time of the injury he was in a car going north on the east track of the railway. *Gardner v. Metropolitan St. R. Co.* (Mo.), 18-1166.

11. WAIVER OF DEFECTS AND AID BY VERDICT OR FINDINGS.

a. In general.

Application of statute of jeofails to total want of issue. — The statute of jeofails does not cure a total want of issue.

Stony Creek Lumber Co. v. Fields (Va.), 1-242.

Failure to specify objections and subsequent admission of right of action. — The defendants having failed to particularize and specify the matters and facts supposed to constitute each separate and distinct cause of action, so that the court might act intelligently thereon, and having admitted in their answer the facts as alleged in the amended petition, entitling the plaintiff to the relief prayed for, the action of the trial court in overruling the motion to separate the different causes of action, and number same, will not be disturbed. *Kuchler v. Weaver* (Okla.), 18-462.

Rule of state courts as binding on federal courts. — The requirement of the Rev. St. of U. S. that the procedure in a federal court shall conform to the procedure of the courts of the state in which it is held, does not require a federal court to follow a rule of practice of the state courts which so operates that the error in a ruling ordering an amendment depriving the plaintiff of a substantial part of his cause of action is waived by the filing of an amended petition. *Williamson v. Liverpool, etc., Ins. Co.* (Eng.), 5-402.

b. Failure to raise objection in trial court.

Waiver of improper joinder of causes. — An objection that a complaint improperly unites causes of action for false imprisonment and malicious prosecution is waived if not raised by an appropriate pleading in the trial court. *Grimes v. Greenblatt* (Colo.), 19-608.

Waiver of objection to plaintiff's capacity to sue. — Where the defendant in an action desires to raise the question of the plaintiff's capacity to sue, he should do so, by plea in abatement or otherwise, in the trial court. It is too late to raise that question after the action has passed through the Circuit, Appellate, and Supreme Courts, and final judgment has been rendered against the defendant in the Appellate Court. Such judgment is *res judicata* of all the defenses which were or could have been interposed by the defendant, including the capacity of the plaintiff to maintain his suit. *Commercial Loan, etc., Co. v. Mallers* (Ill.), 17-224.

c. Filing new pleading.

In general. — A plaintiff who duly excepts and preserves the exception to an erroneous ruling by the trial court requiring him to amend a petition does not waive the error by filing an amended petition, where the amendment required is fatal to a substantial part of his cause of action. *Williamson v. Liverpool, etc., Ins. Co.* (Eng.), 5-402.

Where an exception to an order striking out a pleading as irregular is entered upon the record, in accordance with the New Jersey Practice Act, section 110, and the defeated party files a new pleading, he thereby

waives the error. *King v. Morris* (N. J.), 12-1086.

Filing new answer after demurrer to answer sustained. — Where, after a demurrer to an answer has been sustained, the defendant takes leave to file, and does file, an amended answer, the ruling upon the former cannot be reviewed on appeal, the filing of the amended answer being a waiver of the exception. *Papillion Times Printing Co. v. Sarpy County* (Neb.), 19-304.

Where the defendant obtains leave to file and files an amended plea, he waives the right to question the correctness of the ruling of the court in holding the former plea insufficient. *Spencer v. Aetna Indemnity Co.* (Ill.), 12-323.

Filing answer after demurrer to complaint overruled. — Where the complaint in a tort action fails to allege the place where the injury occurred, the defendant, in order to avail himself of such defect in the complaint, must rest on the court's ruling on the demurrer and refrain from pleading such facts as a defense. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

d. Aider by findings.

In absence of demurrer. — A complaint which is defective merely in the statement of the plaintiff's title to land, as distinguished from the statement of a defective title, is aided by a finding in favor of the plaintiff and therefore cannot, in the absence of a demurrer, be questioned on appeal. *Seery v. Waterbury* (Conn.), 18-73.

PLEADING GUILTY.

Plea of guilty as defense to action for false imprisonment, see FALSE IMPRISONMENT, 3.

PLEDGE AND COLLATERAL SECURITY.

1. WHAT CONSTITUTES VALID PLEDGE, 1287.
2. RIGHTS AND POWERS OF PLEDGEE, 1287.
3. LIABILITIES OF PLEDGEE, 1288.
4. RIGHTS OF PLEDGOR, 1288.
5. SALE OR ASSIGNMENT OF PLEDGED PROPERTY, 1288.

See PAWNBROKERS.

Liability of pledgee of stock as owner, see CORPORATIONS, 8 g. (2) (b).

Necessity of tender of amount due by pledgor to maintain trover against pledgee, see TROVER AND CONVERSION, 5 a.

Power of factor to pledge goods of principal, see FACTORS, 2.

1. WHAT CONSTITUTES VALID PLEDGE.

Continued possession of pledged goods by pledgor. — Where a manufacturing company in order to facilitate the bor-

rowing of money enters into an arrangement with a warehouse company by which the latter issues to the former for portions of its manufactured goods receipts which the manufacturer uses as collateral for loans, the goods being left in possession of the manufacturer and stored on premises occupied by it although in form leased by it for the warehousing company, the transaction does not create a valid pledge of the goods called for by the receipts, and the trustee in bankruptcy of the manufacturer is entitled to hold the goods as against any one claiming title under such receipts. *Security Warehousing Co. v. Hand* (U. S.), 11-789.

Purchase of draft with bill of lading attached. — A bank which purchases a negotiable sight draft to which a bill of lading covering a shipment of goods is attached, the bill being transferred as security for the collection of the draft, has constructive possession of the goods, and may hold them against all who acquire liens subsequent to such transfer. *Third Nat. Bank v. Hayes* (Tenn.), 14-1049.

Pledge of book accounts. — A pledge of a book account which will be effective as against subsequent pledgees or assignees of the pledgor cannot be accomplished merely by the delivery of a copy of the account without an assignment. *American Exch. Nat. Bank v. Federal Nat. Bank* (Pa.), 18-444.

Purchase of stock for customer by stockbroker. — Stockbrokers who purchase and hold stock for a customer occupy the relation of pledgees to him, though they advance the whole of the purchase price instead of only a percentage thereof; and a sale of the stock by the brokers without notice to the customer of the time and place of the sale constitutes a conversion, in the absence of an agreement dispensing with such notice or specifying the manner in which the stock shall be disposed of. *Content v. Banner* (N. Y.), 6-106.

2. RIGHTS AND POWERS OF PLEDGEE.

Collection of dividends on stock.

The pledgee of stock certificates with blank power of attorney to transfer has the right to collect the dividends accruing on the stock while he holds it. *Maxwell v. National Bank* (S. Car.), 3-723.

Collection of proceeds of insurance policy. — Under the California civil code the pledgee of a life insurance policy has the right to collect from the insurance company the amount of the policy when it falls due. *Puckhaber v. Henry* (Cal.), 14-844.

Foreclosure of pledged mortgage. — A mortgage on real estate which is assigned as collateral security may, upon breach of the condition of the mortgage, be foreclosed by the pledgee under the power of sale contained therein, unless prohibited by the terms of the pledge. *Union Trust Co. v. Hasseltine* (Mass.), 16-123.

If authorized by the power of the mortgage, such pledgee may purchase the property to prevent it from being sacrificed at the auction sale, but, unless expressly authorized to

purchase by the terms of the pledge, the pledgee takes the title as trustee for the pledgor, the property being subject to redemption by the latter upon payment of the debt. The pledgee has consequently no right to resell such property without regard to the pledgor's interests. *Union Trust Co. v. Haseltine* (Mass.), 16-123.

Maintenance of action to preserve assets of corporation. — A pledgee of stock has the right to maintain an action and to invoke the application of appropriate equitable remedies to preserve the assets of the corporation and to prevent such assets from passing out of the hands of the corporation under the terms of a sale which is the result of a "combination and confederation" to destroy the value of the stock of the corporation, and is a fraud on the rights of the pledgee. *Andrews Co. v. National Bank* (Ga.), 12-616.

Effect of bar of statute of limitations against debt secured. — Where an insurance policy is transferred as a security for debt, the fact that a remedy on the latter is barred does not destroy the debt itself, or prevent the holder of the collateral from enforcing her rights thereunder. *Conway v. Caswell* (Ga.), 2-269.

Where a policy of insurance is transferred as a security for debt, the fact that a personal judgment against the debtor has become barred does not render dormant that part of the decree declaring that the creditor holds a valid legal title to the property to the extent specified. *Conway v. Caswell* (Ga.), 2-269.

3. LIABILITIES OF PLEDGEE.

Depreciation in value of pledge. — The pledgee of stock pledged as collateral security for the payment of a note is not liable for depreciation in its value resulting from his failure to sell it at the maturity of the note, where sale at maturity was neither required by the contract nor requested by the maker of the note. *Lake v. Little Rock Trust Co.* (Ark.), 7-394.

Wrongful sale of pledge. — Evidence reviewed in an action brought by the maker of a promissory note against the holder thereof to recover damages as for a conversion for the wrongful sale of bonds pledged as collateral security for the payment of the note, and held to show that the plaintiff is not entitled to recover. *Farmers National Bank v. Venner* (Mass.), 7-690.

Sale of pledge after tender of debt. — A creditor who, holding collateral security, refuses to accept the amount due him, duly tendered by the debtor, and proceeds to collect or realize on the security, is liable for the damage thereby caused the debtor. *Desgrosellers v. Anderson* (Can.), 18-718.

4. RIGHTS OF PLEDGOR.

Recovery of pledge where debt barred by limitation. — Although under the California civil code providing that the lien of a pledge is extinguished by the lapse

of time within which an action can be brought upon the principal obligation, the pledgee cannot, after the debt is barred by the statute of limitations, take affirmative action to enforce his lien, the pledgor will not be aided in the recovery of the possession of his property from the pledgee without paying his debt. *Puckhaber v. Henry* (Cal.), 14-844.

5. SALE OR ASSIGNMENT OF PLEDGED PROPERTY.

Validity of private sale. — The private sale of a bond pledged as security for a promissory note held to be invalid. *Toronto Gen. Trusts Corp. v. Cent. Ontario R. Co.* (Ont.), 4-1163.

Purchase by pledgee at sale. — A sale of collateral pledged as security for the payment of a promissory note is not invalidated by the fact that the pledgee purchases at the sale, where the note expressly provides that he may so purchase. *Farmers National Bank v. Venner* (Mass.), 7-690.

Inadequacy of price as invalidating sale. — Mere inadequacy of price is not of itself sufficient for setting aside a sale of collateral pledged as security for the payment of a promissory note. *Farmers National Bank v. Venner* (Mass.), 7-690.

Sale without proper notice. — Where stockbrokers hold as pledgees stock purchased by them for a customer, a notice to the customer that the stock will be sold in certain contingencies, which notice is indefinite as to time and does not specify the place of the sale, is insufficient; and a sale of the stock "on the curb" pursuant to such notice constitutes a conversion. *Content v. Banner* (N. Y.), 6-106.

Liability of assignee for dividends collected by pledgee after assignment. — Where the pledgee of a stock certificate with blank power of attorney to transfer assigns the same as security to one with notice of the pledge, the assignee is not liable to the pledgor for dividends collected by the pledgee after the assignment. *Maxwell v. National Bank* (S. Car.), 3-723.

PLOVER.

See GAME AND GAME LAWS.

PLUMBERS.

Licensing plumbers, see LICENSES, 5; MUNICIPAL CORPORATIONS, 5 f (2).

POISONS.

Homicide perpetrated by means of poison, see HOMICIDE, 3 c.

Liability for negligent sale of poisons, see DRUGS AND DRUGGISTS.

Poisoning animals as a crime, see ANIMALS, 3 c.

POLES.

See TELEGRAPHS AND TELEPHONES, 10.
Erection of poles in street as additional burden, see EMINENT DOMAIN, 6.

POLICEMEN.

Admissibility of confessions to police officers, see CRIMINAL LAW, 6 n (11) (b) (bb).
Liability of municipality for torts of policemen, see MUNICIPAL CORPORATIONS, 9 c.

POLICE POWER.

See CONSTITUTIONAL LAW, 5.
Abdication of police power by contract, see MUNICIPAL CORPORATIONS, 7 b.
Exercise of police power by municipalities, see MUNICIPAL CORPORATIONS, 4.
Laws for prevention of cruelty to animals, see ANIMALS, 5.
Penalty for conducting business by insolvent bank, see BANKS AND BANKING, 7.
Power of states to regulate state commerce, see INTERSTATE COMMERCE, 2 b (1).
Regulation of automobiles, see MOTOR VEHICLES, 1 b.
Regulation of keeping and selling of articles of food, see FOOD.
Validity of license laws, see HAWKERS AND PEDDLERS, 3.

POLICE REGULATIONS.

Liability of carrier for goods seized under police regulations, see CARRIERS, 4 b (1).
Operation on street railways, see STREET RAILWAYS, 6.

POLICE SURVEILLANCE.

Cruel and unusual punishment, see CRIMINAL LAW, 7 c (1).
Injunction against, see INJUNCTIONS, 2 a.

POLICY.

Insurance policies, see INSURANCE.

POLITICAL BIAS.

Disqualification of judge, see JUDGES, 4 c.

POLITICAL CONDUCT.

Charging participation in foreign revolution as libel, see LIBEL AND SLANDER, 2 a.

POLITICAL PARTIES.

See ELECTIONS, 1 c.

POLITICAL RIGHTS.

Protection in equity, see EQUITY, 2 f.

POLL BOOKS.

Right to inspect, see RECORDS, 7.

POLLING PLACES.

See ELECTIONS.

POLLS.

See ELECTIONS.

POLL TAXES.

See TAXATION.

POLLUTION.

Of water, see WATERS AND WATERCOURSES, 3 b (5).

PONDS.

See WATERS AND WATERCOURSES.
Use of water of ponds for irrigation, see IRRIGATION.

POOL.

See GAMING AND GAMING HOUSES.

POOL ROOMS.

Power of municipality to prohibit pool rooms, see MUNICIPAL CORPORATIONS, 4 d (3).

POOLS.

Labor combinations as pools and trusts, see LABOR COMBINATIONS, 1 a.

POOR AND POOR LAWS.

Who are poor persons. — It is a question for the jury whether a family of three, having a little property and some credit, but all ill with typhoid fever, are poor persons within a statute providing that every town shall "relieve all poor and indigent persons." *Coffeen v. Preble* (Wis.), 20-753.

Loss of settlement rights by pauper. — The settlement rights of a pauper are not affected by his absence in another town while undergoing a term of imprisonment. *Whately v. Hatfield* (Mass.), 13-690.

A pauper who has acquired settlement in a parish does not lose his settlement upon a division of the parish into more than one parish. *West Ham Union v. Edmonton Union* (Eng.), 10-29.

Recovery for maintenance of pauper.

— No right of recovery exists in a municipality for the maintenance of an inmate of an almshouse where no exceptional expenses have been incurred, no accounts kept with the inmate, and the latter has rendered services equal in value to the cost of the support. *Taunton v. Talbot* (Mass.), 1-34.

Liability for services of pauper.

— No cause of action lies against a city maintaining an almshouse for services rendered by an inmate. *Taunton v. Talbot* (Mass.), 1-34.

Liability of officers of almshouse for injuries to pauper.

— Liability of guardians of poor for injury to a pauper inmate of the workhouse resulting from the negligence of fellow workers. *Tozeland v. West Ham Union* (Eng.), 4-475.

POOR HOUSE.

See POOR AND POOR LAWS.

POSSESSION.

Actual possession of property, see PROPERTY. Agent's possession of evidence of debt, effect of, see AGENCY, 3 a (2).

Effect of retention of possession by seller, see FRAUDULENT CONVEYANCES, 1 a.

Having game in possession during close season, see GAME AND GAME LAWS, 4.

Necessity to support replevin, see REPLEVIN, 2.

Necessity to sustain action to quiet title, see QUIETING TITLE—REMOVAL OF CLOUD, 1.

Presumption of payment from possession of evidence of debt, see PAYMENT, 2 b.

Right of salvors to exclusive possession, see SALVAGE.

Right to possession of demised premises, see LANDLORD AND TENANT, 5.

Right to take possession of public office by force, see PUBLIC OFFICERS, 5 a.

Taking possession of land as part performance of contract of sale, see FRAUDS, STATUTE OF, 1 d (2).

Transfer of possession of goods sold under verbal contract, see FRAUDS, STATUTE OF, 9 b.

POSSESSION OF STOLEN GOODS.

See LARCENY, 6 a.

Evidence in burglary cases, see BURGLARY, 4.

POSSESSORY ACTIONS.

See EJECTMENT.

Right to jury trial, see JURY, 1 c.

POSTAL CLERKS.

See POST OFFICE.

Railway postal clerk as passenger, see CARRIERS, 6 d (13).

POSTAL LAWS.

See POST OFFICE.

POST OFFICE.

Criminal liability for sending obscene matter through the mails, see OBSCENITY.

Embezzlement by postal clerk, see EMBEZZLEMENT, 5 a.

Power of Congress to establish post offices and post roads, see CONSTITUTIONAL LAW, 7.

Sending libelous letter through mail as publication, see LIBEL AND SLANDER, 1 a.

Service of process by mail, see SUMMONS AND PROCESS, 2.

Liability of sureties of postmaster for acts directed by superior officers.

— In an action on the official bond of a postmaster to recover for an alleged breach thereof by the postmaster in paying salary to a clerk in his office who had in fact performed no services as clerk therein, it is a complete defense to show that the clerk in question was appointed, and his salary paid, in obedience to directions given to the postmaster by his superior officers in the post-office department, and that the postmaster was innocent of any collusion or intent to defraud the government in making the payment. If the government has any remedy in such a case, it is against the clerk receiving the money, and not against the postmaster or the sureties on his bond. *United States v. Warfield* (U. S.), 17-1186.

In such a case, the postmaster and his sureties cannot be held liable on the theory that the conduct of the post office officials, in directing the appointment of the clerk and the payment of his salary, was improper, and that the postmaster should have disobeyed such directions for that reason. Such disobedience on the part of the postmaster would justify his removal from office for insubordination. *United States v. Warfield* (U. S.), 17-1186.

In such a case, evidence tending to show that the postmaster assumed that the clerk in question was performing duties in the post-office department in Washington, in violation of statute, is not sufficient to render him liable, where his testimony as a whole shows that he had no knowledge on that point. *United States v. Warfield* (U. S.), 17-1186.

Nature of pay granted to disabled postal clerks. — Under the United States postal laws and regulations providing that a report shall be made to the division superintendent of the condition of any railway postal clerk who shall be disabled by a railroad accident, while in the discharge of his duties, and that the division superintendent shall forward the report, "with his recommendation, to the general superintendent of the railway mail service, who will submit the matter to the postmaster-general, who may, in his judgment, the facts justifying such action," grant the disabled clerk pay during certain periods of absence, the pay so granted is simply a gratuity and not a part of the contract of employment. *Illinois Central R. Co. v. Porter* (Tenn.), 10-789.

Delivery of disputed mail matter. —

While in a certain sense it is true that the benefit of one's legal name belongs to every party, individual, or corporation, still the legal name of a corporation is not absolutely conclusive in determining the question of ownership of mail matter as between corporations having closely similar names, since the strictly legal name of a corporation may not be the name by which it is customarily known or addressed. In determining the ownership of disputed mail matter the object is, and must be, to deliver the mail matter to the party for whom it is intended, and it may often be necessary to look beyond the exact legal name in order to arrive at a correct determination. *Central Trust Co. v. Central Trust Co. (U. S.), 17-1066.*

The court will not, at the suit of a foreign corporation doing business in the city of Chicago under the name "Central Trust Company," set aside an order of the first assistant postmaster-general directing the postmaster at Chicago to deliver all mail matter addressed simply to "Central Trust Co., Chicago, Ill.," without the addition of the street, box, or other designation, to an Illinois corporation doing business in the same city under the name "Central Trust Company of Illinois," and restrains the Illinois corporation from receiving and the postmaster from delivering such mail matter in accordance with the order, upon proof merely that the complainant was conducting its business in the city of Chicago, and had its name in the city directory, several years prior to the organization of the defendant corporation, and that the legal name of the latter corporation is not simply "Central Trust Company," but "Central Trust Company of Illinois." *Central Trust Co. v. Central Trust Co. (U. S.), 17-1066.*

Findings of fact by officers in charge of the several departments of government are conclusive unless palpable error appears; and assuming that the courts have power to review orders of the first assistant postmaster-general regarding the delivery of mail matter, the ownership of which is in dispute between corporations or individuals having similar names, the power will not be exercised unless the order complained of is clearly shown to be erroneous. *Central Trust Co. v. Central Trust Co. (U. S.), 17-1066.*

Indictment for using mails to defraud. — An indictment for using the mails to defraud, which definitely and completely avers the nature of the fraudulent scheme and the means by which it was carried out, and which clearly states the ultimate facts, is not vitiated by defective averments as to particular matters which are not essential. *Hibbard v. U. S. (U. S.), 18-1040.*

Presumption of intent to defraud from unlawful acts. — On a trial for using the mails with intent to defraud, the fact that the scheme in the execution of which the defendant used the mails is fraudulent in its operation is a fact from which the intent of the defendant may be inferred; but the defendant is nevertheless entitled to the benefit of the presumption in favor of innocence, and

therefore it is error for the court to charge that an intent to defraud may be inferred from an unlawful act, knowingly committed, which results in loss or injury. *Hibbard v. U. S. (U. S.), 18-1040.*

Evidence in prosecution for using mails to defraud. — On a trial for using the mails to defraud by soliciting applications for medical treatment, the applications and correspondence relating thereto, though hearsay as to the facts stated, are admissible as original evidence in the nature of *res gestæ* to show the treatment and course of business, and thus disprove the charge of fraud in the scheme as executed by the defendant. *Hibbard v. U. S. (U. S.), 18-1040.*

Theft of decoy letter as theft of "post letter" within postal laws. — A decoy letter held to be a "post letter" within the meaning of a statute making it an offense to steal post letters. *Rex v. Ryan (Ont.), 4-875.*

Admissibility of confession to superior officer in prosecution for theft of letter. — In the prosecution of a letter carrier for stealing a decoy letter, evidence of a confession made by the defendant to his superior officer held admissible in evidence. *Rex v. Ryan (Ont.), 4-875.*

POSTPONEMENT.

See CONTINUANCES.

POULTRY.

Regulation of keeping of poultry within municipal limits, see MUNICIPAL CORPORATIONS, 4 d (3).

POVERTY.

False representations as to poverty, see FALSE PRETENSES AND CHEATS, 1 b.

POWDER.

See EXPLOSIONS AND EXPLOSIVES.

POWER.

Right of railroad to use electricity for motive power, see RAILROADS, 5 a.

POWER HOUSE.

Electric power house as nuisance, see NUISANCES, 1 b.

POWER OF ATTORNEY.

Effect of partial cancellation, see AGENCY, 1 b.

POWER OF SALE MORTGAGES.

See MORTGAGES AND DEEDS OF TRUST.

POWERS.

Aider of defective execution of statutory powers, see REFORMATION OF INSTRUMENTS.

Right of donee of power to appoint upon condition. — A person having the power to divide and distribute real property among certain people by appointment may exercise the power by appointing real property to one object of the power upon condition of payment of a certain sum to other objects. *Monjo v. Woodhouse* (N. Y.), 7-135.

Right of donee to appoint lesser estate. — Under a general power to appoint an estate in fee, the donee may appoint a lesser or qualified estate in the property. *Mays v. Beech* (Tenn.), 4-1189.

Right of donee of power to dispose of fee to mortgage. — Where a life tenant is vested with "full power and authority to dispose of the absolute estate in fee simple," and the instrument creating the power prescribes no special mode of exercising it, the power is a general power of appointment and may be executed by a mortgage, which will be operative to the extent of the interest of the mortgagor. *Grace v. Perry* (Mo.), 7-948.

Validity of appointment of life estate with power to appoint under power to appoint fee. — Where the donee under a general power to appoint an estate in fee appoints for life by will, and by the same instrument confers upon the donee the power to appoint in fee by his will, the second power is valid, as it is not a delegation of the first power but is a distinct and original power appurtenant to the life estate. *Mays v. Beech* (Tenn.), 4-1189.

Construction of will containing execution of power. — Where the donee under a general power to appoint real property in fee executes a will devising the income and profits of such property to her husband for his life and also vests him with the power to dispose of such property absolutely by will, the husband takes a life estate in the property itself, with the power to dispose of the fee by his will. *Mays v. Beech* (Tenn.), 4-1189.

Validity of appointment under will. — Where the donee of a power to appoint real property appoints by will to one object of the power subject to a charge in favor of other objects, the charge is not rendered invalid by a provision in the will that the sum charged shall be paid to the donee's executor as part of her residuary estate, if the will discloses an intention that such sum shall be held by the executor merely for the purpose of distribution among the persons designated by the donee as beneficiaries under the appointment. *Monjo v. Woodhouse* (N. Y.), 7-135.

Sufficiency of execution of power. — Where a life tenant who is vested with

power to dispose of the absolute estate in fee simple executes the power, a recital in his deed, given for a valuable consideration, that he conveys the "absolute estate in fee simple" sufficiently indicates that the deed is made in execution of the power, and therefore the deed, though it makes no reference to the power, conveys the fee to the property. *Grace v. Perry* (Mo.), 7-948.

Where a person has the income of property for life with a power of disposing of the principal by deed or by will, or by will alone, a residuary bequest or devise by him of his personal or of his real property is to be construed as an exercise of the power. *Howland v. Parker* (Mass.), 16-201.

Duty of purchaser from donee of power to see to application of purchase money. — A purchaser in good faith from a life tenant invested with discretionary power to sell for reinvestment is not bound to see that the reinvestment is in fact made. *Whitfield v. Burke* (Miss.), 4-370.

PRACTICAL CONSTRUCTION.

See CONTRACTS, 3 a; STATUTES, 4 g.

PRACTICE OF DENTISTRY.

See PHYSICIANS AND SURGEONS, 1 b.

PRACTICE OF MEDICINE.

See PHYSICIANS AND SURGEONS.

Criminal liability for practicing medicine in violation of law, see PHYSICIANS AND SURGEONS, 3.

Right of corporation to practice medicine, see CORPORATIONS, 4 a.

Treatment of one's self without physician's license, see PHYSICIANS AND SURGEONS, 3.

PRACTICE OF LAW.

See ATTORNEYS AT LAW, 2 g.

Right of corporation to practice law, see CORPORATIONS, 4 a; EQUITY, 3.

PRAYERS FOR RELIEF.

See PLEADING, 3 g.

Granting relief not within prayer of complaint as ground for collateral attack on judgment, see JUDGMENTS, 10.

PREAMBLE.

Construction and effect of preamble of constitution. see CONSTITUTIONAL LAW, 1.

PRECEDENTS.

See **STARE DECISIS**.

Absence of precedent as barring right to sue,
see **ACTIONS**, 1.

English decisions as evidence of common law,
see **STARE DECISIS**.

PREFERENCES.

Preference of claims of laborers, see **INSOLVENCY**.

Prohibition of preferences by interstate commerce act, see **CARRIERS**, 2 c.

Voidable preferences by bankrupt, see **BANKRUPTCY**, 10.

PREFERRED DIVIDEND INSURANCE.

See **INSURANCE**, 1 a.

PREFERRED STOCK.

See **CORPORATIONS**, 8.

PREJUDICE.

Appeal by counsel to prejudices of jury, see **TRIAL**, 4 b (5).

As affecting right to appeal, see **APPEAL AND ERROR**, 5 a.

Disqualification of judge by prejudice, see **JUDGES**, 4 c.

Disqualification of jurors by prejudice, see **JURY**, 5 b.

Effect of rulings in case dismissed without prejudice, see **JUDGMENTS**, 6 c.

Ground for change of venue, see **CHANGE OF VENUE**, 1 d.

Ground for reversal on appeal, see **APPEAL AND ERROR**, 15 b.

Ground for removing cause to federal court, see **REMOVAL OF CAUSES**, 3 c.

Presumption of prejudice from excluding public from criminal trial, see **CRIMINAL LAW**, 6 c (2).

Right to subrogation as affected by prejudice to third persons, see **SUBROGATION**, 3 a.

PRELIMINARY EXAMINATION.

See **CRIMINAL LAW**, 4.

Competency of admissions at preliminary examination, see **CRIMINAL LAW**, 6 n (11) (a).

Effect of silence of preliminary examination as evidence of guilt, see **CRIMINAL LAW**, 6 n (11) (a).

Right to file information after preliminary examination, see **INDICTMENTS AND INFORMATION**, 2.

Right to habeas corpus before preliminary examination, see **HABEAS CORPUS**, 1.

PRELIMINARY INJUNCTION.

See **INJUNCTIONS**, 4.

Restraining nuisances, see **NUISANCES**, 6 b (4).

PRELIMINARY PROOF.

Absence of witness, see **DEPOSITIONS**, 8.

PREMATURE SUITS.

See **ACTIONS**.

Ground for plea in abatement, see **PLEADING**, 6.

PREMIUMS.

Cancelling policy for non-payment, see **INSURANCE**, 3 e.

Liability of life tenant for premium on investments, see **LIFE ESTATES**, 2 a.

Power of insurance agent to settle claims for premiums, see **INSURANCE**, 2 b.

PREPARATION FOR TRIAL.

Time to prepare for trial, see **CRIMINAL LAW**, 6 c (3).

PREPAYMENT.

Requiring prepayment of jury fees as denial of right to jury trial, see **JURY**, 1 f.

PREROGATIVES.

State officers, see **STATES**.

PRESCRIPTION.

See **ADVERSE POSSESSION; LIMITATION OF ACTIONS**.

Acquisition of title by thief by lapse of time, see **LARCENY**, 9.

Aider of void marriage, see **MARRIAGE**, 1 b.

Creation of easement, see **EASEMENTS**, 1 b.

Division of watercourse, see **WATERS AND WATERCOURSES**, 3 a.

Establishment of private way by prescription, see **PRIVATE WAYS**.

Highways by prescription, see **STREETS AND HIGHWAYS**, 2 b.

Prescriptive right to divert water, see **WATERS AND WATERCOURSES**, 3 b (3).

Prescriptive right to maintain dam, see **WATERS AND WATERCOURSES**, 3 b (4).

Prescriptive right to maintain nuisance, see **NUISANCES**, 4 a.

Prescriptive right to pollute stream, see **WATERS AND WATERCOURSES**, 3 b (5).

Prescriptive right to use of walls, see **PARTY WALLS**, 2.

PRESCRIPTIONS.

See **DRUGS AND DRUGGISTS.**

PRESENCE OF ACCUSED.

Defendant's presence in court as essential to validity of sentence, see **CRIMINAL LAW**, 7 b (4).
 Necessity of defendant's presence at rendition of verdict in criminal cases, see **CRIMINAL LAW**, 6 r (6).
 Right to be present during trial, see **CRIMINAL LAW**, 6 c (4).

PRESENTMENT.

Presenting note for payment, see **BILLS AND NOTES**, 8.

PRESIDENT.

Powers of bank president, see **BANKS AND BANKING**, 3 a.
 Powers of president of corporation, see **CORPORATIONS**, 7 b.

PRESS, LIBERTY OF.

See **CONSTITUTIONAL LAW**, 17.

PRESUMPTIONS.

See **EVIDENCE**, 16.

PRETENSES.

False pretenses, see **FALSE PRETENSES AND CHEATS.**

PREVENTING EXERCISE OF TRADE OR CALLING.

See **CONSPIRACY**, 1 a.

PREVENTIVE RELIEF.

See **INJUNCTIONS**, 1 b.

PRICE.

Combination to regulate and fix prices, see **CONSPIRACY; MONOPOLIES AND CORPORATE TRUSTS.**
 Failure to pay price of goods sold as ground for rescission, see **SALES**, 5 a.
 Inadequacy of price as ground for setting aside judicial sale, see **JUDICIAL SALES**, 2 c.
 Tender of price as prerequisite to specific performance, see **SPECIFIC PERFORMANCE**, 3 f (6).

Recovery of price of goods sold, see **SALES**, 5 c.
 Regulation of price of articles of food, see **FOOD.**

PRIESTS.

Privileged communications with parishioners see **WITNESSES**, 3 d (3).

PRIMARY.

See **ELECTIONS.**

PRINCIPAL.

Participant in crime, see **ACCESSORIES AND OTHER PARTICIPANTS IN CRIME.**

PRINCIPAL AND AGENT.

See **AGENCY.**

PRINCIPAL AND SURETY.

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PRINTING.

Instrument partly printed as holographic will, see **WILLS**, 3 f.
 Name of foreman of grand jury printed on indictment, see **CRIMINAL LAW**, 6 j (1).
 Printed matter as writing, see **WILLS**, 2.
 Printing establishment as nuisance, see **NUISANCES**, 1 b.

PRIOR ACTS.

Admissibility of evidence of prior acts, see **INCEST**, 4 b.

PRIOR CONVICTION.

Admissibility in evidence, see **CRIMINAL LAW**, 6 n (5).

PRIOR JEOPARDY.

See **JEOPARDY.**

PRIOR USE.

Defense to injunction against disorderly house, see **DISORDERLY HOUSES.**

PRIORITY.

Assignments, see **ASSIGNMENTS**, 2 b.
 Claimants in garnishment proceedings, see **GARNISHMENT**, 6.
 Claims of laborers, see **INSOLVENCY.**
 Claims of state, see **STATES**, 8.

Judgment creditors, see JUDGMENTS, 5 b.
 Lien claimants, see MECHANICS' LIENS, 8.
 Location of right of way by rival railroad companies, see RAILROADS, 2 c (1).
 Payment of legacies, see WILLS, 10 d (2).

PRISONERS.

See CONVICTS; PRISONS.

Arrest of escaped prisoner without warrant, see ARREST, 2 a.

Escape of prisoners, see ESCAPE, PRISON BREAKING, AND RESCUE.

Taking testimony of prisoners, see DEPOSITIONS, 2.

PRISONS.

See CONVICTS; ESCAPE, PRISON BREAKING, AND RESCUE.

Condition of jail as element of damage for false imprisonment, see FALSE IMPRISONMENT, 6.

Liability of municipality for injuries caused by defective condition of jail or lock-up, see MUNICIPAL CORPORATIONS, 9 a.

Proof of participation in prison breach, see ACCOMPLICES.

Testimony of witness in foreign prison, see DEPOSITIONS, 2.

Power of warden to inflict corporal punishment on convict. — A warden in charge of convicts working on a county chain-gang has no authority to administer corporal punishment to a convict, except such as may be reasonably necessary to compel the convict to work or labor in the execution of his sentence or to maintain proper discipline. *Westbrook v. State* (Ga.), 18-295.

Unauthorized corporal punishment as assault. — Corporal punishment of a convict by a warden, administered where the circumstances are not of a character sufficient to authorize such punishment, is an assault. *Westbrook v. State* (Ga.), 18-295.

Convict assisting warden in inflicting punishment on fellow-convict as abettor. — Where a warden attempts to administer corporal punishment to a convict under circumstances where the attempt amounts to an assault, and calls upon another convict to assist in administering the punishment, and the latter (in rendering such assistance) exercises some force against the convict sought to be punished, tending to overcome him and put him in the power of the warden, it is for the jury to say with what intent the force was exercised and whether such other convict is an abettor of the warden. *Westbrook v. State* (Ga.), 18-295.

PRIVACY, RIGHT OF.

Protection of right of privacy, see INJUNCTIONS, 2 b.

Existence of right. — The right of privacy is derived from natural law, recognized by municipal law, and its existence can be inferred from expressions used by commenta-

tors and writers on the law as well as by judges in decided cases. *Pavesich v. New England Mut. L. Ins. Co.* (Ga.), 2-561.

The right of property is embraced within the absolute rights of personal security and personal liberty. *Pavesich v. New England Mut. L. Ins. Co.* (Ga.), 2-561.

There is no such right known to the common law as a right of privacy for the invasion of which an action for damages lies. *Henry v. Cherry* (R. I.), 18-1006.

Liberty of speech and press as limitation on right. — Liberty of speech and of the press are limitations upon the exercise of the right of privacy. The law will not permit the right of privacy to be asserted so as to curtail or restrain such liberties. *Pavesich v. New England Mut. L. Ins. Co.* (Ga.), 2-561.

Waiver of right in general. — The right of privacy may be waived either expressly or by implication, except as to those matters which law or public policy demands shall be kept private; but a waiver authorizes an invasion of the right only to such an extent as is necessarily to be inferred from the purpose for which the waiver is made. A waiver for one purpose and in favor of one person or class does not authorize an invasion for all purposes or by all persons and classes. *Pavesich v. New England Mut. L. Ins. Co.* (Ga.), 2-561.

Waiver of right by public officer or candidate for office. — One who seeks public office, or any person who claims from the public approval or patronage, waives his right of privacy to such an extent that he cannot restrain or impede the public in any proper investigation into the conduct of his private life which may throw light upon the question as to whether the public should bestow upon him the office which he seeks, or accord to him the approval or patronage which he asks. The holder of public office makes a waiver of a similar nature and subjects his life at all times to closest scrutiny, in order that it may be determined whether the rights of the public are safe in his hands. *Pavesich v. New England Mut. L. Ins. Co.* (Ga.), 2-561.

Unauthorized publication of photograph of person in advertisement as violation of right. — The publication of a picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business, is a violation of the right of privacy, and a recovery may be had without proof of special damage. Such a publication is not an exercise of liberty of speech or of the press. *Pavesich v. New England Mut. L. Ins. Co.* (Ga.), 2-561.

The unwarrantable publication of a person's photograph for advertising purposes is not actionable at common law where the only injury alleged is mental suffering. *Henry v. Cherry* (R. I.), 18-1006.

PRIVATE ASYLUMS.

See HOSPITALS AND ASYLUMS, 2.

PRIVATE BANKING.

See **BANKS AND BANKING**, 2.

PRIVATE CORPORATIONS.

See **CORPORATIONS**, 1 a.

PRIVATE DOCUMENTS.

Admissibility in evidence, see **EVIDENCE**, 9 b.

PRIVATE FUNCTIONS.

Liability of municipality for acts done in exercise of private functions, see **MUNICIPAL CORPORATIONS**, 9 b.

PRIVATE HOSPITALS.

See **HOSPITALS AND ASYLUMS**, 2.

PRIVATE INTERNATIONAL LAW.

See **CONFLICT OF LAWS**.

PRIVATE NUISANCES.

See **NUISANCES**, 2.

PRIVATE RAILROADS.

Condemnation of right of way, see **EMINENT DOMAIN**, 4 b.

PRIVATE SWITCHES.

Requiring railroads to construct private switches, see **RAILROADS**, 3 a (2).

PRIVATE USE.

Condemnation of private property, see **EMINENT DOMAIN**, 4.

PRIVATE WAYS.

Compensation for destruction by condemnation proceeding, see **EMINENT DOMAIN**, 4 b.

Effect as boundaries, see **BOUNDARIES**, 1.

Establishment by local custom. — In Connecticut a personal right of way or other easement resting on a local custom is not recognized. *Graham v. Walker* (Conn.), 3-641.

Establishment by prescription. — Where persons claiming a right of way appurtenant by prescription have had title to

the dominant tenement for seven years only they must, to make out a prescriptive right, tack the user by their predecessors in title. *Graham v. Walker* (Conn.), 3-641.

An adjoining landowner who claims the right by prescription to use a private passway must show continuous adverse user by himself, or by himself and grantor, for at least fifteen years. *Riley v. Buchanan* (Ky.), 3-788.

What constitutes way appurtenant.

— A right of way may be a way appurtenant though it stops at a public highway bounding the servient tenement, the dominant tenement being on the opposite side of the highway some distance away, and the way itself being made accessible to the dominant tenement only by the highway. But a direct connection between the use of the alleged dominant tenement and the use of the way sufficient to bring the latter within the definition of a way appurtenant must be shown to the satisfaction of the jury. *Graham v. Walker* (Conn.), 3-641.

Ownership of fee. — The owner of land by opening a private passway over it and building houses fronting on the passway does not part with any portion of the fee of the soil. *Seery v. Waterbury* (Conn.), 18-73.

PRIVILEGE.

Exclusive privileges of collecting and removing garbage, see **HEALTH**, 2 a (2).

Personal privilege of witnesses, see **DISCOVERY**; **WITNESSES**, 4 g.

Privileges of extradited persons, see **EXTRA-DITION**, 5.

Publication of court proceedings, see **OBSCENITY**.

PRIVILEGED COMMUNICATIONS.

See **EVIDENCE**, 17; **LIBEL AND SLANDER**, 3; **WITNESSES**, 3 d.

PRIVILEGES AND IMMUNITIES.

See **CONSTITUTIONAL LAW**, 16.

PRIVILEGE TAXES.

See **LICENSES**.

Licensing dentists, see **PHYSICIANS AND SURGEONS**, 1 b.

Licensing hawkers and peddlers, see **HAWKERS AND PEDDLERS**.

Licensing physicians, see **PHYSICIANS AND SURGEONS**, 1 a.

PRIVITY.

Persons in privity with parties as concluded by judgment, see **JUDGMENTS**, 6 a (2).

PRIVY EXAMINATION.

See **ACKNOWLEDGMENTS.**

PRIZE.

Distribution by chance, see **LOTTERIES.**
 Playing game for prizes, see **GAMING AND GAMING HOUSES, 1 a.**

PROBABLE CAUSE.

See **FALSE IMPRISONMENT, 1; MALICIOUS PROSECUTION.**

Necessity of proving want of probable cause in action for malicious abuse of process, see **ABUSE OF PROCESS.**

PROBATE.

See **WILLS, 7.**

PROBATE COURTS.

See **COURTS, 2 c (2).**
 Collateral attack on orders and decrees, see **JUDGMENTS, 10.**
 Depositions in probate courts, see **DEPOSITIONS, 1.**
 Right to jury trial in probate proceedings, see **JURY, 1 c.**
 Trial *de novo* on appeal, see **APPEAL AND ERROR, 12 b.**

PROCEDURE.

Adoption of rules by legislature, see **STATES, 3.**

PROCEEDINGS.

See **ACTIONS.**
 Condemnation proceedings, see **EMINENT DOMAIN.**

PROCESS.

See **SUMMONS AND PROCESS.**

PROCHEIN AMI.

See **INFANTS, 3 f.**

PRO CONFESSO.

Bill taken as confessed against infant, see **INFANTS, 3 a.**

PRODUCE.

Sale of produce, see **HAWKERS AND PEDDLERS.**
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PRODUCTION OF DOCUMENTS.

See **DISCOVERY.**

Compelling production of documents by accused, see **CRIMINAL LAW, 6 n (1).**

Compelling production of incriminating documents, see **WITNESSES, 4 g.**

Validity of statute applicable to corporations, see **CONSTITUTIONAL LAW, 9 b.**

PROFESSION.

Words affecting person in profession, see **LIBEL AND SLANDER, 2 i.**

PROFESSIONAL SERVICES.

Right of physician to compensation, see **PHYSICIANS AND SURGEONS, 4.**

PROFITS.

Loss of profits as element of damage for personal injuries, see **DAMAGES, 9 c.**
 Loss of prospective profits, see **DAMAGES.**
 Recovery of profits as damages, see **CARRIERS, 4 j (1) (b).**
 Sharing profits as element of partnership, see **PARTNERSHIP, 1 a.**
 What constitutes reasonable profits, see **GAS AND GAS COMPANIES, 4 a.**

PROHIBITION.

1. **GROUND FOR ISSUANCE OF WRIT, 1297.**
2. **CONDITIONS PRECEDENT TO ISSUANCE OF WRIT, 1298.**
3. **PERSONS SUBJECT TO WRIT, 1298.**
4. **PROCEEDINGS TO OBTAIN WRIT, 1298.**

Preventing seizure of gambling implements, see **GAMING AND GAMING HOUSES, 4.**

1. **GROUND FOR ISSUANCE OF WRIT.**

Exercise of unauthorized jurisdiction by inferior court in general. — An appellate court will issue a writ of prohibition to prevent an inferior court from exercising unauthorized jurisdiction. *Commonwealth v. Jones (Ky.), 4-1192.*

Upon an information purporting to have been presented by a private person, neither the prosecuting attorney for the county nor any other officer thereto authorized having exhibited same, the lower court having no jurisdiction to hear or determine such case on said information, and there being no other plain, speedy, and adequate remedy at law for the relator, his remedy is by writ of prohibition to restrain action thereon. *Evans v. Willis (Okla.), 18-258.*

Act in excess of jurisdiction. — A writ of prohibition from the supreme court is proper not only where the lower tribunal has no authority to act at all, but also where, though having general jurisdiction

over a particular class of cases, the tribunal has exceeded its jurisdiction in the particular case; and so where a circuit court, with general jurisdiction to issue writs of prohibition, exceeds its power when it directs the writ to an administrative body, the supreme court may prohibit its further proceeding. *State v. Bright* (Mo.), 20-955.

Enforcement of unauthorized judgment. — The enforcement of a judgment for costs, not authorized by any statute, may be prohibited as a judgment rendered without jurisdiction, when the court rendering it has not jurisdiction of the cause on any other ground. *Bice v. Boothsville Telephone Co.* (W. Va.), 13-1046.

Prosecution under void statute. — Prohibition lies to restrain a prosecution against a public officer under a void statute, where the remedy by appeal is inadequate, notwithstanding the fact that it is necessary to pass upon the constitutionality of the statute in the prohibition proceedings. *Bell v. First Judicial Dist. Court* (Nev.), 6-982.

Performance of administrative acts. — The appointment by the county court of election commissioners for election precincts under the West Virginia code is an administrative or municipal act and cannot be interfered with by writ of prohibition. *Hurst v. County Court* (W. Va.), 3-355.

Where the county court has established election precincts and voting places therein, and has adjourned, prohibition will not lie to interfere with such action. *Hurst v. County Court* (W. Va.), 3-355.

Trial of criminal case without taking necessary preliminary steps. — A writ of prohibition will not issue to restrain an inferior court from proceeding with the trial of a criminal case on the ground that the necessary steps preliminary to the institution of the criminal prosecution have not been complied with, the remedy for the wrongful determination by the inferior court as to the sufficiency of the preliminary proceedings being by appeal. *State v. Third Judicial Dist. Court* (Utah), 1-711.

Interference with court of co-ordinate jurisdiction. — A peremptory writ of prohibition will issue against a court which seeks to interfere with the jurisdiction of a court of co-ordinate jurisdiction by appointing a receiver for property already being administered by a receiver appointed by the latter court and by enjoining the original receiver from proceeding further with his duties. *State ex rel. Sullivan v. Reynolds* (Mo.), 14-198.

2. CONDITIONS PRECEDENT TO ISSUANCE OF WRIT.

Objecting to jurisdiction in inferior court. — The enforcement of the rule respecting application to the inferior court to vacate its unauthorized judgment before awarding a writ of prohibition, to prevent the enforcement of the judgment, is discretionary, and a judgment of a circuit court awarding the writ will not be reversed by the supreme court of appeals for the failure

of the circuit court to require such application before awarding the writ. *Bice v. Boothsville Telephone Co.* (W. Va.), 13-1046.

It is not a hard and fast rule that the jurisdiction of the lower court must be first challenged before a provisional writ can issue in the supreme court, and it is unnecessary where such a challenge would be unavailing. *State v. Bright* (Mo.), 20-955.

3. PERSONS SUBJECT TO WRIT.

Restricted to judicial officers. — A writ of prohibition must be directed to some judicial officer; or, in other words, its purpose is to restrain judicial, and not legislative, executive, or administrative, action. *State v. Bright* (Mo.), 20-955.

Law officers of state, county or city. — The law officer of a state, county, or city cannot be reached by the writ of prohibition. *State v. Bright* (Mo.), 20-955.

Executive officer of city conducting investigation. — A writ of prohibition will not lie against the executive officer of a city who is investigating charges against the chief police officer. *State v. Bright* (Mo.), 20-955.

Mayor and city council as court of impeachment. — The mayor and council of a city sitting as a court of impeachment for the removal of a city officer are not a judicial body, but a mere administrative body, against which a writ of prohibition cannot be issued. *State v. Bright* (Mo.), 20-955.

4. PROCEEDINGS TO OBTAIN WRIT.

Nature of rule in prohibition. — The rule in prohibition is a necessary preliminary notice, but is not a writ within the meaning of the West Virginia constitution and need not run in the name of the state. *Hurst v. County Court* (W. Va.), 3-355.

Construction of return. — Where the return to an alternative writ of prohibition to restrain proceedings under an information alleges that the information charges "upon the information and belief of the affiant" that a crime has been committed by a person named, it shows by fair implication that the information has been sworn to. *People v. Wyatt* (N. Y.), 9-972.

Practice where return not sufficiently full. — Where the return to an alternative writ of prohibition to distraint proceedings under an information charging a crime is not sufficiently full, the relator should move for a further return instead of moving for an absolute writ on the papers as they are; and if he neither traverses the return that has been made nor moves for a new one, but moves for an absolute writ without a trial of the issues, the return is conclusive as to all matters denied by the respondent and as to any new matter alleged in the return, including the substance of the information. *People v. Wyatt* (N. Y.), 9-972.

Right to make return and demur. — A return is in the nature of an answer, and

a demurrer and an answer cannot stand at the same time, where each covers the entire case. *State v. Bright* (Mo.), 20-955.

Abandonment of return by motion to dismiss. — In a prohibition proceeding, a motion to dismiss is tantamount in law to withdrawal or abandonment of the return. *State v. Bright* (Mo.), 20-955.

Ordinarily, the respondents in prohibition, after making a return, should obtain leave of court to withdraw it before filing any pleading in the nature of a demurrer; but, having filed it without such leave, the court may treat the return as withdrawn, and proceed on the issues made by the last pleading. *State v. Bright* (Mo.), 20-955.

Vacation of former proceedings upon granting writ. — Where a writ of prohibition is granted restraining a judge from performing further judicial duties in a cause in which he is disqualified, the court will not vacate an order made by such judge awarding a temporary injunction, as the order is not void, but voidable, and prohibition is not a remedy for the correction of errors. *Grafton v. Holt* (W. Va.), 6-403.

PROHIBITION LAWS.

See INTOXICATING LIQUORS.

PROMISE.

Acceptance of promise without consideration as extinguishment of debt, see ACCORD AND SATISFACTION.

Nonperformance of promise as false representation, see FRAUD AND DECEIT, 1.

PROMISE OF MARRIAGE.

Actions for breach, see BREACH OF PROMISE OF MARRIAGE.

Consideration to support ante-nuptial agreement, see HUSBAND AND WIFE, 2 a (2).

PROMISSORY NOTES.

See BILLS AND NOTES.

PROMOTERS.

See CORPORATIONS, 6.

PROOF.

See EVIDENCE.

Variance between pleading and proof, see PLEADING, 10.

PROOF OF OTHER CRIMES.

See BURGLARY, 4; CRIMINAL LAW, 6 n (6); FORGERY, 4.

Admissibility in homicide cases, see HOMICIDE, 6 a (6).

PROOFS IN EQUITY.

Taking additional proofs after demurrer to answer, see INJUNCTIONS, 3 d.

PROOFS OF LOSS.

Proofs of loss under fire insurance policy, see INSURANCE, 5 1 (6).

PROPERTY.

See LIFE ESTATES; LOST PROPERTY.

Animals as property, see ANIMALS, 1.

Application of rule in *Shelley's case* to personality, see SHELLEY'S CASE, RULE IN.

Assignability of cause of action for injuries to property, see ASSIGNMENTS, 1 c.

Business occupation or calling as property, see CONSTITUTIONAL LAW, 9 b.

Choses in action as personal property, see FRAUDULENT CONVEYANCES, 1 b.

Conversion from one species to another, see CONVERSION AND RECONVERSION.

Damages for injuries to property, see DAMAGES, 9 d.

Deprivation of property without due process of law, see CONSTITUTIONAL LAW, 9.

Destruction of private property, see HEALTH, 1.

Dogs as property, see ANIMALS, 3 b.

Growing crops as realty or personality, see CROPS, 1.

Interference with right of enjoyment, see NUISANCES, 1 a.

Leasehold as personal property, see LANDLORD AND TENANT, 3 a.

Limitation of actions for injuries to real property, see LIMITATION OF ACTIONS, 3.

Ownership of water, see WATERS AND WATERCOURSES, 3 b (3).

Parol trust in personal property, see TRUSTS AND TRUSTEES, 1 a (2).

Parol trust in real property, see TRUSTS AND TRUSTEES, 1 a (2).

Property qualifications of jurors, see JURY, 2.

Property rights in dead body, see DEAD BODY.

Restriction of property rights, see CONSTITUTIONAL LAW, 5 b.

Right of owner of land to hidden treasure, see TREASURE TROVE.

Right of purchaser to hold and sell as property, see CONSTITUTIONAL LAW, 9.

Right of suffrage dependent on ownership of property, see ELECTIONS, 1 d.

Right to recover personal property in possession of another, see LIMITATION OF ACTIONS, 3.

Sale of personal property, see SALES.

State property, see STATES, 7.

Survival of cause of action for injuries to property, see ABATEMENT AND REVIVAL.

User of property as nuisance, see NUISANCES, 1 a.

Venue of action to enjoin trespass on real property, see VENUE, 1.

Voluntary exposure in attempting to save property, see NEGLIGENCE, 7 d.

Waterworks franchise as personal property, see FRANCHISES.

Words affecting property as libelous, see LIBEL AND SLANDER, 2 j.

What included in "chattels real." — "Chattels real" include estates for years at will, by sufferance, and various interests of uncertain duration. They are to be distinguished from things which have no concern with the land, such as mere movables and rights connected with them, which are "chattels personal," and also from a "freehold," which is realty. *Orchard v. Wright, etc., Store Co. (Mo.), 20-1072.*

Effect of statute declaring "real estate" to include chattels real. — The Missouri statute (Ann. St. 1906, p. 850) governing conveyances of real estate which declares that the term "real estate" shall embrace all chattels real does not attempt to convert into real estate that which was personally at common law, but merely prescribes the mode of conveyance or transfer. *Orchard v. Wright, etc., Store Co. (Mo.), 20-1072.*

Crude turpentine in boxes in tree as personalty. — Crude turpentine in turpentine boxes in the pine trees in a state to be dipped up, is personal property. The turpentine crop is properly classed with *fructus industriales*, for it is not the spontaneous product of the trees, but requires annual labor and cultivation. *Richbourg v. Rose (Fla.), 12-274.*

Meteorites as property. — A meteorite, or a mass of metal of glacial origin, which is found resting upon the surface of the earth, is realty, unless it has been severed from the land and appropriated for use as personalty, and therefore the title thereto is in the owner of the land where it is found, and not in the finder. *Oregon Iron, etc., Co. v. Hughes (Oregon), 8-556.*

In an action to replevy a meteorite found by the defendant on the surface of the plaintiff's land and secretly removed by the defendant, evidence that the meteorite was worshipped by the Indians and that water standing in holes therein was utilized by them for practical and religious purposes is insufficient to show a severance of the body from the soil by the Indians and an appropriation of it by them for use as personal property. *Oregon Iron, etc., Co. v. Hughes (Oregon), 8-556.*

Gold-bearing quartz rock beneath surface of earth as property. — Gold-bearing quartz rock found beneath the surface of the earth is not lost property but property embedded in the soil, and title thereto is in the owner of the land. *Ferguson v. Ray (Oregon), 1-1.*

Presumption as to ownership of building erected on another's land. — Where a person places a frame factory upon the land of another, with the landowner's license, but with no agreement respecting the subsequent ownership of the factory, the presumption is that the building remains the

property of the party annexing it, and is removable by him. *King v. Morris (N. J.), 12-1086.*

What constitutes actual possession ousting constructive possession under paper title. — The occupation of pine land by annually making turpentine on it is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. *Richbourg v. Rose (Fla.), 12-274.*

Prevailing title where equities of claimants to realty are equal. — Where the equities are equal as between claimants to real estate none of whom have any legal title, that which is prior in point of time will prevail. *Johnson v. Hayward (Neb.), 12-800.*

PROPRIETARY FUNCTIONS.

Liability of municipality for acts done in exercise of proprietary functions, see MUNICIPAL CORPORATIONS, 9 b.

PROPRIETARY POWER.

Governmental and proprietary powers of municipalities distinguished, see MUNICIPAL CORPORATIONS, 4 b.

PROSECUTING ATTORNEYS.

Disobedience of subpoena issued by district attorney as contempt of court, see CONTEMPT, 1 e.

Effect of promise of immunity to accomplice turning state's evidence, see CRIMINAL LAW, 6 d.

Necessary party to *quo warranto* proceedings, see QUO WARRANTO, 4.

Necessity of signature to information, see INDICTMENTS AND INFORMATIONS, 8.

Request for leniency to accomplice as evidence to impeach accomplice's testimony, see CRIMINAL LAW, 6 n (1).

Special counsel to assist prosecuting attorney, see CRIMINAL LAW, 6 i.

Statement made to prosecuting attorney as privileged, see LIBEL AND SLANDER, 3 b.

Taking prisoner to prosecuting attorney's office, see CRIMINAL LAW, 3.

Nature of office of special attorney to prosecute liquor cases. — An office of special attorney for the state in any county to have full charge and control of all prosecutions in the county relating to the law against the manufacture and sale of intoxicating liquors, would be a public office with governmental functions and could be established only by the legislature. *State v. Butler (Me.), 18-484.*

Power of court to appoint assistant prosecuting attorney. — In Indiana the only express statutory authority for the appointment of attorneys to assist the prosecutor in criminal cases is found in the statute (section 2087 Burns, 1908, Acts 1905, p. 584,

§ 216), which applies to cases taken on change of venue from the county in which the prosecution originated. *Board of Commissioners v. McGregor* (Ind.), 17-333.

As provision is made by statute in Indiana for the election of prosecuting attorneys, who are authorized to appoint deputies to assist in the discharge of their official duties, and also for the appointment by the court of an attorney to prosecute for the term in case of the absence of the prosecuting attorney, an actual necessity for the appointment by the court of an attorney to assist the official prosecutor can scarcely be said to exist in any case; and if it is expedient and desirable that the state should have the assistance of other counsel in the conduct of an important and difficult case, the duty of providing for such emergencies rests primarily with the legislature. *Board of Commissioners v. McGregor* (Ind.), 17-333.

Right of disbarred attorney to hold office of prosecuting attorney. — The disbarment of an attorney is an adjudication that he does not possess a proper knowledge of legal ethics, and therefore that he is not "learned in the law" within a constitutional provision prescribing the qualifications for state's attorneys. *Danforth v. Egan* (S. D.), 20-418.

An attorney who has been disbarred cannot hold the office of state's attorney, though the only qualification for the office expressly required by constitution is that the incumbent shall be "learned in the law." The use of the word "attorney" in the title of the office implies a person entitled to appear in the courts, and moreover a person not so entitled is unable to perform the principal duties of the office. *Danforth v. Egan* (S. D.), 20-418.

Duty of prosecuting attorney to protect defendant's rights. — It is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his constitutional or statutory rights as it is to prosecute him for the crime with which he is charged. *State v. Osborne* (Ore.), 20-627.

Construction of statute authorizing removal of prosecuting attorney. — A statute providing for the removal of a county attorney from office for neglect of duty is penal in character and must be strictly construed. *Tennant v. Kuhlemeier* (Iowa), 19-1026.

Removal for failure to enforce law. — The Iowa mulct law (Code, § 2446) providing for the removal of a county attorney who fails to enforce the provisions thereof refers only to the levy and collection of the mulct tax, and does not contemplate failure to proceed under the prohibitory law. *Tennant v. Kuhlemeier* (Iowa), 19-1026.

PROSECUTION.

See **MALICIOUS MISCHIEF**; **MALICIOUS PROSECUTION**.

Dismissal of proceeding for want of prosecution, see **EMINENT DOMAIN**, 9 a.

PROSPECTIVE STATUTES.

See **STATUTES**, 4 a.

PROSTITUTES.

See **DISORDERLY HOUSES**.

Criminal knowledge of prostitute under age of consent as statutory rape, see **RARE**, 2 b.

PROTEST.

See **BILLS AND NOTES**, 9.

Liability for wrongful protest of check, see **CHECKS**, 9.

Waiver of protest as affecting negotiability of notes, see **BILLS AND NOTES**, 6 a.

PROVABLE CLAIMS.

See **BANKRUPTCY**, 4.

PROVISIONS.

Tea and coffee as provisions within peddlers' license laws, see **HAWKERS AND PEDDLERS**, 2.

PROVISO.

Construction of proviso in statutes, see **STATUTES**, 4 b.

PROVOCATION.

Killing under adequate provocation, see **HOMICIDE**, 4 a (3).

Mitigation of damages, see **DAMAGES**, 5.

Reason for assault and battery, see **ASSAULT AND BATTERY**, 1 e.

PROXIMATE CAUSE.

See **DAMAGES**; **NEGLIGENCE**, 4.

Horse frightened by starting of locomotive, see **RAILROADS**, 8 b (3).

Injuries to servant, see **MASTER AND SERVANT**, 3 i.

Persons injured while intoxicated, see **INTOXICATING LIQUORS**, 8 c.

PRUDENCE.

See **NEGLIGENCE**.

PUBLIC.

Dedication of property to public purposes, see **DEDICATION**.

PUBLIC ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

PUBLICATION.

See NEWSPAPERS.

Advertisements for bids for public work, see MUNICIPAL CORPORATIONS, 7 d.

Contempt by newspaper publication, see CONTEMPT, 1 b.

Element of libel, see LIBEL AND SLANDER, 1 a.

Liability of editor for libelous publication, see LIBEL AND SLANDER, 4 c.

Newspaper account of arrest as element of damage for false imprisonment, see FALSE IMPRISONMENT, 6.

Obscene publication, see OBSCENITY.

Publication of constitutional amendments, see CONSTITUTIONAL LAW, 27.

Publication of ordinances, see MUNICIPAL CORPORATIONS, 5 b.

Publication of statutes, see STATUTES, 1 g.

Publication of wills, see WILLS, 3 b.

Service of process by publication, see SUMMONS AND PROCESS, 2.

Validity of publication of notice on Sunday, see SUNDAYS AND HOLIDAYS, 3.

Validity of statute prohibiting publication of details of execution of death sentence, see CONSTITUTIONAL LAW, 11.

What constitutes publication, see COPYRIGHT.

PUBLIC BUILDINGS.

Contracts to influence location of buildings, see CONTRACTS, 4 e.

Liability of municipality for accidents in connection with public buildings, see MUNICIPAL CORPORATIONS, 9 a.

Powers of county commissioners, see COUNTIES, 5 a.

PUBLIC CORPORATIONS.

See CORPORATIONS, 1 a.

PUBLIC DOCUMENTS.

See EVIDENCE, 9 a.

PUBLIC FUNDS.

Disbursements, see STATES, 5.

Unauthorized deposit in bank, see BANKS AND BANKING, 5 b (1).

PUBLIC GROUNDS.

Power of municipality to accept dedication, see MUNICIPAL CORPORATIONS, 4 e.

PUBLIC HEALTH.

See HEALTH.

Power of municipality to erect and maintain public health, see MUNICIPAL CORPORATIONS, 4 e.

PUBLIC HIGHWAYS.

See STREETS AND HIGHWAYS.

PUBLIC IMPORTANCE.

Judicial notice of matters of public importance, see EVIDENCE, 1 i.

PUBLIC IMPROVEMENTS.

See MUNICIPAL CORPORATIONS.

PUBLIC INTEREST.

As affecting right to maintain nuisance, see NUISANCES, 4 a.

PUBLIC LANDS.

Adverse possession of public lands, see ADVERSE POSSESSION.

Condemnation of public lands, see EMINENT DOMAIN, 5.

Nature of colonial grants. — The title to much of the land in eastern Massachusetts is derived from orders of the general court or the governor and assistants, issued in the early years of the colony. Such orders are usually very informal, and they differ greatly in their terms, but the words shall "belong to" are quite generally used therein as the operative words denoting future ownership. *East Boston Co. v. Commonwealth (Mass.)*, 17-146.

What constitutes grant of public lands. — The order of the Massachusetts general court of March 13, 1640, declaring "that the flats round about Nodles Island do belong to Nodles Island to the ordinary lowe water marke." constituted a grant of the flats in question to Samuel Maverick, who was then the owner of the fee in the island. *East Boston Co. v. Commonwealth (Mass.)*, 17-146.

The words "ordinary lowe water marke," as used in such order, were intended to refer to the line of average or mean low water, and not to the line of extreme low water shown at an ebb of the tide resulting from usual causes and conditions. The use of the word "ordinary" distinguishes such grant from the Colonial Ordinance of 1647, which extends the line of individual ownership as far as the tide ebbs, if that point is not more than one hundred rods from ordinary high water mark. *East Boston Co. v. Commonwealth (Mass.)*, 17-146.

Construction of statute granting public lands. — In an action to determine the title to land, where it appears that the British Columbia Vancouver Island Settlers' Rights Act of 1904 directed that a grant in fee simple without any reservations as to mines and minerals should be issued to settlers therein defined, and that thereunder a grant was made to the defendant of the lot

in controversy, and it further appears that by an act of the same legislature passed in 1883 land which included the said lot had been granted with its mines and minerals to the Dominion government in aid of the construction of the plaintiff's railway, and in 1887 had been granted by the Dominion government to the plaintiff under the provisions of the Dominion act passed in 1884, it is held that the true construction of the act of 1904 is that it legalized the grant to the defendant, and superseded the plaintiff's title; that the act of 1904 was *intra vires* of the local legislature, which had exclusive power of amending or repealing its own act of 1883; and that the act of 1904 related to land which had become the property of the plaintiff, and affected a work and undertaking purely local within the meaning of the British North America Act. *McGragor v. Esquimault, etc., R. Co. (Eng.)*, 9-575.

Filing of selection list, subject to approval, as passing title. — Under the Act of Congress of June 18, 1874 (18 St. L. 80; 6 Fed. St. Ann. 429) referring to a grant to the state of Oregon of lands to be selected from the public domain to aid in the construction of a military road, and providing that patents for said lands, when selected, shall be issued to the state or its grantees, a selection list filed by a grantee of the state does not pass the title to the lands selected until the selection has been approved by the secretary of the interior. *Boe v. Arnold (Ore.)*, 20-533.

Title of homesteader on indemnity lands before segregation. — Appellant, claiming title under a land grant, and respondent, under his homestead entry, conducted a contest through the United States general land office, and the case was finally decided in favor of appellant. Held that the lands in question had not been segregated from the public domain at the time respondent made settlement as the lists of the appellant railroad company, designating indemnity lands, had not been approved by the secretary of the interior at that time, and that the respondent was the equitable owner of the land. *Houston v. Northern Pac. R. Co. (Minn.)*, 18-325.

Estoppel of claimant to lands withdrawn. — Where a person entitled to a certain quantity of land to be selected by him from the public domain makes his selection, and afterwards a part of the land selected is withdrawn by the secretary of the interior, whereupon other land is selected by such person in place of the part withdrawn, his grantee is estopped to claim the land originally selected. *Boe v. Arnold (Ore.)*, 20-533.

Interference by state court with land rights in contest before federal department. — Where a party claims the right to possession of public land by virtue of a homestead entry against a party in possession under claim of superior right, and the claims of the parties are in contest before the federal land department, the courts will protect the rights of the parties so far as the same can be done without deciding a

controversy of which the land department has exclusive jurisdiction. *Zimmerman v. McCurdy (N. Dak.)*, 12-29.

An occupying claimant of public land cannot be ousted by a claimant under a homestead entry, where the merits of their opposing claims to the right of possession are involved in a contest pending before the federal land department, and have not been finally determined. *Zimmerman v. McCurdy (N. Dak.)*, 12-29.

Injunction is the proper remedy in such cases to protect the occupying claimant's possession against the other claimant's attempts to take forcible possession, until the rights of the parties shall have been determined in the pending contest. *Zimmerman v. McCurdy (N. Dak.)*, 12-29.

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1. CREATION OF OFFICE.

Power of legislature. — Only the legislature can establish a public office (other than a constitutional office) as an instrumentality of government. Whether the establishment of such office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the legislature to determine and be responsible to the people for their correct determination. *State v. Butler (Me.)*, 18-484.

2. WHO ARE PUBLIC OFFICERS.

Officers distinguished from employees. — A public officer, as distinguished from an employee, is one whose duties are in their nature public, that is, involving in their performance the exercise of some portion of the sovereign power whether great or small, and in whose proper performance all citizens irrespective of party are interested, either as members of the entire body politic or of some duly established subdivision of it. Where an employment is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office, and the person who performs it is an officer. *Attorney-General v. Tillinghast (Mass.)*, 17-449.

Subordinate officers. — The fact that the authority of one public officer is subordinate to that of another does not prevent him from being an officer as distinguished from a mere employee. A subordinate or inferior officer is none the less an officer. *Attorney-General v. Tillinghast (Mass.)*, 17-449.

3. APPOINTMENT AND ELECTION.

a. Appointment.

(1) In general.

When vacancy exists. — The word "incumbent" as used in the Wyoming statute (Rev. St. 1899, § 381) providing that an elective office shall be deemed vacant in case of the death of the incumbent before the end of his term of office, or upon certain other contingencies, necessarily refers to a living person, and can have no application to a person who has been elected to an office but who has died before the commencement of his term. *Ballantyne v. Bower (Wyo.)*, 17-82.

Power of legislature to appoint officers. — A state legislature has no power to appoint county officers or to extend, by an act solely for that purpose, the terms of such officers who are already in office. *State ex rel. Hensley v. Plasters (Neb.)*, 13-154.

Right of court to control discretion in appointment. — Where the legislature authorizes officers and boards to make appointments and vests them with a discretion, the courts cannot supervise or control the discretion so vested. *Dever v. Humphrey* (Kan.), 1-293.

Validity of appointment to term commencing after expiration of appointing officer's term. — The well-settled rule of the common law forbids that an officer clothed with power of appointment to a public office, shall forestall the rights and prerogative of his successor, by making a prospective appointment to fill an anticipated vacancy in an office the term of which cannot begin until after his own term and power to appoint have expired. *State ex rel. Morris v. Sullivan* (Ohio), 18-139.

This established rule of the common law is neither abrogated nor modified by the provisions of section 1 of the act of the general assembly of the state of Ohio passed April 2, 1906 (98 O. L., 342), creating a railroad commission, and requiring the governor to appoint thereto "in January, 1909, and biennially thereafter, one commissioner for the term of six years from the first Monday in February of such year." *State ex rel. Morris v. Sullivan* (Ohio), 18-139.

(2) Appointment subject to confirmation.

When confirmation may be made. — The confirmation by the senate of an appointment of a public officer made by the governor is not a legislative act, but can be performed as well at a special session as at a regular session. Nor is it material, in this regard, for what purpose the legislative body may have been called in session. Whenever the senate is lawfully convened for legislative purposes it has the right to act for administrative purposes, even without mention of such purpose in the call for a special session. *State ex inf. Major v. Williams* (Mo.), 17-1006.

Rights of appointee pending confirmation. — A statute authorizing the governor to appoint a specified public officer with the advice and consent of the senate, cannot reasonably be construed as contemplating that there can be no occupant of the office until both the governor and the senate have acted. On the contrary, it contemplates that the appointment shall be made at the proper time, and that the senate shall act thereupon at its next session. In the meantime, the appointee, after having otherwise qualified under the act, is entitled to the office until such time as the senate may pass adversely upon his appointment, in which event it would become incumbent upon the governor to appoint another person. *State ex inf. Major v. Williams* (Mo.), 17-1006.

(3) Civil service laws.

Validity of statute granting preference to veterans. — A statute providing that veterans of the Civil war shall be preferred for appointment to public office is con-

stitutional. *Goodrich v. Mitchell* (Kan.), 1-288.

Qualifications for preference. — To obtain the preference given by a statute to veterans of the Civil war for appointment to public office, the applicants must possess equal qualifications with others. *Dever v. Humphrey* (Kan.), 1-293.

Exercise of discretion in appointment. — In investigating the qualifications of an applicant for a position under the veterans' preference law, the appointing power must act in good faith and make the determination fairly and honestly. *Dever v. Humphrey* (Kan.), 1-293.

Construction of statute exempting office from civil service rules. — The Massachusetts statute (Rev. Laws, c. 19, § 9), which provides that officers whose appointment is subject to confirmation by the city council of any city shall not be affected as to their selection or appointment by the civil service rules, must be held to refer to officers whose offices have been created and whose appointment has been made subject to confirmation by a city council since the enactment of the statute, as well as to those whose appointment was subject to such confirmation at the time of its enactment. *Attorney-General v. Tillinghast* (Mass.), 17-449.

Inasmuch as the assistant city auditor of the city of New Bedford is appointed by the city auditor subject to confirmation by the city council, and receives a fixed annual salary, and is subject to removal by the city auditor, and is authorized to assist the latter in the performance of his duties and temporarily to discharge those duties in the absence of the city auditor or during a vacancy in the office, it must be held that such assistant city auditor is a public officer, and, therefore, that his appointment is not subject to the rules of the civil service commissioners. *Attorney-general v. Tillinghast* (Mass.), 17-449.

b. Election.

Election held at same time constitutional amendment creating office adopted. — When an amendment to the constitution creates a public office, such office may be filled by vote of the electors at the same election at which the amendment is adopted. *State ex rel. Thompson v. Winnett* (Neb.), 15-781.

4. QUALIFICATIONS.

Power of legislature to define. — The legislature has power to define the qualifications of statutory officers, in the absence of any regulation of the subject by the constitution. *State v. Goldthait* (Ind.), 19-737.

Validity of statute relating to qualifications for constitutional office. — A statute requiring a candidate for a public office to declare that if nominated and elected he will qualify does not add to a qualification not required by the constitution, but merely gives the electors the right to know

whether one nominated and elected will serve. *State v. Frear* (Wis.), 20-633.

Filing bond. — Where it is provided by statute that a person elected to a municipal office shall file a bond within a certain period after election, such period should be reckoned not from the date of casting the votes for office but from the date of the decision by the proper officials or by the court as to who has been elected. *Murdoch v. Strange* (Md.), 3-66.

5. RIGHTS, POWERS, AND DUTIES.

a. In general.

Power of legislature to prescribe mode of exercising discretionary powers. — The legislature has plenary power to prescribe the manner in which statutory officers shall exercise the discretionary powers conferred on them. *State v. Goldthait* (Ind.), 19-737.

Right to forcibly obtain possession of office. — A person rightfully elected county judge and entitled to possession of the office is justified in forcibly taking possession by breaking into the office room during the absence of the wrongful incumbent. *State ex rel. Dithmar v. Bunnell* (Wis.), 11-560.

Right to office pending contest. — In an election contest the judgment of the trial court, duly appealed from, declaring the contestant elected and annulling the certificate of election held by the incumbent does not give the contestant the right to hold the office, to discharge its duties, and to receive the compensation until the affirmance of the judgment on appeal. *Chubbuck v. Wilson* (Cal.), 12-888.

What are duties of officers in general. — The duties of a public office include all those which fairly lie within its scope; those which are essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, are germane to or serve to promote or benefit the accomplishment of the principal purposes. All such duties are official, and the incumbent may be compelled to perform them. Duties not so related to an office are unofficial, cannot rightfully be attached to it, and the incumbent is not obliged to perform them. *Moore v. Nation* (Kan.), 18-397.

Construction of statutes relating to performance of duties. — Where no rights are impaired, statutory provisions concerning the time and manner in which public officers are to perform assigned acts are directory. *St. Hilaire, Petitioner* (Me.), 8-385.

A statute prescribing the manner in which public officers shall exercise their discretionary powers does not take away their discretion but only defines the way in which it must be exercised. *State v. Goldthait* (Ind.), 19-737.

b. Right to hold several offices.

Constitutional provisions confined to state officers. — The constitutional provisions

against holding two offices at the same time apply to state officers only, and a city recorder is not a state officer within such prohibition. *State ex rel. Murphy v. Townsend* (Ark.), 2-377.

The constitutional provisions against one person holding two offices at the same time apply to state officers only, and a chief of police is not a state officer within such prohibition. *Peterson v. Culpepper* (Ark.), 2-378.

Compatibility of offices of sheriff and chief of police. — The offices of sheriff and chief of police of a city are not incompatible and may be held by one person at the same time. *Peterson v. Culpepper* (Ark.), 2-378.

Compatibility of offices of county and probate judge and city recorder. — The offices of county and probate judge and recorder of a city are not incompatible and may be held by one person at the same time. *State ex rel. Murphy v. Townsend* (Ark.), 2-378.

Compatibility of offices of county judge and justice of the peace. — The offices of county judge and justice of the peace are incompatible with each other, and one person cannot hold both of them at the same time. *State v. Jones* (Wis.), 10-696.

c. Right to incur expenses.

In excess of appropriation act. — Under the provision of the Illinois constitution requiring the legislature to provide for all appropriations necessary, for the ordinary and contingent expenses of the government, all expenses for the conduct of the office of state treasurer are provided for by the legislative appropriation acts, and are limited to the amount appropriated by such acts; and therefore the state treasurer has no authority to incur any expenses beyond the amounts fixed in the appropriation acts, and if he incurs such expenses and pays them out of his private means, he has no right to reimburse himself out of the public funds in his hands, unless an appropriation for that purpose is made by the legislature. *Whittemore v. People* (Ill.), 10-44.

d. Right to question validity of statute.

Refusal to act on ground of invalidity. — Whether a ministerial officer can refuse to perform an act required by an unconstitutional statute before it has been judicially declared invalid, *quære*. *Payne v. Staunton* (W. Va.), 2-74.

6. COMPENSATION.

a. Right to compensation in general.

In absence of statute fixing compensation. — When the compensation of an officer is not fixed by law at the time he renders a service, but it clearly appears that it was the intention of the lawmakers that he should receive a reasonable compensation, to be fixed by law, until it is so fixed he is entitled to a reasonable compensation, to be determined by the proper tribunal. *Bohart v. Anderson* (Okla.), 20-142.

What constitutes appropriation for payment. — A provision in a statute that the salaries of officers appointed under it shall be paid out of "any money in the treasury not otherwise appropriated" does not make an appropriation to pay such salaries. *People v. Joyce* (Ill.), 20-472.

Acceptance of part payment as payment in full. — Within the rule that a part payment of a debt is not a sufficient consideration to support a release as to the balance, a public officer, by receiving less than the legal rate of compensation for services rendered in full satisfaction, is not estopped from recovering the full amount. *Bordenhofer v. Hogan* (Iowa), 19-1073.

Validity of agreement to perform services for less than legal compensation. — An agreement by a public officer to render the services required of him for less than the compensation provided by law is void as against public policy. *Bordenhofer v. Hogan* (Iowa), 19-1073.

b. Right to additional pay for increased duties.

When a public official takes office he undertakes to perform all its duties, although some of them may be called into activity for the first time by legislation occurring after he enters upon his term. In such an event he must perform the increased service without increased compensation, unless the legislature has the power and sees fit to grant him additional pay. *Moore v. Nation* (Kan.), 18-397.

c. Right to compensation for two compatible offices.

In absence of statute. — A public officer holding two offices not incompatible with each other may recover the compensation attached to each in the absence of statutory provision to the contrary. *State ex rel. Chatterton v. Grant* (Wyo.), 2-382.

d. Right to compensation for full term for service of less than whole term.

Part of term filled by de facto officer. — Where an officer has been appointed for a whole term and has duly qualified to perform the duties thereof, a mandamus will lie to compel the auditor of accounts to issue a warrant for the salary of such officer, although he did not personally assume the office and perform its duties for a portion of the time, during which the salary was paid to a *de facto* officer, as the payment of the salary to the latter did not discharge the obligation to the person lawfully entitled to the emoluments of the office. *Tanner v. Edwards* (Utah), 10-1091.

Even if it is true that a public officer cannot maintain an action for his salary unless he has actually exercised the office, especially if the salary has been paid to a *de facto* officer, and that he must in any event establish his right by mandamus before he can be given any pecuniary relief, even against the

person who has wrongfully held the office or against the municipality paying the salary, this rule does not apply to a laborer whose place on a gang of workmen employed by the city has been taken from him wrongfully and given to another laborer. *Ransom v. Boston* (Mass.), 7-733.

Where a candidate for public office is, on the face of the returns, declared duly elected by the canvassing board, and takes the oath of office and enters upon the performance of the duties thereof, and subsequently the opposing candidate institutes a contest, claiming that because of irregularities and illegal voting he himself is entitled to the office, and succeeds in ousting the contestee, the latter is nevertheless, until ousted, a *de facto* officer, and not a usurper, and the contestant cannot require the commonwealth to pay him salary for the period during which the contestee is in office, and performs the duties thereof and draws the salary; and the contestant has no greater right in this respect because of a section of the state constitution providing that "the salaries of public officers shall not be changed during the terms for which they were elected;" but the remedy of the contestant is against the contestee. *Nall v. Coulter* (Ky.), 4-671.

e. Effect of constitutional provision against increase or decrease during term.

Right to increased compensation. —

Under the provisions of the Illinois constitution authorizing the legislature to fix the salary of the state treasurer, and forbidding the increase or diminution of such salary during the official term of the treasurer, and prohibiting the treasurer from receiving to his own use "any fees, costs, perquisites of office, or other compensation," the state treasurer cannot receive, directly or indirectly, any compensation other than the salary fixed by the legislature. *Whittemore v. People* (Ill.), 10-44.

Rights of person appointed to fill vacancy. — Generally speaking, a constitutional prohibition as to increase or decrease of salary of an office during a term thereof, whether in the form of a prohibition of such a change during the term for which an officer is elected or during an officer's term of office, refers to the full term, fixed by the fundamental or other law, and a person appointed to a vacancy or elected thereto does not have a term of office, in the constitutional sense, but takes a part of the unit, to wit, of the full term. He merely steps into the place and term of his predecessor and becomes subject to the incident of that term, the salary. *State v. Frear* (Wis.), 16-1019.

7. DURATION AND TERMINATION OF TERM OF OFFICE.

a. Duration.

(1) In general.

Where term fixed, but time of beginning or ending not fixed. — Where the term of an elective office is fixed by the

constitution or statute, but without any time being established for its beginning or ending, a person elected to the office will be entitled to hold for the period established as the full term thereof, whether he was elected upon the happening of a casual vacancy or at the expiration of a complete term. *State ex rel. Irvine v. Brooks* (Wyo.), 7-1108.

The Missouri statute creating the office of factory inspector provides that such officer shall be appointed by the governor, with the advice and consent of the senate, to hold office for four years from the date of his appointment or until his successor is appointed and qualified. As the first appointment under this statute was made, by the governor then in office, for a term ending May 13, 1905, it follows that all subsequent terms of the office must end on the 13th day of May, at intervals of four years, and, consequently, the factory inspector whose term ended on May 13, 1909, had no standing to contest, by *quo warranto* proceedings, the title of his successor in office, who was appointed for a term of four years from that date, even though such appointment was not immediately confirmed by the senate. *State ex inf. Major v. Williams* (Mo.), 17-1006.

Term until "next general election."

— In Montana the act creating Sanders county, appointing certain persons to fill various county offices, and providing in part that all of said officers "shall hold their respective offices until after the next general election, or until their successors are duly elected and qualified," the phrase "next general election" as employed in the act means, so far as the office of clerk of the district court is concerned, not the next general election held for any purpose, but the next general election held in conformity with the general law for filling that particular office in the judicial district in which Sanders county is situated. *State v. Smith* (Mont.), 10-1138.

Term until successor appointed or qualified. — Where the statute creating an appointive public office provides that the incumbent shall hold office for a specified term of years from the date of his appointment "or until his successor is appointed and qualified," the latter provision does not operate to extend the term of the office beyond the period of years specified. The purpose of such a provision is simply to prevent, on grounds of public necessity, a vacancy in fact in the office until the newly appointed officer can have a reasonable time within which to qualify. When the regular term expires, the office becomes vacant in the eye of the law, and the incumbent is authorized to continue in the discharge of his functions, until the appointment and qualification of his successor, by sufferance rather than from any intrinsic title to the office. *State ex inf. Major v. Williams* (Mo.), 17-1006.

(2) Power to fix commencement or duration of term.

Ordinance giving power to appoint but not fixing term. — An ordinance au-

thorizing a water board to appoint a clerk, without fixing his term of office, gives to such board the power to fix the term, and the board having so fixed it at one year, a clerk who fails to be reappointed at the end of a term cannot, by mandamus, compel his recognition as clerk, on the ground that he holds office for an indefinite term, and that his removal violates the statute prohibiting the arbitrary removal of public officers during their term of office. *Robertson v. Coughlin* (Mass.), 13-804.

Statute fixing term but not time of commencement of term. — Where the law creates an appointive office and prescribes the length of the term, but fixes no date for the beginning or ending thereof, and designates the person in whom is vested the power to fill such office by appointment, it necessarily follows that the appointive power has the right to fix the commencement of the term, and when the same is fixed by the appointment first made by such appointive power, all subsequent terms of office necessarily have reference to such initial period, and each term commences at the end of the preceding term. *State ex inf. Major v. Williams* (Mo.), 17-1006.

(3) Duration of term of appointee to fill vacancy.

In absence of special provision. —

Where the time of the commencement and termination of the term of an office, as well as its duration, are definitely fixed by constitutional or statutory enactment, and provision is made for filling vacancies therein by appointment or election, but without any provision as to the duration of authority of a person so appointed or elected, such person is entitled to serve for the remainder of the unexpired term. *State ex rel. Irvine v. Brooks* (Wyo.), 7-1108.

The provision of the Wyoming constitution that all state officers elected at the first election held under the constitution adopted prior to the admission of the state to the Union "shall hold their respective offices for the full term next ensuing such election, in addition to the period intervening between the date of their qualification and the commencement of such full term," has the effect of fixing definitely the date of the commencement and termination of the term of officers, the length of whose official term is prescribed by the constitution, so that a person elected to fill a vacancy caused by the resignation of such an officer is entitled to hold only for the unexpired portion of his predecessor's term, even though he is elected at a general election. *State ex rel. Irvine v. Brooks* (Wyo.), 7-1108.

What constitutes special provision.

— Under the Missouri statute providing for the appointment of jury commissioners in certain cities who "shall hold said office for the term of four years from and after the first day of May in the year of his appointment," and that "in case of any vacancy occurring in said office of jury commissioner during the term for which any person was

appointed thereto, or by the expiration of such terms," the vacancy shall be filled by the appointment of some person possessing the proper qualification "in like manner as hereinbefore provided," no distinction is made as to whether the vacancy is caused by the removal, death, or resignation of the incumbent, or by the expiration of the term, and a person appointed to fill a vacancy during an unexpired term is entitled to hold the office for a full term of four years from the first of May of "the year of his appointment" to such vacancy, although his appointment is made in the month of January. *State ex inf. Hadley v. Corcoran* (Mo.), 12-565.

The fact that the term of a person appointed to such office of jury commissioner is limited by the provisions of the appointment to the period of the unexpired term of his predecessor, does not control the length of his term as fixed by the statute. *State ex inf. Hadley v. Corcoran* (Mo.), 12-565.

The jury commissioner of a city, provided for in such statute, is neither a county, township, nor municipal officer within the purview of a constitutional provision that the terms of "county, township, and municipal officers" shall not exceed four years. *State ex inf. Hadley v. Corcoran* (Mo.), 12-565.

b. Termination.

(1) Resignation.

To whom should be tendered. — In the absence of a statute to the contrary, a public officer should tender his resignation to the tribunal having authority to appoint his successor. *State ex rel. Fast v. Popejoy* (Ind.), 6-687.

In a proceeding brought before the commissioners of one county to secure drainage of lands in several counties, the board of commissioners of a county other than that in which the head of the ditch is to be has authority to accept the resignation of the viewers for its county and to appoint the successors of such viewers, notwithstanding the fact that the board of commissioners of the county in which the proceeding originates has general jurisdiction over the work. *State ex rel. Fast v. Popejoy* (Ind.), 6-687.

Necessity of acceptance to become effective. — The resignation of a public officer must be accepted in order to relieve the officer of responsibility and to create a vacancy in the office. *State ex rel. Royse v. Superior Court* (Wash.), 13-870.

Right to withdraw resignation. — A public officer who has tendered his resignation unconditionally may withdraw such resignation before it is accepted by the proper authorities. To make such withdrawal effective it is not necessary for him to recover possession of the paper on which the resignation is written. *State ex rel. Jernigan v. Stickley* (S. Car.), 15-136.

A public officer who has tendered an absolute and unconstitutional resignation to take effect in the future cannot withdraw the resignation after it has been duly accepted

by the proper authority, though the time at which it is to take effect has not arrived. *Murray v. State* (Tenn.), 5-687.

(2) Suspension or removal.

Power of legislature to remove. — The legislature of a state cannot legislate out of office any constitutional officer, where a statute is passed for this purpose alone; but where the legislature is given by the constitution power to legislate upon any specific subject-matter, a statute passed in the exercise of this power, which conforms strictly to the constitutional grant, is not rendered unconstitutional by the fact that it has the incidental effect of legislating out of office certain officers holding office under the general provisions of the constitution. *Conner v. Gray* (Miss.), 9-120.

Power of legislature to authorize suspension. — It is within the power of the legislature to authorize the temporary suspension of a public officer during the pendency of valid proceedings to remove such officer and as an incident to such proceedings, notwithstanding the fact that the constitution has given power to remove such officer only for cause and after a hearing. *Griner v. Thomas* (Tex.), 16-944.

The Texas statute empowering the district judge to suspend temporarily an officer for whose removal a petition has been presented to him is not so clearly opposed to the provisions of the Texas constitution fixing the term of office of a county judge at two years and providing for the removal of such officer for given causes established by the verdict of a jury, as to justify the courts in disregarding such statute. *Griner v. Thomas* (Tex.), 16-944.

Necessity of notice to suspension or removal. — Where a public officer is removable at pleasure, his removal may be effected, so far as his title to the office is concerned, by a declaration of removal; but notice or knowledge is necessary to complete the removal so far as the validity of official acts is concerned. *State v. Roney* (Ohio), 19-918.

Notice and hearing are not prerequisites to the suspension of a public officer under a statute which does not provide for such notice and hearing. Suspension without such notice does not deprive the officer of property without due process of law, because such property in an office as the holder thereof has is qualified by all pre-existing valid laws which provide for its suspension or termination. *Griner v. Thomas* (Tex.), 16-944.

Removal for misconduct during prior term of office. — Under Comp. Laws, N. M., 1897, § 844, a justice of the peace, constable, or sheriff is removable from office for "official misdemeanors" committed by him while holding the same office in a preceding term, at least if there has been no intervening term held by another. *Territory v. Sanchez* (N. Mex.), 20-109.

Removal for act punishable as crime. — The fact that an act by a public officer is punishable as a crime does not affect his

liability to removal from office for the same act. *Territory v. Sanches* (N. Mex.), 20-109.

Right to jury trial in removal proceedings. — Whether by the terms of Comp. Laws, N. M., § 854, relating to the removal of public officers, one accused and on trial under it is entitled to trial by jury *quære*; but if it is accorded to him by the court, it should be conducted as in other similar judicial proceedings. *Territory v. Sanches* (N. Mex.), 20-109.

Right of trial court to direct verdict. — A statutory proceeding for the removal of a public officer is so far a civil cause in its nature, that the trial court has the right to direct a verdict against the defendant, if the evidence would warrant such a direction in a civil cause, and if the facts thus found, or any of them, constitute, as a matter of law, any one of the grounds for removal enumerated in the statute, to enter a judgment of removal. *Territory v. Sanches* (N. Mex.), 20-109.

Necessity that order of removal be based on statutory cause for removal. — Where a statute provides that an officer may be removed for certain specified causes, the order of removal must be based upon some one or all of such causes, and cannot be made for other causes. *Kendrick v. Nelson* (Idaho), 12-993.

Questions material in proceeding to vacate order of removal. — The question whether a valid order suspending a public officer became operative upon the making of the order or upon the receipt of notice thereof by the officer is not material in a proceeding to vacate such order. *Griner v. Thomas* (Tex.), 16-944.

Order of removal as precluding election of same officer for same term. — Where the mayor of a city of the first class by official misconduct forfeits his office, and a forfeiture is judicially declared in a *quo warranto* proceeding, a judgment of ouster will operate to deprive him of the right to take or hold office during the remainder of the term to which he had been elected; and the electors of such city cannot in a special election restore that which was forfeited or limit the effect or enforcement of the judgment of ouster by electing an unfaithful officer for the remainder of the term forfeited. *State ex rel. Coleman v. Rose* (Kan.), 10-927.

8. DE FACTO OFFICERS.

Validity of acts in general. — The acts of a *de facto* public officer are valid so far as they concern the public or third persons who have an interest in the things done, and such acts cannot be attacked collaterally. *Butler v. Phillips* (Colo.), 12-204.

Validity of acts performed under unconstitutional statute. — An officer appointed, under authority of a statute, to fill an office created by that statute is at least a *de facto* officer, and acts done by him antecedent to a judicial declaration that the statute is unconstitutional, are valid, so far as they involve the interests of the public

and of third persons. *Lang v. Bayonne* (N. J. L.), 12-961.

Liability of de facto officer for misconduct in office. — A person claiming to hold a certain office and assuming to perform the duties thereof cannot escape liability for his conduct in that capacity by showing that he was never legally appointed to the office. *People v. McCann* (Ill.), 20-496.

Right of de facto officer to compensation. — A *de facto* officer is not entitled to the pay attached to an office because he has performed the duties thereof. *Sheridan v. St. Louis* (Mo.), 2-480.

The rule that a *de facto* officer is not entitled to compensation for his official services, applies even where there is no other claimant of the office. *Eubank v. Montgomery County* (Ky.), 16-483.

Liability to de jure officer for emoluments of office. — At common law the salary annexed to a public office is incident to the title to the office and not to its occupation and exercise, and, in the absence of statute, the *de jure* officer recovering possession of the office has a right of action against the intruder for the salary and fees received by the latter during his occupancy of the office. *Chubbuck v. Wilson* (Cal.), 12-888.

Under the California statute providing that "when the title of the incumbent of any office . . . is contested by proceedings instituted in any court for that purpose, no warrant can thereafter be drawn or paid for any part of the salary until such proceedings have been finally determined," as amended in 1891 by a provision that "this section shall not be construed to apply to any party to a contract or proceeding now pending or hereafter instituted who holds the certificate of election or commission of office, and discharges the duties of the office; but such party shall receive the salary of such office the same as if no such contest or proceeding was pending," a *de jure* officer who has successfully maintained his claim to the office can neither enforce, as against the disbursing officer or sovereignty, the payment of salary already once paid an incumbent discharging the duties of the officer, nor recover from such incumbent as damages the amount of salary or fees received by the incumbent during his tenure of office and withheld from the *de jure* officer. *Chubbuck v. Wilson* (Cal.), 12-888.

9. CIVIL LIABILITIES.

a. In general.

Liability of public officer for acts of body of which he is member. — A public officer, who is a member of a corporate body upon which a duty rests, cannot be held liable for the neglect of duty of that body. *Monnier v. Godbold et al.* (La.), 7-768.

Liability for interest on public funds. — A public officer is bound to account for interest which he receives on money which comes into his hands by virtue of his office. *Rhea v. Brewster* (Iowa), 8-389.

Liability for loss of public money. — For reasons of public policy, the custodian of

public money is held liable and must account therefor as a debtor or insurer, notwithstanding the relation, subsisting between him and the state or municipality, is substantially that of bailment for hire, and no loss of the fund, otherwise than by an act of God or the public enemy, will relieve him from the obligation to pay it. Loss by fire, theft, burglary, bank failure, or the like does not relieve him, however careful and prudent he may have been. *Cameron v. Hicks* (W. Va.), 17-926.

Liability for secret profits from public works. — A public officer in charge of a public work who receives a part of the profits made by the contractors working under his supervision will be required to account to the government for all the profits so received by him, and it is not material that the government is unable to show any specific abuse of discretion by the officer, or that the government has suffered any actual loss. *United States v. Carter* (U. S.), 19-594.

In a proceeding by the government to compel an officer to account for secret profits made by him by virtue of his office, it is immaterial that the evidence, separately considered, is insufficient as to any one or more of the facts alleged as constituting official misconduct and unfair dealing, if the evidence, taken as a whole, shows that the contractors, doing the work under such officer's supervision realized a profit abnormally large, and that the officer received a part of the profit so realized, and no credible explanation is made of either fact. *United States v. Carter* (U. S.), 19-594.

b. Liability of sureties on official bond.

Procurement of money on spurious orders as official act. — The misconduct of the auditor of a county in drawing in favor of fictitious persons spurious orders for the refunding of taxes, and in falsely representing to a bank that the orders are genuine, and in signing the mythical names of the payees and procuring the money from the bank, is not a representative or official act, but purely a personal one, and is therefore not an act or delinquency contemplated by the Minnesota statute providing that "the official bond or other security of a public officer to the state or any municipal body or corporation, whether with or without sureties, is to be construed as security to all persons severally for the official delinquencies against which it is intended to provide as well as to the state, body, or corporation designated therein." *National Surety Co. v. State Savings Bank* (U. S.), 13-421.

Allowance of interest on funds converted. — In an action on the bond of a state treasurer to recover for the conversion of the public funds, where it appears that the money was converted by the treasurer under the honest belief that he was entitled to it, and it further appears that the treasurer made no effort to conceal his retention of the money or to delay the state in demanding payment or suing for its recovery, interest should be allowed only from the time of demand of

payment; and where it does not appear that demand was made before the time of the commencement of the suit, interest should be allowed from such time only. *Whittemore v. People* (Ill.), 10-44.

Necessity and sufficiency of demand for payment. — In an action by a municipal corporation on the bond of an officer thereof, for the recovery of money received by him *virtue officii*, it is not necessary to aver presentation to him for payment of an order, drawn for the amount, or service upon him of a copy of an order, made and entered by the council, requiring him to pay it, unless such mode of procedure is prescribed by a statute or ordinance, or stipulated in the contract. *Cameron v. Hicks* (W. Va.), 17-926.

As the custody of public funds by municipal officers partakes of the nature of a bailment for hire, a demand for payment is a condition precedent to a right of action for the money, but, in the absence of a prescribed or stipulated form of demand, it suffices to aver any facts, showing authority in the defendant to pay, and a desire on the part of the plaintiff for payment, known to the defendant. *Cameron v. Hicks* (W. Va.), 17-926.

In such a case it is sufficient to aver the making and entry of an order by the town, requiring payment of the money, and notice thereof on the part of the officer. As a municipal corporation can move in such matters, only through its council or governing tribunal acting as a body, strict accuracy would require an averment that the order was made by the council, but an allegation that the town made the order, though inartistic and variant from good form, is sufficient. *Cameron v. Hicks* (W. Va.), 17-926.

10. CRIMINAL LIABILITY.

Necessity, in indictment for misconduct, of alleging defendant to be de jure officer. — An indictment against a public officer for official misconduct need not show that he was an officer *de jure*. It is sufficient to show that he was a *de facto* officer. *People v. McCann* (Ill.), 20-496.

PUBLIC POLICY.

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PUBLIC PROPERTY.

Lease of municipal property, see MUNICIPAL CORPORATIONS, 7 b.
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PUBLIC SERVICE CORPORATIONS.

See CARRIERS; CORPORATIONS; GAS AND GAS COMPANIES; RAILROADS; TELEGRAPHS AND TELEPHONES.
 Duties and liabilities of public service corporation, see CORPORATIONS, 5 b.
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 Regulation of rates for public service, see CORPORATIONS, 3 c.
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PUBLIC TRIAL.

Right of accused to public trial, see CRIMINAL LAW, 6 c (2).

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PUBLIC WATERS.

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 Right to take ice from public waters, see ICE.

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PURCHASER'S LIEN.

See VENDOR AND PURCHASER, 3 h.

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QUIETING TITLE — REMOVAL OF CLOUD.

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3. **JURISDICTION OF SUIT**, 1314.
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1. **RIGHT TO MAINTAIN SUIT.**

Good title and actual possession as essential. — A bill in equity to remove a cloud on the title to underlying coal cannot be maintained unless the plaintiff has both good title and actual possession. *Wallace v. Elm Grove Coal Co.* (W. Va.), 6-140.

A bill in equity to remove a cloud on the title to underlying coal cannot be maintained unless the plaintiff has both good title and actual possession. *Wallace v. Elm Grove Coal Co.* (W. Va.), 6-140.

A bill in equity to remove a cloud on title to land cannot be sustained unless the plaintiff has both good title and actual possession, as the weakness of the adversary will not sustain the bill. *Mills v. Henry Oil Co.* (W. Va.), 4-427.

Sufficiency of possession by agent or tenant. — The possession of land by an agent or tenant of the holder of the legal title is sufficient to enable him to maintain a suit to quiet title. *Stewart v. May* (Md.), 18-856.

Previous adjudication in suit at law as precluding right. — It is no ground for refusing to entertain a suit to quiet title, that the plaintiff's title has already been determined in a court of law, but such fact rather strengthens the plaintiff's right to maintain the suit, since he must make clear proof that he has the legal title. *Stewart v. May* (Md.), 18-856.

2. **WHAT CONSTITUTES CLOUD.**

Decree rendered in suit between strangers to title. — A decree affecting the title to land, rendered in a suit between strangers to the title, to which suit neither the true owner of the title nor any privy to the title is a party, does not cloud the title of the true owner. *Haggart v. Chapman, etc., Land Co.* (Ark.), 7-333.

Deed and mortgage describing part of premises. — A deed of a lot to the defendant and a mortgage thereof by the defendant to his grantor, the description in which includes a part of the plaintiff's adjoining lot, and the assertion by the defendant of title to the overlap, constitute a cloud on the plaintiff's title. *Stewart v. May* (Md.), 18-856.

3. JURISDICTION OF SUIT.

Quieting title to homestead in one spouse. — The Nebraska district court has the power to quiet the title to a homestead in one of the spouses without the concurrence of the other. *Cizek v. Cizek* (Neb.), 5-464.

Cancellation of tax deed issued by court of co-ordinate jurisdiction. — In an action between private individuals to remove an alleged cloud on the title to land, where the complaint alleges that the plaintiff is the owner of the land, that the same is situated in the county of J., and that a deed held by the defendant constitutes a cloud upon the title, an objection by the defendant to the jurisdiction of the court, on the ground that the land in question was conveyed to the defendant's predecessor in title, the county of C., by a tax deed issued out of the superior court of that county, and that to set aside such tax deed would be to annul the judgment of a court of the same power and jurisdiction as the court in which the action is brought, is properly overruled. In such a case it is unnecessary to determine whether the judgment in the action will be binding on the county of C., which is not a party to the action, since it will undoubtedly be binding on all the parties who appear in the action, and that is all that can be required as regards jurisdiction. *Puget Sound Nat. Bank v. Fisher* (Wash.), 17-526.

4. PLEADING.

Sufficiency of complaint. — Allegations of complaint reviewed in a suit to quiet the title to real property, and held to show that the complaint contains all essential averments. *Gibbs v. Potter* (Ind.), 9-481.

Contradictory averments in complaint. — In a suit to quiet title, brought by the original grantee under a deed, an allegation in the complaint that the deed, after it was fully executed, was altered by the erasure of the plaintiff's name and the substitution of the name of the defendant as grantee does not contradict the general allegation of title in the plaintiff, as alteration of the deed did not divest the plaintiff's title. *Gibbs v. Potter* (Ind.), 9-481.

Defenses probable under general denial. — Where the defendant in a suit to quiet title has filed an answer of general denial, all matters of defense are provable thereunder and it is not erroneous to strike out special answers filed by him. *Gibbs v. Potter* (Ind.), 9-481.

5. EVIDENCE.

Burden of proof of title. — In a suit brought to remove a cloud from the title to real estate and to enjoin action of ejectment to recover the same, one of the indispensable allegations of the bill is that the plaintiff has title to the land, and if an answer is filed denying such allegation, or if the defendant claiming adversely to the plaintiff is an infant, the plaintiff must prove title. *Holderby v. Hagan* (W. Va.), 4-401.

Sufficiency of evidence. — Evidence reviewed in an action to reform a deed and to

quiet title to the land covered thereby, and held not to justify the appellate court in disturbing a judgment for the plaintiff as being against the weight of evidence. *Gibbs v. Potter* (Ind.), 9-481.

Evidence examined and held sufficient to sustain the decree of the trial court quieting title to the real estate in controversy in the plaintiff. *Best v. Gralapp* (Neb.), 5-491.

QUIT.

Notice to quit, see **LANDLORD AND TENANT**, 3 g.

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QUO WARRANTO.

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2. WHO MAY FILE INFORMATION.

3. PERSONS SUBJECT TO PROCEEDINGS.

4. PLEADING.

5. ISSUANCE OF WRIT.

6. EFFECT OF EXPIRATION OF TERM OF OFFICE PENDING PROCEEDINGS.

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Testing validity of liquor license, see **INTOXICATING LIQUORS**, 4 b.

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1. NATURE OF PROCEEDINGS.

As remedy to try title to office. — *Quo warranto* and not mandamus is the proper legal remedy to try, as between adverse claimants, a doubtful title to public office. *Hoy v. State ex rel. Buchanan* (Ind.), 11-944.

An information in the nature of *quo warranto* does not lie to try the title to an alleged office which in fact and in law has no

legal existence. *Hedrick v. People ex rel. Ball* (Ill.), 5-690.

Ordering delivery of books, papers, etc., to relator in proceedings. — The function of a *quo warranto* proceeding is merely to try the respondent's title to the office, and the relator's title is not in issue except so far as it may be necessary to show that he has sufficient interest to maintain the proceeding. Accordingly a judgment directing the respondent to deliver to the relator the books, papers, and other things pertaining to the office goes beyond the proper scope of the proceeding. *Albright v. Territory* (N. Mex.), 11-1165.

2. WHO MAY FILE INFORMATION.

Prosecuting attorney. — Under the Missouri statute making it the duty of a county prosecuting attorney to exhibit an information in the nature of a writ of *quo warranto* at the relation of any person desiring to prosecute the same in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, the prosecuting attorney is charged with a discriminating duty in respect to exhibiting the information, and must determine whether the proceeding shall commence, and the exercise of his determination to exhibit the information must be evidenced by his signature to the information in due form and its exhibition in court. *State ex inf. Dorian v Taylor* (Mo.), 13-1058.

Where the permission of the prosecuting attorney of a county to use his name in a *quo warranto* proceeding brought by a private individual is given merely because he and the relator's attorneys think that he has no discretion to withhold the use of his name, and after the information is drawn and presented to him he refuses to sign it and is, in fact, opposed to the proceeding, he has no real or substantial part or lot in the proceeding, which consequently has no legal existence and is properly dismissed. *State ex inf. Dorian v. Taylor* (Mo.), 13-1058.

Private individual. — In the absence of statutory authorization and without the intervention of the attorney-general, a private individual cannot, either as of right or by leave of court, file an information in the nature of *quo warranto* to try the title to a public office. *Meehan v. Bachelder* (N. H.), 6-462.

3. PERSONS SUBJECT TO PROCEEDINGS.

Municipal corporation. — A municipal corporation is a person within the meaning of the Alabama statute providing that an action in the nature of *quo warranto* may be brought against any person who usurps any franchise, and therefore such action will lie against a municipal corporation when it usurps the exercise of a franchise not granted by its charter or by-law. *Uniontown v. State* (Ala.), 8-320.

4. PLEADING.

Necessity of allegation of legal existence of office. — An information in the

nature of *quo warranto* to try the title to a public office created by municipal ordinance is fatally defective if it fails to allege affirmatively and distinctly the legal existence of the office. *Hedrick v. People ex rel. Ball* (Ill.), 5-690.

An information in the nature of *quo warranto* held not to show sufficiently the existence of the office in question. *Hedrick v. People ex rel. Ball* (Ill.), 5-690.

Practice upon demurrer to information. — Where an information in the nature of *quo warranto* is demurrable, a demurrer to the plea should be carried back to the information and sustained. *Hedrick v. People ex rel. Ball* (Ill.), 5-690.

5. ISSUANCE OF WRIT.

Discretion of court. — When the attorney-general of a state, acting in his official capacity as the chief law officer of the state, exhibits an information in the nature of *quo warranto* to a district court and asks that a writ issue directed to a municipal corporation requiring it to show cause why its franchise should not be declared null and void, the court has no discretion, but must grant leave to file the information as a matter of course and direct the writ to issue. Upon the return it is the duty of the court to try the issues of law and fact presented thereby and to determine the same upon the merits according to rules of law applicable thereto. *State ex rel. Young v. Kent* (Minn.), 6-905.

Refusing leave to file information. — In Minnesota, when an application for a writ of *quo warranto* is made by an attorney-general to the supreme court, instead of to a district court, the former court will exercise the discretion given it by statute and determine whether it is a case in which the writ should issue out of that court. If in its judgment the application should have been made to the district court, leave to file the information will be denied. *State ex rel. Young v. Kent* (Minn.), 6-905.

6. EFFECT OF EXPIRATION OF TERM OF OFFICE PENDING PROCEEDINGS.

Dismissal of writ of error. — The expiration of the term of office of the defendant during the pendency of a *quo warranto* proceeding to try title to the office, does not terminate the proceeding, or require the dismissal of a writ of error prosecuted from a judgment ousting the respondent. The relator, if he finally prevails, will be given judgment of ouster and for costs. *Albright v. Territory* (N. Mex.), 11-1165.

RACE.

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RAILROADS.

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1. INCORPORATION.

Company chartered in foreign state.

— Under the constitution and laws of South Carolina, the secretary of state has no power to issue a charter of incorporation to the owners or projectors of a railroad who have obtained a charter in another state and are desirous of extending their road into South Carolina, but who have not complied with the laws of South Carolina relative to the incorporation of railroad companies. Before a charter can be issued in such a case, the applicants must open books of subscription in South Carolina, take subscriptions to the amount of five hundred dollars per mile, elect officers, and take the other steps for incorporation set out in sections 1918-1921 of the Civil Code. *Lyles v. McCown* (S. Car.), 17-436.

Amount of fees payable. — The amount of fees to be paid by a railroad company for its charter in South Carolina is governed by the Act of Feb. 25, 1902 (23 St. 1053), which requires payment of the fees prescribed by the repealed Act of Feb. 25, 1899, and not by the intervening Act of Feb. 20, 1901. *Lyles v. McCown* (S. Car.), 17-436.

2. LOCATION OF LINE AND ACQUISITION OF RIGHT OF WAY.

a. Location.

Necessity of survey. — Ordinarily one of the requisites of the valid location of a railroad, as to third persons and rival corporations, is a preliminary entry by engineers and surveyors, who run and mark the lines and report them to the company claiming prior location; but where the lines are clearly defined, as by the existence of an old roadbed which is entered on and staked out by agents of the locating company, and the route so marked is approved and adopted by the directors as the permanent location of their railroad, a survey by engineers is not of the substance, and should not be considered as essential. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co.* (N. Car.), 9-683.

Filing of map. — Under the North Carolina statute a railroad company is required, within a reasonable time after its road is constructed, to file with the corporation commission a map and profile of its route and of land condemned for its use; but this is for information deemed necessary to enable the commission to deal intelligently with matters within the scope of its duties, and is not required as a part of a correct and completed location. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co.* (N. Car.), 9-683.

Location across tracks of another railway. — The Indiana statute of March 8, 1905, entitled "An act concerning highways," and providing that any street railroad or other company organized under the laws of the state for similar purposes "desiring to build an interurban electric railway outside of any city or town on any public highway, may do so by procuring the consent of the board of commissioners of the

county in which such highway is situated," is broad enough as respects its title to cover the authorization contained in the body of the act, of the location, construction, and operation of electric interurban railroads upon public highways, and across railroads crossing such highways, although the title of the statute does not expressly mention railroad crossings. *South East, etc., R. Co. v. Evansville, etc., R. Co. (Ind.)*, 14-214.

The owners of a railway constructed across a highway acquire merely the privilege of crossing in the transportation of freight and passengers, subject to all proper uses to which the highway may be devoted under the law, and are bound to know that a street or interurban railroad may thereafter be lawfully located upon such highway across their track at that point. *South East, etc., R. Co. v. Evansville, etc., R. Co. (Ind.)*, 14-214.

All railroads are declared by the Louisiana constitution to be public highways and all railroad companies to be common carriers. This declaration applies not only to the main tracks, but also to all subsidiary tracks used for the purposes of railroad traffic. *Kansas City, etc., R. Co. v. Louisiana Western R. Co. (La.)*, 7-831.

The constitutional right of a railroad company to interest, connect with, or cross any other railroad, is not confined to main tracks, but extends to spur and other tracks forming a part of the same system. *Kansas City, etc., R. Co. v. Louisiana Western R. Co. (La.)*, 7-831.

Location on public highway. — A corporation organized under the general railroad laws of Kentucky operating an interurban and interstate electric railroad, is a "trunk railway," and consequently, although it may lay its tracks along the streets of a city or town, it is within the exception to sections 163 and 164 of the constitution of Kentucky, which provide that no street railway shall construct its tracks over the streets of cities or towns without the consent of the legislative bodies thereof, nor be granted a franchise for a term exceeding twenty years, such franchise to be sold to the highest bidder, but that such prohibitions shall not apply to a trunk railway. *Diebold v. Kentucky Traction Co. (Ky.)*, 4-445.

b. Change of location.

Right to relocate. — The general rule is that where a railroad company's charter prescribes the termini and the general route of the railroad, leaving the determination of details to the discretion of the corporation, the exercise of such discretion exhausts the power of the company to fix the location of its road and condemn a right of way, and it cannot relocate its road without statutory authority; and it is no ground for an exception to this rule that the interests of the public will be best served by a change in the location of the road, or that from a business or financial point of view the change is essential to the accomplishment of the purposes for which the road was built. *Cairo, etc., R. Co. v. Woodyard (Ill.)*, 9-55.

The Illinois statute authorizing the stockholders of a corporation "to enlarge or change the object for which such corporation was formed" does not empower the stockholders of a railroad company, formed to "purchase, own, construct, operate, and maintain," a railway between certain specified termini, to relocate portions of its roadway for the purpose of straightening its line and shortening the distance between the same termini, as such relocation does not change the object of the corporation. *Cairo, etc., R. Co. v. Woodyard (Ill.)*, 9-55.

Where a railroad company, to which has been given the power to choose its particular route between designated termini, has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority. *Brown v. Atlantic, etc., R. Co. (Ga.)*, 7-1026.

A railroad held not authorized, under the Georgia statute, to tear up its track at its mere volition and relocate the same at a different place. *Brown v. Atlanta, etc., R. Co. (Ga.)*, 7-1026.

Granting injunction to prevent relocation. — The allegation in an answer by a railroad to an application for an injunction to prevent the railroad from tearing up and relocating the tracks, held insufficient to prevent the injunction staying the relocation until a final trial can be had. *Brown v. Atlantic, etc., R. Co. (Ga.)*, 7-1026.

c. Acquisition of right of way.

(1) By purchase.

Nature of title acquired. — A conveyance by statutory warranty deed for a valuable consideration to a railroad company of land sought to be condemned by the company for right of way, vests in the company a fee simple title to the land and the company has a right to sell and convey the same in fee simple. *Spierling v. Ohl (Ill.)*, 13-430.

An instrument which is in form a general warranty deed, conveying a strip of land to a railroad company for a right of way, does not vest an absolute title in the railroad company, but the interest conveyed is limited by the use for which the land is acquired, and when that use is abandoned the property will revert to the adjoining owner. *Abercrombie v. Simmons (Kan.)*, 6-239.

Deed of right of way as release of damages. — The sale of a right of way to a railroad company operates as a remission by the landowner of all damages to which he would have been entitled in a proceeding to condemn the right of way. *Hord v. Holston River R. Co. (Tenn.)*, 19-331.

(2) By condemnation proceedings.

Crossing tracks of another railway. — The Indiana statutes, one of which provides for special proceedings and compensation for crossing only at places "not within the limits of any street or highway," and the other two of which provide in substance that their provisions shall in no wise impair or

abridge the right, under existing laws, of any street or interurban railroad company authorized to locate its road upon a public highway, to construct such road across the tracks and right of way of any railroad at a street or highway intersection without special proceedings or the consent of the owner of the railroad, do not purport to grant a street or interurban railway constructed along a public highway the right to cross the tracks of a railroad crossing such highway, and in a case involving such right the constitutionality of these statutes is not in question. *South East, etc., R. Co. v. Evansville, etc., R. Co. (Ind.)*, 14-214.

A steam railroad company whose track is constructed across a highway is not entitled to recover compensation for the crossing of its track at grade by an electric interurban road built upon such highway with the consent of the board of commissioners of the county, nor can such crossing be enjoined on the ground that compensation to the steam railroad has not been assessed, paid, or tendered. *South East, etc., R. Co. v. Evansville, etc., R. Co. (Ind.)*, 14-214.

Priority as between rival condemnors. — Where two railroads are seeking to condemn the same land, and in each case the grant to the company is indefinite, leaving the exact route to be selected by the company, the prior right will attach to that company which first locates its lines; and in the absence of statutory regulations to the contrary, the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co. (N. Car.)*, 9-683.

A street railway company which has made a valid prior location of its right of way along an old and abandoned roadbed is entitled to an injunction restraining a railroad company from condemning and appropriating such right of way for its own use, where the defendant has no express grant to condemn the plaintiff's right of way and no necessity is shown for such condemnation, and the evidence shows that the roadbed is only sufficiently large to permit of laying one track, so that if the defendant is allowed to appropriate it the appropriation will directly destroy the plaintiff's use of the right of way, and the defendant's engineers are surveying the route with the view of presently carrying into effect the defendant's avowed and unlawful purpose. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co. (N. Car.)*, 9-683.

Where a railroad company has secured priority of right to a right of way by priority of location, its right cannot be defeated by the action of a rival company in agreeing with the landowners and purchasing the property. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co. (N. Car.)*, 9-683.

Damages. — The owner of land through which a railroad company has a right of way may recover from the company for injuries to the land caused by driving wagons

over the land to and from the right of way, and also for the value of fences torn down by the company's laborers for use as firewood. *Hord v. Holston River R. Co. (Tenn.)*, 19-331.

Where a railroad company appropriates an alley in a city for the purpose of laying its tracks, and makes a deep excavation therein close to the lot line, the damages recoverable by an abutting owner are restricted to the special injury sustained by him by reason of being cut off from access to, and egress from, his property. A landowner does not suffer damages recoverable at law for injury to lateral support of his property until the earth is so much disturbed that it slides or falls. The actionable wrong for impairment to lateral support is not the excavation, but the act of allowing the owner's land to fall. *Kansas City, etc., R. Co. v. Schwake (Kan.)*, 3-118.

d. Abandonment of location.

What constitutes. — A railroad company having title to a right of way for the construction of a spur track to certain industries, which right of way is claimed and occupied by a rival company under court process erroneously granted, does not abandon such right of way by constructing, during the pendency of the litigation and the occupation of its rival, another spur track into the industries it desires to reach over a longer and more expensive route. *Atlanta, etc., R. Co. v. Southern R. Co. (U. S.)*, 11-766.

Preventing abandonment by injunction. — In an action by private persons to restrain a railroad company from tearing up a portion of its tracks and abandoning the operation of such portion of its line, where relief is sought on the ground that the wrongful action would work special damage to the plaintiffs apart from such damage as would be suffered by the general public, the injunction will not be denied on the ground that the plaintiffs have an ample remedy at law, or on the ground that the damages complained of are not irreparable. *Brown v. Atlantic, etc., R. Co. (Ga.)*, 7-1026.

Private persons can apply for an injunction restraining a railroad company from wrongfully tearing up a portion of its tracks and abandoning the operation of such portion of its line, where the wrongful action would work special and irreparable damage to them, and not merely such damage as would be shared in by the general public. *Brown v. Atlantic, etc., R. Co. (Ga.)*, 7-1026.

The fact that a railroad company had begun to tear up its tracks before an injunction was applied for to restrain the completion of such action does not furnish a reason for refusing to enjoin it from proceeding with the work, if its action is wrongful and is working special damage to the plaintiff. *Brown v. Atlantic, etc., R. Co. (Ga.)*, 7-1026.

A mandatory injunction requiring a railroad company to relay a substantial portion of the track which it has torn up, and requiring it to operate such portion of its road,

will not be granted at an interlocutory hearing of the cause. *Brown v. Atlantic*, etc., R. Co. (Ga.), 7-1026.

In an action for an injunction to prevent a railroad company from tearing up its tracks, the facts as disclosed by the pleadings and evidence in the record in the appellate court, held not to make such a case as to be controlled by the discretionary action of the presiding judge in granting or refusing the injunction. *Brown v. Atlantic*, etc., R. Co. (Ga.), 7-1026.

3. STATUTORY REGULATIONS.

a. Validity.

(1) Power to regulate in general.

Power of state. — Since railroads are created by the state for *quasi*-public purposes and are, therefore, affected by a public interest, the legislature may to the extent of such interest regulate and control them except in so far as it is restricted by the contract obligation imposed by the charter or statute under which the companies are incorporated, and subject of course to the constitutional restrictions against the impairment of vested rights, denial of the equal protection of the laws or due process of law. *Atlantic Coast Line Railroad Co. v. Coachman* (Fla.), 20-1047.

Power of dominion board of railway commissioners. — The dominion board of railway commissioners has no power to compel a provincial railway company to make a traffic arrangement with a company under the control of the Dominion Parliament. *Montreal Park, etc., Co. v. Montreal* (Can.), 18-143.

(2) Regulation of operation and equipment.

Compelling reasonable facilities for connecting railways. — The governmental power to regulate railroads and compel them to furnish adequate facilities for the traveling public not only includes a requirement that a railroad shall furnish adequate facilities for those traveling upon its own road, but extends to securing to the public reasonable facilities for making connections between different railroads. *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.* (U. S.), 11-398.

Requiring operation of certain train. — The fact that an order requiring a railroad corporation to operate a certain train may occasion a pecuniary loss so far as that particular train is concerned does not render the order in violation of the Constitution of the United States as a taking of property without due process of law or a denial of the equal protection of the laws. The duty of the railroad company to furnish necessary facilities is coterminous with the powers of the corporation, and the obligation to discharge that duty must be considered in connection with the corporate business as a whole, the character of the service required, and the need for its performance. *Atlantic*

Coast Line R. Co. v. North Carolina Corp. Com. (U. S.), 11-398.

An order of the corporation commission of North Carolina requiring a railroad company to operate a train from Rocky Mount, N. C., to Selma, N. C., a distance of forty-two miles, so as to connect at the latter point with a train of another railroad serving and making connections for points in the western part of the state, is not arbitrary and unreasonable, where it appears that there is a large population in the territory surrounding Rocky Mount which, without the train ordered, has no convenient and adequate means of transportation from Rocky Mount to Selma and thence west by connection with the trains of such other road. *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.* (U. S.), 11-389.

Requiring construction of private switches. — The Nebraska statute (Laws 1905, c. 105) requiring railroad companies, at their own expense, to construct side tracks to grain elevators along the right of way is unconstitutional as depriving the railroad companies of their property without due process of law. *Missouri Pacific R. Co. v. Nebraska* (U. S.), 18-989.

Imposing absolute liability for fires communicated by locomotive. — A statute imposing liability irrespective of negligence for damage to property communicated from locomotives operated by railroad companies is constitutional. *St. Louis, etc., R. Co. v. Shore* (Ark.), 16-939.

It is not essential to the validity of such a statute that it should contain a provision giving to railroad companies an insurable interest in buildings along their routes. *St. Louis, etc., R. Co. v. Shore* (Ark.), 16-939.

Such a statute is not rendered invalid by the fact that it applies also to persons operating railroads and to fires communicated in other ways in the operation of railroads. Even if these provisions are void, the validity of the statute as applied to fires communicated from locomotives operated by railroad companies is not affected thereby. *St. Louis, etc., R. Co. v. Shore* (Ark.), 16-939.

Requiring safety devices at crossings. — A railroad company receives its charter and franchises subject to an implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may from time to time require, and therefore the state may compel the railroad company to construct and maintain, at its own expense, suitable crossings at new streets and highways, to the same extent as at streets and highways in existence at the time of the construction of the railroad. *State ex rel. Minneapolis v. St. Paul, etc., R. Co.* (Minn.), 8-1047.

A state may, in the exercise of its police power, impose upon a railroad company, whose lines intersect public highways laid out after the construction of the railroad, the uncompensated duty of constructing and maintaining at such crossings all such safety devices as are reasonably necessary for the

protection of the traveling public; and the exercise of such power does not constitute the taking of private property for public use without just compensation. *State ex rel. Minneapolis v. St. Paul, etc., R. Co.* (Minn.), 8-1047.

Within the meaning of the rule that a railroad may be required to maintain such safety devices at crossings with highways as are necessary for the protection of the traveling public, a bridge over the tracks of a railroad is a "safety device," if it is necessary to make the crossing safe for public use. *State ex rel. Minneapolis v. St. Paul, etc., R. Co.* (Minn.), 8-1047.

The expense of constructing a railway bridge over a highway, made necessary by the action of the municipality in opening such highway through the railway company's embankment, may be cast on the railway company without denying the due process of law guaranteed by the Federal Constitution, which requires that compensation shall be made when private property is taken for public use. *Cincinnati, etc., R. Co. v. Connersville* (U. S.), 20-1206.

b. Construction.

Statute providing for forfeiture of franchises. — The Arkansas statute providing for the forfeiture of the franchises and charter rights of a railroad company operating under a lease is not retrospective in its operation, and does not authorize the forfeiture of a prior lease of railroad property made in disregard of the statute governing the making of such leases. — *Louisiana, etc., R. Co. v. State* (Ark.), 5-637.

Under the Arkansas statute providing that the franchises and charter rights of a railroad company operating railroad property under a lease shall be forfeited and the company ousted from the possession of such property, if such lease has not been made in conformity with the statute governing such leases, or if the lessee shall fail to perform certain enumerated public duties, the state may enforce the forfeiture of a lease of railroad property located within its boundaries though the lessee is a foreign corporation. *Louisiana, etc., R. Co. v. State* (Ark.), 5-637.

Requiring reports. — The Illinois statute requiring every railroad company incorporated or doing business in the state to make reports to the warehouse commission, applies to every railroad company doing business in the state, whether it is a domestic or a foreign corporation, and whether it is engaged in intrastate or interstate commerce. *People ex rel. Stead v. Chicago, etc., R. Co.* (Ill.), 7-1.

Requiring blocking of frogs. — A statute requiring railroad companies to fill or block all angles in frogs in all yards or stations where trains are made up is to be construed as for the protection of a person who happens to be dragged into an unlocked frog and not merely for the protection of persons who step into such a frog. *Cooper v. Baltimore, etc., R. Co.* (U. S.), 14-693.

Requiring repair of streets. — Where the charter of a railroad company authorizes it to construct its lines on any street or highway, and requires it to put such street or highway "in such condition and state of repair as not to impair or interfere with its free and proper use, the provision applies to streets and highways laid out over a railroad after its construction. *State ex rel. Minneapolis v. St. Paul, etc., R. Co.* (Minn.), 8-1047.

Application of blow-post law. — The blow-post law as embodied in the Civil Code of Georgia has no application where the track of the railroad company crosses the public highway upon a bridge or trestle above the latter. *Barton v. Southern R. Co.* (Ga.), 16-1232.

Requiring stopping of trains at junctions with other railroads. — The Minnesota statute (Rev. Laws 1905, § 2033), which requires railroad companies to stop their trains before reaching junctions with or crossings by railroads, imposes no duty on them to stop such trains before reaching connections of their own tracks with double tracks and connections of such tracks with side tracks which are all parts of one line of railroad, directed by the same management or controlled by the same operator. Such connections are not "junctions" within the meaning of this statute. *Chicago Great Western R. Co. v. Minneapolis, etc., R. Co.* (U. S.), 20-1200.

Such statute imposes no duty on a railroad company in favor of those injured in a head-end collision between trains on the same line of railroad who suffered neither danger nor injury from crossing trains and such parties can maintain no action against it on the ground that the trains which collided did not stop at same crossing. *Chicago Great Western R. Co. v. Minneapolis, etc., R. Co.* (U. S.), 20-1200.

Tax on "gross earnings." — The gross earnings which form the basis of the three per cent. tax on railroads, under the provisions of the Minnesota statute, are not limited to income derived by a railroad company directly from the operation of trains, but include earnings received by such company in connection with all operations reasonably within the powers conferred upon it by its charter. *State v. Minnesota, etc., R. Co.* (Minn.), 16-426.

The following items constitute gross earnings within the meaning of such statute: (1) amounts received from lumber companies and other parties for the use of locomotives and their crews in moving, transferring, and switching cars at log loading works, unless the inclusion of such amounts would result in double taxation; (2) amounts received from the rental or hire to other railroad companies, or private parties, of the company's equipment, such as steam shovels, hoisting machinery, work trains, and cars and engines with their crews, excluding, however, receipts for labor and work-train service and materials furnished in constructing, maintaining, repairing, or taking up spur tracks for private

parties; (3) amounts received from other railroad companies for work-train service in construction work for them, unless the inclusion of such amounts would result in double taxation; (4) the amount received by the company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies. *State v. Minnesota, etc., R. Co. (Minn.)*, 16-426.

The following items do not constitute gross earnings within the meaning of such statute: (1) amounts received from the sale to other railway companies of supplies, or of old or worn-out cars and appliances, or of surplus equipment; (2) amounts received for labor and material in repairing cars for other railway companies under a reciprocal arrangement whereby no profit results to the company; (3) interest or exchange from moneys deposited in banks, interest on securities, rentals from property on the right of way, garnishee fees, commissions from insurance companies, rental from telephone companies for the use of right of way, billboard receipts, and receipts from the sale of hay, stumpage, etc.; (4) amounts which the company would have received if it had charged itself, at the usual rates, for transportation of its own supplies and material over its own lines (5) receipts from labor, work-train service, and materials furnished in constructing, maintaining, repairing, or taking up spur tracks for private parties. *State v. Minnesota, etc., R. Co. (Minn.)*, 16-426.

4. CONTRACTUAL OBLIGATIONS.

a. In general.

Binding effect of covenant in deed to railway company. — Where a railroad company accepts a deed conveying to it land for its right of way and so uses the land, any valid contract or agreement contained in the deed of conveyance is binding upon the railroad company, even though the company did not sign the deed, and under proper circumstances such agreement may be enforced in equity by specific performance. *Taylor v. Florida East Coast R. Co. (Fla.)*, 14-472.

Power of court to nullify contract. — While a common carrier railroad corporation may not be bound by a contract which renders the corporation incapable of performing its duties to the public, yet where the subject-matter of a contract made by such a corporation is not foreign to the lawful purposes of the corporation, but is fairly within its authorized powers and purposes, and the contract is not forbidden by statute and is not otherwise illegal, it will not be nullified by the courts. *Taylor v. Florida East Coast R. Co. (Fla.)*, 14-472.

Whether the duty a common carrier railroad corporation owes to the public is materially and injuriously affected by the contract obligations of the corporation to individuals cannot be arbitrarily determined by the corporation for itself. *Taylor v. Florida East Coast R. Co. (Fla.)*, 14-472.

Construction of contract. — Hay, grain, straw, and feed furnished to a contractor employed in the construction of a railroad do not constitute either "material," "labor," or "board" within the meaning of a notice posted by the railroad company that it will "protect all claims for material, labor, and board." *Pennsylvania Co. v. Mehafeey (Ohio)*, 9-305.

b. Selection of particular route.

Validity of contract. — A contract whereby a railroad company is induced to select a particular route does not *per se* contravene any rule of public policy. Such a contract is enforceable unless the selection of the route is prejudicial to the public interests, as where it is provided that the route selected shall be to the exclusion of all others, or unless the contract provides for private emoluments to officers of the railroad company who control the selection of a route. *McCowen v. Pew (Cal.)*, 15-630.

Where it appears that the only advantage received by the projectors of a railroad from options to purchase certain timber lands at a fair price, given by the owners thereof as an inducement to the building of the road over one of several contemplated routes, is the securing of freight for the road when completed, and that such options contain no stipulation for the selection of such route to the exclusion of any other route, there being nothing to indicate that the selection of such route is injurious to the public interests, such options do not violate any rule of public policy and are enforceable. *McCowen v. Pew (Cal.)*, 15-630.

c. Location of depot.

Validity of contract. — The contract of a railroad company to locate a station at a given point is not *per se* void, but is enforceable against the company so long as it is possible for the company to discharge the duties owing by it to the public and at the same time discharge the duties imposed upon it by the contract; and it is incumbent on the company, seeking to be discharged from a contract to locate and maintain a station, to show satisfactorily that there has arisen such a conflict between its public duties on the one hand and its duties under the contract on the other that it is impossible for it to discharge the former without entirely abandoning the latter. *Atlanta, etc., R. Co. v. Camp (Ga.)*, 13-439.

Duration of contract. — A deed conveying lands to a railroad company for its right of way, by the owner of a hotel situated near to the proposed road, containing an agreement on the part of the corporation "to maintain said spur track, depot, and platform, and to operate all its regular passenger trains upon said spur track to said depot during what is known as the winter tourist season, which consideration is binding upon the party of the second part, its successors, and assigns," taken in connection with the

conditions that surround the parties and the purpose to be accomplished, indicates an intention that the agreement should remain in force at least during a continuance of substantially the same mutual conditions and relations of the parties and their privies. *Taylor v. Florida East Coast R. Co. (Fla.)*, 14-472.

Enforcing specific performance. —

Where a common carrier railroad corporation asks for and receives land upon which to construct its road, and as a consideration therefor promises to maintain a spur track and depot at a certain place upon lands given for that purpose, and the party giving the land, relying upon the promise of the corporation, incurs great expense in improving his property for use in connection with the advantages of the spur track and depot and the operation of trains thereon, and the breach of the promise results in an injury that cannot be adequately compensated in damages, equity may enforce performance of the promise in the manner and to the extent agreed, at least in the absence of a proper showing of superior rights of the public. *Taylor v. Florida East Coast R. Co. (Fla.)*, 14-472.

Where the owner of a hotel conveys land to a railroad company upon which to construct its right of way for the main line, a spur track and depot, and the deed of conveyance contains an agreement upon the part of the railroad company to maintain the spur track and depot to a point near the grantor's hotel and to operate all its regular passenger trains upon the spur track to the depot during a certain season of the year, and it appears that a controlling consideration for the conveyance was the maintenance of the spur track and depot thereon and the operation of passenger trains over the spur to the depot, which would be peculiarly beneficial to the grantor's hotel property and business, and extensive improvements of the hotel property are made upon the fact of the agreement to maintain the spur and depot and to operate the passenger trains as stated, such agreement may be specifically enforced in equity unless such enforcement will directly, materially, and injuriously affect the rights of the general public, and the enforcement of such contract accords with the public policy declared by the Florida statute. *Taylor v. Florida East Coast R. Co. (Fla.)*, 14-472.

Enjoining operation of trains for breach of covenant. — Where the owner of land conveys it to a railroad corporation for the right of way of its main line, and the corporation violates its agreement contained in the deed of conveyance to maintain a spur track and a depot on the spur track, the grantor of the land cannot enjoin the running of trains over the main line, since the public have rights requiring uninterrupted service over the main line. *Taylor v. Florida East Coast R. Co. (Fla.)*, 14-472.

Liability in damages for breach. — Where, for the purpose of increasing its earning opportunities, a railroad company adopts the policy of offering inducements to procure settlers along its line, and in pursuance of

such a policy agrees with a prospective settler that if he will purchase certain land along the line of the railroad, the company will establish and maintain a station at a point near the land, and put into effect a schedule under which two trains will stop at such station from each direction daily, the purchase of the land and the establishment of the station constitute a contract binding the company to maintain the station and schedule, except as the public interest may require their discontinuance, and the other party to the contract has a right of action for damages for the breach of such contract. *Atlanta, etc., R. Co. v. Camp (Ga.)*, 14-439.

Measure of damages for breach. — In an action for damages for breach of contract by a railway company in failing to erect and maintain a depot on the plaintiff's land, the measure of damages is the difference between the value of the residue of the plaintiff's land after the conveyance of the right of way to the railroad company, without the depot, and what the value would have been if the depot had been established at the point agreed on by the parties. *Louisville, etc., R. Co. v. Whipps (Ky.)*, 4-996.

Pleading in action for breach. — In an action for damages for breach of contract by a railway company in failing to erect and maintain a depot at a certain point on its land, held not an abuse of discretion for the court to refuse to permit an amended answer to be filed. *Louisville, etc., R. Co. v. Whipps (Ky.)*, 4-996.

Admissibility of evidence in action for breach. — In an action for damages for breach of contract by a railway company in failing to erect and maintain a depot on the plaintiff's land, evidence as to the selling prices of other lands contiguous to and situated like that of the plaintiff, and as to the advantages of the plaintiff's land for business and suburban purposes, and also as to what value the location of the depot on the plaintiff's land at the point agreed on would have given the land, is competent. *Louisville, etc., R. Co. v. Whipps (Ky.)*, 4-996.

d. Location of offices and shops.

Validity of contract. — The enforcement of a contract by a railroad company for a valuable consideration to maintain its general offices, roundhouses, and machine shops at or in a certain city is not against the public policy of the state, especially where the observance of such a contract is specifically required by statute. *Tyler v. St. Louis Southwestern R. Co. (Tex.)*, 13-911.

Statutes requiring enforcement. — Under the Texas statute providing that railroad companies shall keep and maintain their machine shops and roundhouses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and if said general offices and shops and roundhouses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed,

the purpose of the last clause relating to railroads aided by county bonds is not to qualify the first clause but to apply the rule stated in the first clause to the different class of contracts specified in the last. *Tyler v. St. Louis Southwestern R. Co. (Tex.)*, 13-911.

Under the Texas statute providing in substance that the general offices of every railroad company shall be kept at the place named in its charter, and if no place is named in its charter, and such railroad company has, for a valuable consideration, contracted to locate its general offices at a particular place, then such offices must be kept and maintained at such place, a railroad company cannot, by virtue of a power to amend its charter, remove its offices from a place named by its charter for their location and at which the company has also contracted to locate them. *Tyler v. St. Louis Southwestern R. Co. (Tex.)*, 13-911.

Right of municipality to enforce contract. — A municipal corporation may properly be the depository of a contract by which a railroad company agrees to maintain its offices, roundhouses, and machine shops in the city, and has capacity to maintain suit on such contract as trustee for its citizens. *Tyler v. St. Louis Southwestern R. Co. (Tex.)*, 13-911.

Decreeing specific performance. — A court will not refuse to enforce the specific performance of a contract by a railroad company to maintain its general offices, roundhouses, and machine shops at a certain city, where it appears that there will be no difficulty in enforcing specific performance and that there will be no necessity for the supervision of any judicial or executive officer in the operation of the offices, roundhouses, and shops in question. *Tyler v. St. Louis Southwestern R. Co. (Tex.)*, 13-911.

e. Use of city streets.

Injunction for violation of contract by company. — Where a railroad has entered into a contract with a municipality for the use of the streets, it will not be presumed that the company will violate the same, and an injunction against the use of the streets will not be granted upon a mere allegation of the intended breach. *Mordhurst v. Ft. Wayne, etc., Traction Co. (Ind.)*, 2-967.

5. RIGHTS, POWERS, AND DUTIES.

a. In general.

Nature of right of way. — Under the Nebraska constitution, a railroad constructed and operated in the state is a public highway. *McLucas v. St. Joseph, etc., R. Co. (Neb.)*, 2-715.

Right to use electricity for motive power. — Unless restricted by legislation or its charter, a railroad may employ electricity as a motive power, and it is immaterial that the use of such power was unknown at the time when the railroad was incorporated. *Howley v. Central Valley R. Co. (Pa.)*, 5-51.

Right to receive municipal aid. — Whether a corporation, which in the purposes of its organization is not restricted to a railway enterprise, may lawfully be the beneficiary of a tax under article 270 of the constitution — *quære*. But certainly not without proper restrictions, whereby the aid would be confined to the railway enterprise. *Tolson v. Police Jury (La.)*, 12-847.

b. Change of name.

Under Illinois statute. — Railroad corporations are entitled to the benefit of the Illinois statute providing for changing the names, for changing the places of business, for increasing or decreasing the capital stock, for increasing or decreasing the number of directors, and for enlarging or changing the objects for which corporations are formed. *Cairo, etc., R. Co. v. Woodyard (Ill.)*, 9-55.

c. Conduct of other business.

Duty to maintain public grain elevators. — The public duty of a railroad company to carry grain, and, as incidental thereto, to furnish temporary storage for grain at important points, does not require or empower the railroad to maintain and operate its grain elevators as public warehouses of class "A" under the Illinois statute, at which all grain offered for storage must be accepted, as this might cause the elevators to be monopolized by others than shippers and seriously impair the ability of the carrier to serve the public. *People ex rel. Healy v. Illinois Cent. R. Co. (Ill.)*, 13-285.

Grain elevators operated by a railroad company for a long term of years as public warehouses of class "A" under the Illinois statute, do not thereby become impressed with a public user so that the railroad company cannot cease to operate them for the benefit of the general public. *People ex rel. Healy v. Illinois Central R. Co. (Ill.)*, 13-285.

Equity will not compel a railroad to contract with a third person for carrying on public warehouses which the railroad itself has no power as a common carrier to conduct. *People ex rel. Healy v. Illinois Central R. Co. (Ill.)*, 13-285.

Power to run omnibuses. — The business of running omnibuses for the distribution and collection of its passengers is not incidental to or consequential upon the authority given a railway company to maintain and use a railway, and where not specially authorized, such business is beyond its power to conduct. *Atty.-Gen. v. Mersey R. Co. (Eng.)*, 4-906.

Power to maintain relief association. — A railroad company has the power to establish and maintain a relief association or department to care for its employees and their families in case of the sickness, injury, or death of employees, as the association is a beneficial and not an insurance one. *Harrison v. Alabama Midland R. Co. (Ala.)*, 6-804.

Who may question power. — One who has been enjoined from interfering with the construction of a railroad is not precluded thereby from maintaining a suit against the road, if, in operation after construction, it undertakes to exercise a franchise not possessed by it. *Howley v. Central Valley R. Co. (Pa.)*, 5-51.

d. Powers and duties with respect to depot grounds.

What constitute depot grounds. — The depot or station grounds of a railroad company are the places where passengers get on and off trains and where freight is loaded and unloaded, and include all grounds reasonably necessary or convenient for that purpose, together with the necessary tracks, switches, and turnouts thereon or adjacent thereto for handling and making up trains, storage of cars, and such uses, and so much of the main track outside of the switches as is required for the proper operation of trains at the stations. *Wilmont v. Oregon R. Co. (Ore.)*, 11-18.

Where grounds have been appropriated, surveyed, and set apart by a railroad company for station or depot purposes, such action by the company affords very strong if not conclusive evidence that their boundaries and extent are such as, and no more than, are necessary and proper for the carrying on of the business of the company, and their limits should not be curtailed or extended by the court or jury except in very clear cases. *Wilmont v. Oregon R. Co. (Ore.)*, 11-18.

Grant of exclusive privilege on depot grounds. — A railroad company may grant to one person or company the exclusive privilege of going on its depot premises to solicit the patronage of passengers in conveying them and their baggage to and from the depot, and may deny that privilege to all others. *Oregon Short Line R. Co. v. Davidson (Utah)*, 14-489.

Even though the grant by a railroad company to one transfer company of the exclusive privilege of soliciting patronage on its depot grounds is void as against public policy as creating a monopoly, that does not give rival transfer companies and hackmen the legal right to enter the depot premises for the purpose of soliciting patronage. *Oregon Short Line R. Co. v. Davidson (Utah)*, 14-489.

Hackmen and transfer companies having a contract to receive or deliver freight or passengers at a railroad depot may enter upon the railroad's premises as a matter of right, but they have no right to require the railroad company to devote any of its property to their use for the purpose of soliciting business for themselves. *Oregon Short Line R. Co. v. Davidson (Utah)*, 14-489.

A union depot company organized under the Act of April 3, 1868 (65 O. L. 63, now sections 3446 to 3452, Revised Statutes, inclusive); may grant to a transfer company the exclusive right to use a designated portion of its depot grounds for the purpose of

standing thereon its hacks and vehicles, and of soliciting thereon the patronage of incoming passengers; and a rule of said depot company excluding therefrom all others engaged in a like business, except for the purpose of delivering passengers or of receiving passengers who shall have previously employed them, is a reasonable rule, and may be enforced so long as said transfer company provides and furnishes at such depot adequate accommodations in the way of vehicles to meet the reasonable requirements of the traveling public, and makes no greater charge for its services in carrying passengers and baggage to and from such station than is made or may be permitted to be made by others for like services. *State v. Union Depot Co. (Ohio)*, 2-186.

Duty to fence depot grounds. — Whether a railroad company shall fence its tracks at its depot grounds is a question of law for the determination of the court. *Wilmont v. Oregon R. Co. (Ore.)*, 11-18.

e. Duties with respect to operation and equipment.

Duty to furnish reasonable and necessary facilities. — A railway company is required to furnish all necessary equipment and facilities for the discharge of its duties as a common carrier; but when such are not reasonable and necessary for such purpose, it is not, independent of its duties as a common carrier, to be required to furnish them, that the public may, commercially, derive convenience therefrom. *Atchison, etc., R. Co. v. State (Okla.)*, 18-102.

When a state confers upon a railroad corporation the rights of a common carrier, the law imposes upon such corporation the duty of providing all facilities and of operating them so as to adequately meet all reasonable requirements of the service it engages to render. This duty is implied by law in conferring the franchise and privileges of a common carrier or in permitting their use, whether the provisions of the grants be mandatory or merely permissive; and the acceptance or exercise of the rights carries with it the duty of properly rendering the public service undertaken by virtue of the rights conferred or permitted to be exercised. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

Discretion of railway company. — The roadbed and track of a railroad have the elements of stability, and it can be readily ascertained when they are put in the condition required by specific allegations and commands in mandamus proceedings. But in the nature of things there can be no fixed standard for the number of engines and cars that will be sufficient to move the traffic along the different lines of a railroad company, as the requirements of the service may greatly and rapidly fluctuate from time to time. A large discretion in such cases must be left to the management of the road and the supervision of the state tribunal charged with that duty. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

Determination of sufficiency of equipment and facilities. — In determining whether the roadbed, track, rolling stock, and other equipment of a common carrier railroad corporation is reasonably sufficient, and is being maintained and operated in a reasonably safe and adequate condition, and is being managed for the proper rendering of the public service that the corporation has undertaken to perform, the conditions under which the service is being rendered, the character and extent of the service, its reasonable requirements, and the means, facilities, and methods best suited to such service in common use, will be considered by the court, together with any other material and pertinent matters available. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

Whether or not the property devoted by a common carrier railroad corporation to the public service which it is authorized to perform, is adequate, and is being operated in a reasonably safe and convenient manner for the proper rendering of such public service, may be determined by the courts when the question is duly presented by the state through its proper official representative; and in determining the question, any legal method of ascertaining the material and essential facts may be adopted which is best suited to the case. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

Duty to furnish telegraph service at stations. — A railway company engaged as a common carrier in the transportation business is not required to install and maintain telegraph stations to receive and transmit messages for commercial purposes, independent of its business as such common carrier. *Atchison, etc., R. Co. v. State (Ala.)*, 18-102.

Enforcement of duties by mandamus. — The duty of providing a reasonably safe and sufficient roadbed, track, equipment, and facilities, and of maintaining and operating the property in a proper condition for rendering safe, prompt, and adequate service, and of actually rendering to the public such service without unjust discrimination, being required for the public good and contemplated by law and imposed upon a common carrier railroad corporation in permitting it to exercise the franchises and privileges of a common carrier, may be enforced by mandamus in a proper case upon the relation of the attorney-general when no other adequate remedy is provided by law. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

When it is sought by mandamus to compel a railroad company to do any act in relation to the equipment and operation of its road, the courts, as a general rule, will not interfere except where the act sought to be enforced is specific. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

The common-law writ of mandamus may be issued to specifically enforce the performance of a duty imposed by law upon a railroad corporation where no other adequate remedy is provided by law. *State ex rel. Ellis v. Atlantic Coast Line R. Co. (Fla.)*, 12-359.

6: SALE OF PROPERTY AND FRANCHISES.

Liability of purchaser at judicial sale on contracts of former owner. — Where the property and franchises of a railroad company are sold at a judicial sale, the purchaser takes them free from liability for the company's personal contracts, unless he assumes the liability or unless it is imposed by statute or by the decree under which the sale is made. *Hunkle v. Atchison, etc., R. Co. (Kan.)*, 6-83.

7. LIABILITY FOR INJURIES TO PROPERTY.

a. Killing of animals.

Duty to fence depot grounds. — The Oregon statute making a railroad company liable for the value of stock killed by its trains upon or near unfenced tracks does not extend to stock killed upon the depot grounds, because the purposes for which such grounds are used and the right of the public convenience are inconsistent with the obligation to fence at that point. *Wilmont v. Oregon R. Co. (Ore.)*, 11-18.

Where, in an action against a railroad company to recover the value of stock killed by its trains, it appears that the stock entered upon the tracks of the company at its depot grounds which it was not required to fence, the owner of the stock cannot recover. *Wilmont v. Oregon R. Co. (Ore.)*, 11-18.

Instructions in action for killing dog. — In an action against a railroad company for killing a dog on the track, it is proper to refuse to charge that a dog is an animal of superior intelligence, possessing greater ability to avert injury than live stock; that the presumption is that he has the instinct and ability to get out of the way of danger, unless his freedom of action is interfered with; that the diligence which an engineer owes to the owner of a dog is the same as that which he owes to a man walking on or near the track, apparently in possession of his faculties; and that the engineer is warranted in acting upon the belief that the dog will be aware of the approaching danger and get out of the way in time to avoid injury. The request is objectionable as invading the province of the jury to determine for themselves questions of fact, and also as not correctly stating the degree of care that should be exercised to avoid injuring a dog. *St. Louis, etc., R. Co. v. Rhoden (Ark.)*, 20-915.

Presumption of negligence from failure to keep lookout. — Under the Arkansas statute (Kirb. Dig., § 6607) making it the duty of persons running trains to keep a constant lookout for persons and property on the track, and providing that if any person or property shall be killed or injured by the negligent failure of any employee of a railroad company to keep such lookout the company shall be liable for the damages therefrom, and that the burden of proof shall be on the company to prove performance of the duty, the killing of a dog by the running of a train is *prima facie* evidence of the rail-

road company's negligence. The company owes the same degree of care to avoid injury to dogs as to other species of property or to persons under similar circumstances. *St. Louis, etc., R. Co. v. Rhoden* (Ark.), 20-915.

Sufficiency of evidence of negligence.

— In an action against a railroad company for killing a dog on the track, evidence held sufficient to go to the jury on the question whether the engineer was keeping a constant lookout for persons or property on the track. *St. Louis, etc., R. Co. v. Rhoden* (Ark.), 20-915.

In an action against a railroad company for killing a dog on the track, evidence held to support a judgment for plaintiff. *St. Louis, etc., R. Co. v. Rhoden* (Ark.), 20-915.

Sufficiency of evidence of negligence and absence of contributory negligence.

— In an action against a railroad company for damages for the negligent killing of cattle on its right of way, evidence examined and held sufficient to make the question of negligence one for the jury, and to fail to show contributory negligence on the part of the plaintiff. *Union Pacific R. Co. v. Meyer* (Neb.), 14-634.

Questions for jury. — In an action against a railroad company to recover the value of stock killed, the question whether the act of the owner in turning the stock out in uninclosed lands near unfenced depot grounds is such contributory negligence as will defeat a recovery is for the determination of the jury. *Wilmont v. Oregon R. Co.* (Ore.), 11-18.

In an action to recover for stock killed by a railroad company, where the liability of the company depends on whether the stock entered upon the tracks within or without the depot grounds, the question as to the place where the stock entered upon the tracks is for the determination of the jury. *Wilmont v. Oregon R. Co.* (Ore.), 11-18.

b. Smoke, noise, and vibration.

Liability in absence of negligence. —

Where property situated adjacent to the mouth of a railroad tunnel and an open cut is injured by smoke, vibrations, etc., resulting from the operation of the road, the owner may recover damages in an action against the railroad company without proof of negligence on the part of the defendant, and though it has constructed its road at such point by express legal authority; and this is especially true where the railroad has failed to comply with a municipal ordinance requiring it to erect a shed over the open cut. Though such injury to the property does not amount to actual invasion, but is only consequential, the owner has a right of recovery. *Baltimore Belt R. Co. v. Sattler* (Md.), 3-660.

The section of the Maryland Code exempting railroads from liability for injuries to stock and for fires set by engines upon proof that the injury complained of was committed without negligence, does not effect the plaintiff's right to recover in an action against

the railroad for injuries by smoke, vibrations etc., resulting from the operation of the road. *Baltimore Belt R. Co. v. Sattler* (Md.), 3-660.

An authorized railroad is not liable to adjacent landowners for damages from the noise, smoke, and dust, the vibration and jarring of buildings, caused by the running of its trains, when the road is operated without negligence, since that cannot be a nuisance which the law authorizes. *Fisher v. Seaboard Air Line R. Co.* (Va.), 1-622.

Admissibility of evidence. — In an action against a railroad to recover for injuries to property by the smoke resulting from the operation of the road, testimony by an expert witness that in his opinion the quantity of the smoke cast on the plaintiff's land is greater on account of the existence of the tunnel, is improperly admitted, but where other witnesses have testified that the smoke collects in the tunnel and is forced out upon the plaintiff's land, the defendant is not prejudiced by the admission of the expert opinion to the same effect. *Baltimore Belt R. Co. v. Sattler* (Md.), 3-660.

In an action against a railroad to recover for injuries to property by smoke, vibrations, etc., resulting from the operation of the road, evidence as to the effect produced by the smoke on the property other than the plaintiff's in the immediate neighborhood is admissible. *Baltimore Belt R. Co. v. Sattler* (Md.), 3-660.

In an action against a railroad company to recover for injuries to property by smoke, vibrations, etc., resulting from the operation of the road at the mouth of a railroad tunnel and through an open cut, evidence as to an ordinance requiring the defendant to erect a shed over the open cut and provide the same with smoke escapes, and that the defendant has not complied therewith, is admissible. *Baltimore Belt R. Co. v. Sattler* (Md.), 3-660.

c. Fires.

(1) Liability in general.

Liability of government of Canada for fire started by locomotive on governmental railroad. —

The government of Canada is liable by statute (7 & 8 Edw. VII., c. 31, § 2) for damage to property caused by a fire started by a locomotive working on a government railway, whether its officers or servants are or are not negligent; but, by a proviso, the amount of damages is limited if modern and efficient appliances have been used and the officers or servants "have not otherwise been guilty of any negligence," *Leger v. Rex* (Can.), 17-189.

The expression "have not otherwise been guilty of any negligence," as used in the above statute, means negligence in any respect and not merely in the use of a locomotive equipped with modern and efficient appliances. *Leger v. Rex* (Can.), 17-189.

Where it appears that sparks from a locomotive on a government railway set fire to the roof of a government building near the

railway track and the fire was carried to and destroys private property, and it is shown that the roof of the government building in question had on several previous occasions caught fire in a similar way and the government officials, though notified on many such occasions, had only patched it up without repairing it properly, the owner of the property destroyed is entitled to recover the total amount of his loss, because of the negligence of the government officials in having a building with a roof in such condition so near to the track. *Leger v. Rex* (Can.), 17-189.

Change of wind as intervening cause.

— Where the setting of a fire by and from the locomotive of the defendant is the proximate cause of the injury to the plaintiff's trees, it is none the less the proximate cause by reason of a change in the direction of the wind which is blowing, at the time the fire is set, and which continues to blow without any extraordinary increase in its velocity until the flames are carried by the wind to the trees of plaintiff and injure and destroy them. A simple change in the direction of the wind is not an intervening cause that will prevent recovery. *Florida East Coast R. Co. v. Welch* (Fla.), 12-210.

(2) Contributory negligence.

Duty of adjoining owner to take precautions against fire. — A farmer through whose lands a railroad is operated may cultivate and use such lands in accordance with the methods customary among farmers, and is not required to take unusual precautions against loss from fire negligently set out by a railroad company. *Walker v. Chicago, etc., R. Co.* (Kan.), 13-1204.

Contributory negligence in permitting combustibles to remain on land. — While an adjacent owner would not be warranted in needlessly placing combustible property close to a railroad in a place of known danger contrary to common usage, a farmer who permits dry grass or cornstalks to remain in a field where they were grown, as farmers usually do, is not on that account deemed to be negligent and is not thereby deprived of redress for the loss of property burned through the negligence of the railroad company. *Walker v. Chicago, etc., R. Co.* (Kan.), 13-1204.

An owner of lands adjoining a railroad right of way is not guilty of contributory negligence because he allows grass, weeds, and brush to grow upon his land. *Louisville, etc., R. Co. v. Beeler* (Ky.), 15-913.

(3) Pleading.

Denial of unnecessary allegations in answer. — In an action by an owner of land adjoining a railroad track to whose land fire has been communicated by the railroad company's locomotives, the fact that such locomotives were screened as required by statute is a matter of evidence on the question of negligence, but it is unnecessary for the railroad company to plead such fact, and

if pleaded, it is unnecessary for the plaintiff to take issue upon it. *Louisville, etc., R. Co. v. Beeler* (Ky.), 15-913.

(4) Evidence.

Presumption of negligence from starting of fire. — In an action by the owner of adjoining lands for damages caused by fire, it is sufficient to establish a *prima facie* case for the plaintiff to show that fire has been communicated from the company's engine to his property, which resulted in its damage or destruction; and such proof, when made, raises the presumption of negligence of the company either in the construction and equipment or management and operation of its engine, and casts the burden upon the defendant of rebutting this presumption of negligence. *Osborn v. Oregon, R., etc., Co.* (Idaho), 16-879.

The fact that the setting of the fire by the defendant's locomotive is proved by circumstantial evidence only, does not prevent such presumption of negligence from arising, since a fact may be established just as fully by circumstantial as by direct evidence. *Osborn v. Oregon, R., etc., Co.* (Idaho), 16-879.

Under the Florida statute making proof of damage by fire from a railroad locomotive *prima facie* evidence of negligence, it devolves upon the railroad company to show that their agents or servants exercised care and diligence. *Florida East Coast R. Co. v. Welch* (Fla.), 12-210.

Necessity of proof of negligence where presumption rebutted. — When the presumption of negligence which thus arises is repelled and rebutted by proof on the part of the defendant of proper construction of its locomotives and the use of proper appliances and careful management and operation, the plaintiff cannot recover without producing proof of actual negligence or want of ordinary care. *Osborn v. Oregon R., etc., Co.* (Idaho), 16-879.

Presumption of negligence causing collision. — In an action against a railroad company to recover damages for injury to property by a fire resulting from a collision, where it appears that at the time of the collision the defendant used the "block system," and that the danger signal was displayed and could have been seen for the distance of a half-mile, and the defendant fails to introduce any evidence explaining the cause of the collision, the jury are warranted in drawing an inference of negligence as a matter of fact on the part of the defendant. *Cincinnati, etc., R. Co. v. Saulsbury* (Tenn.), 5-744.

Admissibility of evidence of other fires. — In an action against a railroad company for damages caused by fire set from an engine running on the defendant's road, where the engine that must have set the fire is identified and it is shown by the defendant's witnesses that the particular engine that set the fire is no better than any of its other engines, it is not error to admit evidence of the setting of other fires a short

time previous to the destruction of the plaintiff's property. *Osburn v. Oregon R., etc., Co. (Idaho)*, 16-879.

Under such conditions and circumstances, the reasonable inference of fact would be that the identified engine would be as likely to throw igniting sparks and live coals and set the fire as was any of the other of the company's engines that are shown to have emitted sparks and fire about the same time. *Osburn v. Oregon R., etc., Co. (Idaho)*, 16-879.

In an action against a railroad company for damages to trees caused through its negligent communication of fire from a locomotive to the lands of the plaintiff, where the engine charged with the fire is not identified, it is competent for the plaintiff to show that other engines of the defendant company started other fires at or about that time, either before or after the destruction of the trees, or emitted sparks, as tending to prove that some locomotive of the defendant company caused the fire on the occasion stated. *Florida East Coast R. Co. v. Welch (Fla.)*, 12-210.

Nature of evidence required. — An allegation that a fire was set by a passing engine need not be proved by the testimony of an eyewitness, but must be proved by evidence that reasonably leads an inquiring and unbiased mind to the conclusion that a spark from the engine in question caused the fire. *Clark v. Grand Trunk Western R. Co. (Mich.)*, 12-559.

Sufficiency of evidence. — Where it appears in an action by an owner of lands adjoining a railroad right of way that the fire originated on the railroad right of way and spread therefrom to the plaintiff's land, that some time before the railroad company mowed the grass and weeds upon its right of way, but left them lying upon the ground, and that a train passed about ten minutes before the fire occurred, a peremptory instruction to find for the defendant is properly refused. *Louisville, etc., R. Co. v. Beeler (Ky.)*, 15-913.

In an action for damages caused by a fire set by a locomotive, testimony for the defendant that its locomotive was properly equipped and managed is uncontradicted and conclusive where there is no proof to the contrary except an alleged presumption of improper equipment or improper management arising from the fact that the locomotive set the fire. *Clark v. Grand Trunk Western R. Co. (Mich.)*, 12-559.

Questions for jury. — In an action against a railroad company for negligently setting fire to the plaintiff's property by sparks from a passing engine, evidence examined and held to be sufficient to require its submission to the jury on the question whether the fire was set by the defendant's locomotive. *Clark v. Grand Trunk Western R. Co. (Mich.)*, 12-559.

In an action, to recover for damages to property by fire communicated from a railroad locomotive it is a question for the jury to determine, under the instructions of the

court and upon all the evidence adduced, the difference between the market value of the property before and after the fire, and witnesses who have a sufficient knowledge of the value of land situated in that locality may, in giving their opinions as to the market value, state their reasons for such opinions, based upon their estimates of the value of the products of the land. *St. Louis, etc., R. Co. v. Shore (Ark.)*, 16-939.

In an action against a railroad company for damages caused by fire set from an engine running on the defendant's road, evidence of actual negligence on the part of the defendant examined and held sufficient to call for the submission of the case to the jury. *Osborn v. Oregon R., etc., Co. (Idaho)*, 16-879.

(5) Variance.

What constitutes fatal variance. — In an action for damages caused by fire there is no fatal variance between the allegation and proof where the declaration alleges that the defendant company, through its negligence, communicated fire to the lands of the plaintiff by and from a locomotive, which fire, so communicated from the locomotive, spread over and upon the lands of the plaintiff and burned up and injured trees of the plaintiff, and the proof shows that the fire was not set by and from the locomotive directly, or in the first instance, to the land of the plaintiff, but that the fire was negligently set by the defendant's locomotive upon the adjoining land of another, and spread thence naturally to the land of the plaintiff, and destroyed his trees. The fact that a fire set by the defendant's locomotive passes over lands of another before reaching the plaintiff's property does not render the defendant's negligence any the less the proximate cause of the destruction of such property by fire. *Florida East Coast R. Co. v. Welch (Fla.)*, 12-210.

In such action, where the plaintiff in his declaration seeks to recover for damages by a fire alleged to have been negligently set by a locomotive of the defendant on or about the 10th day of January, and the evidence shows that the fire which caused the damage was set by the locomotive on January 17, and there is no objection by the defendant at the trial to the testimony that the fire occurred on the latter date, or any claim by him that he was surprised by the variance, and he fails to make any showing that he was misled to his prejudice in the preparation of his defense, or to request postponement of the trial on account thereof, or to object to the form of the statement of time in the declaration, no error is committed in refusing to charge the jury that the plaintiff cannot recover because of the variance between the declaration and the proof. *Florida East Coast R. Co. v. Welch (Fla.)*, 12-210.

(6) Instructions.

Confusing, misleading, and argumentative instruction. — A requested instruction that "one who owns property alongside

of the railroad must know that trains are expected to run with regularity, and if there are special risks arising from no want of care in the proper equipment of engines and trains, those risks are not chargeable to the railroad, but are incident to the situation, and the extra care they demand devolves upon the other party, and the consequence of his not exercising it must fall upon him because the railroad is not in fault," is confusing, misleading, and argumentative, and is properly refused. *Florida East Coast R. Co. v. Welch* (Fla.), 12-210.

(7) Limitation of liability by contract.

Validity of contract releasing railroad in advance. — Notwithstanding a statute making every railroad company liable in damages to the owner of property which is injured by fire communicated by the company's locomotives, except where the property has been placed on the right of way unlawfully or without the consent of the railroad company, an agreement by a railroad company with the owner of cotton in reference to placing the cotton on the railroad right of way, stipulating that the cotton is deposited on the premises of the railway company and so remains without its consent and at the owner's sole risk until tendered and accepted for shipment, is a valid contract and relieves the railroad company from liability for the burning of the cotton, before the acceptance for shipment, by sparks communicated from a locomotive. *German-American Ins. Co. v. Southern Ry.* (S. Car.), 12-495.

d. Interference with extinguishment of fires.

Delaying running of hose across tracks. — The rule that a railroad company must run its trains with a reasonable regard to the right of persons fighting a fire to carry their apparatus across its track does not render it liable for a fire loss resulting from the fact that its train delayed the running of hose across its track to the burning property, unless with actual knowledge of the fire and of the fact that the operation of its train would interfere with the work of extinguishment, it wilfully interfered therewith. *American Sheet, etc., Co. v. Pittsburgh, etc., R. Co.* (U. S.), 6-626.

Running upon and cutting hose. — Where the servants of a railroad company in charge of a train have notice or warning of the presence of fire hose on the tracks, and although able to stop the train, run upon the hose and cut it so that delay is occasioned in procuring water, and the destruction of burning property is the proximate result, the owner of the property may recover against the railroad the consequent damages; but the railroad company's servants are not chargeable with negligence in failing to look for and discover the hose, especially in the night. *Clark v. Grand Trunk Western R. Co.* (Mich.), 12-559.

Sufficiency of evidence. — In an action against a railroad company to recover damages for the interference of its train with the extinguishment of a fire, it is not suffi-

cient to show that the railroad's servants in charge of the train disregarded signals to stop given by the fire fighters, but it must also be shown that such servants knew or should have known that the signals were given to prevent interference with the fighting of the fire. *American Sheet, etc., Co. v. Pittsburgh, etc., R. Co.* (U. S.), 6-626.

e. Floods.

Liability for flood caused by negligent construction of culvert. — The failure of a railroad company to make culverts in an embankment, constructed by it for its roadbed, on lands subject to overflow of waters, of sufficient size to permit the water behind the embankment to rise and fall as fast as the stream, is a negligent and unskilful construction, making the company liable in damages for resulting injury. *Uhl v. Ohio River R. Co.* (W. Va.), 3-201.

f. Pleading.

Sufficiency of declaration. — A declaration in an action for damages against a railroad company which alleges the running of trains so carelessly and negligently as to injure the plaintiff's property, but which fails to state acts of negligence and carelessness on the part of the defendant with such reasonable certainty as to enable the latter to make defense thereto, is demurrable. *Fisher v. Seaboard Air Line R. Co.* (Va.), 1-622.

Facts admitted by demurrer. — In an action against a railroad company for damages to real estate caused by smoke, noise, etc., incident to the running of the defendant's trains, an allegation in the defendant's plea that the injury was the unavoidable result of the operation of the trains in a lawful manner is not admitted by a demurrer, since the allegation states a conclusion of law. *Baltimore Belt R. Co. v. Sattler* (Md.), 3-660.

Defenses admissible under general issue. — In an action against a railroad company to recover damages for flooding the plaintiff's land, the defense that the injury was inflicted by another railroad company to which the defendant had leased its railroad under statutory authorization is available under a plea of general issue. *Ackerman v. Cincinnati, etc., R. Co.* (Mich.), 8-118.

g. Companies liable.

Liability of lessor for tort of lessee. — Under the Michigan statute authorizing railroad companies to lease their roads, etc., the lessor in a lease executed pursuant to statute is not liable for a tort committed by the lessee in the operation of the railroad. *Ackerman v. Cincinnati, etc., R. Co.* (Mich.), 8-118.

8. Liability for injuries to persons.

a. In general.

Duty to fence to prevent person falling onto right of way. — The purpose of

the Massachusetts statute (Rev. Laws, c. 111, § 120, re-enacted in Laws, 1906, c. 463, pt. 2, § 103) requiring every railroad company to erect and maintain suitable fences on both sides of its track, except at public crossings, etc., is to require a railroad company to maintain fences sufficient to prevent the intrusion of cattle on the road; and a person who, while at work on premises adjacent to a track, is thrown from a pile of lumber and over a wall on the right of way, cannot recover for injuries sustained, on the ground that if the company had fenced its right of way, the fence would have prevented his fall. *Menut v. Boston, etc., R. Co.* (Mass.), 20-1213.

b. Persons at crossings.

(1) In general.

Mutual rights and duties. — At the crossing of a railroad track and the highway, both the railroad company and a traveler on the highway are bound to use due care, one to avoid inflicting an injury, and the other to avoid being injured; and the degree of care to be exercised by each is that which a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty. *Cooper v. North Carolina R. Co.* (N. Car.), 6-71.

(2) Speed of trains.

Speed as negligence per se in absence of statute. — In the absence of a statute or a duly authorized municipal ordinance placing a restriction upon the rate of speed at which railroad trains may be run, no rate of speed is negligence *per se*. *Chicago, etc., R. Co. v. Campbell* (Colo.), 7-987.

Forty to fifty miles per hour as negligence per se. — The running of an electric car on a suburban railroad at the rate of forty or fifty miles an hour does not constitute negligence *per se*, but it does not follow that such a rate of speed is not negligent when the conditions are such that it is impossible for a person crossing the track to get off of the same in safety after he discovers the car. *Folkmiere v. Michigan United R. Co.* (Mich.), 17-979.

Twenty-five to fifty miles per hour as negligence per se. — In the absence of any restrictive order of the railroad commissioners, to whom the power to regulate the speed of trains at crossings has been delegated by statute, a railroad company is not negligent in merely running its train at a rate of from twenty-five to fifty miles an hour over a grade crossing from the vicinity of which the approach of the train is visible for a considerable distance. *Freedman v. New York, etc., R. Co.* (Conn.), 15-464.

(3) Warning of approach of trains.

Duty of locomotive standing at crossing to give warning before starting. — Where a driver starts to cross in front of

a locomotive which is standing still, it is the duty of those in charge of such locomotive, regardless of any statutory requirement, to ring the bell before moving the engine over the crossing. *Atchison, etc., R. Co. v. Wilkie* (Kan.), 15-731.

Running train at night without headlight as negligence. — It is inexcusable negligence to run a train at night without a headlight across the country and public highways at the rate of thirty miles an hour, and the presence of a red light on the end of the tender of a reversed engine running in this manner is not notice to travelers of the approach of the train. *Gorton v. Harmon* (Mich.), 15-461.

Duty to give warning at crossing other than grade crossing. — The California statute providing that a bell must be rung or a whistle sounded on the approach to a crossing makes it the duty of a railroad to give the required signal at all crossings of a highway by a railroad, whether above, below, or at grade; and a railroad bridge over a highway is a crossing within the meaning of the statute. *Johnson v. Southern Pac. R. Co.* (Cal.), 3-358.

Though it is the duty of a railroad company, the tracks of which cross a highway by means of an overhead bridge, to warn travelers on the highway of the approach of trains if the place is dangerous, the law imposes no absolute duty to give such warning at any particular crossing; but the question whether the place is so dangerous as to render warning necessary is one of fact for the determination of the jury. *Louisville, etc., R. Co. v. Sawyer* (Tenn.), 4-948.

A railroad company, whose road passes over a highway or bridge, is not liable to a traveler in the highway for an injury caused by the fright of his team, occasioned by the running of a train in the usual and customary manner, and without unnecessary or unusual noises, although the approach of the train to the overhead bridge is not signaled, and the topography of the country is such, that accidents of a similar character are peculiarly liable to happen. *Barton v. Southern R. Co.* (Ga.), 16-1232.

Duty to give signals where approach of train is known. — Where it appears that a person injured by a train knew that the train was fast approaching, the failure to sound the bell or to blow the whistle is not a ground of recovery. *Sissel v. St. Louis, etc., R. Co.* (Mo.), 15-429.

Proximate cause. — Where the negligent moving of such locomotive without first giving warning of the intention to do so causes the driver's horse to become frightened thereby causing injury, the negligent moving of the locomotive is the proximate cause of the injury. *Atchison, etc., R. Co. v. Wilkie* (Kan.), 15-731.

(4) Duty to maintain flagman at crossing.

In absence of statute. — Where the danger at a railroad crossing is exceptional because of conditions which render ordinary

prudence on the part of persons using the crossing insufficient protection against injury, it is the duty of the railroad company, even though not required by statute or by any order of the railroad commission, to maintain a flagman at such crossing, or to protect the same by gates or signals, and the failure to do so constitutes negligence. *Folk-mire v. Michigan United R. Co.* (Mich.), 17-979.

In the absence of statutory requirement it is not negligence *per se* for a railroad company to fail to maintain a watchman at a grade crossing of its track and a public road to warn travelers on such road of an approaching train. *Cowen v. Dietrick* (Md.), 4-292.

(5) Duty to keep safety gates closed.

Existence and violation of duty. — It is the duty of a railroad company to keep the safety gates at a crossing closed when a train is approaching, and the fact that the gates are open at such time is evidence of negligence for the jury. *Northern Central R. Co. v. State* (Md.), 3-445.

(6) Keeping view of tracks unobstructed.

Failure to cut trees on right of way as negligence. — In an action against a railroad company to recover damages for personal injuries sustained at a grade crossing by a traveler on the highway, while the fact that trees growing upon the land adjacent to the highway, including the land owned by the company, obstructed the traveler's view of the crossing, is clearly one of the circumstances to be considered in determining whether the company exercised ordinary care in the operation of its cars, the mere neglect of the company to cut down the trees on its own land cannot, in the absence of a statute to the contrary, be held to have constituted actionable negligence. *Cowles v. New York, etc., R. Co.* (Conn.), 10-481.

(7) Passing over or around cars obstructing crossing.

Negligence in injuring person passing behind train at crossing. — A declaration for negligent injuries averring that the railroad company unreasonably detained a freight train with its rear car across the principal street of a village, that the plaintiff was proceeding cautiously and prudently to pass around said car when the train without warning suddenly, swiftly, and violently started backwards upon her, is not ill because of failure to aver that the defendant's agents actually saw her in time to prevent the accident. *Johnson v. Atlantic Coast Line R. Co.* (Fla.), 20-1093.

One finding the highway blocked an unreasonable time by a train of cars is not a trespasser upon the railroad's property in passing prudently around the end of the train. *Johnson v. Atlantic Coast Line R. Co.* (Fla.), 20-1093.

The rule that a railroad company by ob-

structing a highway for an unreasonable length of time or for a longer time than the law permits, becomes a trespasser and is estopped from saying that a person making a reasonable use of the cars for the purpose of crossing the track is a trespasser, is not changed by the South Carolina statute prescribing liabilities and penalties for the obstruction of a highway crossing by railroad cars. *Walker v. Southern Ry.* (S. Car.), 12-591.

(8) Contributory negligence.

(a) In general.

Driving in front of standing locomotive. — One who attempts to drive over a public crossing in front of a locomotive which is standing still, with no sign or indication of an attempt on the part of the enginemen to move it, is not *per se* guilty of contributory negligence. *Atchison, etc., R. Co. v. Wilkie* (Kan.), 15-731.

Crossing between cars obstructing crossing. — A postmaster whose duty requires him to take charge of a mail sack as soon as it is thrown from a passing mail train is not negligent as a matter of law in attempting to get possession of such mail sack by crossing between the cars of a freight train which has blocked a public crossing for an unreasonable length of time, and relying on the duty of the railroad company to give the statutory signals before moving the train. *Walker v. Southern Ry.* (S. Car.), 12-591.

(b) Duty to stop, look, and listen.

Existence of duty. — The law imposes the duty upon a person approaching a railway crossing to stop, look, and listen for an approaching train, and if, on nearing a crossing, the person is prevented by an obstruction from hearing and seeing an approaching train, it is his duty to resort to other means of ascertaining whether a train is approaching, and after passing the obstruction, to stop, look, and listen. *Colorado, etc., R. Co. v. Thomas* (Colo.), 3-700.

The rule that one who steps in front of a moving train, which he could have seen and heard if he had looked and listened, will be conclusively presumed to have been negligent, applies only to clear cases where no inference except that of negligence is possible from the facts. *Sefcik v. Pennsylvania R. Co.* (Pa.), 16-357.

The failure of a person to observe an approaching train while driving across a railroad track at a grade crossing at which there is an unobstructed view of the track for several hundred feet, is contributory negligence which will preclude him from recovering damages for injuries sustained in a collision with such train if the railroad company is free from negligence, and this though he stops and looks before crossing. *Cowen v. Dietrick* (Md.), 4-292.

Application of rule to driver of fire engine. — The rule requiring drivers to stop, look, and listen before going upon the

track of a steam railroad applies to the drivers of fire engines and hose carriages. *Thompson v. Pennsylvania R. Co. (Pa.)*, 7-351.

Application of rule to passenger in vehicle having no control over driver.

— The rule requiring a person, before crossing a railroad track, to look and listen for approaching trains, is not applicable in all its force to a passenger in a vehicle, who has no control over the driver or his management of the team. *Liabraaten v. Minneapolis, R. Co. (Minn.)*, 15-1147.

Application of rule to driver of unmanageable team. — Where in an action to recover damages resulting from the collision of a team with a railway train the facts justify the jury in inferring that the horses became frightened at the approaching train when about sixty-eight feet from the track, that from that time the driver was unable to retain control of the horses, and that he could not stop them or divert them continuing in their course and prevent them from colliding with the train, such facts constitute good ground for excusing the driver from the performance of the usual duty to look and listen and to stop, if necessary for his safety, before attempting to cross the railroad track. *Sarles v. Chicago, etc., R. Co. (Wis.)*, 16-952.

To establish the fact that such horses were beyond the driver's control, it is not necessary to prove that the horses were in a state of frenzy from fright and were running at a very great speed. It is sufficient if it appears that the driver was unable to prevent them from proceeding, under the impulse of fright induced by the noise and speed of the train, upon the track at a time of danger. *Sarles v. Chicago, etc., R. Co. (Wis.)*, 16-952.

Where there is evidence in such action that the horses did not become frightened until they arrived at a point about sixty-eight feet from the track, and the findings negative the claim that the horses became frightened from a cause other than the train, the defendant's contention that the team was uncontrollable at a point so remote from the crossing that it could not have been frightened at the approaching train, and hence that the defendant's negligence could not have been the proximate cause of the injury, cannot be sustained. *Sarles v. Chicago, etc., R. Co. (Wis.)*, 16-952.

Existence of duty where gates maintained. — While the quantum of care which it is reasonable for a traveler to use in driving across a railroad track may be less where gates are provided at the crossing and are relied upon by the traveler, the mere existence of the gates does not of itself justify a traveler in going blindly ahead or excuse him from the duty to look and listen for an approaching train before crossing. *Koch v. Southern California R. Co. (Cal.)*, 7-795.

Existence of duty where flagman stationed. — Where a traveler on the highway sees that the flagman at a railroad crossing is at his post of duty, he has a right to rely on the flagman's protection; but where he

discovers that the flagman is absent from his post of duty, the traveler is bound to look and listen for passing trains, and his failure to do so is contributory negligence, though the flagman is guilty of negligence in deserting his post. *Hodgin v. Southern R. Co. (N. Car.)*, 10-417.

Existence of duty where gates maintained and flagman stationed. — The fact that gates are maintained and a watchman stationed at a railroad crossing does not relieve a person about to cross of the duty to use his senses to discover the presence of danger. *Northern Cent. R. Co. v. State (Md.)*, 3-445.

Signal from flagman to cross as relief from duty. — The signal to cross given a traveler on a highway by the flagman at a railroad crossing of a city street, does not relieve the traveler of the duty to look and listen before venturing on the tracks. *Union Pacific R. Co. v. Rosewater (U. S.)*, 13-851.

Failure to hear after stopping, looking, and listening. — Where the driver of a vehicle stops, looks, and listens before attempting to cross a railroad track, his failure to hear an approaching train does not render him guilty of contributory negligence as a matter of law. *Birmingham Southern R. Co. v. Lintner (Ala.)*, 3-461.

(9) Actions.

(a) Evidence.

(aa) Presumptions and burden of proof.

Presumption that person killed at crossing stopped, looked, and listened.

— The presumption that a person killed by a passing locomotive while he was driving across a railroad track stopped, looked, and listened before attempting to cross the track, is not strengthened by the fact that he was pulling the reins when the horses reared as the locomotive struck them. *McKahan v. Baltimore, etc., R. Co. (Pa.)*, 16-173.

(bb) Weight and sufficiency.

Negligence. — In an action by a passenger in a vehicle to recover damages for personal injuries sustained in a collision between the vehicle and a railroad train at a crossing, evidence examined and held to be sufficient to justify the jury in finding that the railroad company was negligent. *Liabraaten v. Minneapolis, etc., R. Co. (Minn.)*, 15-1147.

Evidence examined and held sufficient to show that a collision between the plaintiff's vehicle and the defendant's locomotive at a crossing was due to the defendant's negligence. *Gibson v. Bessemer, etc., R. Co. (Pa.)*, 18-535.

In an action against a railroad company for the alleged death by wrongful act of a person killed by a train at a grade crossing by reason of the alleged negligence of the defendant in maintaining at the crossing a space between a rail and the planking so wide that the intestate's heel caught therein

and was held until he was struck by a train, and in failing to light the crossing, evidence examined and held to show that the crossing was properly constructed without negligence as to the space between the rail and the planking, and to fail to show that any defect in the crossing at the spot where the deceased was struck had existed long enough to charge the defendant with notice thereof or that there was any negligence in failing to light the crossing. *Connor v. New York, etc., R. Co. (R. I.), 13-1033.*

Contributory negligence. — Evidence reviewed in an action to recover damages for personal injuries sustained by the plaintiff at a railroad crossing, and held to show that the plaintiff exercised no care whatsoever in crossing the defendant's tracks. *Koch v. Southern California R. Co. (Cal.), 7-795.*

Where in an action to recover for the death of a person killed by a passing locomotive while he was driving across a railroad track, it appears that with the view of the track cut off he proceeded for a distance of two hundred feet before reaching the track until he drove in front of the locomotive, the approach of which he would have seen had he stopped at a certain point before reaching the track, and that though the whistle had sounded a signal that the locomotive was approaching he drove onto the track in spite of a fruitless effort to stop him, such person will, as a matter of law, be held to have been guilty of contributory negligence. *McKahan v. Baltimore, etc., R. Co. (Pa.), 16-173.*

In an action against a railroad company to recover damages for the death of a person killed at one of its crossings, evidence examined and held to show contributory negligence on the part of the deceased as a matter of law, so as to call for the direction of a verdict in favor of the defendant. *Folk-mire v. Michigan United R. Co. (Mich.), 17-979.*

Where a passenger in a vehicle testifies that as the result of injuries sustained in a collision between a train and such vehicle, her mind is a blank as to everything which happened from the time she entered the vehicle until three days after the accident, it cannot be said that there is evidence that she looked or listened or made any effort to cause the driver to do so. But the mere fact that she could, had she looked or listened, have noticed the approaching train, does not show conclusively that she was guilty of negligence in failing to do so. *Lia-braaten v. Minneapolis, etc., R. Co. (Minn.), 15-1147.*

Negligence and absence of contributory negligence. — In an action against a railroad company for damages or injuries received by a person driving a vehicle across the railroad tracks at the invitation of the flagman, evidence examined and held sufficient to support a finding of negligence on the part of the defendant but not to show that the plaintiff was guilty of contributory negligence as a matter of law. *Union Pacific R. Co. v. Rosewater (U. S.), 13-851.*

Weight due to positive and negative testimony as to signals. — In an action against a railroad company to recover for personal injuries sustained by the plaintiff by reason of a collision with a train at a crossing, where it is alleged that the bell on the locomotive was not rung as the train approached a crossing, the evidence of witnesses who were present, conscious, in the possession of their physical senses, and listening for signals, that they did not hear it ring has probative value sufficient to take the issue to the jury, although other witnesses testify that the bell did ring. *Cotton v. Willmar, etc., R. Co. (Minn.), 9-935.*

(cc) Function of court and jury.

Negligence.—Evidence in an action against a railroad company for the wrongful death of the plaintiff's son at a crossing considered, and held to be sufficient evidence of negligence on the part of the defendant or its agents to go to the jury. *Northern Central R. Co. v. State (Md.), 3-445.*

In an action against a railroad company to recover damages for the death of a person killed at one of its crossings, where the evidence tends to show that the crossing was situated at a long curve of the railroad, and in a cut which was little wider than was necessary to accommodate the railroad and its cars, that the highway, which crossed at grade was at an oblique angle with the railroad track, and that there was no place at which a person crossing the track could see a car thereon until reaching a point but a few feet from the track, and that the distance at which the car might then be seen, as it came around the curve, did not exceed 450 feet, the question whether the railroad company was negligent in running its cars at the rate of forty or fifty miles an hour, and in failing to station a flagman at the crossing, is properly submitted to the jury. *Folk-mire v. Michigan United R. Co. (Mich.), 17-979.*

Contributory negligence. — In an action to recover damages for personal injuries sustained at a railroad crossing by a person traveling along the highway, if it appears that there was nothing in the circumstances to deceive the traveler and throw him off his guard, and that he went upon the track without looking or listening, the court should declare that he was guilty of contributory negligence, as a matter of law; but if it appears that the circumstances were such that an ordinarily prudent person might not have expected a train to pass at that moment, the question of contributory negligence should be submitted to the jury. *Scott v. St. Louis, etc., R. Co. (Ark.), 9-212.*

In an action brought by a deaf person to recover damages for personal injury sustained by him at a railway crossing, it is for the jury to determine whether the plaintiff's hearing was so defective that he could not have heard the bell or the whistle if either had been sounded, and whether his failure to look and listen for approaching

trains was contributory negligence. *Toledo, etc., R. Co. v. Hammett (Ill.)*, 5-73.

The rule that one who steps in front of a moving train, which he could have seen and heard if he had looked and listened, will be conclusively presumed to have been negligent does not apply in an action against a railroad company to recover damages for death by wrongful act, where the evidence shows that the conditions at the crossing where the accident occurred were exceptionally dangerous, that the accident took place at night when the weather was cloudy and the air filled with smoke, and that the deceased stopped, looked, and listened when four feet distant from the railroad tracks. Under such circumstances, the question whether the deceased was guilty of contributory negligence is properly submitted to the jury. *Sefcik v. Pennsylvania R. Co. (Pa.)*, 16-357.

In an action to recover damages for personal injuries sustained by the plaintiff at a railroad crossing, where unconflicting evidence shows that the plaintiff exercised no care whatsoever in crossing the defendant's tracks, the question whether the plaintiff's case shall be submitted to the jury is one of law for the determination of the court. *Koch v. Southern California R. Co. (Cal.)*, 7-795.

Evidence in an action against a railroad company for the wrongful death of the plaintiff's son considered, and held not to be sufficient evidence of contributory negligence to justify the court in withholding the case from the jury. *Northern Cent. R. Co. v. State (Md.)*, 3-445.

The evidence in an action to recover damages for personal injuries sustained by a traveler at a railroad crossing, held sufficient to entitle the plaintiff to have the question of contributory negligence submitted to the jury under appropriate instructions. *Scott v. St. Louis, etc., R. Co. (Ark.)*, 9-212.

Where, in an action to recover for the damages resulting from a collision between a train which carried no headlight while crossing a country highway, and a vehicle driven thereon by the plaintiff, it appears that the wind was blowing the dust from the coal in the tender and the smoke from the engine directly between the plaintiff and the cars behind the engine, and was carrying away from the plaintiff the sound of the automatic bell and of the whistle, the question whether the plaintiff was guilty of contributory negligence in failing to see the lights from the windows of the passenger cars in the rear of the engine or to hear the sound of the bell or the whistle should be submitted to the jury. *Gorton v. Harmon (Mich.)*, 15-461.

Plaintiff, driving a horse and buggy, was injured by being struck by defendant's railroad train at a grade crossing. It appeared that the view down the track was substantially interfered with by a line of telegraph poles maintained by defendant as part of its equipment for electrical propulsion of its trains. This line of poles stood twenty-two feet from the middle track on which the accident occurred, and probably not over ten feet from the nearest rail of the first track.

Held, that the question of contributory negligence was for the jury. *Dobbs v. West Jersey, etc., R. Co. (N. J.)*, 20-293.

In an action against a railroad company to recover damages for the killing of the plaintiff's intestate at a crossing, the evidence held to be sufficient to entitle the defendant to have the question of contributory negligence submitted to the jury. *Cooper v. North Carolina R. Co. (N. Car.)*, 6-71.

(b) Instructions.

Negligence in general. — Instruction as to the liability of a railroad for an injury to persons crossing the tracks held to be erroneous. *Southern R. Co. v. Chatham (Ga.)*, 4-675.

Care exercised by engineer after discovering peril. — In an action to recover damages for the death of a person killed by a train while crossing a railroad track, instructions examined and held to have submitted to the jury fairly the question whether the engineer, when he learned or should have learned that the deceased was in peril, did all that a reasonably prudent person would have done to avoid the accident. *Freedman v. New York, etc., R. Co. (Conn.)*, 15-464.

Duty of railroad company to restore highway to original condition. — An instruction as to the duty of a railroad company to restore the condition of a highway across which it has constructed its railroad, which says in effect that it is the duty of the company to do everything reasonable and practicable to restore the highway to its former state so that its use for public travel shall not be endangered, affords no ground for reversing a judgment against the company for negligently killing a person at the crossing. *Atchison, etc., R. Co. v. Townsend (Kan.)*, 6-191.

Contributory negligence in general. — In an action against a railroad company for the wrongful death of the plaintiff's son at a crossing, an instruction as to contributory negligence approved. *Northern Cent. R. Co. v. State (Md.)*, 3-445.

Contributory negligence in failing to stop, look, and listen. — In an action against a railroad company to recover damages for the killing of the plaintiff's intestate at a crossing, it is reversible error to instruct the jury that if the railroad company failed to give the signals required by the statute, and if the deceased would not have gone upon the track had the proper warning been given, it was not contributory negligence for the deceased to go on the track without looking or listening for the approach of the train, though other portions of the charge are correct as to the duty of the deceased to look and listen. *Cooper v. North Carolina R. Co. (N. Car.)*, 6-71.

Comparative probative value of positive and negative evidence as to signals. — In an action against a railroad company for the wrongful death of the plaintiff's son at a crossing, an instruction approved as to the comparative probative value of the

positive and negative evidence of the signals having been given at the crossing. *Northern Cent. R. Co. v. State (Md.)*, 3-445.

(c) Pleading.

Requiring bill of particulars. — In an action against a railroad company to recover damages for injuries alleged to have been sustained by the plaintiff by the negligence of the defendant in running one of its trains upon and against him within the twelve months preceding the commencement of the action, where it appears that the defendant operates a trunk line through the county where the accident occurred, that it has perhaps fifty miles of track within such county, and that in the course of twelve months thousands of trains passed over its road, operated by hundreds of different employees, at all hours of the day and night, the trial court has power to compel the plaintiff to furnish further information as to the time and place of the accident, whether it occurred during the day or night, and whether the injury was inflicted by a freight or a passenger train, provided the defendant shows that it is not possessed of such information and has not reasonable means of obtaining the same. But, in such case, it is error to require the plaintiff to give the number of the train producing the injury, or the names of the parties in charge thereof. *Bogard v. Illinois Cent. R. Co. (Ky.)*, 3-160.

c. Travelers near right of way.

Duty to avoid frightening horses on highway near right of way. — A railroad company is not required to keep a special lookout for travelers upon the highway adjoining its road, nor to keep its engines and cars under such control that they can be stopped if a team is found at a point of danger on the highway. The same degree of care in the operation of the engines and trains is not required under such circumstances as is required at grade crossings. *Fares v. Rio Grande Western R. Co. (Utah)*, 3-1065.

A railroad company has the right to run its trains on a track adjoining the highway and is not responsible to a person whose horses became frightened by trains if the latter are operated prudently and without unnecessary noise or wilful disregard of such person's peril after it has been discovered by those operating the train. *Fares v. Rio Grande Western R. Co. (Utah)*, 3-1065.

Moving freight car in street by gravity frightening horses as negligence. — The moving of a freight car by gravity, in charge of a brakeman, at a slow rate of speed and with no unusual or unnecessary noise, on a track running along the street, is not negligence, and no cause of action arises in favor of a person who is driving along the street parallel with and in front of the moving car, and who sustains personal injuries in consequence of the fact that his horses are frightened and caused to run away by

the noise of the approaching car. *Everett v. Great Northern R. Co. (Minn.)*, 10-294.

Failure to give warning at crossing as negligence where approach frightens team. — The Minnesota statute requiring railroad companies to give warning signals when their trains are approaching crossings does not require a railroad company to give such signal for the benefit of a person who is driving a team of horses along the street parallel to the railroad track near the crossing, but who does not intend to use the crossing; and therefore where the approach of the train frightens such horses and causes them to run away, negligence cannot be predicated of the failure of the company to give the crossing signals required by statute. *Everett v. Great Northern R. Co. (Minn.)*, 10-294.

Failure to give signal before starting as negligence where horses frightened. — The failure of railroad employees to give a signal before starting the engine from a watering station in a canyon through which the railway and a highway run parallel is not negligence as to a person driving along the highway with knowledge of the presence of the engine, where the giving of such signals would probably increase the fright of the horses. *Fares v. Rio Grande Western R. Co. (Utah)*, 3-1065.

Driving from safe to dangerous place as contributory negligence. — Where one driving along a highway in proximity to a railroad sees a train and attempts to drive from a safe place through a dangerous part of the highway and is injured by his team taking fright at the engine, he is guilty of such contributory negligence as will prevent a recovery for injuries received by being thrown from the vehicle. *Fares v. Rio Grande Western R. Co. (Utah)*, 3-1065.

Burden of proof of negligence in locating railroad. — Where the topography of the country is such as to render it necessary for railway companies to avail themselves of canyons in constructing their lines, it will be presumed that a railway constructed through a canyon, through which a highway also runs, is lawfully constructed, although it is in such proximity to the highway as to render it unsafe for a team to pass a train in certain portions of the canyon, and the burden is on one alleging that the company was negligent in so constructing its road to show the negligence alleged. *Fares v. Rio Grande Western R. Co. (Utah)*, 3-1065.

d. Trespassers upon right of way.

(1) Liability in general.

Duty to keep lookout for trespassers. — As a general rule the agents of a railroad company operating a train are not required to anticipate the presence of a trespasser upon its tracks or property, and the duty of using ordinary care and diligence does not arise until his presence there becomes known. This general rule applies as well to children

as to grown persons. *Southern R. Co. v. Chatman* (Ga.), 4-675.

The law with respect to the duty of operators of trains to discover or anticipate the presence of a mere trespasser on the tracks is the same whether such trespasser is a child or an adult. At places where they owe no duty to keep a lookout for adult trespassers, they are likewise under no legal obligation to keep a lookout for children who may be trespassing upon the tracks. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

Except at crossings, the operators of railroad trains owe ordinarily, while traversing country districts, no active duty to keep a lookout for and to anticipate the presence of trespassers upon the track, and it is not negligence for such operators to fail to discover a trespasser unless their failure to see him is due to gross neglect, such as amounts to wilfulness, wantonness, or recklessness. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

But at places in thickly settled portions of cities, towns, and villages where persons have free access to the tracks, and at all other places where persons in any considerable number have passed over or along the tracks for such a period as to impart notice thereof to the employees of the railroad company, or where a railroad company expressly or impliedly permits persons to pass along or across its tracks for a considerable period, the operators of trains owe the active duty to exercise ordinary care in keeping a lookout for and in avoiding injury to persons who are on or near the tracks. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

Duty after discovery of trespasser. —

When a railroad company first discovers that trespassers on its track are in danger of being struck by its approaching train and that they are unaware of their peril, active duty on the part of the company arises and it is then bound to exercise the care required by the law in the case of persons not trespassers. *Clemans v. Chicago, etc., R. Co.* (Ia.), 5-1006.

Where an employee of a railroad company discovers a trespasser in a dangerous situation upon its track, he must, after such discovery, use a proper degree of care to avoid injuring him. *St. Louis, etc., R. Co. v. Raines* (Ark.), 17-1.

Where train operators are under no legal obligation to anticipate the presence of trespassers upon the tracks, their duty to exercise a higher degree of care to prevent injury to a trespassing child of tender years or a helpless person than to a person having judgment and discretion and capable of taking care of himself, does not arise until such child or helpless person is actually discovered by them on the tracks or in a place of danger; but where such operators are required to anticipate the presence of trespassers upon the tracks, or where such child or helpless person occupies such a position that it constitutes recklessness or wilfulness not to see him, such duty arises when the child or helpless person could be discovered by them

by the exercise of ordinary care. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

When such duty arises, the operators have no right to assume that the child or helpless person will leave the track upon warning given by them, but they must at once act upon the assumption that he will remain, and, to avoid injuring him, must slacken the speed of or stop the train, if this can be done without serious danger to the passengers. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

The presumption which ordinarily obtains that a person walking on a railroad track sufficiently in advance of an approaching train to enable him to get out of the way before the train reaches him, will do so, has no application to a person in such situation whose appearance indicates that he is insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it. In such a case the employees of the railroad have no right to presume that the trespasser will get out of the way, but should act upon the hypothesis that he may not or will not, and should use a proper degree of care to avoid injuring him. *St. Louis, etc., R. Co. v. Raines* (Ark.), 17-1.

As to a child of tender years, no presumption arises that it will appreciate danger and will act with the discretion of an adult in getting out of the way of a train, and persons in charge of a train are not authorized to act on such a presumption. *Southern R. Co. v. Chatman* (Ga.), 4-675.

Failure to give signal at crossing as negligence as to trespasser. — The statute which requires railroad trains to give signals by bell and whistle on approaching road crossings, is intended for the protection of persons using such crossings. While failure to give the statutory signals may, in some cases, be evidence of negligence as to persons who are on or near the railroad track but not using a crossing, it does not constitute negligence *per se* as to persons so situated; and, therefore, in an action for personal injuries, brought by a person injured between crossings, it is error for the trial court to instruct the jury that the failure by the defendant to give the statutory signals constituted negligence, for which the plaintiff is entitled to recover if he was hurt as the proximate result of such omission. *Missouri, etc., R. Co. v. Saunders* (Tex.), 16-1107.

(2) Contributory negligence.

Voluntary use of railway bridge. —

A person who voluntarily uses, for purposes of foot passage, a railroad bridge of such length that he cannot escape from a passing train, is guilty of contributory negligence in placing himself in danger, though the general use of the bridge for that purpose by persons walking along the track may imply a license. *Texas Midland R. Co. v. Byrd* (Tex.), 20-137.

(3) Actions.

Admissibility of evidence as to distance within which train could be

stopped. — In an action to recover for the death of an infant from injuries inflicted by a railroad train, evidence as to the distance within which the train could be stopped is admissible. *Davis v. Seaboard Air Line Ry.* (N. Car.), 1-214.

Admissibility of ordinance regulating speed of trains. — In an action against a railroad company to recover damage for personal injuries sustained by a trespasser on its track, the plaintiff cannot introduce in evidence a municipal ordinance regulating the speed of trains, as the ordinance affords no protection to the trespassers. *Clemans v. Chicago, etc., R. Co.* (Ia.), 5-1006.

Probative value of experiment. — The fact that persons who were making experiments saw a child sitting upon a railroad track, where they expected to see it, is insufficient to establish the fact that at another time an engineer on a fast moving train who, though he looked down the track, did not have any child in mind, and owed no duty to see, actually saw and discerned the character of another two-year-old child who was lying prone upon the track alongside of the rail. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

Sufficiency of evidence of negligence after discovery of trespasser. — Evidence reviewed in an action against a railroad company to recover damages for personal injuries sustained by a trespasser on its tracks, and held to show that the trial court erred in not submitting to the jury the question whether the defendant was guilty of negligence after it discovered the plaintiff's peril. *Clemans v. Chicago, etc., R. Co.* (Ia.), 5-1006.

In an action against a railroad company to recover damages for the negligent killing of the plaintiff's intestate, where the evidence shows that the deceased caught his foot in a stockguard in attempting to cross the defendant's track, and fell to the track, and was run over by a passing train, and there is also evidence strongly tending to show that the engineer of the train discovered the perilous situation of the plaintiff's intestate on the track at a distance of from two hundred and two to two hundred and sixty yards, but failed to stop the train before striking him, although, according to the testimony of an experienced engineer, it could have been stopped within a distance of sixty yards, by the exercise of ordinary care, it cannot be said that a verdict in favor of the plaintiff is contrary to the evidence. *St. Louis, etc., R. Co. v. Raines* (Ark.), 17-1.

In an action to recover for the death of a child who, while trespassing upon a railroad track in the open country, was killed by a train, evidence examined and held that the engineer could not, after discovering the presence of the child on the track, have stopped the train in time to avoid injuring the child, and that the engineer was not reckless or wilfully careless in not discovering the child in time to stop the train. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

Duty of railway to trespasser as question for court. — Where a person is

on a railroad track under circumstances which would, as a matter of law, make him a trespasser if he were on real estate other than a railroad track, the duty which the railroad company owes to such trespasser is for the court to determine. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

Where the facts with regard to the use of a railroad track by trespassers and the surrounding conditions are not in dispute, and it appears therefrom that once or twice a week a few persons walked on the track in a sparsely settled country district, the question whether the engineer of a railroad train was required to keep a lookout at the time when and the place where a trespasser was injured, is one of law. *Palmer v. Oregon Short Line R. Co.* (Utah), 16-229.

Determination of care required as to children. — In determining what ordinary care on the part of a railroad requires in reference to trespassing children, the fact of their apparent size, age, and inability to protect themselves, is proper for consideration by the jury. *Southern R. Co. v. Chatman* (Ga.), 4-675.

e. Persons rightfully on right of way.

(1) Licensees in general.

Duty as to making flying switch. — While it is the duty of a railroad company, in making a flying switch, to use reasonable care to avoid injuring the licensees upon its tracks, it is not its duty to have a special lookout established for that purpose; and where a conductor is stationed upon one of the cars being switched, it is not his duty to disregard the signal of the engineer, which requires him to apply the brakes, in order to keep a constant supervision over the track to see that a licensee who has avoided the engine does not fail to turn his head to see that the track is clear before he returns to it. *Chesapeake, etc., R. Co. v. Farrow* (Va.), 10-12.

It cannot be said that it is negligence *per se* for a railroad company to make a "running," "flying," or "gravity" switch in its yards in a city, at a point where its tracks neither occupy nor cross the street. *Chesapeake, etc., R. Co. v. Farrow* (Va.), 10-12.

Duty of licensee. — A licensee on the track of a railroad company in its yard is charged with the duty to care for his own safety, and is charged with a knowledge that the track is frequently used for the shifting of cars, and that the method of shifting cars by means of a flying switch has been in constant and daily use by the railroad company for many years. *Chesapeake, etc., R. Co. v. Farrow* (Va.), 10-12.

Application of last clear chance doctrine. — In an action against a railroad company to recover for the death of a licensee caused by a flying switch made by the defendant, where it appears that the defendant stepped off the track in order to avoid the approaching engine, and that as soon as the engine passed he stepped back upon the track and was run over by a detached car follow-

ing the engine, but there is no evidence that the defendant knew or could have known of his position of danger in time to avert the accident, the doctrine of the last clear chance has no application. *Chesapeake, etc., R. Co. v. Farrow (Va.)*, 10-12.

Sufficiency of evidence of negligence.

—In an action against a railroad company to recover for the death of a licensee caused by a flying switch made by the defendant, where the uncontradicted evidence shows that the accident occurred in the defendant's yards at a point where the tracks neither crossed nor occupied the street, that a flying switch was the usual and customary mode of transferring cars and was under all the circumstances the safest and most expeditious mode, that such mode of switching the cars had been in daily use ever since the construction of the railroad, that upon the front of the box car next to the engine the conductor of the train was stationed, and that upon an alarm signal being given by the engineer, the conductor went to the rear of that car to apply the brakes for the purpose of making the switch, as it was his duty to do, the defendant's demurrer to the evidence should be sustained. *Chesapeake, etc., R. Co. v. Farrow (Va.)*, 10-12.

(2) Persons mailing letters on train.

Implied invitation of railroad. — One passing along a recognized way leading from a public street over the station grounds of a railroad company to its station platform for the purpose of mailing a letter on one of defendant's trains, is there by implied invitation of defendant. *Atchison, etc., R. Co. v. Jandera (Okla.)*, 20-316.

Duty of railroad company to provide safe way to trains. — It is the duty of a railroad company which carries mail under contract with the United States, and by whose regulation postal clerks on mail trains are required to receive mail matter on the mail car while stopping at stations along its route, to use reasonable care to keep in a reasonably safe condition a recognized way over its grounds to its station platform, and a failure so to do, resulting in personal injury to one passing along said way for the purpose of mailing a letter on one of defendant's mail trains upon its arrival, is actionable negligence. *Atchison, etc., R. Co. v. Jandera (Okla.)*, 20-316.

(3) Shippers and consignees.

Duty to keep premises safe for use. — A shipper of stock who is on the railroad's premises engaged in loading the stock into a car furnished him for that purpose, or in performing necessary duties relative to the final preparation of the car for shipment, is not on the premises as trespasser or licensee, but by invitation as a customer, and the carrier is required to exercise ordinary care to make its premises safe for his use. *Southern Ry. v. Goddard (Ky.)*, 12-116.

Unguarded ditch. — A railroad company, in maintaining on its premises a ditch near

which a shipper, having no knowledge of the presence of the ditch, has occasion to go in loading his stock on a car at night, is liable in damages to such shipper who by reason of the darkness falls into the ditch and is injured, if the carrier is guilty of negligence in failing to guard the ditch with a barrier or provide signal lights to prevent persons from falling therein, or to warn the shipper of the danger so that he might have avoided it. *Southern Ry. v. Goddard (Ky.)*, 12-116.

Car as temporary freight house. —

Where a railroad company, instead of unloading a car and delivering the goods at its freight house, chooses to make delivery from the car itself, it makes the car its temporary freight house, and is bound to exercise ordinary care to keep the car in a safe condition for the use of the consignee and of those persons who shall properly come to do the work of unloading, notwithstanding the fact that the car is owned by another railroad company. *Ladd v. New York, etc., R. Co. (Mass.)*, 9-988.

When a person enters upon the car of a railroad company to deliver property for transportation according to custom, and with the company's knowledge, or at the request of the company, the latter will be liable for an injury received by such person through the company's negligence and without contributory negligence on his part. *State, Use of Mummaugh v. Western Maryland R. Co. (Md.)*, 1-598.

Inspection of loaded cars. — It is not the duty of a railroad company which receives a loaded car from another railroad company to inspect the manner of loading, to the extent of ascertaining whether the freight is so arranged as to be safe to persons who may be called on to remove it from the car; and, consequently, such a company is not liable in damages to a person who is injured while unloading a car, because of the improper manner in which it was loaded. *Gulf, etc., R. Co. v. Wittnebert (Tex.)*, 16-1153.

Care required of shipper. — A shipper of live stock, who, after the stock have been placed in the car by means of a chute provided for that purpose, goes around the car for the purpose of seeing that a door is securely fastened, or for performance of other necessary duties connected with the shipment, has the right to assume that the premises are safe for his use, and though it is incumbent on him to use ordinary care for his own safety, he is not required to anticipate danger. *Southern Ry. v. Goddard (Ky.)*, 12-116.

The fact that a carrier has erected a chute for the purpose of loading stock on cars does not make it negligence *per se* for a shipper engaged in preparing a car of stock for shipment to approach the car for other purposes than the loading of the stock by leading them through the chute to the car. *Southern Ry. v. Goddard (Ky.)*, 12-116.

Duty of consignee. — A consignee owes no duty to a carrier of goods to warn his servants whom he directs to unload a car, of the

danger to be apprehended if the carrier shall fail to remedy the defective condition of the car to which the consignee has called the attention of the carrier's servant. *Ladd v. New York, etc., R. Co. (Mass.)*, 9-988.

Measure of damages. — In an action by a stock shipper for damages, for personal injuries received by falling into a ditch on the premises of the railroad company while preparing a car for shipment, it is held, under the facts, that the recovery must be confined to compensatory damages, that is, such a sum as will fairly and reasonably compensate the plaintiff for his mental and physical suffering, the necessary and reasonable expense incurred for medical treatment, and for the permanent impairment of his ability to earn money that may have been caused by or resulted from the negligence complained of, not to exceed the amount claimed in the petition. *Southern Ry. v. Goddard (Ky.)*, 12-116.

Sufficiency of evidence. — Evidence reviewed, in an action against a carrier of goods to recover damages for personal injuries sustained by the plaintiff while unloading a defective car which the defendant had made its temporary freight house, and held sufficient to justify the jury in finding that the defendant was guilty of negligence, either in failing to discover the defect or in failing to remedy it when notified thereof, and sufficient to justify the jury in finding that the defendant's negligence continued up to the time of the injury, and that the defendant was itself the last wrongdoer, both in point of time and in the chain of causation. *Ladd v. New York, etc., R. Co. (Mass.)*, 9-988.

Question for jury. — In an action for damages against a carrier by a shipper of stock, who while preparing a car for shipment sustained injuries by falling into a ditch on the defendant's premises, the issues of negligence and contributory negligence are held, under the evidence, to be for the jury. *Southern Ry. v. Goddard (Ky.)*, 12-116.

f. Children on turntables.

Duty of railroad company in general. — A railroad company is not liable for an injury sustained by a young child while playing with his companions on a turntable maintained by a railroad on its own premises for its own necessary purposes in the regular conduct of its business, though the turntable is unfenced, unguarded, and unfastened, and though other children have been injured previously while playing on the turntable. *Walker v. Potomac, etc., R. Co. (Va.)*, 8-862.

The doctrine of the so-called turntable cases which hold a railroad company maintaining a turntable liable for injuries received by children who, uninvited, come on the premises and are injured while playing with it, is a sweeping innovation on the settled common-law rule that a landowner is not liable for the condition of his premises to one who enters them without permission, and is not

sound in principle. *Thompson v. Baltimore, etc., R. Co. (Pa.)*, 11-894.

A railroad company is not liable to an infant who comes upon its premises without invitation and who is injured there while playing, without its knowledge, with a turntable. The doctrine of the turntable cases is disapproved. *Wheeling, etc., R. Co. v. Harvey (Ohio)*, 11-981.

Duty to keep turntable fastened. — It is not enough for a railroad company to provide a sufficient fastening for its turntable, but it must also use reasonable care to keep it fastened. *Berg v. Minneapolis, etc., R. Co. (Minn.)*, 5-375.

Necessity of actual knowledge of use by children to liability. — In order to hold a railroad company liable for injury inflicted by its turntable upon a child it is not necessary to show that at the time of the injury it had actual knowledge that children had been using the turntable. *Berg v. Minneapolis, etc., R. Co. (Minn.)*, 5-375.

Application of doctrine to track in open country. — The doctrine of the turntable cases is inapplicable to a railroad track in the open country. *Palmer v. Oregon Short Line R. Co. (Utah)*, 16-229.

Sufficiency of evidence. — Evidence to the effect that notwithstanding the fact that a railroad company had knowledge that a turntable which it maintained on its land was a habitual resort for children, being accessible from a nearby highway through a gap in the fence, it did not lock such turntable, and took no steps to prevent the children's presence or to prevent them from playing thereon, is sufficient to support a verdict against such railroad company for personal injuries sustained by a child while playing on such turntable. *Cooke v. Midland Great Western Ry. (Eng.)*, 15-557.

Negligence and contributory negligence as questions for jury. — Evidence reviewed in an action to recover damages for personal injuries sustained by an infant while playing on the turntable, and held to justify the trial court in leaving the questions of negligence and contributory negligence to the jury. *Berg v. Minneapolis, etc., R. Co. (Minn.)*, 5-375.

g. Articles thrown from train.

Liability for injuries in general. — In order to establish liability against a railroad company for injury to a bystander caused by a lump of ice thrown from a passing train, it is not necessary to show that the ice was placed on the train with the knowledge of the company or that it was thrown from the train with its knowledge or direction; but the case is sufficiently made out if it appears by reasonable inference that the servant throwing off the ice was acting within the scope of his authority. *Willis v. Maysville, etc., R. Co. (Ky.)*, 13-74.

Contributory negligence. — A person injured by an object thrown from a passing train is not guilty of contributory negligence in standing on a public street a few feet away

from the train and at a point where there is no danger of being struck by the train. *Willis v. Maysville, etc., R. Co. (Ky.), 13-74.*

Question for jury. — Where, in an action against a railroad company for damages for personal injuries, it appears that a brakeman on the defendant's freight train whose duty required him to look over the train and see that it was in order, and to provide the train crew with ice water, found abandoned ice in the refrigerator car and took the same to the caboose, and after supplying the water keg placed a remaining lump of ice on the caboose platform, from which he pushed it off and injured the plaintiff, who was standing near the track, the question whether such brakeman was acting within the scope of his employment is one for the jury, although it appears that he pushed the ice from the platform with the intention of giving it to a friend. *Willis v. Maysville, etc., R. Co. (Ky.), 13-74.*

h. Fires.

Liability for injuries to person protecting property from fire started on right of way. — Every one is bound to anticipate the results naturally following from his acts, and where a railroad company negligently sets a fire on its right of way it is bound to anticipate that the owner of adjacent premises to which the fire spreads will attempt to extinguish it, and if, in doing so and while exercising ordinary care, the owner is burned by the igniting of her garments, the railroad company will be held to have anticipated such result and to be liable therefor. *Illinois Cent. R. Co. v. Siler (Ill.), 11-368.*

Pleading in action for death. — In an action against a railroad company for the burning to death of the plaintiff's intestate by fire negligently started by the defendant, where counts of the declaration allege that the defendant negligently suffered large quantities of combustible material to accumulate on its right of way, and that fire from one of the defendant's engines ignited said material and thence spread to the decedent's premises and burned the decedent, such reference to the accumulation of dangerous combustible material on the right of way does not make the counts statutory and therefore bad under the statute regulating the liability of railroads for such negligence but applicable only to stock and not to persons. *Illinois Cent. R. Co. v. Siler (Ill.), 11-368.*

In an action against a railroad company for the burning to death of the plaintiff's intestate by fire negligently started by the defendant, counts in the declaration alleging substantially that the fire was communicated to the decedent's premises by the negligence of the railroad company, and that while the decedent with all due care for her safety was trying to extinguish the fire, her clothing was ignited, and her burning and death resulted, are not demurrable as showing specifically that the death of the decedent was not the proximate result of the negligence

charged; for one who has negligently set fire to another's premises can be held liable for the burning of the owner while engaged in trying, with reasonable prudence and care, to extinguish such fire. *Illinois Central R. Co. v. Siler (Ill.), 11-368.*

Finality of judgment of appellate court as to facts. — Where, in an action against a railroad company for the burning to death of the plaintiff's intestate by fire started by the defendant, there was evidence tending to show that the defendant allowed dry grass and weeds to accumulate on its right of way; that the fire started in such grass and weeds and spread to the deceased's premises immediately after the passing of a train of the defendant; that the deceased commenced to rake the grass and leaves on her lot and near her house, and while doing so her clothes caught fire; that the fire was started by the negligence of the defendant, and that the deceased exercised ordinary care, the judgment of the appellate court affirming a judgment for the plaintiff is final as to the facts. *Illinois Central R. Co. v. Siler (Ill.), 11-368.*

i. Ejecting trespasser from train.

Duty to trespasser boarding moving train. — A trespasser detected in the act of attempting to climb upon a moving train may be ordered off, or his attempt resisted with reasonable force while the train is still in motion, as his gaining a foothold upon the train does not impose a duty upon the railroad company to permit him to ascend or to stop the train. *Powell v. Erie R. Co. (N. J.), 1-774.*

Where a trespasser while attempting to board a moving train is opposed by a threat of excessive force by an employee, the force not being in fact exerted, and the trespasser releases his hold upon the car and falls to the ground, he has no action, it not appearing that in attempting to avoid physical injury he accidentally lost his hold, or that he was so overcome with fear as to lose his presence of mind. *Powell v. Erie R. Co. (N. J.), 1-774.*

Removal of trespasser from train by force. — In removing trespassers from a railroad train, the employees of the company may use such force as is reasonably necessary to accomplish the end in view. *Clark v. Great Northern R. Co. (Wash.), 2-760.*

Liability of railroad for wanton or malicious act of brakeman. — It is *prima facie* within the implied authority of a brakeman on a train to eject trespassers, and if in so doing he acts wantonly or maliciously the railroad company is liable. *Dixon v. Northern Pac. R. Co. (Wash.), 2-620.*

Admissibility of contemporaneous statement of ejected trespasser. — Where one who is ejected from a railroad train as a trespasser is found soon thereafter near the track crying and suffering intense pain, his statement made at such time to the effect that the brakeman kicked him off the train is admissible under the doctrine of *res gestæ*,

Dixon v. Northern Pac. R. Co. (Wash.), 2-620.

Instruction as to proximate cause. — A railroad company is not chargeable with the consequences of a conductor's act in compelling a trespasser to get off its train while in motion, except in so far as the conductor had knowledge of an injury likely to result; and an instruction which charges the company with responsibility for knowledge which the conductor in the exercise of ordinary care could have had is erroneous. *Doggett v. Chicago, etc., R. Co.* (Iowa), 13-588.

j. Trespasser jumping from train.

Jumping from moving train as contributory negligence. — A person injured while jumping on or off a train in motion is guilty of contributory negligence. *Powell v. Erie R. Co.* (N. J.), 1-774.

In an action against a railroad company to recover damages for the negligent killing of an infant fourteen years and eleven months of age, where it is shown that the deceased was an intelligent boy, who had resided for two years near the railroad, and that his death was caused by voluntarily jumping from a railroad car while the train was in rapid motion, and there is no evidence whatever that he was not possessed of such discretion as is usual with children of his age, the defendant is entitled to a nonsuit on the ground of contributory negligence. *Baker v. Seaboard Air Line R. Co.* (N. Car.), 17-351.

k. Companies liable.

Liability of owner for acts of company to which it has turned over road without authority. — A corporation owning a railroad by virtue of the power conferred by its charter is liable for personal injuries negligently inflicted by another corporation to which, without statutory authority, it has turned the railroad over to operate. *Smalley v. Atlanta, etc., R. Co.* (S. Car.), 6-868.

Liability of connecting railroads. — The only duty resting upon a company which owns a track connecting the line of a transporting railroad company with the premises of a shipper is to provide a reasonably safe roadbed and track over which the engines, trains, and employees of the transporting railroad company can be carried into and out of the premises of the shipper. *Williams v. Monongahela Connecting R. Co.* (Pa.), 16-271.

9. OFFENSES BY RAILROAD COMPANIES.

Jurisdiction of prosecution for obstructing highway. — The obstruction of a highway by railroad cars, being a statutory misdemeanor (Rev. Laws Mass., c. 214, § 1), is within the jurisdiction of the District Court which includes all misdemeanors committed within the district, except criminal libels and conspiracies. *Commonwealth v. New York Central, etc., R. Co.* (Mass.), 19-529.

Act of third person as defense to prosecution for obstructing highway. —

On a complaint against a railroad company to recover a penalty for the obstruction of a public street by one of the company's trains, under the Massachusetts statute, which provides that no railroad corporation shall in any case obstruct, use, or occupy a highway, town way, or street, with cars or engines, for more than five minutes at one time, it is no defense that the obstruction was caused by the malicious act of strangers, who opened the valves to the air brakes of the train without the knowledge of the defendant, thereby making it impossible to move the train within the statutory period. As the statute does not make wrongful intent or guilty knowledge on the part of the railroad company an essential element of the offense, the absence of such intent or knowledge affords no justification. *Commonwealth v. New York Central, etc., R. Co.* (Mass.), 16-587.

Cumulative penalties for excessive speed of trains. — A statute prohibiting the running of trains or locomotives faster than six miles per hour in cities and villages which provides that "for each and every violation" thereof the railroad company shall forfeit a certain amount, authorizes the recovery of cumulative penalties when the statute has been violated several times. *State v. Wisconsin Central R. Co.* (Wis.), 14-1061.

Prosecutions under Canadian Railway Act. — Violators of the Canadian Railway Act must be prosecuted thereunder, and not under a statute which makes it an offense for any person to disobey wilfully, without lawful excuse, any statute of the Parliament of Canada or of any legislature in Canada, unless some penalty or other mode of punishment is expressly provided by law. *Rex v. Hays* (Ont.), 8-380.

RAPE.

1. NATURE AND ELEMENTS OF OFFENSE, 1343.

- a. Nature of offense, 1343.
- b. Persons who may commit, 1343.
- c. Persons upon whom may be committed, 1343.
- d. Want of consent, 1343.

2. PROSECUTION AND PUNISHMENT, 1343.

- a. Indictment or information, 1343.
- b. Defenses, 1344.
- c. Witnesses, 1344.
 - (1) Competency, 1344.
 - (2) Necessity and sufficiency of corroboration of prosecutrix, 1344.
- d. Evidence, 1345.
 - (1) Presumptions and burden of proof, 1345.
 - (2) Admissibility, 1345.
 - (3) Sufficiency, 1347.

- e. Instructions, 1348.
- f. Verdict, 1348.
- g. Appeal and error, 1349.

Act constituting either rape or incest, see INCEST, 1 b.
 Civil liability of father for rape of daughter, see PARENT AND CHILD, 3 a.

1. NATURE AND ELEMENTS OF OFFENSE.

a. Nature of offense.

Under Nebraska statute. — The Nebraska statute concerning rape construed, and held to describe three classes of crimes, each of which is totally distinct from the other two. *Edwards v. State* (Neb.), 5-312.

b. Persons who may commit.

Child under fourteen. — There is a presumption that a child under fourteen is not physically capable of consummating the crime of rape, and under the North Dakota statute a person of that age cannot be convicted of the offense "unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt." *State v. Fisk* (N. Dak.), 11-1061.

Husband on wife. — A husband cannot be guilty of an assault with intent to rape his wife where he himself is the one who attempts the intercourse. *Frazier v. State* (Tex.), 13-497.

c. Persons upon whom may be committed.

Commission of offense rendering accused guilty of incest. — A person who in committing the crime of incest is also guilty of rape, may be convicted on either charge. *State v. Rennick* (Ia.), 4-568.

d. Want of consent.

Persons under age of consent. — In a prosecution for an assault upon the person of a girl under the statutory age of consent, with intent to commit rape, it is not necessary to allege or prove that the acts were done against her will. Whether she consented or resisted is immaterial. *Liebscher v. State* (Neb.), 5-351.

Persons asleep. — If a man have carnal connection with a woman while she is asleep he is guilty of rape. *State v. Welch* (Mo.), 4-681.

When the offense of rape upon a sleeping woman has been completed by penetration, no submission or consent of the woman upon awakening can avail as a defense. *State v. Welch* (Mo.), 4-681.

Amount of resistance to force required. — In a prosecution for rape, it is necessary to prove not only that there was an entire absence of mental consent or assent on the part of the prosecutrix, but also that she made the most vehement exercise of every physical means or faculty within her power to resist the penetration of her person, and that she persisted in such resistance until the offense was consummated, unless there is proof that her power of resistance was overcome by unconsciousness, threats, or exhaustion. *Brown v. State* (Wis.), 7-258.

In a prosecution for rape, resistance by the

female is of necessity an issue only as it is involved in the proof of her want of consent, which is always required. To show such unwillingness her resistance must be proportionate to the occasion under the circumstances and at the time of the act complained of. In ordinary cases, there must be resistance to the utmost, or at least to the extent of the female's ability. In peculiar cases, a less degree may be sufficient. In exceptional cases, rape may be made out without any proof of resistance. *State v. Cowing* (Minn.), 9-566.

2. PROSECUTION AND PUNISHMENT.

a. Indictment or information.

Allegation of time. — It is not required that the exact time of the commission of an offense shall be set forth in the indictment therefor, except where time is a material ingredient of the offense; and an indictment charging the crime of rape to have been committed on — day of January, 1903, is not subject to a demurrer because the day of the month is left blank. *Cecil v. Territory* (Okla.), 8-457.

Allegation of age of accused. — Under a statute providing that it shall be rape for any male person of the age of sixteen years and upwards to have carnal knowledge of a female person under the age of fourteen years, with or without her consent, the indictment for the offense must allege that the accused was at the time of the age of sixteen years and upwards, as the offense cannot be committed by a younger person. *Schramm v. People* (Ill.), 5-111.

Allegation of age of person against whom committed. — An information for statutory rape which charges that at a specified time and place the defendant "then and there, unlawfully and feloniously, did carnally know" the prosecutrix, "a female child under the age of eighteen years," is not open to the objection that it fails to allege that the female child was under the age of eighteen years at the time the defendant carnally knew her. *State v. Falsetta* (Wash.), 10-177.

Allegation of the overt act. — An indictment for rape held to be fatally defective in failing to aver the overt act. *Hogan v. State* (Fla.), 7-139.

Necessity of allegation that prosecutrix was not wife of accused. — An indictment for carnally knowing a female under the age of sixteen years, which alleges that the defendant, on a specified day prior to the finding of the indictment, and in the county where it is found, "did unlawfully carnally know Esther Miller, who was then and there a female under the age of sixteen years," is sufficient under the Kentucky statute defining that offense. In such an indictment it is not necessary to allege that the female on whom the offense was committed was not the wife of the defendant. *Com. v. Landis* (Ky.), 16-901.

Omission of word "feloniously" as invalidating information. — Where an

information for rape charges the offense with such a degree of certainty as to inform the accused fully of the charge against him and as to enable the court to pronounce a judgment according to the merits of the case, it is not rendered fatally defective by the fact that it omits the word "feloniously." *Brown v. State* (Wis.), 7-258.

Requiring election of counts.—Where, upon the trial of a person over eighteen years of age charged with rape upon the person of a female under the age of sixteen years, the indictment, in the first count, charges the offense to have been committed with the consent of the female, and, in the second count, forcibly and against her will, it is not error for the court to overrule a motion made by the defendant at the conclusion of the state's evidence in chief, to require the state to elect upon which count of the indictment it will rely for a conviction. *State v. Hensley* (Ohio), 9-108.

b. Defenses.

Subsequent marriage of parties.—It is no defense to a prosecution for rape that the defendant has married the prosecutrix since the commission of the offense. *State v. Falsetta* (Wash.), 10-177.

Fact that offense was committed in house of ill fame.—Carnal knowledge and abuse of a female under the age of sixteen years being a crime and punishable under section 1148 of the General Statutes of Connecticut, the fact that the act occurs in a house of ill fame does not remove or reduce the degree of its criminality. *State v. Burns* (Conn.), 16-465.

There is no conflict between section 1148 of the General Statutes of Connecticut which makes it a crime carnally to know and abuse a female under the age of sixteen years, and section 1311 which makes it a crime to receive, employ, harbor, and use a female for purposes of prostitution. To support a conviction under section 1148 it is necessary to prove that the act of sexual intercourse actually took place and that the female was under the age of sixteen years, which proof is not necessary to support a conviction under section 1311; but on the trial of an indictment under section 1148, where the essential facts are proved, it is no defense that the proof also shows the accused to have been guilty of the crime mentioned in section 1311. *State v. Burns* (Conn.), 16-465.

c. Witnesses.

(1) Competency.

Prosecutrix alleged to have been of unsound mind.—In a prosecution for rape on a female who was at the time of unsound mind and incapable of giving consent, the accused may object that the witness is incompetent to testify, and the court will examine into and pass upon the grounds of the objection in the same manner and to the same extent as if it were made against the compe-

tency of any other witness. *State v. Simer* (Idaho), 9-1216.

The fact that the state accuses the defendant with rape in having had carnal knowledge of a female who was at the time of unsound mind and incapable of giving consent does not *per se* establish the incompetency of such female to testify against the accused. *State v. Simes* (Idaho), 9-1216.

(2) Necessity and sufficiency of corroboration of prosecutrix.

Necessity of corroboration in absence of statute.—In the absence of an express statutory prohibition, a person charged with rape may be convicted upon the uncorroborated evidence of the prosecutrix alone, provided such evidence satisfies the court and the jury of the guilt of the defendant beyond a reasonable doubt. *Brenton v. Territory* (Okla.), 6-769.

On the trial of an indictment for rape no corroboration of the prosecuting witness as to the rape by any other witness is necessary to a conviction, provided the jury believe her testimony to be true. *State v. Welch* (Mo.), 4-681.

In order to justify a conviction for rape on the uncorroborated testimony of the prosecutrix, such testimony must be most clear and convincing. *Brown v. State* (Wis.), 7-258.

Nature of corroboratory evidence required by statute.—The corroboratory evidence contemplated by the Washington statute which forbids a conviction for rape or seduction upon the uncorroborated testimony of the female raped or seduced, is evidence of some substantive fact or circumstance independent of the statement of the prosecutrix. Such evidence may be either direct or circumstantial, but, however slight, it must tend to connect the defendant with the crime. Corroboration of the testimony of the complaining witness is not sufficient. Corroboration of the fact in dispute is essential. *State v. Stewart* (Wash.), 17-411.

Sufficiency of corroboration in general.—Evidence reviewed, in a prosecution for rape, and held to show that while the testimony of the prosecutrix, which is somewhat inconsistent in itself and is in a number of respects impeached by her own former testimony upon preliminary examination, is corroborated in a measure, the corroboration is largely by the testimony of her sister, who, together with the prosecutrix, destroyed the natural and best corroborating evidence. *State v. Coving* (Minn.), 9-566.

Flight and declarations of accused as corroboration.—In a prosecution for assault with intent to commit rape, the testimony of the prosecutrix is corroborated by proof of flight by the defendant to avoid prosecution and of statements by him in reference to the charge that he had used no force. *State v. Hetland* (Iowa), 18-899.

Complaint of commission of offense by prosecutrix as corroboration.—A complaint of the commission of the offense,

made by the prosecutrix to another person, however timely, does not constitute the corroboratory evidence required by the statute above mentioned. *State v. Stewart* (Wash.), 17-411.

d. Evidence.

(1) Presumptions and burden of proof.

Mental and physical competency of defendant between age of seven and fourteen years. — In the prosecution of a person between the ages of seven and fourteen, for rape or an attempt to commit rape, the burden is upon the state to show the mental and physical competency of the defendant. In the absence of such proof, the presumption of incompetency must prevail. *State v. Fisk* (N. Dak.), 11-1061.

(2) Admissibility.

Birth of child to prosecutrix. — In a prosecution for statutory rape, where the prosecutrix has testified to intercourse with the defendant, it is competent for her to testify that conception followed, that in due time a child was born, and that the defendant is the father of the child. *State v. Miller* (Kan.), 6-58.

Exhibition of child to prove birth and paternity. — In a prosecution for statutory rape, a child born to the prosecuting witness may be exhibited by the state to the jury for the purpose of establishing the facts of birth and of prior unlawful intercourse. *State v. Danforth* (N. H.), 6-557.

Where the paternity of an infant is in issue in a prosecution for statutory rape, it is not improper to produce the infant and point out to the jury its resemblance to the putative father, though it would be better and more regular to have the likeness testified to by witnesses. *Rex v. Hughes* (Can.), 19-534.

Other acts of intercourse between parties. — In a prosecution for rape, acts of sexual intercourse between the defendant and the prosecutrix occurring subsequent to the one charged in the indictment and relied on by the prosecution for conviction should not be considered by the jury, either in corroboration of the main offense charged or for any other purpose, as proof of subsequent offenses has no tendency to prove that prior to such offenses the defendant had probably committed the crime charged against him. *Cecil v. Territory* (Okla.), 8-457.

On the trial of an indictment charging defendant with having carnally known and abused a female person under sixteen years of age with her consent, evidence of similar prior acts of sexual intercourse between the accused and the prosecutrix within a period of two months immediately preceding the date laid in the indictment, is admissible for the purpose of showing the relation and intimacy of the parties, and as corroborative of the testimony of the prosecutrix touching the particular act relied upon for a conviction. *Boyd v. State* (Ohio), 18-441.

In the prosecution for rape on a female child under the age of consent, testimony as to improper conduct on the part of the defendant, at other times than that charged, with the same child and of the same character named and set out in the information is properly received. *Evers v. State* (Neb.), 19-96.

Acts of familiarity between parties.

— In a prosecution for statutory rape, evidence of acts of familiarity between the defendant and prosecutrix is admissible as tending to show likelihood and opportunity to commit the offense, the admission of such evidence not being in conflict with the rule that in a prosecution of this kind evidence of other acts of intercourse is not admissible. *Henard v. State* (Tex.), 11-670.

Previous acts of co-defendant in prosecution with same female. — In a prosecution for an assault with intent to rape, the admission of evidence of a previous similar assault on the daughter of the prosecuting witness by a co-defendant not on trial is reversible error. *State v. Osborne* (Ore.), 20-627.

Sexual intercourse of prosecutrix with other men. — In a prosecution for statutory rape, the defendant is not entitled as a matter of right to question the prosecuting witness on cross-examination as to her sexual intercourse with other men. *State v. Stimpson* (Vt.), 6-639.

Declarations of prosecutrix. — In a prosecution for rape it is proper to refuse to permit a physician called by the defendant to testify that the prosecutrix at the time of her physical examination on the day after that on which the offense was committed stated to the witness that she had made no resistance or fight, unless a foundation has been laid for the question as impeaching the evidence, even though the state has previously proved the fact of the physical examination. *Brown v. State* (Wis.), 7-258.

In a prosecution for rape, evidence of complaints made by the prosecutrix more than six months after the alleged offense, without excuse for the delay, should be entirely excluded from the consideration of the jury. *State v. Griffin* (Wash.), 11-95.

In a prosecution for rape, evidence of complaints made by the prosecutrix as to the outrage must be limited to the fact that complaint was made, and the witnesses should not be allowed to testify that the prosecutrix named defendant as the guilty party. *State v. Griffin* (Wash.), 11-95.

Where it appears in a prosecution for rape that the prosecutrix was assaulted while wheeling her child in a baby carriage in a somewhat secluded spot; that she was choked into insensibility; that upon regaining consciousness, she found that the child and its carriage were missing; that in the course of half an hour she approached a house, about half a mile away, in a greatly exhausted and excited condition, bleeding from wounds in her face, and crying and screaming; that to the persons who came to her assistance she made statements to the effect that some

one had knocked her down and stolen her baby; that a man had tried to kill her and her baby; that the child was found and returned to her; and that she was thereafter taken into the house, all declarations made by her until the child was found and restored to her are admissible as part of the *res gestæ*, but it is error to receive in evidence the statements and declarations made by her out of the presence of the accused after entering the house. *State v. Alton* (Minn.), 15-806.

Opinion as to age of prosecutrix. — Where a witness for the defendant in a prosecution for rape has given his opinion as to the present age of the prosecutrix, it is not erroneous to refuse to permit him to give his opinion as to her age at the time she came to the United States. *State v. Falsetta* (Wash.), 10-177.

Family records to prove age of prosecutrix. — In a prosecution for statutory rape where there is evidence tending to show that the prosecutrix was above the age of consent at the time of the alleged offense, it is reversible error to admit in evidence to prove her age an entry in a family record made by or at the instance of her father if he is present at the trial as a witness. *State v. Miller* (Kan.), 6-58.

Testimony of prosecutrix as to her age. — In a prosecution for statutory rape, the prosecutrix may testify as to her age, though both of her parents have testified as to that fact. *State v. Miller* (Kan.), 6-58.

Conduct of prosecutrix after commission of offense. — Where it appears that the prosecutrix laughed and joked with her husband immediately before telling him of the assault upon her, she may be asked whether, after telling her husband thereof, she ceased to laugh and joke with him. *Smith v. State* (Tex.), 15-357.

Where it is sought to be shown on the cross-examination of the prosecutrix that at the time she told her husband of the assault they were laughing and joking and that the charge was made in furtherance of a scheme to compel the defendant to deed certain land to her, it is not error to permit the state to prove that after she told her husband of the assault she was sitting in his lap and they were both crying. *Smith v. State* (Tex.), 15-357.

Reason for not making outcry. — The prosecutrix may testify that at the time of the assault upon her by her father she did not cry out because she was afraid her father would whip her, she having been at the time of the assault of tender years and subject to her father's will. *Smith v. State* (Tex.), 15-357.

Condition of prosecutrix after offense and statement by third person. — In a prosecution for rape, testimony by a woman that on the morning of the alleged offense prosecutrix called to her; that she was bareheaded with her hair disheveled and was crying; and that when prosecutrix offered to tell her about the alleged assault she (the

witness) told her that she did not want to hear her troubles and directed her to the home of a justice of the peace, is admissible. *State v. Campbell* (Mo.), 14-403.

Negotiations for settlement. — In a prosecution for rape, evidence of negotiations for the settlement of the crime, by way of offers by the defendant to pay money to the prosecutrix or her parents, is always relevant against the defendant; but where it appears that such negotiations were carried on by the father of the defendant, or by others, the prosecution, in order to make such evidence admissible against the defendant, must show that the father of the defendant, or other persons acting, were acting for the defendant and by his direction and authority. *Cecil v. Territory* (Okla.), 8-457.

Reason for husband demanding settlement. — The husband of the prosecutrix may testify that he wrote a letter to the defendant demanding the transfer of land, not for the purpose of getting the property, but for the purpose of saving his wife from disgrace and exposure, and for the good of the defendant and "the children." *Smith v. State* (Tex.), 15-357.

Advice of third person to compromise. — Where the husband of the prosecutrix is asked on cross-examination whether he told a certain person that he had a scheme to extort money from the defendant, it is not error to permit such person to testify that when he was informed of the assault upon the prosecutrix he advised her husband to settle the matter by getting the defendant to transfer to him a tract of land. *Smith v. State* (Tex.), 15-357.

Statement of defendant to prosecutrix immediately after commission of crime. — It is not error to permit the prosecutrix to testify what her father said to her after he committed the assault, as to what she should do to prevent conception. *Smith v. State* (Tex.), 15-357.

Conversation between parties after crime committed. — In a prosecution for rape, evidence of a conversation between the defendant and prosecutrix at the home of the justice of the peace holding the preliminary hearing is competent if such conversation tends to prove any of the material issues involved in the proceeding, or any admission on the part of the defendant, but it is inadmissible if the conversation amounts simply to a wordy controversy between the prosecutrix and the defendant, the one asserting his guilt and the other denying it. *State v. Campbell* (Mo.), 14-403.

Conversations between parties before crime committed. — In a prosecution for rape, testimony by the prosecutrix that a few weeks before the alleged offense, when she and the defendant were together alone, he asked her why she was getting lonesome and if it was because she could not be with him, to which she replied that such was not the case, does not, when entirely disconnected with the offense, amount to a prior improper act or solicitation and is inadmissible. *State v. Campbell* (Mo.), 14-403.

Result of examination by physician. — Testimony by a physician that he made an examination of a woman alleged to have been raped about three days previously and found a lacerated condition of the hymen, which in his opinion had existed from three to five days, is admissible. *State v. Campbell*, (Mo.), 14-403.

Permitting prosecutrix to state act was against her will. — In a prosecution for rape it is proper to permit the prosecuting attorney to ask the prosecutrix whether the intercourse was against her will, where the purpose of the question is to inquire into her mental state of willingness or unwillingness, and not to call for the conclusion of the prosecutrix as to whether the offense was against her will in the sense that it was accomplished by overcoming the utmost physical resistance of which she was capable. *Brown v. State* (Wis.), 7-258.

In a prosecution for rape, no mere general statements of the prosecutrix involving her own conclusions, that she did her utmost, etc., are sufficient to establish the fact that she offered the resistance required by the law, but she must relate the very acts done by her, in order that the jury and the court may judge whether any were omitted. *Brown v. State* (Wis.), 7-258.

Testimony of prosecutrix as to force used. — In a prosecution for statutory rape, the prosecutrix may testify whether force was used in the commission of the offense, and whether the defendant had a revolver at that time, where she testifies to these conditions as a part of the overt act constituting the offense, as a part of the *res gestæ*. *State v. Falsetta* (Wash.), 10-177.

Motive in testifying. — Where in a prosecution for rape the prosecutrix has been cross-examined as to her participation in the writing of a letter to the defendant, her father, in reference to surrendering his land to her and leaving the country as a means of avoiding a criminal prosecution, she may state on direct examination that she is not testifying for the purpose of getting the land, but is telling the truth. *Smith v. State* (Tex.), 15-357.

Admission of defendant obtained by fellow Mason. — In a prosecution for rape a witness who is a member of the masonic order may testify that before the arrest he asked the defendant to tell him upon his honor as a Mason, the defendant likewise being a member of such order, whether he was guilty of the accusation and that if he was guilty the witness did not expect him to answer, and the defendant replied, "I want it investigated." The fraternal relation of such witness to the defendant is no reason for excluding such testimony. *Smith v. State* (Tex.), 15-357.

Reason for husband questioning wife. — The husband of the prosecutrix may testify, as a reason for questioning her in regard to the matter, that after their marriage he ascertained that his wife was not a virgin. *Smith v. State* (Tex.), 15-357.

Finding spermatozooids on defendant's shirt by microscopic test. — In a prosecution for rape evidence of the determination by microscopical test that a stain on the defendant's shirt contains spermatozooids is, in the absence of any evidence tending to prove their origin and time of deposit, incompetent for the purpose of identifying the defendant as the guilty person. *State v. Alton* (Minn.), 15-806.

Finding of cloth similar to defendant's shirt at place of assault. — In a prosecution for rape, evidence of the fact that a small pearl button found on the ground at the place of the assault contained a shred of black cotton cloth of the same texture as the defendant's shirt, together with the fact that a button was missing from one sleeve of the defendant's shirt, held, under the circumstances of the case, to be incompetent for the purpose of establishing the identity of the defendant as the guilty person. *State v. Alton* (Minn.), 15-806.

(3) Sufficiency.

In general. — Evidence held to authorize a conviction under the Michigan statute defining rape. *Schramm v. People* (Ill.), 5-111.

Evidence reviewed, and held sufficient to sustain a verdict of guilty in a prosecution for rape. *Hammons v. State* (Ark.), 3-912.

Evidence reviewed, in a prosecution for rape, and held to show that while the inference to be drawn from the unsatisfactory testimony of the two physicians who examined the prosecutrix is negatively in favor of the state in some respects, that testimony, as a whole, justifies an inference adverse to the state because, among other things, the physicians were not called until five and seven days respectively after the time of the illegal intercourse, and they found no evidence of bruises or marks on the person of the prosecutrix traceable to the violence of the struggle. *State v. Cowing* (Minn.), 9-566.

In a prosecution for rape, evidence examined and held sufficient to warrant the court in submitting the case to the jury, and to support a verdict of guilty predicated upon such testimony. *State v. Campbell* (Mo.), 14-403.

Resistance. — Evidence reviewed in a prosecution for rape held insufficient to show that the prosecutrix made the resistance required by law. *Brown v. State* (Wis.), 7-258.

Evidence reviewed, in a prosecution for rape, and held not to show sufficiently specific acts of resistance on the part of the prosecutrix which the law requires. *State v. Cowing* (Minn.), 9-566.

Age of prosecutrix. — Evidence examined in prosecution for rape and held sufficient to satisfy the jury that the prosecutrix was under the age of fifteen years at the time of the commission of the offense and therefore sufficient to sustain the verdict. *Henard v. State* (Tex.), 11-670.

Absence of relation of husband and wife. — In a prosecution for statutory rape it is not necessary to prove by direct and positive evidence that the defendant and the prosecutrix were not husband and wife at the time of the alleged offense, but it is sufficient if there are facts and circumstances in evidence that will justify the jury in reaching that conclusion. *Brenton v. Territory* (Okla.), 6-769.

e. Instructions.

Duty to instruct as to corroboration required. — The failure of the court to instruct the jury that the defendant charged with rape cannot be convicted without evidence corroborating the prosecutrix is not error unless it appears that such an instruction was requested. *Edwards v. State* (Neb.), 5-312.

Instruction as to corroboration. — An instruction in a prosecution for statutory rape as to the corroboration of the prosecutrix reviewed, and held to be more favorable to the defendant than is justified by the law. *Brenton v. Territory* (Okla.), 6-769.

On a prosecution for rape the jury should be instructed that the corroboration arising from a timely complaint made by the prosecutrix to another person, cannot be taken as corroboration tending to support the testimony of the prosecutrix in the particular that the defendant is the guilty person. In such a case, an instruction from which the jury might infer that such a complaint constitutes the corroboration required by the statute, is erroneous. *State v. Stewart* (Wash.), 17-411.

Alibi. — In a prosecution for rape, an instruction telling the jury, in effect, that if they believe from the evidence that the defendant was not present at the time and place of the alleged rape, or if they entertain a reasonable doubt as to his presence they will acquit him, is correct in form and properly given. *State v. Campbell* (Mo.), 14-403.

Familiarities with other men. — Where, in a prosecution for rape, there is evidence tending to show that the prosecutrix was discovered in a compromising position with another man shortly before she preferred the charge against the defendant, and the theory of the defense is that the charge was made against the defendant for the purpose of stopping further inquiry and shielding the person with whom she was consorting, it is error for the court to withdraw this theory from the jury by charging that the evidence tending to show intercourse with the other person can be considered by the jury only as a circumstance explaining her condition when she was examined by a physician a short time before the trial. *State v. Griffin* (Wash.), 11-95.

Failure to make outcry. — Where, in a prosecution for statutory rape, the prosecutrix testifies to a case of forcible rape, her failure to make outcry or timely complaint is proper matter for the consideration of the jury in weighing the testimony of the prose-

cutrix as to the manner in which the assault occurred, and a requested instruction submitting such matter should be given. *State v. Griffin* (Wash.), 11-95.

Confession of defendant. — On a trial for rape, where the fact that the defendant has made a confession on his preliminary examination is practically undisputed, an instruction that if the jury find from the evidence that the defendant made a confession that he had committed the crime of rape upon the prosecutrix, that alone would not be sufficient to authorize a conviction, but the confession, if made, accompanied by proof that the offense was actually committed, would warrant a conviction, and that if the jury find from the evidence beyond a reasonable doubt that the defendant made the confession of the crime, and that the crime was committed, they should convict, does not present reversible error as being a charge on the weight of the evidence. *Skaggs v. State* (Ark.), 16-622.

Fabrication of testimony. — In a prosecution for rape, where the evidence tends to show that after the alleged offense was committed the prosecutrix returned to the defendant's home in pursuance of an agreement with other persons in order that they might obtain a flashlight photograph of the defendant in a compromising position with the prosecutrix if opportunity arose, a charge that if their only object was to obtain a photograph of the defendant in a position in which he should voluntarily place himself their acts did not amount to a conspiracy to fabricate testimony, is correct. *State v. Griffin* (Wash.), 11-95.

Conviction on separate counts. — Where, upon the trial of a person over eighteen years of age charged with rape upon the person of a female under the age of sixteen years, the indictment, in the first count, charges the offense to have been committed with the consent of the female, and, in the second count, forcibly and against her will, it is error for the court to charge the jury that they may find a general verdict of guilty upon both counts of the indictment if they find the evidence to be of such a character as to warrant a conviction upon either count. *State v. Hensley* (Ohio), 9-108.

f. Verdict.

Conviction of lesser offense. — On a trial for rape it is within the power of the jury to find the defendant guilty of an assault to commit rape, although the evidence justifies a conviction of the graver offense. *Skaggs v. State* (Ark.), 16-622.

Attempt to commit offense charged. — Where a complaint charges both an assault on and rape of a female child under the age of fifteen years, the jury may find the defendant not guilty of rape, but guilty of an attempt to commit rape. *Evers v. State* (Neb.), 19-96.

Sufficiency of verdict. — A verdict "that the defendant is guilty of assault with intent to rape, as charged in the information,"

is sufficient notwithstanding the omission of the word "commit" and the name of the female. *Evers v. State* (Neb.), 19-96.

g. Appeal and error.

Exclusion of evidence not shown by record to be admissible. — In a prosecution for statutory rape, the exclusion, as irrelevant and immaterial, of evidence offered by the defendant, held not to be error, the bill of exceptions not showing the purpose of the evidence, and there being no theory in the case under which the evidence could have been admissible. *Henard v. State* (Tex.), 11-670.

Nonprejudicial leading question. — In a prosecution for rape, a question propounded to the prosecutrix as to whether the offense was committed within a certain time, even if leading, is not prejudicial, where no issue is made as to the time when the offense was committed. *Henard v. State* (Tex.), 11-670.

Exclusions of questions designed to show defendant married to prosecutrix. — A conviction for rape will not be reversed on account of the refusal of the trial court to permit the defendant to ask the prosecutrix on cross-examination questions designed to elicit the fact that she was then the wife of the defendant, though the purpose of the cross-examination was to test the competency of the prosecutrix to testify against the defendant, where it appears that the defendant failed to challenge the competency of the prosecutrix at the time she was sworn; and this is particularly true where it appears that subsequently the defendant was given opportunity to put in evidence facts which he claimed showed a marriage, and the evidence fell far short of proving the marriage. *State v. Falsetta* (Wash.), 10-177.

Failure of record to show defendant, under fourteen years of age, capable of committing offense. — When the record fails to show that a child under fourteen years of age, who is charged with assault with intent to commit rape, had the physical capacity to consummate the offense, a conviction for the attempt cannot be had. The legal incompetency in such a case extends both to the act and the attempt. *State v. Fisk* (N. Dak.), 11-1061.

Sufficiency of indictment. — Under the Arkansas statute, an indictment for rape must charge that the act was committed against the will of the prosecutrix, but an indictment charging that the defendant "unlawfully, wilfully, feloniously, forcibly, and with his malice aforethought did make an assault" on the prosecutrix, and that he "unlawfully, wilfully, feloniously, forcibly, and of his malice aforethought did ravish and carnally know" the prosecutrix, is sufficient to support a judgment of conviction, where its sufficiency is question for the first time on appeal, whether or not it would have been sustained as against a demurrer or motion in arrest of judgment. *Beard v. State* (Ark.), 9-409.

Misconduct of prosecuting attorney. — In a prosecution for statutory rape, it is not reversible error for the prosecuting attorney to kiss the prosecuting witness's child in the presence of the jury. *State v. Danforth* (N. H.), 6-557.

In a prosecution for statutory rape, where the prosecuting attorney exhibits to the jury a child born to the prosecuting witness, it is not erroneous to permit him to call attention to a general resemblance between the child and the defendant and to common peculiarities in their features, though the child is only a few months old. *State v. Danforth* (N. H.), 6-557.

On a trial for rape, an offer by the prosecuting attorney, after the evidence is closed, to show that the defendant is a gambler, is properly refused by the trial court; but such an offer, in the presence of the jury, does not, in itself, constitute such flagrant misconduct on the part of the prosecuting attorney as to call for a reversal on appeal. *Skaggs v. State* (Ark.), 16-622.

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RECEIVERS.

1. **APPOINTMENT OF RECEIVER, 1351.**
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 - b. Notice to adverse party, 1351.
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1. **APPOINTMENT OF RECEIVER.**

a. In general.

As ancillary remedy. — The appointment of a receiver in an equitable action is ordinarily an ancillary remedy, provisional in character, and incidental to the main object or purpose of the suit. *Vila v. Grand Island Electric Light, etc., Co. (Neb.)*, 4-59.

Maintenance of suit solely for purpose of appointment. — A receivership is a purely ancillary remedy and cannot be maintained in a proceeding instituted solely for that purpose. *Vila v. Grand Island Electric Light, etc., Co. (Neb.)*, 4-59.

In suit involving title to personalty. — In a suit in equity involving the title to personal property, where the property is of such character that, in order to protect the interests of the parties, it should be sold during the pendency of the suit if the market is favorable, the court may properly appoint a receiver to take charge of and sell the property. *Nutter v. Brown (W. Va.)*, 6-94.

Appointment at instance of mortgagee for property not included in mortgage. — A receiver cannot be appointed at the instance of a mere mortgagee for property not covered by the mortgage. *Vila v.*

Grand Island Electric Light, etc., Co. (Neb.), 4-59.

b. Notice to adverse party.

Appointment without notice in general. — Courts of equity are averse to interference *ex parte* and will not ordinarily entertain an application for the appointment of a receiver except upon notice to the adverse party. *Henderson v. Reynolds (Ind.)*, 11-977.

Although in exceptional cases, where the defendant is beyond the jurisdiction of the court, or cannot be found, or when some emergency is shown, or when notice will jeopardize the delivery of the property over which the receivership is to be extended, a receivership may be granted without notice, the case must be one of imperious necessity and where protection cannot be afforded the plaintiff in any other way. *Henderson v. Reynolds (Ind.)*, 11-977.

Refusal where injunction affords ample protection. — A receiver will not be appointed without notice where the court has power to grant a temporary restraining order that is ample to protect the property until an application for a receiver, with notice, can be passed upon. *Henderson v. Reynolds (Ind.)*, 11-977.

Dispensing with notice because of emergency created by laches of applicant. — A party seeking the appointment of a receiver cannot by his own delay or failure to act promptly create an emergency that will excuse his giving the required notice to the adverse party. *Henderson v. Reynolds (Ind.)*, 11-977.

Sufficiency of affidavit on application for appointment without notice. — Under the Indiana statute forbidding the appointment of receivers without notice, "except upon sufficient cause shown by affidavit," it must appear either in the verified complaint or by affidavit not only that there is cause for the appointment of a receiver but that there is cause for such appointment without notice. *Henderson v. Reynolds (Ind.)*, 11-977.

An affidavit to the effect that the statements in an application for the appointment of a receiver, without notice, "are true to the best of the knowledge and belief of the affiant" or "to the best of his information and belief," is insufficient and is not admissible in evidence. *Henderson v. Reynolds (Ind.)*, 11-977.

The statement in an affidavit for the appointment of a receiver for a growing crop, "that if notice is served said defendant can and will cut" said crop and haul the same away before a hearing can be had on the petition, is a mere statement of an opinion and does not warrant the appointment of the receiver without notice. *Henderson v. Reynolds (Ind.)*, 11-977.

2. **RIGHTS, POWERS, AND LIABILITIES OF RECEIVER.**

In general. — A receiver is a creature of the court, appointed on behalf of all parties

who may establish rights in the cause, and not on behalf of the complainant or the defendant; and he has no powers except such as are conferred upon him by the order of his appointment, and the course and practice of the court. *Atlantic Trust Co. v. Chapman* (U. S.), 13-1155.

Right to purchase property of receivership. — A receiver appointed by court is in a fiduciary position, and cannot, without leave of court, purchase the property of which he is receiver, even where the sale is made, not in the action in which he was appointed, but by a mortgagee selling with leave outside the action. *Nugent v. Nugent* (Eng.), 14-76.

Right to purchase receivership property in name of wife. — A receiver is a trustee for all persons interested in the property intrusted to his charge and if he purchases an outstanding title to such property for his wife, she will hold the property in trust for her husband's *cestuis que trustent*, subject to the right to be reimbursed the amount expended by her for such title, together with the interest thereon. *Cook v. Martin* (Ark.), 5-204.

A purchase by the receiver's wife of receivership property is voidable merely and not void, and the *cestuis que trustent* of the husband waive the right to enforce the trust in their favor by contesting the purchaser's title and asserting a superior title. If they fail in such contest, they cannot, on appeal, abandon their position and claim the right to enforce the trust. *Cook v. Martin* (Ark.), 5-204.

Charging receivership property with debts incurred. — Where it is sought to make debts incurred by a receiver in conducting the receivership, a first charge upon the trust property, there should be a reference to a commissioner to inquire into and take evidence concerning the debts, and if the debts are allowed, the decree for their payment should set forth specifically the amount of each claim and the date from which the interest is to be computed. *Peoples National Bank v. Virginia Textile Co.* (Va.), 7-583.

Where a receiver is appointed at the instance and for the benefit of lien creditors, and is charged with the duty of operating the property for the benefit of such creditors, all proper charges, expenses, and liabilities, incurred as an incident to the receivership, are a first charge, not only upon the current earnings, but also upon the *corpus* of the estate. *Peoples National Bank v. Virginia Textile Co.* (Va.), 7-583.

3. LIABILITY OF APPLICANT FOR RECEIVER.

Expenses of receivership. — A complainant who has in good faith prosecuted a suit upon a good cause of action, and upon whose application the court has properly appointed a receiver, and who obtains a decree fully establishing his rights, is not personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to sell for enough to cover

the allowance made by the court to the receiver and his counsel, and the expenses which the receiver, without special request of the complainant, has incurred. *Atlantic Trust Co. v. Chapman* (U. S.), 13-1155.

4. CONTROL OF RECEIVERS BY COURT.

Court of co-ordinate jurisdiction. — Where a court assumes lawful jurisdiction of a proceeding having for its object the winding up of the affairs of a concern and the distribution of its assets among its creditors, and in conformity with law appoints a receiver to take charge of the assets of the concern and orders him to hold and administer them under the direction of the court, such assets are *in custodia legis*, and no other court of concurrent jurisdiction has authority to oust the jurisdiction first obtained or interfere with the assets; and the assets are not released from the custody and control of the first court so as to subject them to seizure by another court, by the fact that the first court removes the receiver and appoints another in his stead and grants an appeal, and takes bond thereon, from an order refusing to set aside the second appointment. *State ex rel. Sullivan v. Reynolds* (Mo.), 14-198.

Where a court of equity acquires jurisdiction of a cause and appoints a receiver to take charge of the property involved, no other court of co-ordinate jurisdiction has power or authority to interfere with the property in the hands of the receiver by enjoining the receiver from exercising control over the property and by appointing another receiver to take charge of and administer the same property under its own jurisdiction. *State ex rel. Sullivan v. Reynolds* (Mo.), 14-198.

Control of federal receiver by state court. — Where a receiver for a telephone company is appointed by a federal court, the right to determine the rate at which the receiver shall furnish telephone service belongs exclusively to such court, and a state court has no power to interfere by injunction with such determination. *Rogers v. Chippewa Circuit Judge* (Mich.), 3-114.

5. FOREIGN RECEIVERS.

Enforcement of claims by foreign receivers. — It is only upon considerations of comity that courts of one state will recognize and enforce the claims of a receiver appointed in another state; and such considerations will not induce the courts to permit a foreign receiver to enforce claims to the injury of citizens of the domestic state. *Choctaw Coal, etc., Co. v. Williams-Echols, etc., Co.* (Ark.), 5-569.

Where a resident creditor has seized property of a nonresident debtor under writs of attachment and garnishment, in the enforcement of a valid claim, a foreign receiver of the property of such debtor will not be permitted to displace the creditors' liens on the property seized. *Choctaw Coal, etc., Co. v. Williams-Echols, etc., Co.* (Ark.), 5-569.

RECEIVING STOLEN PROPERTY.

1. NATURE AND ELEMENTS OF OFFENSE, 1353.
2. INDICTMENT OR INFORMATION, 1353.
3. EVIDENCE, 1353.
4. INSTRUCTIONS, 1354.
5. VERDICT, 1354.

1. NATURE AND ELEMENTS OF OFFENSE.

As accessory or substantial offense.—

In Nebraska receiving or buying stolen goods, with intent to defraud the owner, is not an accessory, but a substantive, offense, and a conviction may be had without regard to the person who stole the goods, or from whom they were received. *In re Loomis* (Neb.), 18-1024.

Necessity that property received be stolen property.— Under an indictment for receiving stolen goods knowing them to be stolen, the accused cannot be convicted of an attempt to commit the crime where it appears that the goods had lost their character as stolen goods at the time they were offered to the accused. *People v. Jaffe* (N. Y.), 7-348.

Knowledge of stolen character of property as element.— Knowledge of the stolen character of the property is an essential element of the offense of attempting to receive stolen goods knowing them to be stolen, and there cannot be such knowledge where the goods have not in fact been stolen. *People v. Jaffe* (N. Y.), 7-348.

Consideration for receiving as element.— The phrase "upon any consideration" in a statute (Rev. Pen. Code S. D., § 618) making it a crime to buy or receive stolen property "in any manner upon any consideration," is synonymous with "any motive" or "for any cause," and does not make "some consideration" for buying or receiving stolen property an ingredient of the offense and therefore an information under the statute need not allege a consideration. *State v. Pirkey* (S. D.), 18-192.

2. INDICTMENT OR INFORMATION.

Necessity of allegation of name of thief.— It is not necessary that an indictment for receiving stolen property shall allege the name of the thief or that his name is unknown to the grand jury. *Beuchert v. State* (Ind.), 6-914.

An information for buying or receiving stolen property need not allege the name of the person who committed the larceny, and it is sufficient on the trial to prove that the property was stolen without showing who stole it. *State v. Pirkey* (S. D.), 18-192.

Criminal intent of receiver.— An indictment for receiving stolen goods with knowledge of their character need not allege a criminal intent on the part of the receiver, if found under a statute which does not make such intent a constituent element of the offense. *State v. Sakowski* (Mo.), 4-751.

Under a federal statute providing for the punishment of one who receives property which has been feloniously taken or stolen from another, knowing the same to have been taken or stolen, it is not essential to allege in the indictment that the property was received without the consent of the owner or with intent to deprive him of its use and benefit, the criminal intent and evil purpose of the receiver being sufficiently alleged where his act is characterized as "unlawful" and "felonious." *Bise v. United States* (U. S.), 7-165.

Allegation that receiver knew from whom goods stolen.— Where the statute makes receiving stolen goods an independent substantive offense, an allegation in an indictment that the receiver knew from whom the goods were stolen is unnecessary and immaterial, and the failure of the prosecution to prove such allegation does not affect the validity of a verdict of guilty based upon evidence establishing the offense under the remaining allegations of the indictment. *State v. Sakowski* (Mo.), 4-751.

Sufficiency of information in general.— The charge of buying stolen horses in this state, knowing the same to have been stolen, with intent by such buying to defraud the owner, states an offense, even though the charge further recites that the horses were stolen in South Dakota. *In re Loomis* (Neb.), 18-1024.

Sufficiency of description of stolen goods.— A description of goods in an indictment for receiving stolen goods, held sufficient. *State v. Sakowski* (Mo.), 4-751.

3. EVIDENCE.

Burden of proof.— To sustain a conviction on an indictment for buying and receiving stolen goods, the state must bear the burden of showing that the defendant bought the property described, that the property received was stolen, and that the defendant knew it to be stolen when he bought it. *State v. Gordon* (Minn.), 15-897.

Admissibility of evidence of possession of other stolen property.— In a prosecution for receiving stolen goods, evidence tending to prove that other stolen goods were found in the possession of the defendant at the time of or prior to the receiving complained of, is competent to be considered by the jury in determining whether the defendant received the goods with guilty knowledge; and it is proper for the court to instruct the jury as to purpose for which such evidence has been admitted. *Beuchert v. State* (Ind.), 6-914.

Admissibility of evidence that accused knowingly gave stolen property in exchange for that received.— On a trial for receiving stolen property knowing it to have been stolen, it is competent to show that the defendant gave other property which he knew to have been stolen for that which he was charged with receiving, since such evidence tends to show the inadequacy of the consideration paid by the defendant. *State v. Pirkey* (S. D.), 18-192.

Hour of receiving. — In a prosecution for receiving stolen property the fact that the property was taken to the accused at an unusual hour of the night is a circumstance indicating guilty knowledge. *State v. Gordon* (Minn.), 15-897.

Admissibility of bill of sale not properly proved. — On a trial for receiving stolen property knowing it to have been stolen, it is not error for the court to exclude from evidence a paper purporting to be a bill of sale from the person from whom the defendant received the property, where there is no evidence that it had been signed by such person, and he testifies that he had no knowledge of the paper and never signed it. *State v. Pirkey* (S. D.), 18-192.

Nature of evidence of guilty knowledge required. — In a prosecution for receiving stolen property, guilty knowledge on the part of the accused need not be directly proved. It may be shown by circumstances. In determining whether he had such knowledge, the jury are justified in presuming that the accused acted rationally, and that whatever would convey knowledge or induce a belief in the mind of a reasonable person would, in the absence of countervailing evidence, be sufficient to apprise the accused of a similar fact and to create in his mind a similar impression and belief. *State v. Gordon* (Minn.), 15-897.

Sufficiency of evidence. — In a prosecution for receiving copper wire from two boys who had stolen it, evidence held to be sufficient to sustain the conviction of the defendant. *State v. Gordon* (Minn.), 15-897.

Evidence reviewed in a prosecution for receiving goods stolen from a corporation and held sufficient to establish the corporation's nonconsent to the taking. *Beuchert v. State* (Ind.), 6-914.

In a prosecution for receiving stolen goods from a corporation, it is proper to refuse to instruct the jury that if they find that persons other than the president were authorized by the corporation to buy and sell its goods and materials, then they shall find that the corporation's want of consent to the taking of the goods in question has not been shown unless the state has proved the nonconsent of each and every person that was authorized by the corporation to buy and sell goods. *Beuchert v. State* (Ind.), 6-914.

4. INSTRUCTIONS.

Refusal of instructions not based on evidence. — In a prosecution for receiving stolen goods it is proper to refuse an instruction that the defendant must have received the goods from the thief and not from the guilty receiver, where there is no evidence to which the instruction is applicable. *Beuchert v. State* (Ind.), 6-914.

Right of defendant to complain of favorable instruction. — In a prosecution for receiving stolen goods, the defendant cannot complain of an instruction that he must be acquitted if the evidence shows that he or his wife bought the goods in good faith with-

out knowledge that they had been stolen from one having possession of them, as such instruction is very favorable to the defendant. *State v. Sakowski* (Mo.), 4-751.

Proper instruction as to felonious taking. — In a prosecution for receiving stolen goods an instruction as to felonious taking held sufficient. *State v. Sakowski* (Mo.), 4-751.

5. VERDICT.

Finding as to value of goods received. — A conviction for receiving stolen property will not be reversed on the ground that the jury failed to find the value of the property, where the information alleged that it was of the value of \$1,200 and the jury found that it was greatly in excess of twenty dollars. *State v. Pirkey* (S. D.), 18-192.

RECIPROCAL DEMURRAGE.

See CARRIERS, 3.

RECITALS.

Dedication evidenced by recitals in deeds, see STREETS AND HIGHWAYS, 2 a.

Inconsistent recitals in deeds, see DEEDS, 3 f.

Effect of recitals in tax deed, see TAXATION, 10 c.

Necessary recitals in indictments, see INDICTMENTS AND INFORMATIONS, 3.

Recital in will as acknowledgment of legal obligation, see LIMITATION OF ACTIONS, 5 b.

Recital of consideration in deed as promise by grantee to pay, see LIMITATION OF ACTIONS, 3.

Record of justice's judgment as *prima facie* evidence of recitals, see JUSTICES OF THE PEACE, 4.

Record on appeal, see APPEAL AND ERROR, 8 c.

Sheriff's deed as evidence of authority, see SHERIFFS AND CONSTABLES, 2.

Stipulations in notes as affecting negotiability, see BILLS AND NOTES, 6 a.

RECLAIMING GOODS.

Right of seller on breach of contract by buyer, see SALES, 5 b.

RECLAMATION DISTRICTS.

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RECOGNIZANCE.

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RECOLLECTION.

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RECORDS.

1. VALIDITY AND CONSTRUCTION OF STATUTES, 1355.
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Judicial notice of records, see APPEAL AND ERROR, 12 g; EVIDENCE, 1 c.

Lost records, see LOST PAPERS AND RECORDS.

Marriage license and certificate from another state as evidence in bigamy case, see BIGAMY, 4.

Minutes of grand jury as public record, see GRAND JURY, 6.

Necessity of recording lease, see LANDLORD AND TENANT, 2.

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Record on appeal, see APPEAL AND ERROR, 8.

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Summons as part of record, see SUMMONS AND PROCESS, 1.

Supplying omissions in record of judgment, see CRIMINAL LAW, 7 b (5).

Time for making or completing record on appeal, see APPEAL AND ERROR, 7 a.

Weather bureau records in evidence, see EVIDENCE, 9 a.

1. VALIDITY AND CONSTRUCTION OF STATUTES.

Validity of statute requiring record of pre-existing instruments. — Statutes making filing or recording essential to the validity of certain instruments are not unconstitutional as impairing the obligation of contracts with respect to pre-existing instruments. Hence, where a statute provides that no amendment to the by-laws of a beneficial association shall take effect until it has been filed, an amendment not so filed cannot be set up by the association as a defense to an action on a pre-existing benefit certificate, though such certificate was issued with the proviso that it should be subject to all future amendments of the association's by-laws. *Knights of Maccabees v. Nitsch* (Neb.), 5-257.

Validity of California Torrens Act. — The California Torrens Act establishing a system for the registration of titles to land whereby the official certificate will always show the state of the title and the person in whom it is vested, and as a foundation for the system authorizing a proceeding in court whereby, prior to a registration, titles may be settled and declared by a conclusive decree of the court upon the filing of a petition by the owner of land with the names of all the adjoining owners and persons having any claim to or interest in the land, and notice by publication of the time and place of hearing, and notice by either personal service or by publication upon proper affidavit upon the persons mentioned in the petition, with a further provision that any person who has been or would be defrauded by the decree and who has had no actual notice of the proceeding may maintain an action to establish his right against the registered owner within five years after the first registration, does not operate as a denial of due process of law or the equal protection of the laws as respects persons actually owning the land or some interest therein but who, because of the fact that their claims are unknown to the petitioner, are not named in the petition and consequently do not receive any notice except that afforded by publication. *Robinson v. Kerrigan* (Cal.), 12-829.

The Torrens Act of California, in providing for a proceeding in court for the establishing of titles, is not invalid as committing to the judicial department of the state a function which is administrative and not judicial in character. The fact that the proceeding may be had where there is no adverse claim to the land and no existing controversy or dispute as to the ownership thereof, does not make the proceeding an administrative function which cannot be performed by the judicial department. *Robinson v. Kerrigan* (Cal.), 12-829.

The provisions of such act requiring the registrar to note upon the duplicate certificate of title in his office the existence and general character of instruments creating liens, incumbrances, trusts, powers, or leases affecting the land described in the certificate, are not objectionable as conferring judicial

functions upon a nonjudicial officer in requiring the registrar to determine the legal effect of the instruments mentioned. *Robinson v. Kerrigan* (Cal.), 12-829.

Such act is not open to the objection that it is special in that it makes special provisions regarding the statute of limitations, the rights of purchasers in good faith of lands registered under the act, and other matters peculiar to the lands brought within its provisions. *Robinson v. Kerrigan* (Cal.), 12-829.

Such act, being entitled "An act for the certification of land titles and the simplification of the transfer of real estate," is not invalid as embracing more than one subject or as failing to express that subject in the title, although the act contains provisions relating to felonies, county government, principal and surety, attorneys at law, judgments, liens, procedure, and adverse claims, such subjects all being germane to the general subject and appropriate to effect the main object of the law. *Robinson v. Kerrigan* (Cal.), 12-829.

Construction of Massachusetts Torrens Act. — Upon an application for the registration of a title to real property under the Massachusetts statute, the appointment of a master is for the determination of the facts. Exceptions to his findings may be taken, and they are then considered by the Land Court. But in such a proceeding a party may take an appeal from the decision of the judge, for a trial by jury upon the facts. If he does this, issues are framed, and the facts are finally determined by the jury. Questions of fact which are raised by the appealing party by exceptions to the master's report cannot afterwards be considered by the judge on the exceptions, when the party has elected to have a trial by jury on an appeal. Upon such an election, issues should be framed to cover all the material questions of fact that he raised by his exceptions. *East Boston Co. v. Commonwealth* (Mass.), 17-146.

In such a proceeding the report of the judge presents for the consideration of the Supreme Judicial Court only questions of law. The judge has no jurisdiction to report anything but questions of law in such a case, with such facts as are necessary to the understanding of them. These arise upon the rulings and refusals to rule set out in the report. *East Boston Co. v. Commonwealth* (Mass.), 17-146.

2. EFFECT OF CHANGE OF RECORDING DISTRICTS.

Validity of prior record upon change of districts. — That part of the Act of Congress providing for the record of deeds and other conveyances and instruments of writing in the Indian Territory, which provides that, "such instruments heretofore recorded with the clerk of the United States Court of the Indian Territory shall not be required to be again recorded under this provision, but shall be transferred to the indexes without

further cost, and such record heretofore made shall be of full force and effect, the same as if made under this statute," casts no additional duties upon mortgagees who, prior to its passage, had filed or recorded their instruments in conformity with the recordation laws then in force. *Keys v. First Nat. Bank* (Okla.), 18-152.

Where a chattel mortgage was filed or recorded, at Muskogee, in the Northern District of the Indian Territory, which was the proper place of recordation at the time thereof, and by a subsequent Act of Congress the Northern District was subdivided and Vinita made the recording office for the part of the Northern District in which the property mortgaged was situated, such change did not affect the validity of such recordation. *Keys v. First Nat. Bank* (Okla.), 18-152.

The record of a chattel mortgage, in a district where the property covered thereby lies, though upon subdivision of the district subsequent to the record of the mortgage the property may fall within the new district, is notice to purchasers or incumbrancers. *Keys v. First Nat. Bank* (Okla.), 18-152.

3. INSTRUMENTS REQUIRING RECORDATION.

Assignment of mortgage. — An assignment of a mortgage on real property is a conveyance within the meaning of a statute requiring conveyances of real property to be recorded and providing that conveyances not so recorded shall be void as against subsequent purchasers for value without notice. *Huitink v. Thompson* (Minn.), 5-338.

A purchaser of land may rely on the registry records as to the ownership of outstanding mortgages, and he will be protected in making a payment to a mortgagee to procure a release of the mortgage, a previous assignment of which has not been recorded; because he pays the mortgage debt, not as a debtor, but as a part of the purchase price of the land, and therefore the case does not come within the exception to the rule as to the effect of the registry records that a debtor whose debt is evidenced by a negotiable note, though secured by a recorded mortgage, has no right to rely on the records in paying such debt. *City Bank v. Plank* (Wis.), 18-869.

Necessity that deed be recorded to make possession of part of lot extend to whole. — In Georgia, the controlling cases are to the effect that a record is not necessary in order to make possession of a part extend to the limits of a lot or known tract described in the deed, and the code provision is immaterial where the deed relied upon was made prior to its adoption. *Roberson v. Downing Co.* (Ga.), 1-757.

4. WHAT CONSTITUTES RECORD OF INSTRUMENT.

Delivery to clerk outside of office as constituting filing. — The delivery of a paper to the clerk of a court at a place other than the clerk's office is not a filing of such paper in the clerk's office. *Old Colony St. R. Co. v. Thomas* (Mass.), 18-247.

5. EFFECT OF RECORDING OR FAILING TO RECORD INSTRUMENT.

Validity of unrecorded conveyance against subsequent purchaser in general. — The failure of a prior purchaser to record his conveyance may, when taken in connection with other facts and circumstances, estop him to rely upon it against a subsequent purchaser whom he has led to believe in and act upon its nonexistence, even though he afterwards gets his conveyance on record before the later one; and this is so notwithstanding the existence of a recording act which merely declares void any unrecorded conveyance as against any subsequent *bona fide* purchaser "whose conveyance shall first be duly recorded." *Marling v. Nommensen* (Wis.), 7-364.

Validity of unrecorded warranty deed against subsequent quitclaim deed. — An unrecorded warranty deed is valid and effectual as against a recorded quitclaim deed which was executed subsequently by the same grantor and which purports only to "remitse, release, and quitclaim" the grantor's interest in the premises. *Fowler v. Will* (S. Dak.), 8-1093.

In order for the grantee in a quitclaim deed to take advantage of the statute requiring conveyances of real estate to be recorded, and thereby to defeat the title held under an earlier unrecorded deed executed by the same grantor, he must have paid a valuable consideration therefor, and the payment of a merely nominal amount will not meet this requirement. *Morris v. Wicks* (Kan.), 19-319.

Validity of unrecorded deed as against subsequent lessee. — A lease of an interest in a mining claim for two years is not a conveyance within the Alaska statute (Civ. Code, c. 11, § 98) providing that an unrecorded conveyance shall be void as against a subsequent purchaser whose conveyance shall be first recorded, and therefore the lessee is not entitled to protection against a purchaser under a prior deed which has not been recorded at the time of the execution of the lease. *Eadie v. Chambers* (U. S.), 18-1096.

Failure to record assignment of mortgage as estoppel to deny authority of mortgagee to discharge. — An assignee of a mortgage may, by failing to record the assignment, estop himself to deny the mortgagee's authority to discharge the mortgage in favor of a purchaser of the property in good faith and in reliance upon the public records. *Marling v. Nommensen* (Wis.), 7-364.

Record of instrument not in chain of title as constructive notice. — Under the South Dakota statute (Rev. Pol. Code, §§ 868-871), requiring a numerical index as well as a grantor and grantee index to be kept of all recorded mortgages, etc., affecting the title to real property, the record of a mortgage indexed in accordance with the statute is constructive notice to a subsequent purchaser of the premises, though the name of the mortgagor does not appear in the

chain of title. *Fullerton Lumber Co. v. Tinker* (S. Dak.), 18-11.

Defective record as constructive notice in general. — Where a deed is properly attested, a clerical error in its registration does not destroy the character thereof as a constructive notice. *Roberson v. Downing Co.* (Ga.), 1-757.

Under the Alabama Code providing that a conveyance is operative as a record from the day of the delivery to the judge of probate, the fact that the judge, in the recordation of a mortgage on crops raised during certain years, omits to specify the years as set out in the mortgage does not render the record ineffective as constructive notice to subsequent purchasers for value. *Chapman & Co. v. Johnson* (Ala.), 4-559.

Record of mortgage in "Miscellaneous Record Book" as constructive notice. — Where a recording act does not require the keeping of special books in which to record mortgages, the recording of mortgages in the "Miscellaneous Record Book" is sufficient to operate as constructive notice. *Ivey v. Dawley* (Fla.), 7-354.

Record of deed intended as mortgage in book of deeds as constructive notice. — Under the Michigan recording act, a deed which is absolute on its face but is intended as a mortgage is void as against subsequent purchasers for value, if it is recorded in the entry book of deeds, and not in the book of mortgages, and the defeasance is unrecorded. *Grand Rapids Nat. Bank v. Ford* (Mich.), 8-102.

Effect of destruction of record as against subsequent purchasers. — Where a deed has been once recorded, a subsequent burning or other destruction of the records will not render the same ineffectual as notice to subsequent purchasers. *Cooper v. Flesner* (Okla.), 20-29.

6. PROOF OF RECORDS.

Certificate of officer as proper authentication of copy. — A mere certificate from an official having the custody of records is a sufficient authentication of a copy thereof. *Kellogg v. Finn* (S. Dak.), 18-363.

Presumption that instrument is properly indexed. — All public officers are presumed to have performed their duty, and therefore the registrar of deeds will be presumed to have indexed, as required by statute, a mortgage recorded in his office. *Fullerton Lumber Co. v. Tinker* (S. Dak.), 18-11.

7. RIGHTS, DUTIES, AND LIABILITY OF RECORDING OFFICER.

Liability of recording officer for negligence in recording or failing to record instrument. — The register of deeds is a ministerial officer, and as such is liable at common law, in the absence of an express statute, to an action for damages caused by his failure or neglect to perform the duties of his office, or for their negligent or illegal

performance. *Rising v. Dickinson* (N. D.), 20-484.

Under the Tennessee statute regulating the duties of the registers of deeds, the register and his sureties are liable to individuals for damages caused by failure to register a deed properly, without regard to whether or not the failure was due to wilfulness or negligence, or to an innocent mistake. *State v. McClellan* (Tenn.), 3-992.

Under sections 2452, 2453, Rev. Codes 1905, it is made the duty of the register of deeds of each county to keep a numerical index in his office, in which shall be noted, opposite the description of each tract, the volume and page of each mortgage or other instrument affecting the title thereto. Held, that defendant's failure for over two months after a mortgage was duly recorded, to note the same in such numerical index is negligence *per se*, rendering him liable to one who, in reliance on such index, purchases the property and sustains damage as the necessary and proximate result of such official neglect. *Rising v. Dickinson* (N. D.), 20-484.

When cause of action for negligence accrues. — The right of action against a register of deeds for failure to register a deed properly accrues and the statute begins to run when the consequential injury occurs and not at the time the incorrect registration is made. *State v. McClellan* (Tenn.), 3-992.

Contributory negligence of plaintiff as defense to action against recording officer. — It is essential to a recovery for such negligence that plaintiff be free from contributory negligence, but it was not contributory negligence on plaintiff's part in failing to examine the grantor and grantee index wherein such mortgage was noted. *Rising v. Dickinson* (N. D.), 20-484.

In an action on the official bond of a former register of mesne conveyances, for negligence in failing to record an original chattel mortgage for a larger sum than \$100, in the manner required by law, where it appears that a negligent act of the mortgagee, after delivery of the mortgage to the register was the direct and proximate cause of the failure of the register to record the mortgage in the manner required, the mortgagee is estopped to recover damages. *Burris v. Austin* (S. C.), 20-1308.

Sufficiency of evidence in action against recording officer. — In an action against the register of deeds, where plaintiff's right to recover was admittedly dependent upon proof that a third person was insolvent, evidence examined, and held insufficient to establish such fact. *Rising v. Dickinson* (N. D.), 20-484.

Duty to permit inspection of records. — Under the provisions of the Florida statute the public generally, including any person or firm who may be engaged in the enterprise of compiling a complete set of abstract books of the titles to all the real estate in a county, have the continuous right at all reasonable hours and times, by themselves or their agents or assistants, without any service or assistance from the clerk or his depu-

ties in connection therewith other than that general supervision and watchfulness as to what is going forward in his office that is necessary to the safe keeping of such records, then such clerk is not entitled to any fees or compensation from the persons making the abstracts. *State ex rel. Davis v. McMillan* (Fla.), 6-537.

Poll books of a special election under a special act of the legislature deposited in the office of the clerk of a county court are public papers, and it is the duty of the clerk to allow an inspection thereof in a proper cause, though such special act be unconstitutional. *Payne v. Staunton* (W. Va.), 2-74.

The clerk of a county court has such an interest as entitles him to refuse an inspection of the records in his office when such inspection is not called for by law. *Payne v. Staunton* (W. Va.), 2-74.

An inspection of the records in a county clerk's office is not a right vested in every person under all circumstances. The person asking it must have an interest in the record and the inspection must be for a legitimate purpose. *Payne v. Staunton* (W. Va.), 2-74.

Mandamus to compel inspection of records. — Several persons who make common application to a clerk of the county court for the inspection of public records may upon refusal unite in mandamus to compel such inspection, if entitled thereto. *Payne v. Staunton* (W. Va.), 2-74.

Mandamus will not lie to compel inspection of records by a private individual for the sole purpose of learning evidence for the institution of criminal prosecution. *Payne v. Staunton* (W. Va.), 2-74.

RECOUNPMENT.

See SET-OFF AND COUNTERCLAIM.

RECRIMINATION.

Defense to action for divorce, see DIVORCE, 3 a.

REDEMPTION.

Dower in equity of redemption, see DOWER, 1.

Equity of redemption, see MORTGAGES AND DEEDS OF TRUST, 12.

Execution sales, see EXECUTIONS, 9.

Municipal bonds redeemed before maturity, see MUNICIPAL CORPORATIONS, 8 e (2).

Tax sales, see TAXATION, 10 d.

REDUNDANCY.

Striking out redundant matter by amendment, see PLEADING, 9 d.

RE-ENACTMENT.

Repeal and re-enactment of statute, see STATUTES, 6.

RE-ENTRY.

Right of landlord to re-enter, see **LANDLORD AND TENANT**, 7.

RE-EXAMINATION.

See **WITNESSES**, 4 e.

REFERENCES.

Refusal of referee to allow filing of additional pleas at hearing as harmless error, see **APPEAL AND ERROR**, 15 b (2).
Referring injunction suit to master, see **INJUNCTIONS**, 3 f.

Necessity of exceptions to rulings of referee. — Under the provisions of the old code (§§ 293, 295), a report of a referee appointed by the District Court could be assailed by a motion to set it aside or by proper exceptions thereto filed on the coming in of the report, and it was not essential that exceptions be taken to errors occurring on the trial before him if such errors appeared of record. *Kelley, etc., Milling Co. v. Schreiber* (Kan.), 20-192.

The amended code makes no provision for exceptions or for bills of exception. (Laws 1909, c. 182; Gen. St. 1919, c. 95.) *Kelley, etc., Milling Co. v. Schreiber* (Kan.), 20-192.

Extension of time for filing report. — Where the District Court, by an order appointing a referee, limits the time within which he shall file his report, the court may for cause, and within the time limited, extend the time within which such report may be filed. *Clark v. Bank of Hennessey* (Okla.), 2-219.

Striking report from files for non-prejudicial failure to give notice of findings. — It is not error for the court to deny a motion to strike the referee's report from the files because the defeated party was not notified of the finding, where it is not shown that any substantial right was prejudiced thereby. *Clark v. Bank* (Okla.), 2-219.

REFERENDUM.

Application of referendum law to incurring of municipal indebtedness, see **MUNICIPAL CORPORATIONS**, 8 c.

Direct exercise of legislative power by people, see **MUNICIPAL CORPORATIONS**, 2.

Effect as delegation of legislative power, see **CONSTITUTIONAL LAW**, 20.

Self-executing constitutional provisions, see **CONSTITUTIONAL LAW**, 24.

Validity of initiative and referendum as affecting form of government, see **CONSTITUTIONAL LAW**, 13; **MUNICIPAL CORPORATIONS**, 2.

REFORMATION OF INSTRUMENTS.

Contracts for sale of real estate, see **VENDOR AND PURCHASER**, 3 k.

Fire insurance policies, see **INSURANCE**, 5 k.

Insurance policies generally, see **INSURANCE**, 3 d.

Mortgage of real estate in form of chattel mortgage, see **MORTGAGES AND DEEDS OF TRUSTS**, 2.

Oral contracts, see **FRAUDS, STATUTE OF**, 2.

Tax deeds, see **TAXATION**, 10 c.

Reformation of wills. — A court of equity has no power to reform a will duly admitted to probate. *Polsey v. Newton* (Mass.), 15-133.

A plain, written legal will cannot be reformed by making additions to it. *Crawley v. Kendrick* (Ga.), 2-643.

Reformation of deed for mutual or unilateral mistake. — A deed may be corrected on the ground of mistake where the mistake is mutual. If unilateral, the remedy is rescission. *Wirsching v. Grand Lodge of F. & A. M.* (N. J.), 3-442.

Reformation of insurance policy for mutual mistake. — A court of equity has power to reform a policy of fire insurance which by reason of mistake in its execution does not conform to the real agreement of the parties. *Phoenix Ins. Co. v. State* (Ark.), 6-440.

Reformation of voluntary conveyance at suit of grantee. — A voluntary conveyance, founded on love and affection, and made without any prior consultation or agreement with the grantee, will not be reformed in equity at the suit of the grantee so as to describe the lands correctly. *Smith v. Smith* (Ark.), 10-522.

Reformation of sheriff's deed. — The rule that equity will not aid the defective execution of statutory powers does not apply to a sheriff's deed to a partnership in its firm name, where the execution and antecedent proceedings give the individual names of the partner composing the firm. *Spaulding Mfg. Co. v. Godbold* (Ark.), 19-947.

Reformation of contract made with agent having no power to make contract as sought to be reformed. — A petition seeking to reform a contract of insurance is properly dismissed on demurrer when it appears therefrom that the agent of the insurer with whom the contract was made had no authority to make the contract in the form in which it is sought to be reformed. *Vardeman v. Penn Mut. L. Ins. Co.* (Ga.), 5-221.

Sufficiency of petition. — Where a proceeding is brought for the reformation of a written contract, the instrument which is sought to be reformed should be set forth in the petition or attached thereto as an exhibit, so that from it and the allegations it may clearly appear that the instrument does not conform to the real contract made by the parties. The petition should also show the particular mistake, or fraud and mistake,

complained of, and how it occurred. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. (Va.)*, 7-1134.

Where a petition seeks to reform a written instrument as a contract between parties, and also to enforce it, the allegations must be sufficient for both purposes. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. (Ga.)*, 7-1134.

Burden of proof of mistake. — The party seeking reformation of a written instrument on the ground of mistake has the burden of proving the alleged mistake. *Perkins v. Herring (Va.)*, 19-342.

Contradiction of recitals by parol evidence. — In an action to have a bill of sale of stock declared a mortgage, oral evidence is admissible to contradict a recital in the bill of sale that the person executing the conveyance was afraid the stock conveyed would not sell for a sufficient price to pay the debt in consideration of which the bill of sale was executed, and that he feared a deficiency judgment against him, and also to contradict the recital of a cash consideration in such bill of sale. *Gibbons v. Joseph Gibbons Consol. Mining, etc., Co. (Colo.)*, 11-323.

In an action to have a bill of sale of stock declared a mortgage, the fact that the complaint contains no allegation of fraud in the making of the bill of sale does not render extrinsic evidence as to the intent of the parties inadmissible. *Gibbons v. Joseph Gibbons Consol. Mining, etc., Co. (Colo.)*, 11-323.

Evidence regarding value of property transferred. — In an action to have a bill of sale of stock declared a mortgage, evidence of the amount which a person had offered to pay for the stock is admissible as tending to show the value of the stock, and as an important circumstance in determining whether the bill of sale, which was for a much smaller amount, was intended as a mortgage. *Gibbons v. Joseph Gibbons Consol. Mining, etc., Co. (Colo.)*, 11-323.

Degree of proof required. — In order to justify a decree for the reformation of an instrument on the ground of mistake, the evidence of mistake must be clear, convincing, and satisfactory. *Perkins v. Herring (Va.)*, 19-342.

Sufficiency of evidence of mistake. — Evidence examined and held not sufficient to support a decree for reformation on the ground of mistake. *Perkins v. Herring (Va.)*, 19-342.

REFORMATION OF PLEADINGS.

See ACTIONS.

REFRESHING MEMORY.

See WITNESSES, 4 c (3).

REGISTRATION.

Registration of voters, see ELECTIONS, 9.
Requiring registration of automobiles, see MOTOR VEHICLES, 1 b.

REGISTRATION LAWS.

See RECORDS.

REGISTRARS.

Appointment of board of county registrars, see JUDGES, 3 b.

REGULARITY.

Presumption of regularity, see ACKNOWLEDGMENTS; APPEAL AND ERROR, 14.

REGULATE.

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RELEASE AND DISCHARGE.

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1. **DEFINITIONS.**

Distinction between receipt and release. — A receipt is evidence that an obligation has been discharged, but a release is itself a discharge of the obligation. *Allen v. Ruland* (Conn.), 8-344.

2. **VALIDITY OF RELEASE.**

Release executed by infant. — In an action by a minor to recover damages for personal injuries, a release of damages signed by the plaintiff which recites the payment of a sum much less than the amount of damages claimed in the complaint, in satisfaction of the injury, is not admissible in evidence, either to bar the action or as affecting the credibility of the plaintiff's testimony regarding the extent of her injuries. *Holinger v. York R. Co.* (Pa. St.), 17-571.

Release in consideration of re-employment for indefinite time. — A release to a corporation of all claims on account of personal injuries stating the consideration to be re-employment by said company for such time only as may be satisfactory to the company is without consideration, as the time of employment is left optional with the releasee and the fact of employment does not bind it and therefore the releasor is not bound to anything. *Missouri, etc., R. Co. v. Smith* (Tex.), 4-644.

Validity as question for jury. — The question whether a release of a claim for damages for personal injuries is a valid contract and binding on the releasor is for the determination of the jury, upon the evidence, under proper instruction from the court. *St. Louis, etc., R. Co. v. Brown* (Ark.), 3-573.

3. **CONSTRUCTION OF RELEASE.**

Release of damages for personal injuries as covering injuries subsequently developing. — A release of personal injuries held sufficient to cover injuries subsequently developing from the accident for which the release was given, though the injuries were unknown to the releasor at the time of giving the release. *Quebe v. Gulf, etc., R. Co.* (Tex.), 4-545.

4. **EFFECT OF RELEASE OR DISCHARGE.**

Release of one joint tortfeasor as release of all. — Under the common-law rule, the release of a judgment as to one or more of several joint tortfeasors against whom the judgment has been rendered, operates to discharge the judgment as to all. *Ducey v. Patterson* (Colo.), 11-393.

A release of one of several joint trespassers, which is given for a valuable consideration, is a release of all. *Allen v. Rutland* (Conn.), 8-344.

Release of one joint tortfeasor with reservation of rights against other as release of all. — A stipulation in a release of certain tortfeasors against whom a judgment has been rendered, that there is no release of the judgment except as to the tortfeasors expressly released, does not change the release into a covenant not to sue, or prevent the discharge of all the tortfeasors. *Ducey v. Patterson* (Colo.), 11-393.

The discharge of one tortfeasor is a bar to a further action against the remaining tortfeasor in spite of the reservation of the right to proceed against the latter. *McBride v. Scott* (Mich.), 1-61.

Release of one joint tortfeasor with assignment of claim against others as release of all. — One of two joint tortfeasors, who satisfies a claim for wrong and takes an assignment of the claimant's cause of action, cannot maintain an action on the claim against the other tortfeasor, as the satisfaction discharges both of the tortfeasors and leaves no cause of action which the claimant can assign. *Tanner v. Bowen* (Mont.), 9-517.

Release of person not liable for tort as release of tortfeasors. — While the release of one of several joint tortfeasors bars the right to recover against the others, a release of one against whom no claim is made and who is not legally answerable in tort to the releasor or any one else, in consideration of a mere gift or gratuity from such person to the releasor, does not operate as a release of the persons actually liable for the tort. *Pickwick v. McCauliff* (Mass.), 8-1041.

Payment by express company for damages to messenger as release by him of rights against railroad company. — Where by contract between a railroad company and an express company, the ultimate liability for any damage sustained by an express messenger through the negligence of the railroad company is placed upon the express company, an express messenger injured by the negligence of the railroad company, who obtains satisfaction from and discharges the express company, will be held to have acted in view of the relations subsisting between the two companies for the railroad company's benefit, and the payment by the express company, although that company is in no way liable, will not be considered as payment by a stranger, but by one having the right to pay for its own protection, and will operate to discharge the railroad company from liability. *Robinson v. St. Johnsbury, etc., R. Co.* (Vt.), 12-1060.

Release of saloonkeeper from statutory liability as release of railroad company's liability for personal injuries. — Where an intoxicated passenger is injured by the negligence of the carrier and thereafter his wife brings a statutory action against the saloonkeepers who sold him the

liquor causing the intoxication, which action lies in favor of the wife alone, the fact that on the settlement of such action without trial he joins with the wife in executing the release does not release his claim for damages against the carrier. *Fox v. Michigan Cent. R. Co.* (Mich.), 5-68.

Retrospective effect of Colorado statute. — The Colorado statute providing that a release of one or more joint debtors shall not affect the liability of the remaining debtor or debtors, has no retrospective effect, and cannot be invoked to keep alive as to a certain joint debtor a judgment rendered prior to the adoption of the statute, and afterwards released as to the other debtors, the debtor not released having a vested interest in the judgment as against the other joint debtors which the statute could not take away without violation of the provision of the Colorado constitution against *ex post facto* and retrospective laws. *Ducey v. Patterson* (Colo.), 11-393.

5. AVOIDANCE OF RELEASE.

a. Grounds of avoidance.

(1) Mental incapacity of releasor.

Release of damages for personal injuries. — A release of damages for personal injuries executed under seal at a time when the releasor was still in a nervous condition and suffering considerable pain as the result of injuries and before the full extent of the injuries had developed, should be set aside in an action to recover damages for injuries. *Ryckman v. Hamilton, etc., R. Co.* (Ont.), 4-1126.

(2) Fraud or deceit.

Release under seal. — A release of a claim for damages for personal injuries may be avoided for fraud in procurement though executed under seal. *Rockwell v. Capital Traction Co.* (D. C.), 4-648.

Right to attack release for fraud in general. — The rule that a mistake of law affords no ground for relief held not to preclude a releasor from attacking a release on the ground of fraudulent procurement. *Rockwell v. Capital Traction Co.* (D. C.), 4-648.

What fraud available in general. — The only fraud available in an action at law to avoid a formally executed release of the claim sued on is misrepresentation, deceit, or trickery practiced to induce the execution of a release which the signer never intended to execute, and upon which the minds of the contracting parties never met, and does not include any of those misrepresentations of fact which may be resorted to in order to persuade the claimant to agree to the release as actually made. *Pacific Mutual Life Ins. Co. v. Webb* (U. S.), 13-752.

Fraudulent representation of physician in employ of person released. — A release of a claim for personal injuries, executed in reliance on fraudulent and false representations of probability of recovery, made to the injured person by an attending physician in the employ of the persons sought

to be charged therewith, is voidable. *Nelson v. Chicago, etc., R. Co. (Minn.)*, 20-748.

Avoidance in action at law where release pleaded in bar. — Where a release of damages for personal injuries has been procured by fraud, it is not necessary for the releasor to have it set aside in equity before he can bring an action at law to recover damages for the injury, it being sufficient if he sets up the fraud in the action at law when the release is pleaded as an accord and satisfaction. *Memphis St. R. Co. v. Giardino (Tenn.)*, 8-176.

A release procured by untrue representations that the person signing it has no meritorious cause of action, and that the consideration for the release is a gift, can properly be attacked for the fraud only in a court of equity, and a state statute providing that wherever any release alleged to be fraudulent is set up in defense to an action, the validity of the release shall be decided along with the other issues of the case, is ineffectual, so far as the federal courts are concerned, to transfer this equitable remedy to a court of law. *Pacific Mutual Life Ins. Co. v. Webb (U. S.)*, 13-752.

Ratification of release by re-entering employ of person released. — The fact that a servant after releasing an employer from damages for personal injuries returns to the latter's employment will not prevent his recovery for such injuries where the release was fraudulently secured. *Bjorklund v. Seattle Electric Co. (Wash.)*, 1-443.

Ratification of release by using consideration in ignorance of fraud. — Where a release of damages for personal injuries is procured by fraud, the releasor does not ratify it by using the consideration money, if such use is made in ignorance of the fraud. *Rockwell v. Capital Traction Co. (D. C.)*, 4-648.

(3) Duress.

Right of creditor to avoid release for duress of releasor. — A debtor's refusal to pay any part of a debt unless his creditor will accept a certain sum offered in payment and sign a receipt reciting that the payment is in full settlement does not of itself constitute such duress as will entitle the creditor to avoid the receipt. *Earle v. Berry (R. I.)*, 8-875.

(4) Mistake.

Mutual mistake of injured person and physician in employ of person released. — A release of a claim for personal injuries, executed in reliance on representations of probability of recovery made to the injured person by an attending physician in the employ of the persons sought to be charged therewith may be avoided when its execution is due to a mutual mistake of the injured person and of such a physician, who assists in procuring the settlement. *Nelson v. Chicago, etc., R. Co. (Minn.)*, 20-748.

Where, however, such an attending physician in the course of treatment expresses a

mistaken, but honest, opinion as to the period within which the injured person, suffering from a known injury, will recover, and where that expression of opinion, when made, has no connection whatever with a settlement, or with negotiations for a settlement, a release executed in reliance on his statement under such circumstances is valid. *Nelson v. Chicago, etc., R. Co. (Minn.)*, 20-748.

b. Return of consideration as condition precedent to avoidance.

Right to plead fraud in avoidance of release with return or tender of consideration. — Where a release of a claim for damages for personal injuries is procured by fraud, at the time when the releasor is mentally incapable of contracting, the releasor may bring an action for injuries without first refunding or tendering the money paid him as consideration. *St. Louis, etc., R. Co. v. Brown (Ark.)*, 3-579.

The rule that a release obtained by fraud may be rescinded without a return of the consideration therefor applies only to fraud in procuring the execution of the release and not to fraud in the consideration, as where the party knew that he was executing a release but was induced to do so by fraudulent representations of the other party as to matters other than the character of the instrument. *Babcock v. Farwell (Ill.)*, 19-74.

The amount paid to one who has been fraudulently induced to sign a release of damages for personal injuries need not be returned by him before bringing suit to recover such damages, but may be credited upon the amount of his recovery. *Bjorklund v. Seattle Electric Co. (Wash.)*, 1-443.

In an action for damages for personal injuries, where the defendant relies on a release signed by the plaintiff, the plaintiff is not precluded from setting up a fraud in the release because he has not returned the sum of money which he received as a part of the consideration for the execution of the release. *Hayes v. Atlanta, etc., R. Co. (N. Car.)*, 10-737.

Where the releasor seeks to avoid a release of damages for personal injuries on the ground that it was procured from him by fraud, he must show that as soon as he discovered the fraud he returned, or offered to return, the money paid him for executing the release. *Harrison v. Alabama Midland R. Co. (Ala.)*, 6-804.

Where the plaintiff in an action to recover damages for personal injuries files a replication seeking to avoid, on the ground of fraudulent procurement, a release executed by him and set up by the defendant as an accord and satisfaction, he must at the same time return or tender the consideration paid him for executing the release, as such return or tender is a condition precedent to his right to proceed with his suit. *Memphis St. R. Co. v. Giardino (Tenn.)*, 8-176.

When tender or return should be made. — In order to avoid a release of damages for personal injuries on the ground that it was fraudulently procured, it is not neces-

sary that the releasor should offer to return the consideration before suing for the injuries, but it is sufficient if the fraud is alleged and the offer to return is made when the release is set up as a defense to an action for the injuries. *Rockwell v. Capital Traction Co. (D. C.)*, 4-648.

Where the plaintiff in an action to recover damages for personal injuries files a replication seeking to avoid, on the ground of fraudulent procurement, a release executed by him and set up by the defendant as accord and satisfaction, but fails to return or tender the consideration paid him for executing the release, whereupon the defendant moves to strike out the replication, which motion is denied, a tender made by the plaintiff after he has introduced some of his evidence is made too late, and the action should be dismissed. *Memphis St. R. Co. v. Giardino (Tenn.)*, 8-176.

Necessity of tender of consideration where avoidance based on want of consideration. — Where in an action against an employer to recover for the death of an employee, the defendant pleads a release for a valuable consideration, which is denied by the plaintiff, and the finding of the jury is that there was no consideration for a release, a rescission of the release and a tender of the consideration are not necessary to entitle the plaintiff to maintain an action, as in such case there is no contract of release to rescind or any consideration therefor to be tendered back. *Vindicator Consol. Gold Min. Co. v. Firstbrook (Colo.)*, 10-1108.

c. Actions.

Duplicity in pleading accord and satisfaction and release under seal. — In an action against a railroad company to recover damages for injuries received by the plaintiff on the defendant's road while employed as messenger for an express company, pleas alleging that the express company, for the purpose of settling for and procuring a discharge of the plaintiff's cause of action, made a payment to the plaintiff which was received as full satisfaction and discharge of his cause of action, and that in consideration of said payment the plaintiff executed to the express company a release and discharge of the claim under seal, are confined to a single transaction culminating in the release and point to the release as the defense relied on, and are not demurrable for duplicity as setting forth both accord and satisfaction and a release under seal. *Robinson v. St. Johnsbury, etc., R. Co. (Vt.)*, 12-1060.

Admissibility of evidence of statements of releasee's agents. — In an action by a servant against an employer to recover damages for personal injuries, the defense being a release thereof executed by the plaintiff, testimony as to statements made by agents of the defendant to the plaintiff are admissible in evidence, it being for the jury to determine whether the statements were such that the plaintiff had a right to

and did rely upon them as facts. *Bjorklund v. Seattle Electric Co. (Wash.)*, 1-443.

Sufficiency of evidence of fraud. — Evidence held not sufficient in itself to establish a fraud in procurement of a release, but to be entitled to weight in determining whether the release was signed in reliance upon false representations. *Rockwell v. Capital Traction Co. (D. C.)*, 4-648.

Where, in an action for damages for personal injuries, the defendant relies on a release signed by the plaintiff in consideration of a certain sum of money, but the plaintiff's evidence tends to prove that the agreed consideration for the release was not only the sum of money, but also the lifetime employment of the plaintiff by the defendant, and that the release as read to the plaintiff, who was an illiterate person, provided for such employment, there is evidence from which the jury may find that the release is fraudulent and void. *Hayes v. Atlanta, etc., R. Co. (N. Car.)*, 10-737.

Sufficiency of evidence of mental incapacity of releasor. — Where there is evidence tending to show that the releasor, at the time of the signing, did not have sufficient mental capacity on account of physical injuries and whiskey taken, to understand the contents of a paper signed by him, the jury are justified in finding that the release is not binding upon the releasor because procured by fraud. *St. Louis, etc., R. Co. v. Brown (Ark.)*, 3-573.

Credibility of witnesses and sufficiency of evidence as question for jury. — Where there is sufficient evidence to require a submission to the jury of an issue as to whether a release set up as a defense to an action for damages for personal injuries was procured by fraud, the credibility of the witnesses and the sufficiency of the evidence introduced in support of the allegations of fraud are questions for the exclusive determination of the jury. *Rockwell v. Capital Traction Co. (D. C.)*, 4-648.

6. CONTRADICTION OF RELEASE.

Unsealed and sealed releases. — Under the statute of Missouri the use of private seals in written contracts or other instruments theretofore required to be under seal, is abolished, and a release not under seal has the same force and validity, as against collateral attack in a court of law, as a sealed release. *Pacific Mutual Life Ins. Co. v. Webb (U. S.)*, 13-752.

Where a release is under seal and the releasor accepts the sum of money named in the instrument as the consideration, it is immaterial whether the sum is large or small. *Allen v. Ruland (Conn.)*, 8-344.

Under the Rhode Island statute doing away with the necessity of affixing a seal to a general or special release, an instrument which, while not in form a release, is more than a mere receipt, in that it acknowledges that the sum received is all that is due the creditor, is binding upon both parties as a compromise, and cannot be contradicted except on proof.

of mistake, fraud, duress, or undue influence. *Earle v. Berry* (R. I.), 8-875.

Admissibility of parol evidence to vary release. — Where a release of damages is given in terms broad enough to cover a certain cause of action, extrinsic evidence is not admissible to show that the release did not in fact relate to and was not intended to discharge such cause of action. *Allen v. Rutland* (Conn.), 8-344.

RELEVANCY.

Of evidence, see EVIDENCE, 2.

RELIEF.

Granting relief not within prayer of complaint as ground for collateral attack on judgment, see JUDGMENTS, 10.

Prayers for relief, see EQUITY, 3; PLEADING, 3 g.

RELIEF ASSOCIATIONS.

Employers' relief association, see MASTER AND SERVANT, 3 j.

Maintenance by railroad companies, see RAILROADS, 5 c.

RELIGION.

Religious belief as affecting admissibility of dying declarations, see HOMICIDE, 6 a (3) (b).

Religious belief as affecting competency as witness, see WITNESSES, 3 b (6).

Religious profession as affecting competency of jurors, see JURY, 5 b.

Religious exercises in public schools, see SCHOOLS, 6.

RELIGIOUS CEREMONY.

Necessity to constitute marriage, see MARRIAGE, 1 b.

RELIGIOUS SERVICES.

Disturbance of, see DISTURBING MEETINGS.

RELIGIOUS SOCIETIES.

Communications between priest and parishioner as privileged, see WITNESSES, 3 d (3).

Exemption from taxation generally, see TAXATION, 12 c (4).

Exemption from succession taxes, see TAXATION, 13 a.

Liability of church for negligence, see CHARITIES, 8.

Legality of religious society having community of property. — An incorporated religious society, to which all members are required to surrender all their property, and which owns said property, and manages it for the benefit of all the members equally, and in the management of the property conducts various business enterprises, such as farming, cattle raising, keeping stores and hotels, etc., but with the view of producing only a sufficient income to meet the necessary expenses of the community and to maintain its members as required by their religious faith, is not exercising the functions of a corporation for pecuniary profit. Such a society is not illegal as obnoxious to sound public policy in that its communistic basis is inconsistent with the development of individuality and with prevailing American ideals. *State v. Amana Society* (Iowa), 11-231.

Power of churches to unite. — One church organization may lawfully unite with another where there is nothing in the fundamental law of the church expressly or impliedly prohibiting such action. *First Presb. Church v. First Cumberland Presb. Church* (Ill.), 19-275.

Grounds for partition of church property. — It is not a ground for decreeing partition of the property of an incorporated church between two factions of the church, that by a majority vote of the congregation at a lawful meeting thereof the church building has been moved, against the wishes of the minority, to a place about three-fourths of a mile from the original location, when the management of all the affairs of the church is vested in the congregation, and there are no differences in regard to any matter of doctrine or practice. *German, etc., Congregation v. Deutsche, etc., Gemeinde* (Ill.), 20-404.

Liability of new corporation purchasing property of old corporation at foreclosure sale for debts of old corporation. — Where the members of an insolvent religious corporation, whose property has been sold at a foreclosure, organize a new corporation for the promotion of the same purposes to which the old corporation was dedicated and buy in such property at less than one-half the mortgage debt for which it was sold, the new corporation is not, in the absence of fraud, chargeable with the debts of the old corporation. *Allen v. North Des Moines M. E. Church* (Iowa), 4-257.

Liability of member of incorporated religious society for debts of corporation. — The creditor of a religious corporation is not a creditor of the members thereof and has no right of action against them as such. *Allen v. North Des Moines M. E. Church* (Iowa), 4-257.

Jurisdiction of civil court to review action of religious society in expelling member. — Courts have jurisdiction to review the action of a church or religious society in expelling some of its members pursuant to a fraudulent scheme to obtain control of the property of the organization and misappropriate it or otherwise divert it from

its original channel, where there is no ecclesiastical question involved. *Hendry v. People's United Church* (Wash.), 7-764.

Review, by civil court, of determination of ecclesiastical tribunal that churches be united. — A determination of an ecclesiastical tribunal that the church organization be united with that of another church affects property rights because it operates to transfer the church property to the consolidated organization, and therefore such determination is subject to review by the civil courts. *First Presb. Church v. First Cumberland Presb. Church* (Ill.), 19-275.

Review, by civil court, of determination of ecclesiastical tribunal as to identity of creeds. — The question whether the creed and doctrine of a church are inconsistent with those of another church is a matter strictly of ecclesiastical cognizance, and having been determined by the proper ecclesiastical court is not subject to review in a civil court. *First Presb. Church v. First Cumberland Presb. Church* (Ill.), 19-275.

Whether the fundamental law of a particular church organization permits union with another church is a purely ecclesiastical question, and the decision of the question by the proper ecclesiastical court will not be reviewed by a civil court. *First Presb. Church v. First Cumberland Presb. Church* (Ill.), 19-275.

Review, by civil court, of determination of ecclesiastical tribunal as to what faction constitutes church. — The civil courts, in adjudicating on property rights in a controversy arising out of a division of church membership, are bound by the adjudication of the ecclesiastical court as to which of the contending factions is the true representative of the church, and will decree the title of church property accordingly. *First Presb. Church v. First Cumberland Presb. Church* (Ill.), 19-275.

Review, by civil court, of determination of ecclesiastical tribunal as to question of church law. — On the question of the union of one church with another, the highest ecclesiastical tribunal has authority to determine what matters must be submitted to the inferior bodies of the church organization, and its determination of the question is conclusive on the state courts. *First Presb. Church v. First Cumberland Presb. Church* (Ill.), 19-275.

RELOCATION.

Changing location of railroads, see **RAILROADS**, 2 b.

REM.

Judgments *in rem*, see **JUDGMENTS**, 17.

REMAINDERS.

See **LIFE ESTATES**.

Character of remainder as vested or contingent, see **WILLS**, 8 c (9).

Fixtures as between life tenant and remainderman, see **FIXTURES**, 5.

Liability of remainderman to reimburse life tenant for discharging incumbrances, see **LIFE ESTATES**, 1 d.

Right of remainderman to maintain ejectment, see **EJECTMENT**, 2.

Right to dower in remainder, see **DOWER**, 1.

Nature of remainders created by particular devises. — A devise to A for life, with remainder in fee to A's issue, and in default of such issue with a limitation over to B, creates a contingent remainder with a double aspect, and not an executory devise. *McCreary v. Coggeshall* (S. Car.), 7-693.

Where a testator devises property to his wife for her life in trust for the benefit of herself and their children, with power to sell the property for reinvestment and with power to use so much of the principal as may be necessary for the benefit of herself and her children, and the will provides that the children shall take the fee in the property remaining at the death of the testator's wife, the children take vested and not contingent remainders. *Roberts v. Roberts* (Md.), 5-805.

Where a testator devises property to his wife for life in trust for herself and their children with power of disposition in the life tenant and with remainder over to the children, the remainders are vested ones and are not rendered contingent by the fact that the will provides that the child or children of a deceased child shall stand in the place of the parent, and receive and have the share and interest the parent would have been entitled to if living. *Roberts v. Roberts* (Md.), 5-805.

A vested remainder is created by a devise in trust for the use of J. for life, with a direction, after the death of J. to pay to J's wife, for life, if she should survive him, one-third of the income of the land devised, and to pay the residue of the income to the children of J. in the proportions of three-eighths to A. and five-eighths equally to J's other children "then living in the lifetime of their mother; and immediately after the decease of the said J. and wife, I direct that the said real estate . . . shall be vested in the children of the said J., in the same proportions as above mentioned as to the income thereof; and if any of the said children be then deceased, under lawful age and without issue," the survivors "to take the share of said decedent in the same proportions, but if either of the said children be then deceased leaving lawful issue him or her surviving, such issue shall take . . . the part or share his, her, or their deceased parent would have taken if then living." *Jacobs v. Whitney* (Mass.), 18-576.

Under the Michigan statutes, a grant to one for life "and to his heirs thereafter forever," conveys to the remainderman a vested future estate which descends to his heirs on his death prior to the death of the life tenant. *Porter v. Osmun* (Mich.), 3-687.

Validity of remainder. — An estate in

remainder cannot be created to take effect beyond the end of a life or lives in being and twenty-one years and ten months thereafter, and the remainder is void if there is any uncertainty or doubt that it will vest during that period. *U. S. Fidelity, etc., Co. v. Douglas* (Ky.), 20-993.

Disposition of estate after termination of life estate and destruction of remainders. — Where property is devised for life with contingent remainders over, the fee vests in the residuary devisee upon the determination of the particular estate and the destruction of the contingent remainders. *McCreary v. Coggeshall* (S. Car.), 7-693.

Conveyance of remainder. — A vested remainder may be conveyed by the remainderman by deed of trust for the benefit of his creditors. *Roberts v. Roberts* (Md.), 5-805.

Right of one of several remaindermen purchasing life estate and making improvements to allowance therefor. — Equity will not make an allowance for improvements to one of several remaindermen who, with knowledge of the character of the life tenant's estate, purchases the property and places improvements thereon during the continuation of the life estate. *Porter v. Osmun* (Mich.), 3-687.

Recovery of property. — In an action by a contingent remainderman to recover the possession of real property, where the evidence establishes that a person holding by permission of the life tenant and those claiming under such person have been in possession of the land, subject to the rights of the plaintiffs, for a much longer period than is necessary to establish the presumption of a good title against all the world except the plaintiffs, the right of the plaintiffs to recover possession against the last of these successive holders necessarily embraces the right to recover against another defendant claiming to derive title from a different source. *McCreary v. Coggeshall* (S. Car.), 7-693.

Where one purchases from a life tenant land held by the grantor of the life estate by virtue of a primary school certificate entitling him to a patent from the state, and the purchaser thereafter obtains a patent the legal title is thereby vested in the purchaser, and the remedy of a remainderman claiming an interest in the land is by bill in equity instead of ejectment. *Porter v. Osmun* (Mich.), 3-687.

REMAND.

Remand by appellate court, see **APPEAL AND ERROR**, 16.

Remanding prisoner on habeas corpus, see **HABEAS CORPUS**, 6 b.

REMARKS.

See **COMMENTS**.

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REMOVAL OF CAUSES.

1. **VALIDITY OF STATUTES REGULATING REMOVAL**, 1367.

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1. **VALIDITY OF STATUTES REGULATING REMOVAL**.

Power of state to revoke license of corporation removing cause to federal court. — A state has the right to pass a statute providing that the license of a foreign

insurance company to do business within the state shall be revoked if the company, without the consent of the opposing party, removes to a federal court any action brought by or against it in a state court. *Security Mutual Life Ins. Co. v. Prewitt* (U. S.), 6-317.

2. REMOVABLE SUITS AND CONTROVERSIES.

In general. — A cause cannot be removed from a state court to a Circuit Court of the United States unless it is within the original jurisdiction of the latter court. *Cochran v. Montgomery County* (U. S.), 4-451.

Whatever the nature of a civil suit or criminal proceeding in a state court may be, it cannot be removed into a federal court unless its removal is authorized by some act of Congress. *Kentucky v. Powers* (U. S.), 5-692.

Action for writ of mandamus. — An action for a writ of mandamus is not a suit of a civil nature at law or in equity, and therefore is not removable under the provisions of the federal statutes from a state court to a Circuit Court of the United States. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.* (Ind.), 6-880.

3. GROUNDS FOR REMOVAL.

a Diversity of citizenship.

Action against nonresident and resident, properly joined. — A cause is not removable from a state court to a federal court on the ground of diverse citizenship where one of the defendants, who is a proper, if not necessary, party to the determination of the controversy, is a resident of the state. *Wilson v. Big Joe Block Coal Co.* (Ia.), 14-266.

Action against nonresident master and resident servants as joint tortfeasors. — Where a state statute provides that a person injured by the negligence of another's servant has the election of proceeding either jointly or severally against the servant and his master, a joint action brought under a statute in a state court by a resident plaintiff against a nonresident railroad corporation and its resident servants does not contain a separable controversy entitling the nonresident defendant to remove the cause to the United States Circuit Court. *Cincinnati, etc., R. Co. v. Bohon* (U. S.), 4-1152.

An action brought in a state court by a resident plaintiff against a nonresident railroad corporation and its resident servants jointly to recover damages for injury resulting from the negligence of the servants, involves no separable controversy between the plaintiff and the defendant corporation entitling the latter to remove the cause to the United States Circuit Court, though the liability of the corporation is based solely upon the doctrine of *respondent superior*, and though the state court may decide finally that the plaintiff cannot maintain an action

against the defendants. *Alabama Great Southern R. Co. v. Thompson* (U. S.), 4-1147.

Action against nonresident and resident joined solely for purpose of preventing removal. — An action which is brought in a state court by a resident plaintiff against a nonresident railroad corporation and its resident servants jointly to recover damages in excess of \$2,000 for personal injuries sustained by the plaintiff, involves no separable controversy between the plaintiff and the defendant corporation entitling the latter to remove the cause on that ground to the Circuit Court of the United States, where the declaration states a *prima facie* case of joint and concurrent liability against all the defendants, though the evidence produced at the trial may show that some of the defendants are not liable, and though the resident defendants are joined solely for the purpose of preventing removal. *Louisville, etc., R. Co. v. Vincent* (Tenn.), 8-66.

In an action brought in a state court by a resident servant against his master, a foreign corporation, and against a resident employee of such corporation to recover damages which the plaintiff alleges to have been caused by the joint negligence of the defendants, the defendant corporation is entitled to remove the cause to the Circuit Court of the United States, on the ground of separable controversy, where it establishes the fact, by affidavits filed with the petition for removal, that the resident defendant did not sustain the relation of superintendent to the plaintiff, that he was not guilty of or liable for the alleged negligence, and that he was joined as defendant for the sole and fraudulent purpose of preventing the removal of the cause from the state to the federal court. *Wecker v. National Enameling, etc., Co.* (U. S.), 9-757.

A petition for the removal of a negligence action from a state court to a federal court on the ground that the real defendant is a citizen of another state, and that a resident codefendant had been joined as such "for the sole and simple purpose of preventing a removal, and with no intention whatever on the part of the plaintiff to prove any of the acts of negligence alleged in the petition against said codefendant, or to prosecute the alleged cause of action against said codefendant," shows a *prima facie* cause of removal. *McAlister v. Chesapeake, etc., R. Co.* (U. S.), 13-1068.

An averment in a petition for removal by one defendant that the other defendant is a sham and pretentive defendant presents no ground for removal. *Baber v. Southern Ry.* (S. Car.), 11-960.

Action against corporation incorporated simultaneously in several states. — A corporation incorporated simultaneously and voluntarily in several states cannot, when sued in one of such states, have the cause removed to a federal court on the ground of diverse citizenship. *Patch v. Wabash R. Co.* (U. S.), 12-518.

b. Denial of civil rights.

Necessity that denial should arise from statutes or constitution of state.

— The denial of equal civil rights to a person accused of a crime does not authorize a Circuit Court of the United States to take cognizance of a criminal prosecution commenced in a state court unless the denial of rights proceeds from a discrimination against the accused by the constitution or laws of such state in respect of such rights as are specified in the first clause of the statute permitting the removal of causes wherein equal civil rights are denied. *Kentucky v. Powers* (U. S.), 5-692.

Denial arising from illegal or corrupt acts of administrative officers.

— There is no right of removal of a cause on the ground of the denial of equal civil rights where the alleged discrimination against the accused is due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the state as interpreted by its highest court, such as the refusal to recognize a pardon granted by an acting governor of the state. *Kentucky v. Powers* (U. S.), 5-692.

Who may remove for denial of civil rights. — The Fourteenth Amendment of the Federal Constitution and the federal statute providing for the removal of a cause wherein the petitioners are denied equal civil rights are for the benefit of all persons of every race whose cases are embraced by their provisions, and are not for the benefit of the African race alone. *Kentucky v. Powers* (U. S.), 5-692.

c. Prejudice or local influence.

As independent ground for removal.

— Prejudice or local influence does not furnish a separate or independent ground for removing a cause from a state court to a federal Circuit Court, but the cause must be removable on other grounds before the expiration of the time allowed the defendant to answer or plead to the complaint or declaration in the state court. *Cochran v. Montgomery County* (U. S.), 4-451.

Where an action, which is of such a nature that a federal court could take jurisdiction only on the ground of diversity of citizenship, is brought in a state court by a citizen of that state against a citizen of the same state and a citizen of another state, and both the defendants are necessary parties, and no severable controversy is involved, the nonresident defendant is not entitled to remove the cause to the federal Circuit Court on the ground of prejudice or local influence. *Cochran v. Montgomery County* (U. S.), 4-451.

4. PROCEEDINGS FOR REMOVAL.

Time for filing petition. — Under the Act of Congress of March 3, 1875, c. 137, § 3, as amended by the Act of March 3, 1887, c. 373, § 1, and the Act of Aug. 13, 1888, c. 866, § 1, providing that a defendant seeking to remove a cause from a state court to a federal court may file his petition and

bond therefor in the state court at or before the time when he is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, a petition for removal filed after the date thus fixed is too late, and the time for filing such petition is not extended by the fact that the court in its discretion grants the defendant further time in which to plead to the complaint or declaration, or by agreement of the parties. *Wilson v. Big Joe Block Coal Co.* (Ia.), 14-266.

An action in a state court against two defendants, only one of whom is a citizen of the same state as the plaintiff, becomes removable to the federal court at any time that it is severed as to the nonresident defendant and proceeded with against him alone, though the provision of the statute (25 St. L. 435; 4 Fed. St. Ann. 349) is that the petition for removal may be filed "at the time, or any time before the defendant is required . . . to answer or plead." *Golden v. Northern Pacific R. Co.* (Mont.), 18-886.

Where an action is brought in a state court against two defendants, of whom only one is a citizen of the same state as the plaintiff, and the nonresident defendant alone is served with process, an announcement of readiness for trial by the plaintiff is a severance of the action as to the nonresident defendant, and a petition to remove the cause to the Federal Court, filed after the plaintiff has introduced his evidence, is too late. *Golden v. Northern Pacific R. Co.* (Mont.), 18-886.

Necessity that all defendants join in petition for removal.

— Where the complaint in an action in a state court alleges a joint tort on the part of two defendants, a petition by one defendant only for the removal of the action to a federal court is fatally defective. *Baber v. Southern Ry.* (S. Car.), 11-960.

Sufficiency of petition for removal on ground of diverse citizenship.

— A petition for removal of a cause from a state to a federal court examined, and held to make out a case entitling the petitioner to removal on the ground of diverse citizenship. *Texarkana Tel. Co. v. Bridges* (Ark.), 5-246.

A cause cannot be removed from a state to a federal court on the ground that it contains a separable controversy, unless that fact is shown by the plaintiff's initial pleading. *Alabama Great Southern R. Co. v. Thompson* (U. S.), 4-1147.

Trial of issue of fact raised by petition. — A state court has no jurisdiction to try an issue of fact raised on a petition for the removal of a cause from a state court to a federal Circuit Court. This can only be done by the federal court after removal on a motion to remand to the state court. *Texarkana Tel. Co. v. Bridges* (Ark.), 5-246.

Right of Circuit Court to maintain jurisdiction where petition sufficient.

— Averments of fact in a petition to remove a cause from a state court to a federal Circuit Court, must be taken as admitted in the

absence of some denial by answer or contradiction by the records, and if the petition is sufficient on its face to justify a removal, the Circuit Court will be entitled to maintain its jurisdiction. *Atlanta, etc., R. Co. v. Southern R. Co.* (U. S.), 11-766.

A United States Circuit Court to which a cause had been removed from a state court by the filing of the removal petition and transcript and having the same docketed, has jurisdiction at least for the purpose of hearing and determining whether the cause has or has not been legally removed, and therefore has authority to enjoin the plaintiff from proceeding in the state court until such time as the Circuit Court shall hear and determine the question of its own jurisdiction. *McAlister v. Chesapeake, etc., R. Co.* (U. S.), 13-1068.

Right of state court to maintain jurisdiction after petition filed. — A petition for removal from a state court to a federal court on the ground of diverse citizenship does not require the state court to surrender its jurisdiction except when the petition, taken in connection with the remainder of the record, shows on its face that the petitioner has the right to transfer the cause to the federal court. *Wilson v. Big Joe Block Coal Co.* (Ia.), 14-266.

Waiver of right of removal. — When a petition for the removal of a cause from a state to a federal court has been duly presented to the state court and improperly denied, the right of the petitioners to a removal of the cause is not waived by filing answers and contesting the suit upon its merits. *Texarkana Tel. Co. v. Bridges* (Ark.), 5-246.

An objection to the refusal of a state court to grant a petition for the removal of a cause to the federal court is not waived by proceeding with the trial after reserving an exception. *Golden v. Northern Pacific R. Co.* (Mont.), 18-886.

5. PROCEEDINGS AFTER REMOVAL.

Right of plaintiff to bring new action in state court after dismissal in federal court. — The fact that a cause which has been properly removed from a state to a federal court has been dismissed in the latter court does not prevent the state court from again assuming jurisdiction of a suit for the same cause of action. *Stevenson v. Illinois Central R. Co.* (Ky.), 4-890.

Where a federal court has discontinued at the plaintiff's instance and cost an action properly removed from a state court, the plaintiff may bring a new action for the same cause in the state court, and the latter action may be brought for a sum which will give the state court exclusive jurisdiction. *Young v. Southern Bell Tel., etc., Co.* (S. Car.), 9-940.

Consent to accept jurisdiction of federal court. — Where after a removal of a suit by the defendant from a state to a federal Circuit Court on the ground of diversity of citizenship, the plaintiff files an amended complaint in the latter court, signs a stipulation extending the time within which the

defendant is required to answer, and the parties enter into successive stipulations for the continuance of the trial, both parties thereby consent to accept the jurisdiction of such court. The effect of such acts is not affected by the fact that they are done by the next friend of the plaintiff, who is an infant, the election to accept the jurisdiction of a federal court not being prejudicial to the infant's substantial rights. *In re Moore* (U. S.), 14-1164.

Inasmuch as the federal Circuit Courts have general jurisdiction over suits between citizens of different states, such consent to accept the jurisdiction of the court to which the action is removed operates as a waiver of the plaintiff's right to object to the jurisdiction of the particular federal Circuit Court on the ground that the action is not removable because both parties are nonresidents of the state where the action is commenced. *In re Moore* (U. S.), 14-1164.

Disposition of appeal in state court where cause removed after judgment. — The Supreme Court of a state, on appeal in a cause which the trial court has refused to remove to the federal court, will not reverse the judgment on the ground that the federal court has assumed jurisdiction of the cause after the entry of the judgment appealed from, but will leave the appellant to his remedy by appeal to the Supreme Court of the United States, or by injunction against further proceedings in the state court. *Golden v. Northern Pacific R. Co.* (Mont.), 18-886.

Certification to Supreme Court of question of jurisdiction arising from refusal of Circuit Court to remand cause. — Where, in a cause removed from a state court, a Circuit Court of the United States renders judgment for the defendant on the plaintiff's refusal to proceed with the trial of the cause after denial of his motion to remand, the case may be certified to the United States Supreme Court for decision of the question of jurisdiction involved. *Wecker v. National Enameling, etc., Co.* (U. S.), 9-757.

Review of judgment of Circuit Court of Appeals on diversity of citizenship by Supreme Court. — The provision of the Act of March 3, 1891 (26 St. L. 828, c. 517, § 6; 4 Fed. St. Ann. 409), that when the jurisdiction of a Circuit Court of the United States is invoked solely on the ground of diversity of citizenship, the judgment of the Circuit Court of Appeals on the question of jurisdiction is final, precludes the Supreme Court of the United States from reviewing, by writ of error, the judgment of a Circuit Court of Appeals that there was a diversity of citizenship entitling one of the defendants to an action brought in a state court to remove the cause to a Circuit Court of the United States on the ground of prejudice or local influence. But though in such case the Supreme Court will dismiss the writ of error, it may grant a writ of certiorari (to which the record on the writ of error may stand as a return) for the purpose of determining whether the Circuit Court had juris-

diction to order the removal of the cause. *Cochran v. Montgomery County* (U. S.), 4-451.

Questions reviewable on writ of error in Supreme Court. — On writ of error to a judgment of a Circuit Court of the United States denying a motion to remand a cause removed from a state court, the Supreme Court will not consider an assignment of error based upon the action of the Circuit Court in receiving affidavits filed by the petitioner for removal instead of requiring testimony giving the opposite party the privilege of cross-examination, where it appears that the plaintiff in error not only made no objection in the Circuit Court to the consideration of the affidavits, but himself filed a counter-affidavit. *Wecker v. National Enameling, etc., Co.* (U. S.), 9-757.

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Duty to repair railroad fences, see **FENCES**, 3.

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REPLEVIN.

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2. **TITLE SUFFICIENT TO SUPPORT ACTION**, 1372.
3. **DEMAND AS PREREQUISITE TO RECOVERY**, 1372.
4. **DAMAGES**, 1372.
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Recovery of goods seized under execution, see **EXECUTIONS**, 7.
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1. **PROPERTY SUBJECT TO REPLEVIN**.

Deed. — A deed, as such, is recoverable in an action of replevin, where it is unlawfully detained and the controversy is really about the deed and nothing else, there being no dispute about its delivery; but where the real thing sought is an adjudication of title to the real property which the deed represents, and not the actual recovery of the deed itself, replevin is not the appropriate remedy, and cannot be maintained. *Campbell v. Brooks* (Miss.), 17-1017.

Real property. — An action of replevin is one for the recovery solely of personal property, and cannot be maintained to recover real property. *Richbourg v. Rose* (Fla.), 12-274.

Property severed for lands. — Where property annexed to the freehold is severed therefrom, it becomes personal property so as to become recoverable by an action of replevin. But in order to maintain such action the plaintiff must have the actual or

constructive possession of the land, and as the title to land cannot be tried *ex directo* in replevin, if the series of acts in which the severance has occurred are sufficient to create an adverse possession in the defendant, replevin cannot be maintained. *Richbourg v. Rose* (Fla.), 12-274.

Property levied on as property of third person. — The owner of personal property cannot maintain an action of replevin for it after it has been levied on by the sheriff under an attachment, issued against a third person, which is still pending. *Baltimore, etc., R. Co. v. H. Klaff & Co.* (Md.), 7-905.

Property in custody of federal officer. — Replevin cannot be maintained in a state court against an officer of a federal court to recover property in his possession as such officer. The property in such case is *in custodia legis*, and the remedy of the person claiming it to be wrongfully detained from him is in the federal court whose officer withholds it. Objection to the jurisdiction of the state court in such case is seasonably taken by answer, when the facts showing want of jurisdiction do not appear upon the face of the complaint. *Druhe Hardwood Lumber Co. v. Fischbein* (Minn.), 11-300.

Gambling devices incapable of use except in violation of law. — Replevin will not lie against an officer of the law to recover gambling devices known as "slot machines," which are incapable of use for any purpose except in violation of an anti-gambling law. *Mullen v. Moseley* (Idaho), 13-450.

Waiver of objection that remedy not appropriate. — The objection that an action of replevin under a state code to recover copies of a picture alleged to infringe the plaintiff's copyright is not the appropriate or legal remedy, comes too late when made after verdict and on motion for a new trial. *American Tobacco Co. v. Werckmeister* (U. S.), 12-595.

2. TITLE SUFFICIENT TO SUPPORT ACTION.

Title of plaintiff. — The plaintiff in a replevin must recover on the strength of his own title or the right of possession. *Robb v. Dobrinski* (Okla.), 1-981.

The plaintiff in a replevin action must recover on the strength of his own title or right of possession, and not on the weakness of his adversary's title or right of possession, and the defendant may defeat the action by showing title even in a third person. *Robb v. Dobrinski* (Okla.), 1-981.

The plaintiff in an action of replevin can only recover upon the strength of his own right of possession of the property, and must show such right of possession in himself. *Richbourg v. Rose* (Fla.), 12-274.

Possession by defendant. — There must be actual or constructive possession in the defendant in order to sustain replevin. *Casey v. Scott* (Ark.), 12-184.

Replevin cannot be maintained against one not in actual or constructive possession of the

property at the commencement of the action. *Robb v. Dobrinski* (Okla.), 1-981.

An action of replevin against an officer cannot be maintained on a complaint alleging that the officer delivered the property to a third party, thus affirmatively showing that the property sought to be recovered was not in the possession of the defendant at the time the action was commenced. *Kierbow v. Young* (S. Dak.), 11-1148.

Where the plaintiff in an action of replevin does not know at the commencement thereof that the defendant has wrongfully parted with the possession of the chattel in controversy, he may maintain such action and obtain an alternative judgment for the possession of the property or the recovery of its value. *Andrews v. Hoeslich* (Wash.), 14-1118.

Effect of expiration of term of office of defendant. — In replevin against an officer a recovery by the defendant is not defeated by the fact that his term of office has expired. *Hines v. Stahl* (Kan.), 17-298.

3. DEMAND AS PREREQUISITE TO RECOVERY.

Necessity of demand where defendant claims title. — Where the defendant in an action of replevin claims the ownership of the property and the right of possession, proof of demand is unnecessary. *Denver Live Stock Commission Co. v. Parks* (Colo.), 14-814.

A defendant in replevin who asserts title in himself independent of any contract, express or implied, between him and the plaintiff, cannot interpose, as a defense to the action, failure on the part of the latter to demand from him the property in controversy before the commencement of the action. *Kuykendall v. Fisher* (W. Va.), 11-700.

Sufficiency of demand made after suit brought but before execution of writ. — A demand made after the bringing of an action of replevin but before the execution of the writ is sufficient to sustain such action. *Denver Live Stock Commission Co. v. Parks* (Colo.), 14-814.

Waiver of want of demand. — A defendant in an action of replevin, who gives a redelivery bond, procures a change of venue and contests the case on its merits before a justice of the peace, is not in a position to urge in the County Court on appeal the want of a demand before the bringing of the action. *Denver Live Stock Commission Co. v. Parks* (Colo.), 14-814.

4. DAMAGES.

Allowance of punitive damages. — Punitive damages cannot be recovered in an action of claim and delivery of personal property under a statute providing that when the prevailing party is the plaintiff, the jury must assess the damages for the detention, and when the prevailing party is the defendant and the property has been taken in the proceedings, the jury may assess for such taking and the withholding. *Tittle v. Kennedy* (S. Car.), 4-68.

Extent of recovery where goods claimed intermingled by defendant with other goods. — Under a contract for the sale of timber to be cut and removed within a certain time, in an action of replevin by a subsequent grantee of the land to recover the timber removed from the land by the vendee after the expiration of the time limited by the contract, if it appears that some logs were cut before the conveyance of the land, and that they became personalty and so did not pass with the conveyance but were mingled with logs cut after the conveyance, the grantee may recover all of them under the doctrine of confusion of goods. *Mengal Box Co. v. Moore* (Tenn.), 4-1047.

Right to damages for depreciation in value of property returned. — Where the property returned in compliance with an alternative judgment in an action of replevin providing for a return of the property or the value thereof, has depreciated in value, an action may be maintained to recover such depreciation. *Fair v. Citizens' State Bank* (Kan.), 2-960.

Deduction for improvements made on property by wrongdoer. — In replevin for property wilfully and wrongfully taken, where the wrongdoer, since the taking, has expended money or labor in increasing the value of the property, he may not have any deduction for the money or labor so expended in assessing the value for the purpose of the alternative judgment, but where the defendant in replevin acts innocently and in good faith in obtaining possession of the property, and expends money and labor on it in good faith, the owner can recover only what it was worth before the increase in value. *Nashville Lumber Co. v. Barefield* (Ark.), 20-968.

5. PLEADING.

Description of property. — A complaint in replevin must describe the property with such certainty that it can be identified by the officer serving the process, and that the defendant will know what property he is charged with detaining, and a complaint merely describing the property as "goods, wares, and merchandise to the amount and value of \$1,200" is insufficient. *Kierbow v. Young* (S. Dak.), 11-1148.

Ownership of property. — In an action of replevin a complaint failing to allege ownership or a special interest in the property or right to the possession thereof at the time of the commencement of the action, is insufficient and demurrable. *Kierbow v. Young* (S. Dak.), 11-1148.

Matter available under plea of not guilty. — In an action of replevin a plea of not guilty puts in issue not only the right of the plaintiff to the possession of the property replevied, but also the wrongful taking and detention thereof. Under such plea the defendant can give any evidence of a special matter which amounts to a defense to the plaintiff's cause of action to show that the plaintiff is not entitled to the possession of

the property replevied. *Richbourg v. Rose* (Fla.), 12-274.

6. EVIDENCE.

Burden of proof. — In an action of replevin, brought by a mortgagee to recover the possession of property under a chattel mortgage given to secure the payment of certain notes, where the mortgagor admits the execution of the notes and mortgage, and defends only upon the grounds that the mortgagee has no right to maintain the action and the property is exempt, the court does not err in placing the burden of proof as to the contested issues upon the mortgagor. *Colean Mfg. Co. v. Johnson* (Kan.), 20-296.

Admissibility of deed to show title to crude turpentine in boxes. — In an action of replevin for crude turpentine in the boxes of trees, deeds under which the defendants claim to hold possession of the land are admissible for them to show claim of right, followed by proof of adverse possession, and as defining the extent of the possession claimed. *Richbourg v. Rose* (Fla.), 12-274.

7. INSTRUCTIONS.

Title of plaintiff. — In an action of replevin for crude turpentine in the boxes of trees, an instruction that "if the jury should find from the evidence that has been introduced before them, that the plaintiff was the owner of pine trees located upon lands described in the declaration by a conveyance from persons who derived title to the land by title from the United States government, and that the defendants were in possession at the time of the institution of this suit of crude turpentine in the boxes located on this land, and they were not there with the plaintiff's consent, that is, they were not in possession with the plaintiff's consent, then the jury should ascertain how much of the turpentine there was, and its value, and render a verdict for the plaintiff for the amount so found," is erroneous as excluding the contention that defendants were in adverse possession claiming under color of right and were not trespassers. *Richbourg v. Rose* (Fla.), 12-274.

8. JUDGMENT.

Necessity of alternate judgment where plaintiff retains possession of property. — When mortgaged property is seized under the writ of replevin, and the possession of the same is retained by the plaintiff up to the time of judgment in his favor, there is no necessity for rendering an alternative judgment that the plaintiff shall recover the value of the property in case a return thereof cannot be had. *Colean Mfg. Co. v. Johnson* (Kan.), 20-296.

Alternate judgment where defendant prevails. — Where the plaintiff in replevin dismisses his action after obtaining possession, and defendant is found to be entitled to a return of the property, he is also entitled to a judgment for its full value in case

a return cannot be had. *Hines v. Stahl* (Kan.), 17-298.

Necessity of finding wrongful taking or detention. — A verdict in replevin which finds merely that the plaintiff is the owner of the property involved, and entitled to the possession and return thereof, is insufficient because it does not find a wrongful taking or detention by the defendant. *Hickey v. Breen* (Mont.), 20-429.

Effect of failure to find value in finding for defendant. — A judgment in replevin which finds merely that the defendant is the owner and entitled to possession of the property, is good as far as it goes, and although it does not assess the value of the property, the plaintiff's disposal of the property while the suit is pending amounts to a conversion thereof to his own use, and renders him liable to the replevin defendant for its value. *Caldwell v. Ryan* (Mo.), 14-314.

9. ACTIONS ON REPLEVIN BOND.

Dismissal of suit without return of property as breach of condition to duly prosecute. — The condition in a replevin bond that the plaintiff will duly prosecute the action is broken by a dismissal of the action without a return of the property, and the obligee is entitled to recover damages to the amount of the value of the property with interest. *Kentucky Land, etc., Co. v. Crabtree* (Ky.), 4-1133.

Removal of attachment cause as bar to action on bond given for replevin of property attached. — It seems that where property in the possession of an officer of the law under a writ of attachment is replevied, the subsequent removal of the attachment suit to a federal court does not bar an action by an officer on the replevin bond, or prevent him from recovering more than nominal damages in such action. *Maguire v. Pan-American Amusement Co.* (Mass.), 18-110.

Necessity of allegation in pleading of condition and breach. — To maintain an action on a replevin bond where the only condition broken is that to prosecute duly the replevin action, such condition and the breach thereof must be alleged. *Kentucky Land, etc., Co. v. Crabtree* (Ky.), 4-1133.

Amount of damages recoverable on bond in general. — In an action on a replevin bond the plaintiff, if successful, is entitled to recover the fair market value of the property replevied, in the order and condition that it was when taken under the writ, as of the date of the final judgment in the replevin suit. *Maguire v. Pan-American Amusement Co.* (Mass.), 18-110.

In an action on a replevin bond for breach of a condition to prosecute duly the action of replevin, if the plaintiff may recover at all, he is entitled to recover only the value of the property replevied at the time it was taken, with the interest from that date. He is not entitled to recover damages for loss of time, expenses incurred in defending the former action, or an attorney's fee incurred therein. *Kentucky Land, etc., Co. v. Crabtree* (Ky.), 4-1133.

Interest on value of property as element of damages. — If interest on the value of property replevied is recoverable at all by a defendant in replevin, it must be recovered in the replevin suit, as a part of the damages for the taking and detention of the property, and cannot be recovered in a subsequent action on the replevin bond. *Maguire v. Pan-American Amusement Co.* (Mass.), 18-110.

Counsel fees as element of damages. — Where the condition of a bond given by the plaintiff in an action of replevin is that the plaintiff will pay whatever damages and costs the defendant may recover against him, and return the property replevied if such shall be the final judgment, the defendant in the replevin action, in a subsequent action on the bond, cannot recover counsel fees, or any other amount in addition to his damages and taxable costs. *Maguire v. Pan-American Amusement Co.* (Mass.), 18-110.

Statutory damages of twelve per cent. as element of damages. — The statutory damages of twelve per cent. of the value of the goods, allowed to a successful defendant in replevin where the service of an execution has been delayed by the replevin, must be recovered, if at all, in the replevin suit, and cannot be recovered in a subsequent action of the replevin bond. *Maguire v. Pan-American Amusement Co.* (Mass.), 18-110.

Recital of value in replevin bond as conclusive against obligors. — The sum named in a writ of replevin or a replevin bond as the value of the property replevied is competent but not conclusive evidence of that value against the obligors in an action on the bond. Either party in such an action has a right to have the value of the property determined by the jury upon competent evidence, including the testimony of qualified witnesses, and hence it is erroneous for the court to hold as a matter of law that the obligors in the bond are concluded by the recitals of value in the bond or writ, and to exclude the testimony of witnesses offered for the purpose of proving the value of the property. *Maguire v. Pan-American Amusement Co.* (Mass.), 18-110.

REPLY.

See PLEADING, 8.

Right to file reply after demurrer sustained to answer, see INJUNCTIONS, 3 d.

REPORTS.

Census reports to prove age, see CENSUS.

English law reports as evidence of common law, see COMMON LAW, 1.

Extension of time for filing report of referee, see REFERENCES.

False reports by bank officers, see BANKS AND BANKING, 3 b.

False reports by national banks to controller of currency, see BANKS AND BANKING, 9 b.

Liability of directors for failure to file reports, see CORPORATIONS, 7 e (1).
 Railroads required to make reports to public officers, see RAILROADS, 3 b.
 Report of judicial proceedings as privileged, see LIBEL AND SLANDER, 3 b.

REPRESENTATION.

Doctrine of representation as affecting statute of limitations, see LIMITATION OF ACTIONS, 6.
 Representative parties, see PARTIES TO ACTIONS, 1.

REPRESENTATIONS.

See FALSE PRETENSES AND CHEATS; FRAUD AND DECEIT.
 Effect of representations as to credit of another, see FRAUDS, STATUTE OF, 7.
 Representations in applications for insurance, see INSURANCE, 3 c (3).
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REPUBLICAN FORM OF GOVERNMENT.

Constitutional guaranty, see CONSTITUTIONAL LAW, 13.
 Initiative and referendum as consistent with republican form of government, see MUNICIPAL CORPORATIONS, 2.

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Right of infant to repudiate contract, see INFANTS, 2 b.

REPUGNANCY.

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See STATUTES, 4 b.

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Agreement for repurchase by seller as within statute of frauds, see FRAUDS, STATUTE OF, 9 b (1).

REPUTATION.

See EVIDENCE, 4; WITNESSES, 5 b (2) (g).
 General reputation as to existence of partnership, see PARTNERSHIP, 1 b.

Proof of insanity in criminal cases, see INSANITY, 7 c (1).
 Proof of reputation of accused, see CRIMINAL LAW, 6 n (3).
 Reputation of plaintiff as evidence in action for malicious prosecution, see MALICIOUS PROSECUTION, 2 e (2).
 Restraining acts injurious to business reputation, see INJUNCTIONS, 2 a.

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Request to charge, see TRIAL, 3 o.

REQUISITION.

Proceeding for extradition, see EXTRADITION.

RESCISSION.

See CANCELLATION AND RESCISSION.

RESCUE.

See ESCAPE, PRISON BREAKING, AND RESCUE.

RESERVATIONS.

See DEEDS, 3 e.
 Conveyances reserving minerals, see MINES AND MINERALS, 2.
 Creation of easement, see EASEMENTS, 1 a.
 Judicial notice of military reservations, see EVIDENCE, 1 g.
 Jurisdiction of crimes committed on military reservations, see COURTS, 2 c (1).
 Power to amend corporate charter, see CORPORATIONS, 3 b.
 Reserving timber on sale of land, see LOGS AND LUMBER.

RESERVED CASE.

See APPEAL AND ERROR, 12 h (6).

RESERVOIRS.

Liability of water company to infant falling in reservoir, see WATERS AND WATERCOURSES, 4 d.

RES GESTÆ.

See CRIMINAL LAW; EVIDENCE; HOMICIDE, 6 a (1).
 Declarations and admissions as part of *res gestæ*, see EVIDENCE, 10 b.

RESIDENCE.

See DOMICIL.
 Jurisdictional requirement in divorce action, see DIVORCE.

Qualification of candidates for public office, see **ELECTIONS**, 1 c.
 Qualification of jurors, see **JURY**, 2.
 Residence of corporations, see **CORPORATIONS**, 13 a.
 Right of children of nonresident parent to attend public schools, see **SCHOOLS**, 8 a.
 Venue as affected by residence of parties, see **VENUE**, 1.

RESIGNATION.

Effect of resignation by public officer, see **PUBLIC OFFICERS**, 7 b.
 Power of county judge to accept resignation of justice of the peace, see **JUSTICES OF THE PEACE**, 1 b.

RES IPSA LOQUITUR.

See **NEGLIGENCE**, 11.

RESISTANCE.

Amount of resistance required to constitute rape, see **RAPE**, 1 d.
 Sufficiency of evidence to show resistance in prosecution for rape, see **RAPE**, 2 d (3).

RESISTING OFFICERS.

See **OBSTRUCTION OF JUSTICE**.

RESISTING PROCESS.

See **CONTEMPT**.

RES JUDICATA.

See **JUDGMENTS**, 6.
 Application of doctrine to extradition proceedings, see **EXTRADITION**, 1.
 Effect of decree in injunction suit, see **INJUNCTIONS**, 3 e.
 Judgment against principal as bar to action against agent, see **AGENCY**, 3 c.

RESOLUTIONS.

Of legislature, see **STATES**, 3.
 Power of municipality to act by resolution, see **MUNICIPAL CORPORATIONS**, 5.

RESORTS.

See **THEATRES AND PUBLIC RESORTS**.

RESPONDEAT SUPERIOR.

See **AGENCY; MASTER AND SERVANT**.

RESTITUTION.

Recovery of stolen goods, see **LARCENY**, 9.

RESTORATION.

Restoring consideration as essential to disaffirmance of infant's contract, see **INFANTS**, 2 b (5).

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See **INJUNCTIONS**.

RESTRAINT.

Actual restraint as essential to right to habeas corpus, see **HABEAS CORPUS**, 1.
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Contracts in restraint of marriage, see **CONTRACTS**, 4 a.
 Devise in restraint of marriage, see **WILLS**, 9 b.

RESTRAINT OF TRADE.

See **MONOPOLIES AND CORPORATE TRUSTS**.

RESTRAINTS ON ALIENATION.

See **SPENDTHRIFTS**.
 Devises in restraint of alienation, see **WILLS**, 9 c.

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Restricting property rights, see **CONSTITUTIONAL LAW**, 5 b.
 Right of landlord to withhold consent to sublease, see **LANDLORD AND TENANT**, 3 c (2).
 Use of demised premises, see **LANDLORD AND TENANT**, 5 b.
 Use of property conveyed, see **DEEDS**, 3 c.

RESULTING TRUSTS.

See **TRUSTS AND TRUSTEES**.

RETAINING FEES.

See **ATTORNEY AND CLIENT**, 5 c.

RETAKING.

Right to retake property as justifying assault and battery, see **ASSAULT AND BATTERY**, 2 b.

RETIREMENT.

Retirement of partner, see **PARTNERSHIP**, 6.

RETRACTION.

Publication of retraction as defense to libel, see **LIBEL AND SLANDER**, 4 f.

RETREAT.

Duty to retreat before killing in self-defense, see **HOMICIDE**, 5 b.

RETROSPECTIVE LAWS.

Applicability to county, see **CONSTITUTIONAL LAW**, 14.

Existing causes of action affected by enactment of statute of limitations, see **LIMITATION OF ACTIONS**, 1 b.

Statute of limitations construed as prospective or retrospective, see **LIMITATION OF ACTIONS**, 1 c.

RETURN.

See **EXECUTIONS**, 2; **HABEAS CORPUS**, 5; **INDICTMENTS AND INFORMATIONS**, 2.

Return of consideration as condition precedent to avoidance of release, see **RELEASE AND DISCHARGE**, 5 b.

Return of consideration as essential to disaffirmance of infant's contract, see **INFANTS**, 2 b (5).

REVENUE LAWS.

Failure to stamp deed, see **DEEDS**, 2 b.

Parol contract of insurance as affected by Stamp Tax Act, see **INSURANCE**, 5 e (2).

Validity of statute ratifying and legalizing tariff duties already collected.

— Inasmuch as the Congress of the United States had the power to levy tariff duties on goods coming into the Philippine Islands from the United States after the ratification of the treaty with those islands, Congress had the power to enact, as it did by the Act of June 30, 1906, that tariff duties collected by the authorities of the United States prior to the Act of Congress providing for such duties, should be legalized and ratified as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed. Such act is not invalid as delegating the legislative power of prescribing a tariff of duties, nor as a retroactive imposition of duties, nor as a deprivation of property without due process of law. The fact that at the time the ratifying statute was enacted an action was pending for the recovery of duties collected without authority by officers of the

United States in its name, does not make the statute as applied to such duties repugnant to the Constitution of the United States, or remove from its operation the duties which are the subject of that action. *United States v. Heinszen* (U. S.), 11-688.

Validity of act imposing tax on oleomargarine. — The operation of the oleomargarine act being a levy of the excise tax which Congress may impose, the validity of such act is not affected by the fact that the enforcement thereof will have a destructive effect upon the manufacture of artificially colored oleomargarine. *McCray v. United States* (U. S.), 1-561.

Neither the Fifth nor the Tenth Amendment operates to take away the power of Congress to tax, and the tax upon oleomargarine does not violate the due process clause of the Fifth Amendment in distinguishing between artificially colored oleomargarine and natural butter artificially colored. *McCray v. United States* (U. S.), 1-561.

The Oleomargarine Act, not conflicting with any express constitutional limitation, cannot be held void because the tax imposed is excessive in amount. *McCray v. United States* (U. S.), 1-561.

The Oleomargarine Act is constitutional. *Schick v. United States* (U. S.), 1-585.

Construction of act imposing tax on oleomargarine. — The Federal Act of 1886, as amended in 1902, imposing a tax upon oleomargarine but taxing at a less rate oleomargarine free from artificial coloring that causes it to look like butter, is to be so construed as to exclude from the latter class oleomargarine containing no artificial coloration other than that imparted to it by the use as an ingredient of butter which itself contains coloring matter. *McCray v. United States* (U. S.), 1-561.

Effect of absence of provision for enforcement of payment of stamp tax. — The United States government cannot maintain an action for the recovery of the amount of revenue stamps required to be placed on a deed by the "Spanish War Tax" Act requiring stamps of certain amounts to be placed on deeds and prescribing penalties for failure to attach the required stamps, and making an unstamped deed inadmissible as evidence in any court, there being no provision in the statute for the enforcement of the payment of the unpaid tax by the collection of the amount thereof. *United States v. Chamberlain* (U. S.), 13-720.

REVERSIBLE ERROR.

See **APPEAL AND ERROR**, 15.

REVERSIONS.

Reimbursement of life tenant for discharging incumbrances, see **LIFE ESTATES**, 1 d.
Right of lessor to sell demised premises, see **LANDLORD AND TENANT**, 5 b.

REVERTER.

Abandonment of land used as cemetery, see **CEMETERIES**, 1.
 Effect of vacating street, see **STREETS AND HIGHWAYS**, 3 c.
 Nonuse or misuse of dedicated property, see **DEDICATION**.
 Effect of breach of conditions in deed, see **DEEDS**, 3 d.

REVIEW.

See **APPEAL AND ERROR**, 12; **CERTIORARI**.
 Bill of review, see **EQUITY**, 4.
 Defects in matter of form, see **CRIMINAL LAW**, 9 b.
 Exercise of discretionary power, see **APPEAL AND ERROR**, 13.
 Extradition proceedings, see **EXTRADITION**, 4 c.
 Habeas corpus as appellate process, see **HABEAS CORPUS**, 1.
 Judgment of court-martial, see **HABEAS CORPUS**, 2.
 Petition for review in bankruptcy, see **BANKRUPTCY**, 18.
 Tax assessments, see **TAXATION**, 5 f.

Matters reviewable on writ of review. — The return to a writ of review affords the only evidence to be considered in determining whether the inferior court, whose record is sent up, exceeded its jurisdiction or erred in its judgment. *Gay v. Eugene (Ore.)*, 18-188.

Conclusiveness of recital of fact in record. — A recital in the record on a writ of review from the Circuit Court to a municipal court that the defendant accepted a jury summoned by the city marshal is conclusive of that fact, though the counsel for the parties filed a stipulation in the Circuit Court that an objection had been made and an exception taken to the manner of selecting the jury. *Gay v. Eugene (Ore.)*, 18-188.

REVISOR.

Appointment of revisor of statutes by justices of supreme court, see **JUDGES**, 3 b.

REVIVAL.

Actions, see **ABATEMENT AND REVIVAL; DISMISSAL DISCONTINUANCE, AND NON-SUIT**.
 Debts discharged in bankruptcy, see **BANKRUPTCY**, 16.
 Judgments, see **JUDGMENTS**, 14.
 Wills, see **WILLS**, 6.

REVOCATION.

Accord, see **ACCORD AND SATISFACTION**.
 Authority of real estate agent, see **BROKERS**, 1 b.

Deeds, see **DEEDS**, 5.
 Decree of adoption, see **ADOPTION OF CHILDREN**.
 Decree of divorce revoked for fraud, see **DIVORCE**, 8.
 Emancipation of child, see **PARENT AND CHILD**, 7.
 Gifts *inter vivos*, see **GIFTS**, 1 c.
 License of public school teacher, see **SCHOOLS**, 7 c.
 Licenses to sell liquors, see **INTOXICATING LIQUORS**, 4 k.
 Licenses generally, see **LICENSES**, 7.
 Limitation of action to revoke physician's license, see **LIMITATION OF ACTIONS**, 3.
 Pardons, see **PARDON, REPRIEVE, AND AMNESTY**, 3.
 Physician's license, see **PHYSICIANS AND SURGEONS**, 1 a.
 Promise to devise or bequeath property, see **WILLS**, 1.
 Revocable licenses, see **LICENSE (REAL PROPERTY)**.
 Trusts, see **TRUSTS AND TRUSTEES**, 1 a (3).
 Wills, see **WILLS**, 6.

REWARDS.

Authority of county commissioners. — A board of county commissioners has no authority to offer a reward for the arrest and conviction of persons charged with the commission of offenses against the laws of the state. *Felker v. Board of County Com'rs (Kan.)*, 3-156.

Performance as acceptance of offer concluding contract. — A reward offered for the arrest of the offender is an offer or unconditional promise to pay the person performing the required service a certain sum of money. The performance of the service is an acceptance of the offer, or a performance of the condition on which the promise is made, and when done concludes a binding contract. *McClaghry v. King (U. S.)*, 8-856.

What constitutes performance of condition of reward for "arrest." — Where an offer of reward is made for the "arrest" of a suspect, it is not accepted by the giving of information merely, concerning the whereabouts of the suspect, but is accepted only when one assumes the personal danger and responsibility of either actually arresting the suspect or causing some other person to arrest him. *McClaghry v. King (U. S.)*, 8-856.

Literal compliance by the person claiming to have performed the conditions of an offer of reward is not absolutely essential as a foundation of his claim to the reward. Thus, a person who, with the assistance of others whose services he has procured, arrests in California one charged with the commission of a crime in Washington county, Georgia, subsequently causing the prisoner to be delivered to an agent of the state of Georgia, who in turn delivers him to the sheriff of Washington county, in said state, is entitled to a reward offered for the arrest of the

prisoner and his delivery to the sheriff of Washington county, in the state of Georgia. *Hewitt v. Lamb* (Ga.), 14-800.

Right of public officer to recover reward. — Public policy and sound morals alike forbid that a public officer should demand or receive for services performed by him in the discharge of official duty, any other or further remuneration or reward than that prescribed and allowed by the law. *Somerset Bank v. Edmun* (Ohio), 10-726.

The office of constable is not an office created for the private emolument of the holder. Every constable is a conservator of the peace, and it is his duty, within his jurisdiction, "to apprehend and bring to justice all felons and disturbers and violators of the criminal laws of the state," without other reward or compensation therefor than such as is fixed and allowed by law. *Somerset Bank v. Edmun* (Ohio), 10-726.

Right of wrongdoers to rewards. — Under a statute offering a reward for evidence of bribery at elections neither the vote buyer nor the vote seller is entitled to claim a reward, though one of them may furnish testimony which secures the conviction of the other. *Board of Com'rs v. Davis* (Ind.), 1-282.

Necessity of pleading knowledge of offer in action for statutory reward. — In an action to recover a reward offered in a public statute for certain services, the complaint need not aver that the plaintiff rendered services with knowledge of the reward or the intention to recover the same. *Board of Com'rs v. Davis* (Ind.), 1-282.

RIDICULE.

Holding up to ridicule as libel, see **LIBEL AND SLANDER**, 2 c.

RIGHT OF ASYLUM.

See **EXTRADITION**, 3 d.

RIGHT OF PRIVACY.

See **PRIVACY**, **RIGHT OF**.
Protection by injunction, see **INJUNCTIONS**, 2 b.

RIGHT OF WAY.

See **EASEMENTS**; **PRIVATE WAYS**.
Acquisition and location of right of way of railroad, see **RAILROADS**, 2.
Power of city to grant right of way to telephone company in streets and public grounds, see **TELEGRAPHS AND TELEPHONES**, 3.

RIGHTS OF ACCUSED.

See **CONSTITUTIONAL LAW**.
Right to plead guilty, see **CRIMINAL LAW**, 6 j (1).

RINKS.

Power of municipality to regulate or suppress skating rinks, see **MUNICIPAL CORPORATIONS**, 4 e.

Regulating hours for operation of skating rinks, see **THEATRES AND PUBLIC RESORTS**, 1.

Skating rink as nuisance, see **NUISANCES**, 1 b.

RIOT.

Conviction of unlawful assembly under indictment for riot, see **UNLAWFUL ASSEMBLY**.

Liability of municipality for injury by riot, see **MUNICIPAL CORPORATIONS**, 9 d.

Right of people to assemble, see **CONSTITUTIONAL LAW**, 3, 17.

What constitutes common-law offense of riot. — Under the common law, where a number of persons assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot, but if they merely meet on a purpose which, if executed, would make them rioters, and, having done nothing, separate without carrying their purpose into effect, it is an unlawful assembly; and practically the same distinction obtains under the Oregon statute relative to riot and unlawful assembly. *State v. Stephanus* (Ore.), 17-1146.

When special verdict amounts to acquittal. — On a prosecution under an indictment for riot, a special verdict of the jury finding that the defendants or either of them were armed, and that one of the defendants had a dangerous weapon, and that the defendants are guilty of an unlawful assembly, amounts to an acquittal of the crime of riot, being equivalent to a finding that the defendants committed only a part of the acts essential to the crime of riot, and that the principal element of that crime, namely, force and violence, was wanting. *State v. Stephanus* (Ore.), 17-1146.

RIPARIAN OWNERS.

See **WATERS AND WATERCOURSES**, 3 b.
Right to erect wharf in navigable water, see **WHARVES**.
Right to take ice, see **ICE**.

RISK.

See **INSURANCE**, 5 f (4).
Assumption of risk, see **NEGLIGENCE**, 3.
Condition against increase of risk, see **INSURANCE**, 5 g (8).

RIVERS.

Concurrent jurisdiction over boundary river, see **STATES**, 1.

ROADS.

See **STREETS AND HIGHWAYS**.

ROADWAY.

Roadway of street, see **STREETS AND HIGHWAYS**, 1.

ROBBERY.

1. **ELEMENTS OF OFFENSE.**
2. **PROSECUTION AND PUNISHMENT.**
 - a. Indictment or information.
 - b. Evidence.
 - c. Instructions.
 - d. Appeal and error.

Killing in perpetration of robbery, see **HOMICIDE**, 3 a.

1. **ELEMENTS OF OFFENSE.**

Taking from the person. — In the Illinois statute defining robbery, the words "from the person of another" must be held to have been used in the same sense and with the same meaning that the words had acquired at common law at the time the statute was enacted, and under the statute the offense of robbery may be committed by violence or putting in fear, and feloniously taking money or some other thing of value from the person or in the presence and under the immediate control and possession of the person assaulted. *O'Donnell v. People* (Ill.), 8-123.

Use of force or putting in fear. — The crime of robbery is committed where the force or putting in fear employed is sufficient to overcome resistance on the part of the person from whom the property is taken and is the moving cause to induce him to part unwillingly with his property. *State v. Parsons* (Wash.), 12-61.

Persons who falsely represent to an intoxicated man that they are officers of the law, and upon the pretense that they are going to take him to jail and that it is necessary to search him, go through his pockets without resistance on his part, and take his money from him, are guilty of the crime of robbery. *State v. Parsons* (Wash.), 12-61.

Where officers of the law arrest a person for drunkenness, and without asking or receiving his consent to be searched, back him up against a wall, hold up his hands, and extract money from his pockets with the intent to appropriate it to their own use, there is sufficient force to constitute the crime of robbery although no violence is used in taking the money and the person robbed is not put in fear of his life or bodily injury. *Tones v. State* (Tex.), 13-455.

Lack of consent of person robbed. — The fact that persons who suspect that robberies are being committed at a certain place agree with another person that the latter shall go there with marked bills in his

pockets and expose himself to the possibility of being robbed, does not amount to consent to a robbery so as to absolve those who rob him from criminality, where he does not agree to submit to the robbery or otherwise invite the commission of the offense. *Tones v. State* (Tex.), 13-455.

Fraudulent intent of taker. — Under the Texas statute providing that "if any person by assault or violence or by putting in fear of life or bodily injury shall fraudulently take from the person or possession of another any property, with intent to appropriate the same to his own use," he shall be guilty of the crime of robbery, the fraudulent intent to appropriate the property of another is an essential element of the offense, and if the property, though taken from another forcibly, is the property of the taker and is believed by him to be such, the taking does not constitute the crime of robbery. *Glenn v. State* (Tex.), 13-774.

Necessity that thief retain possession. — To constitute the crime of robbery there must be an actual severance of the property from the person, but the crime is consummated if the thief retains possession of the property even for a short time, and it is not necessary that the taking be effectual. *People v. Campbell* (Ill.), 14-186.

2. **PROSECUTION AND PUNISHMENT.**a. **Indictment or information.**

Sufficiency of allegation of asportation. — An information for robbery sufficiently alleges asportation if, following the language of the statute, it charges that the defendants did "forcibly and feloniously take from the person" of the prosecuting witness certain property, though it does not allege that they "carried away" the property so taken. *State v. Smith* (Wash.), 5-686.

Laying ownership in person having possession as agent. — A clerk who is robbed while in charge of a store has a sufficient ownership in the property stolen to justify the laying of the property in him in a prosecution for robbery. *State v. Montgomery* (Mo.), 2-261.

Variation of name of prosecuting witness in different parts of indictment. — An indictment for an attempt to commit robbery is not vitiated by the fact that the name of the prosecuting witness is said in one part of the indictment to be Joseph E. Dorgan, and in another part to be Joseph E. Durgan, as the two names are *idem sonans*. *O'Donnell v. People* (Ill.), 8-123.

b. **Evidence.**

Questioning accused as to attempt to compromise as proper cross-examination. — In a prosecution for robbery in which the accused admits attempting to take the property, but denies that he succeeded in getting it loose from the prosecuting witness, no prejudicial error is committed by asking the accused on the witness stand if he has not attempted to settle the case, although, upon

denial by the accused, there is no offer of any proof of such attempt at settlement. *People v. Campbell* (Ill.), 14-186.

Sufficiency of evidence to connect accused with crime. — The conviction of a person of robbery for having assisted in the commission of a robbery on a street car is justified by the testimony of the prosecuting witness that such person assisted the taker of the property in the struggle which the witness made for its recovery, and the testimony of officers of the law that such person and the taker of the property and two other persons were near the place of the robbery shortly before the occurrence, and got on the car with the prosecuting witness. *People v. Campbell* (Ill.), 14-186.

Sufficiency of evidence of commission of crime. — Evidence that a person charged with robbery jerked a diamond pin from the shirt front of the prosecuting witness, and had the pin entirely out of the shirt before the witness recovered the pin by seizing the hand in which it was held, is sufficient to support a conviction for robbery. *People v. Campbell* (Ill.), 14-186.

In a prosecution for robbery, evidence examined and held not sufficient to show a taking of property with that fraudulent intent which is an essential element of the crime. *Glenn v. State* (Tex.), 13-774.

Evidence considered, in a prosecution for assault with intent to rob, held sufficient to justify the trial court in refusing to direct a verdict of acquittal. *O'Donnell v. People* (Ill.), 8-123.

Variance between information and proof. — Where an information for robbery charges the taking of a certain sum, but the evidence shows that part of such sum had been earned by the prosecuting witness and the rest won by gambling there is not a fatal variance, as it is sufficient if it is proved that any part of the money taken was the property of the person from whom it was taken. *State v. Smith* (Wash.), 5-686.

c. Instructions.

Necessity of instructing as to lesser offenses in absence of request. — In a prosecution for robbery it is not error, in the absence of a request, to fail to instruct the jury as to the lesser offenses included in the offense charged. *State v. Parsons* (Wash.), 12-61.

Refusal of instruction abstractly correct but misleading in connection with evidence. — In a prosecution for assault with intent to rob, it is proper for the court to refuse an instruction which, though technically accurate as a general proposition of law, is, as applied to the facts of the case, liable to mislead the jury. *O'Donnell v. People* (Ill.), 8-123.

d. Appeal and error.

Harmless error in admission of evidence. — In a prosecution for robbery there is no reversible error in admitting in evi-

dence a written memorandum of the numbers and denominations of the bills of money taken by the defendant where the person who made the memorandum testifies that it is correct and was made when the money was delivered to the person robbed, especially where the bills are otherwise sufficiently identified. *Tones v. State* (Tex.), 13-455.

Questions by the prosecuting attorney to a person charged with robbery as to his being arrested prior to the date of the crime, and as to a statement to the police in regard to his age in conflict with his testimony on the trial, and as to property being found secreted upon his person at the time of his arrest, in no way connected with the crime charged, do not require a reversal of a conviction, the jury having given the accused the benefit of any doubt as to his age, and the court having promptly sustained objections to the questions concerning the finding of the property upon the person of the accused. *People v. Campbell* (Ill.), 14-186.

Harmless error in instructions. — In a prosecution for assault with intent to rob, it is harmless error to instruct the jury that they may infer the particular intent charged if they believe beyond a reasonable doubt that the assault was committed deliberately and was such as was liable to be attended with dangerous consequences, where the evidence shows conclusively that the intent and purpose of the defendant were to commit robbery. *O'Donnell v. People* (Ill.), 8-123.

Reversal for insufficiency of evidence. — Where three persons have been tried for robbery and one has been convicted, the conviction will not be reversed on appeal if the record shows that all of the defendants had an active part in the commission of the crime, though it appears that the prosecuting witness, when detailing the circumstances of the crime, sometimes referred to the person of whom he was speaking by gesture, or as "that man" or as "that man there," and the record does not show to which of the defendants such references were made. *State v. Smith* (Wash.), 5-686.

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1. NATURE AND VALIDITY OF CONTRACT.

What constitutes sale in general. —

Where a person applies to a bank for a loan and is refused, whereupon he offers to give his note to the bank in exchange for the note of a third person, which offer is accepted, the transaction does not constitute a sale of his note by the applicant for the loan, but is in substance a purchase by him of the note of the third person, his note being given in payment of the purchase price. *German Nat. Bank v. Princeton State Bank* (Wis.), 8-502.

Acceptance of offer made by mistake.

— Where a manufacturer of souvenir postal cards sends a dealer in such cards a circular letter offering by mistake a certain card at one dollar per thousand when the price intended to be quoted is ten dollars per thousand, and the dealer orders a quantity of the cards at the price quoted without naming it, there is no such meeting of the minds of the parties on the price quoted as will constitute a valid contract. *Cunningham Mfg. Co. v. Rotograph Co.* (D. C.), 13-1147.

Acceptance of goods. — Where a large quantity of hay is shipped to a purchaser in bales, the action of an employee of the purchaser in selling a single bale to a third party before his employer has had an opportunity to inspect the shipment, is not conclusive upon the employer as an acceptance of the entire shipment, especially where the sale made by the employee is without authority, either express or implied, and is repudiated by the employer as soon as he learns of it. *Eaton v. Blackburn* (Ore.), 16-1198.

Extinguishment of indebtedness of vendor. — The recital in a bill of sale that it was made in consideration of the surrender and cancellation of the maker's note does not show conclusively that the debt was extinguished, and although a circumstance favoring the theory of a sale, it is only a circumstance to be considered in connection with all the other facts and circumstances in determining the intended nature of the transaction. *Gibbons v. Joseph Gibbons Consol. Mining, etc., Co.* (Colo.), 11-323.

Validity as against attaching creditors. — The Montana statute (Rev. Codes, § 6128) making sales of personality void as to creditors of the seller unless accompanied by

"immediate delivery," does not render void as to attaching creditors a *bona fide* sale of goods, though delivery is not made at the time of the sale, where the buyer, before the attachment suit is begun, takes and retains actual possession of the property. *Western Mining Supply Co. v. Quinn* (Mont.), 20-173.

Burden of proof of validity of sale between persons in fiduciary relation. — When two parties occupy to each other a confidential or fiduciary relation, and a sale is made by one to the other, equity raises a presumption against the validity of the transaction. To sustain it the buyer must show affirmatively that the transaction was conducted in good faith, without pressure or influence on his part, and with express knowledge of the circumstances and entire freedom of action on the part of the seller. *Stewart v. Harris* (Kan.), 2-873.

2. CONSTRUCTION OF CONTRACT.

Contract of sale or return. — Where a contract of sale or return fixes no time in which the property is to be returned the legal obligation of the purchaser is to return it within a reasonable time. *Greacen v. Poehlman* (N. Y.), 14-329.

Where the subject of a contract of sale or return consists of rubber boots which are delivered to the purchasing merchant about the first of July and are intended for sale during the late fall, and the purchaser, in August, complains of the boots, the quality of which cannot be determined on inspection, and is requested by the seller's agent to give them a further trial, the question whether a return of the goods on the eighth of December is within a reasonable time is a question of fact for the jury. *Greacen v. Poehlman* (N. Y.), 14-329.

A valid contract of "sale or return" in which the property in goods purchased passes to the purchaser subject to an option in him to return them within a reasonable time, is established by evidence that a purchase of goods was made under an agreement that if the goods should prove unsatisfactory the buyer could return them and receive credit for their price. *Greacen v. Poehlman* (N. Y.), 14-329.

Meaning of term "more or less." — In a contract to sell and deliver a specified number of barrel staves "more or less, all new branded" with certain letters, "being all the staves made or contracted for" under the contract, the use of the words "more or less" is merely precautionary so as to cover slight and unimportant inaccuracies, and does not enlarge the descriptive words or quantity, nor do the words last quoted enlarge the description so as to embrace staves not answering to the description theretofore set forth. *Little Rock Cooperage Co. v. Gunnele* (Ark.), 12-293.

Sale "F. O. B. cars" as imposing duty on seller to procure cars. — Where a seller of merchandise agrees to sell a specified number of carloads thereof, to be delivered to the buyer "f. o. b. cars" at the

seller's place of business, it is not the duty of the buyer to furnish the cars to receive the goods; and, in an action by the buyer against the seller to recover damages for nondelivery of the merchandise under such a contract, the petition need not allege that the plaintiff furnished cars ready to receive the goods. *Hurst v. Altamont Mfg. Co.* (Kan.), 9-549.

The phrase "f. o. b. cars," when used in a contract between a buyer and seller of commercial commodities, where the use of a common carrier is necessary, means that the seller will secure the cars, load them, and do whatever may be required to accomplish the consignment and shipment of the goods to the buyer, free of expense to the buyer. *Hurst v. Altamont Mfg. Co.* (Kan.), 5-549.

The term "f. o. b. cars" in mercantile contracts means free on board cars and means also, when used as regards the seller, that he will furnish cars to execute the contract; and such meaning cannot be changed without clear evidence of a custom to the contrary known to both parties to the contract at the time of making the same. *Vogt v. Schienebeck* (Wis.), 2-814.

Construction of contract as to delivery. — Under a contract for the purchase and sale of goods to be ready for delivery, and to be delivered f. o. b. on a certain day, in the absence of any provision in the contract naming the carrier to which the goods are to be delivered or the point to which they are to be shipped, the vendor cannot be held to be in default when directions are not given by the vendee in either respect. *Hughes v. Knott* (N. Car.), 3-903.

The provision in a contract for the sale of goods that they shall be delivered "immediately" will be construed as meaning that no unreasonable length of time shall intervene before the delivery. *Claus Shear Co. v. Lee Hardware House* (N. Car.), 6-243.

Ordinarily the question as to what is a reasonable time for the delivery of goods sold is a mixed one of law and fact; and except where only one inference can be drawn, or except where the time is so short or so long that the court may declare it reasonable or unreasonable, the determination of the question should be left to the jury under instructions by the court as to the circumstances of the particular case. *Claus Shear Co. v. Lee Hardware House* (N. Car.), 6-243.

Time for payment in absence of express stipulation. — Under a contract for the sale of personal property, nothing being said as to the time of payment, the price must be paid either before or concurrently with the passing of the title. *Hughes v. Knott* (N. Car.), 3-903.

3. WHEN TITLE PASSES.

Sale of specified quantity from mass. — On a sale of a specified quantity of flax mixed with flax of like quality and grade, the mere fact that there has been no separation of the part sold from the mass will not prevent the title from passing if the parties

intend that title shall pass and the property sold has been identified. *O'Keefe v. Leistikow* (N. Dak.), 9-25.

Sale of ship after trials and tests. — Where a contract for the building of a ship discloses an intention on the part of the parties that the vessel shall not be considered as being delivered to and finally accepted by the purchaser until after an official trial off a foreign coast, and until after it has been shown by the trials or tests that the conditions of the contract as to speed, capacity, coal consumption, etc., have been performed, the property in the ship does not pass to the purchaser while the vessel remains uncompleted, though the contract contains stipulations for the payment of the price in instalments at certain periods of the construction, and though the work is to be done under the superintendence of an agent appointed by the purchaser; and therefore the vessel cannot be arrested before its completion for a debt due a third person by the purchaser. *Laing v. Barclay* (Eng.), 10-137.

Goods shipped by carrier. — Where goods are ordered and shipped by a common carrier selected by the buyer, or where by the course of trade delivery to a common carrier is intended to pass title, the property passes as soon as the goods are put in the carrier's possession. *Woodbine Children's Clothing Co. v. Goldnamer* (Ky.), 20-1026.

Assuming, without deciding, that where merchandise is sold under a contract providing for its delivery to a carrier *f. o. b.* at the point of shipment, title vests in the vendee, for some purposes, at the time when the merchandise is delivered to the carrier, such title is, nevertheless, conditional as between the vendor and the vendee, the condition being that the merchandise shall be found to be of the quality called for by the contract; and such conditional vesting of title in the vendee does not prevent the latter from exercising his right of inspection when the merchandise arrives at its destination. *Eaton v. Blackburn* (Ore.), 16-1198.

Where a buyer of clothing directs it to be delivered for the spring trade and to be shipped over a certain railroad, a delivery by the seller to a different railroad for transportation does not constitute a delivery to the buyer, though the carrier named by the buyer has no connection with the point of shipment, where the seller does not notify the buyer or give him an opportunity to select another carrier. *Woodbine Children's Clothing Co. v. Goldnamer* (Ky.), 20-1026.

Goods sent with bill of lading attached to draft. — When a vendor ships goods to the vendee, takes the bill of lading in the name of the vendee, and sends the bill of lading, with a draft on the consignee attached, to a local bank for collection, title to the goods does not pass to the consignee until the amount of the draft is paid, and he does not become entitled to them upon tender of the price agreed upon when the draft is for a larger amount. *Greenwood Grocery Co. v. Canadian County Mill, etc., Co.* (S. Car.), 5-261.

Delivery of key to warehouse as delivery of goods. — There is a delivery by the seller of goods in a warehouse where he gives the key of the warehouse to the buyer and does not afterwards exercise any ownership or control over the property. *Western Mining Supply Co. v. Quinn* (Mont.), 20-173.

4. WARRANTIES.

a. In general.

Implied warranties in general. — Where provisions are sold by one dealer to another in the usual course of trade, the maxim *caveat emptor* applies, and there is no implied warranty or representation of fitness; but where articles of human food are sold to a consumer for immediate use, there is an implied warranty or representation that they are sound and fit for food. *Nelson v. Armour Packing Co.* (Ark.), 6-237.

Application of warranty to goods not in existence. — A warranty may apply to goods not in existence at the time it is given. *Watts v. Stevens* (Eng.), 6-109.

Implied warranty of title. — A sale of personalty in the vendor's possession implies a warranty as to the entire title, protecting against partial defects, liens, charges, and incumbrances by which the title transferred is rendered anything less than full, perfect, and unencumbered. *Clevenger v. Lewis* (Okla.), 16-56.

Implied warranty of fitness on sale of stallion. — In a present and executed sale of a stallion, by one who is not a dealer in such horses for breeding purposes, there is no implied warranty that the stallion is reasonably fit for breeding purposes, although the seller knows that the vendee buys the horse for such use. *Thompson v. Miser* (Ohio), 19-871.

Implied warranty on sale of food for human consumption. — Although the offering of food for sale is in itself a representation that it is believed to be sound, there is no implied term or condition of such sale, that food, the selection of which is not left to the skill and judgment of the dealer, is wholesome. If such food is unwholesome, the dealer is not liable unless he knows that it is unfit to be eaten. *Farrell v. Manhattan Market Co.* (Mass.), 15-1076.

The rule which imposes liability on an apothecary who sells poison labeled as a harmless drug does not apply to the sale of articles of food. The liability of a dealer who sells food does not depend on negligence. If the selection of the food is left to him, his failure to discover latent defects notwithstanding the exercise of due care is no defense, but if the dealer offers for sale several articles of food from which the buyer is to make his own selection, the dealer merely impliedly represents that he is not liable for failing to procure better food than he offers for sale. *Farrell v. Manhattan Market Co.* (Mass.), 15-1076.

Where the selection of food purchased from a dealer is left to his skill and judg-

ment, it is an implied term or condition of the sale that the food is wholesome. This rule applies regardless of whether the food is supplied under a pre-existing contract, or in response to an order not given in person or to an order given in person in the dealer's shop. *Farrell v. Manhattan Market Co.* (Mass.), 15-1076.

Implied warranty on sale of cattle food. — The rule that in a sale of goods intended for food there is an implied warranty that the goods are wholesome is limited to a sale of goods for human food and does not extend to a sale of feed-stuff for cattle. *National Cotton Oil Co. v. Young* (Ark.), 4-1123.

Where cotton-seed hulls and meal are purchased for cattle food at an oil mill and loaded by the purchaser into his wagon with a fork and are mixed in small quantities at each feeding, the discovery of foreign metallic substances therein is equally open to the buyer and seller, and there is no implied warranty of soundness and fitness for the purpose intended. *National Cotton Oil Co. v. Young* (Ark.), 4-1123.

b. Actions for breach of warranty.

Persons liable for breach. — A consumer who purchases articles of food from a dealer cannot sue the packer who sold the food to the dealer for a breach of warranty as to its quality. *Nelson v. Armour Packing Co.* (Ark.), 6-237.

Measure of damages for breach. — In an action by the buyer of a machine against the seller for a breach of a warranty that the machine was well made, of good materials, durable, and would do good work, the plaintiff, in the absence of a showing of fraud, is not entitled to recover damages for personal injuries sustained by him in consequence of the breaking down of the machine, as such damages are merely consequential and were not within the contemplation of the parties at the time of the making of the warranty. *Birdsinger v. McCormick Harvesting Machine Co.* (N. Y.), 5-586.

The measure of damages for a breach of warranty of the title to goods sold is the purchase price, with the interest thereon. *Morgan v. Hendrie* (Colo.), 7-935.

In an action for the breach of an implied warranty that tinned salmon sold by the defendants to the plaintiff was fit for consumption as human food, there is no rule of law which prevents the plaintiff from recovering damages claimed by him on the ground that his wife having partaken of the salmon had in consequence died, and that she having performed services for him in the care of his house and family until her death, he was under the necessity after her death of hiring some one else to perform such services. In such an action the death of the wife does not form an essential part of the cause of action sued upon, but only an element in ascertaining the damages arising therefrom. *Jackson v. Watson* (Eng.) 16-492.

Burden of proof of ownership in third person on action for breach of warranty of title. — Where a mortgagee of chattels obtains possession thereof from the mortgagor's vendee by a writ of replevin, the latter is not required to await the final adjudication of the mortgagee's claim before beginning an action for the breach of the mortgagor's implied warranty of title; but if such vendee commences an action before such adjudication, he must, in order to recover, sustain the burden of proving a valid pre-existing mortgage in such mortgagee. *Clevenger v. Lewis* (Okla.), 16-56.

Sufficiency of evidence of warranty. — In an action for damages by one who purchased at the bargain counter of a dealer a chicken which proved to be unwholesome, the plaintiff cannot recover where it does not appear by whom the fowl was selected or that in offering fowls for sale the dealer offered to exercise his skill and judgment in supplying wholesome fowls, it being also a fair inference from the fact that the fowl was purchased at a bargain counter that the selection was to be made by the buyer. *Farrell v. Manhattan Market Co.* (Mass.), 15-1076.

In such action the plaintiff cannot recover on the ground that the defendant knew that the chicken was unfit for food if there is no allegation in the declaration that that effect and there is no evidence to support such a theory. *Farrell v. Manhattan Market Co.* (Mass.), 15-1076.

Question of breach for jury. — In an action for a breach of warranty it is for the jury to determine whether a breach has occurred. *Zimmerman v. Robinson & Co.* (Ia.), 5-960.

5. RIGHTS OF VENDOR.

a. Rescission of contract.

For failure to pay purchase price. — The failure of the purchaser of goods to pay an instalment on the purchase price as provided by contract, held to entitle the vendor to rescind the contract. *Ross-Meehan Foundry Co. v. Royer Wheel Co.* (Tenn.), 3-898.

A buyer of goods under a contract to pay for each successive instalment within sixty days after delivery who fails repeatedly to make such payments within the required time cannot maintain an action against the seller for an alleged breach of the contract in failing to make further deliveries. The default of the buyer gives the seller the right to rescind the contract. In such a case the seller of the goods, by accepting overdue payments for instalments delivered, does not waive the right to rescind the contract as to remaining instalments, or to interpose, in an action by the buyer for breach of the contract, the defense that payments were not made when due. *Ohio Valley Buggy Co. v. Anderson Forging Co.* (Ind.), 11-1045.

For fraud of vendee. — While a sale may be set aside as fraudulent on the ground of an undisclosed intention on the part of the buyer not to pay, it is not sufficient to show

mere insolvency or a mere failure of the buyer to disclose his insolvency, if he was not interrogated, even though the facts were such that the buyer could have had no reasonable expectation of being able to pay. *German Nat. Bank v. Princeton State Bank* (Wis.), 8-502.

Loss of right by acquiescence. — A contract for the sale of a lumber in stacks providing that the quantity shall be ascertained "by counting the same in the stacks or when drawn," at the option of the buyer, is not subject to rescission at the instance of the seller because the buyer removes it without first counting it, where the seller, after the lumber has been removed, sees the buyer count a part of it, and causes the balance to be counted by the official surveyor. *Angel v. Bashaw* (Vt.), 18-449.

b. Reclaiming goods.

Upon failure of vendee to pay on delivery. — Where a contract for the sale of goods provides for payment of the purchase price on delivery of the articles sold and the seller delivers the goods but the buyer fails to pay, the right of property does not pass to the buyer with possession but remains with the seller, who may at his option reclaim the goods. *Frech v. Lewis* (Pa.), 11-545.

Loss of right by laches. — The right of the seller to reclaim goods which he has delivered to the buyer must be exercised immediately upon the buyer's default, except when delayed by trick or artifice. Delay in asserting this right for two and a half months during which time the seller attempts to collect the price and treats the buyer as his debtor defeats any right to reclaim the goods, although the seller is induced by repeated promises of payment to delay proceeding for the recovery of the property. *Frech v. Lewis* (Pa.), 11-545.

c. Recovery of purchase price.

Where goods destroyed after delivery. — Under a contract requiring the purchaser of machinery to give the seller notice of defects therein and an opportunity to remedy them, the seller is entitled to recover the price of defective machinery, which is destroyed before any complaint is made. *Marion Mfg. Co. v. Buchanan* (Tenn.), 12-707.

Goods sold under acceptance of offer containing mistake as to price. — One who orders and receives goods which have been offered by letter at a price far below their value and quoted by mistake, but who is apprised by the bill accompanying the shipment of the price intended to be quoted, becomes bound to pay for the goods at the price named in the bill, by retaining the goods, and this is so even though the goods are received and unpacked a short time before the receipt of the bill. *Cunningham Mfg. Co. v. Rotograph Co.* (D. C.), 13-1147.

d. Actions.

(1) Defenses.

Change of conditions by vendee removing need for goods. — The fact that a railroad company, after making a contract to purchase a specified quantity of cordwood, changes its engines from wood to coal burners, does not excuse it for breaking the contract. *Ives v. Atlantic, etc., R. Co.* (N. Car.), 9-188.

Fraud of vendor. — Where, on June 3, 1908, one was induced to enter into a contract for the purchase of personalty by reason of the fraud of the owner, paying the latter \$700 cash and giving notes for the balance of the purchase money, and on Sept. 5, 1908, paid one of such notes for \$500 then due, and on Jan. 8, 1909, paid \$200 on another of the notes for \$500 due on Jan. 5, 1909, and at the time took from such owner a writing signed by the latter, wherein he agreed to indulge the buyer for thirty days within which to pay the balance of \$300 due on such note: Held, that the conduct of the buyer in making the payments and taking from the seller the writing dated Jan. 8, 1909, with full knowledge at the time of the fraud of the seller in the procurement of the notes, amounted to a waiver of such fraud, and the buyer could not prevent a collection of the balance due on the note due Jan. 5, 1909, and of the amounts due on the other notes, because of any damages sustained by the buyer on account of such fraud. *Tuttle v. Stovall* (Ga.), 20-168.

(2) Pleading.

Sufficiency of account containing trade abbreviations. — In an action for hardware sold and delivered, an itemized account offered in evidence, which uses trade terms and abbreviations well understood by the hardware trade, and which shows on the face that it is for the goods sold by the plaintiff to the defendant, is not open to the objections that it is not properly itemized, is not expressed in intelligible terms, and does not show on its face that it is for the goods sold and delivered. *Claus Shear Co. v. Lee Hardware House* (N. Car.), 6-243.

(3) Measure of damages.

Refusal to receive manufactured article. — The measure of damages for an unqualified annulment, without reasonable cause, by the vendee in an executory contract for the sale of an article not manufactured at the time of the breach, is the difference between the cost of manufacturing and delivering the article, and the contract price. *Worrell, etc. v. Kinnear Mfg. Co.* (Va.), 2-997.

Where a contract for the sale of goods provides that they shall be manufactured upon orders given from time to time by the buyer, and there is no specific determinate chattel in existence, and the buyer refuses to give orders for the manufacture of the goods, and

refuses to accept a performance of the contract, the measure of damages is the profit which the manufacturer would have made if he had been permitted to perform the contract. *Gardner v. Deeds* (Tenn.), 7-1172.

In computing the cost of a manufactured article, the essential element of fixed charges should be taken into consideration. *Worrell, etc., v. Kinnear Mfg. Co.* (Va.), 2-997.

The amount to be deducted from the profit upon a manufactured article as an allowance for fixed charges may be determined from the estimates of experienced witnesses. *Worrell, etc., v. Kinnear Mfg. Co.* (Va.), 2-997.

The vendor of material to be used in the manufacture of an article is not a subcontractor within the meaning of a rule excluding the supposed advantages of a subcontract in computing profits. *Worrell, etc., v. Kinnear Mfg. Co.* (Va.), 2-997.

Value at place of delivery. — In an action by the seller for breach of a contract for the sale of goods to be delivered at a specified place, where it appears that after part of the goods had been delivered the buyer waived the place of delivery and accepted delivery at another place, the seller is entitled to recover for the value of the goods delivered at the latter place. *Ives v. Atlantie, etc., R. Co.* (N. Car.), 9-188.

(4) Evidence.

Burden of proof of acceptance of goods delivered subject to satisfaction of vendee. — In an action for the price of machinery sold under a contract stipulating that the machinery was to be paid for within a certain time from the installation thereof, provided "everything works to the satisfaction" of the buyer, the defendant does not have to maintain the burden of showing that the machinery was not satisfactory to it, but the burden is on the plaintiff to show the maturity of the defendant's obligation by proof of the acceptance of the machinery. *Inman Mfg. Co. v. American Cereal Co.* (Ia.), 12-387.

Admissibility of evidence of loan by third person to plaintiff to enable performance. — In an action by the seller for breach of a contract for the sale of cordwood, evidence that a third person loaned the plaintiff money to enable him to fulfil his contract is admissible, as bearing upon the plaintiff's ability and readiness to perform his part of the contract, notwithstanding the fact that its effect is to make the lender the real plaintiff. *Ives v. Atlantic, etc., R. Co.* (N. Car.), 9-188.

Admissibility of evidence on question of damages. — One who has been sued for a breach of contract is not entitled under the guise of determining "fixed charges," unduly to pry into the business secrets of the injured party and expose them to the scrutiny of a vigilant competitor. *Worrell, etc., v. Kinnear Mfg. Co.* (Va.), 2-997.

Where in an action for breach of a contract for the purchase of an article to be manufactured, a witness for the plaintiff, after stating in response to a question what

the cost was to the plaintiff of a certain material under continuing contracts, was asked with whom the plaintiff had said continuing contracts, an objection to such question was properly sustained upon the questioning counsel disclaiming any purpose of laying a foundation for impeaching the witness. *Worrell, etc., v. Kinnear Mfg. Co.* (Va.), 2-997.

Whether goods conformed to sample as question for jury. — In an action by the seller to recover for goods sold by sample, it is a question of fact whether the goods delivered by the plaintiff corresponded in size and quality with the sample. *Kemensky v. Chapin* (Mass.), 9-1168.

(5) Appeal and error.

Conclusiveness of finding by trial court. — An appellate court will not set aside a trial court's finding of fact that the buyer of property, though he was insolvent and failed to disclose his insolvency at the time of the sale, did not have the purpose not to pay, unless the finding is clearly against the preponderance of the evidence. *Gorman Nat. Bank v. Princeton State Bank* (Wis.), 8-502.

Conclusiveness of verdict of jury. — In an action to recover the purchase price of merchandise, where the evidence as to the terms of the contract of sale regarding the quality of the merchandise, and also as to whether there has been an acceptance of the merchandise by the vendee, is conflicting, those questions are for the jury, and their finding thereon will not be disturbed on appeal. *Eaton v. Blackburn* (Ore.), 16-1198.

6. RIGHTS OF VENDEE.

a. Inspection of goods.

Right to inspect in general. — Under an executory contract for the sale and delivery of goods of a specified quality, the quality is a part of the description, and the seller is bound to furnish goods actually complying with such description. If he tenders articles of inferior quality, the vendee is not bound to accept them, and, unless he does so, he is not liable therefor. This necessarily gives to the vendee the right of inspection, and he must be given an opportunity to make such inspection before becoming liable for the purchase price, unless the contract otherwise provides. *Eaton v. Blackburn* (Ore.), 16-1198.

A vendee of merchandise shipped from a distant point, under a contract specifying the quality of the merchandise and providing for its delivery f. o. b. at the point of shipment, but which contains no provisions as to the time or place of payment, inspection, or acceptance, is entitled to a reasonable time after the merchandise arrives at its destination in which to inspect it at that point, and to reject it if it does not comply with the contract. *Eaton v. Blackburn* (Ore.), 16-1198.

Waiver of right. — A vendee of merchandise shipped from a distant point does not waive his right to inspect the same upon

its arrival at its destination, by offering to sell it to a third party before he has made his inspection. Such offer is not conclusive in law of the vendee's intent to accept the merchandise in performance of the contract. *Eaton v. Blackburn (Ore.)*, 16-1198.

b. Rejection of goods.

Unmerchable goods. — An English dealer ordered from a foreign manufacturer a large number of motor horns of different descriptions and prices, "delivery as required." The horns were delivered in several instalments. The buyer, after accepting the first instalment, rejected the later instalments on the ground that the goods were not of merchantable quality. In an action for the price of the goods the official referee found that a large proportion of the horns were dented and badly polished owing to defective packing and careless workmanship, but that they could easily have been made merchantable at a trifling cost, and he declined to hold that the consignment as a whole was unmerchable and gave judgment for the seller with an allowance to the buyer in respect of the defective goods. This judgment was affirmed by the Divisional Court. On appeal it was held, (1) upon the construction of the contract, that the acceptance of the first instalment did not preclude the buyer from rejecting the later instalments; (2) that the buyer was justified in rejecting the later instalments as unmerchable. *Jackson v. Rotax Motor, etc., Co. (Eng.)*, 20-523.

Waiver of conditions by rejection. — Where goods are sold on credit, and the credit has not been obtained by fraud, the stipulation as to credit is unconditional unless the contract contains an express provision to the contrary, and therefore the buyer does not waive the stipulation by refusing to accept the goods. *Tatum v. Ackerman (Cal.)*, 7-541.

When a purchaser of goods has absolutely rejected the goods for any assigned reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor, cannot be construed as a waiver of the purchaser's right to insist on his plea of nonperformance on those grounds. *List & Son Co. v. Chase (Ohio)*, 17-61.

c. Actions.

(1) In general.

Acceptance of goods as waiver of right of action for delay in delivery. — The mere acceptance of a purchased article after the agreed time of delivery does not constitute a waiver of damages for failure to deliver in time, unless such acceptance is accompanied by other circumstances which manifest an intention on the part of the buyer to waive such damages. *Johnson v. North Baltimore Bottle Glass Co. (Kan.)*, 11-505.

Splitting demands and maintaining successive actions. — Where the seller un-

der an entire contract for the sale of goods to be delivered and paid for in instalments repudiates and breaks the contract after delivering some of the instalments, by refusing to deliver further instalments, the buyer, though he may sue either at the time of the breach or at the maturity of the contract, cannot split up his demand and maintain successive actions, but must recover all his damages in one action. *Pakas v. Hollingshead (N. Y.)*, 6-60.

Tender of payment as condition precedent to recovery for failure to deliver. — Where, under an executory contract for the purchase and sale of goods, the vendor at the time set for delivery refuses to comply with the contract, the vendee being ready and willing to make payment, a tender of payment is unnecessary. *Hughes v. Knott (N. Car.)*, 3-903.

Regarding time of payment as essence of contract. — In an action at law for the recovery of damages for breach of contract in failing to deliver goods bought, the time fixed by the contract for payments by the purchaser for each instalment will be regarded as of the essence of the contract. *Ohio Valley Buggy Co. v. Anderson Forging Co. (Ind.)*, 11-1045.

Sufficiency of evidence of fraudulent concealment to warrant rescission. — Evidence reviewed in a suit by the buyer to rescind a contract for the sale of timber, and held insufficient to show that the plaintiff is entitled to rescission on the ground of the failure of the defendant to disclose information as to the true value of the timber. *Cook v. Bagnell Timber Co. (Ark.)*, 8-251.

Whether purchaser was ready and able to perform as question for jury. — Where it appears that the party to an executory contract for the purchase of goods appeared with checks and collateral with which to make payment at the time stipulated for the transfer of the property, upon refusal of the other party to deliver the property, the purchaser should have been allowed a reasonable time to convert his funds into currency, and it is a question for the jury whether the purchaser was ready, able, and willing to comply with the terms of the contract. *Hughes v. Knott (N. Car.)*, 3-903.

(2) Measure of damages.

In general. — In an action to recover damages for the breach of an executory contract to sell and deliver goods, the general rule is that the difference between the market value thereof at the time and place for delivery, and the contract price, with interest from the time of the breach, is the true measure. *Vogt v. Schienebeck (Wis.)*, 2-814.

Goods deliverable in instalments. — In an action by a buyer for breach of a contract for the sale of goods deliverable in instalments, the rule for measuring damages is the difference between the contract price and the market value at the time and place named in the contract for the delivery of each successive instalment, the damages re-

coverable being the aggregate of such differences; but where the time of delivery has been postponed to a subsequent date by agreement of the parties at the request of the seller, the damages should be estimated on the basis of the market value on that date. *Crescent Hosiery Co. v. Mobile Cotton Mills* (N. Car.), 6-164.

7. LIABILITY OF VENDOR TO THIRD PERSONS.

Damages arising from concealment of defects in manufactured article.

One who sells an article, knowing it to be dangerous by reason of concealed defects, is guilty of a wrong, without regard to the contract, and is liable in damages to any person, including one not in privity of contract with him, who suffers an injury by reason of his wilful and fraudulent deceit and concealment. *Kuelling v. Roderick Lean Mfg. Co.* (N. Y.), 5-124.

8. CONDITIONAL SALES.

a. Essentials and construction.

In general. — Where a contract between a vendor and a vendee of chattels is made upon the condition that the title shall vest in the latter upon payment of the agreed price, and not otherwise, the contract evidences a conditional sale. *Monitor Drill Co. v. Mercer* (U. S.), 16-214.

Provision authorizing vendor to retake possession. — Nor is the character of such sale affected by a provision in the contract authorizing the vendor, under certain conditions, to retake possession of the portion of the chattels which remain unsold by the vendee, where such provision does not require the vendor to sell such remaining chattels and to apply the proceeds to the indebtedness of the vendee. *Monitor Drill Co. v. Mercer* (U. S.), 16-214.

Clause giving vendor right to proceeds of resale. — A provision in such contract authorizing the vendor, under certain conditions, to take possession of the proceeds of whatever nature derived by the vendee from the sale of any portion of such chattels, to reduce such proceeds to cash, to apply the same, after deducting expenses, to the debt due from the vendee, and to deliver the surplus, if any, to the vendee, does not qualify the title of the seller to the portion of such chattels which remains unsold by the vendee. *Monitor Drill Co. v. Mercer* (U. S.), 16-214.

Effect of taking collateral security. — The taking of notes for the purchase price of such chattels and the taking of collateral security do not affect the character of such transaction as a conditional sale. *Monitor Drill Co. v. Mercer* (U. S.), 16-214.

Conditional sale or chattel mortgage. — A clause in a contract providing for the resale of property for an unpaid purchase price held not to change the character of the contract from a conditional sale to that of a chattel mortgage. *Freed Furniture, etc., Co. v. Sorensen* (Utah), 3-634.

Conditional sale or absolute sale with security. — The fact that subsequent to a

sale of goods shown to be conditional by the note taken for the purchase price, the parties ascertain and adjust their accounts and the vendee makes a new note for the balance due, does not make the transaction an absolute sale with security for the debt. *Freed Furniture, etc., Co. v. Sorensen* (Utah), 3-634.

Conditional sale or lease. — A contract called a lease, by which one party agrees to "hire to the use" of another, for a stated number of months, certain personal property, and providing that the lessee shall pay, as security for the performance of the contract, a certain sum in cash and stated sums each month as rent, and that if the lessee pays the instalments of rent as they fall due he shall have the right to purchase the property for a stated amount, equal to the total of the security and instalments of rent, deducting from that amount all sums paid as security and as rent, but that if the lessee fails to pay any instalment of rent, the lessor shall have the right to take possession of the property, retaining for the breach of the contract the security money paid, is a conditional sale and not a lease of bailment for use with an option to purchase. *Hamilton v. Highlands* (N. Car.), 12-876.

In an action by the seller on such a contract a motion by the defendant, rejected by the plaintiff and denied by the court, that he be permitted to surrender the property and lose what he has paid and be discharged from further liability, is no election to treat the contract as a lease. *Hamilton v. Highlands* (N. Car.), 12-876.

Description of property as warranty. — In a contract of conditional sale, the description of the thing sold as a "rebuilt" engine—that is, an old engine which has been made as good as possible and practically as good as new—is a warranty. *New Hamburg Mfg. Co. v. Webb* (Can.), 20-817.

b. Remedies of vendor.

(1) In general.

Sale of property by court. — Under a contract denominated a lease, but which is in fact a conditional sale, and which provides for the payment of monthly instalments, default in the payment of a part of the monthly instalments and the continued possession of the property by the buyer beyond the term specified in the contract does not give the seller the right to recover as rent the stipulated monthly instalments for the entire period and to retake the property. The measure of his relief is the sale of the property by the court and the payment to him out of the proceeds of the balance of the purchase price due him, together with interest and costs, deducting the payments made, and paying any surplus to the buyer, or, in case of a deficiency, a judgment against the buyer for such deficiency. *Hamilton v. Highlands* (N. Car.), 12-876.

Election of remedies. — Where property is sold on credit and the title thereto is reserved by the vendor, upon a breach of the

conditions of the sale the vendor either may treat the sale as absolute and sue for the price thereof, or may treat the sale as canceled and recover the property, but the vendor cannot pursue both courses, and the election to pursue either one of two inconsistent remedies operates in law as an abandonment or waiver of the other. *American Process Co. v. Florida White Pressed Brick Co. (Fla.)*, 16-1054.

A seller of personal property who has by contract retained the legal title, and has taken possession thereof in default of payment, is deprived of the right to enforce the payment of the debt and to have the contract enforced by a court of equity. *Sanders v. Newton (Ala.)*, 1-267.

Remedy against purchaser from vendee. — The mere possession of personal property is only *prima facie* evidence of title; and a purchaser of personal property from one who has only the possession of the property under an incomplete conditional sale cannot in general defeat a recovery by the true owner, although such purchaser bought for value and without notice. *American Process Co. v. Florida White Pressed Brick Co. (Fla.)*, 16-1054.

Where machinery is consigned by the vendor to the order of a person who is engaged in the business of furnishing and installing such machinery in manufacturing plants on the lands of others, and there is nothing to indicate that the title is reserved by the consignor, who knows that the machinery is to be installed for another party and to become permanently affixed to its land, and gives no notice to such party of the reservation of the title, he cannot recover the property from the party for whom it is installed, and who pays value for it without notice of the conditional sale, particularly where, after merely filing a *præcipe* in an action for conversion, he institutes proceedings for the balance due on the price against the immediate consignee and receives part payment of the price in such proceedings. *American Process Co. v. Florida White Pressed Brick Co. (Fla.)*, 16-1054.

(2) Recovery of purchase price.

Performance of conditions by vendor. — Where personal property is sold on a conditional sale and the seller is to perform certain conditions before title can pass to the purchaser, the seller cannot before performing such conditions elect to treat the property as that of the purchaser and sue for the contract price. *American Soda Fountain Co. v. Gerrer (Okla.)*, 2-2318.

Property destroyed without fault of either party. — A seller of personal property, sold and delivered on the condition that the title thereto shall not pass until the payment therefor has been made, may recover the purchase price, notwithstanding the destruction of the property without the fault of the buyer before the price falls due. *La Valley v. Ravenna (Vt.)*, 6-684.

Where personal property is sold and de-

livered with a reservation of title by the seller until the payment of the purchase price, and the property is afterwards destroyed without the fault of either party and before the execution of the purchase money notes, the buyer is nevertheless liable for the payment of the purchase price. *Marion Mfg. Co. v. Buchanan (Tenn.)*, 12-707.

c. Remedies of vendee.

Right to maintain action for breach of warranty before title passes. — A conditional vendee, before the title has vested in him by payment of the price in full, cannot recover general damages for a breach of warranty, that is, the difference between the value of the thing contracted for and that of the thing supplied; but he may recover any special damage that he may have suffered from the breach of warranty, such as losses resulting from the failure of the thing purchased to serve the purpose for which it was intended. No one can be injured by a diminution in value of a chattel until he owns it; but he may be injured by the failure of a machine to do the work he wants it for, no matter who owns the machine. *New Hamburg Mfg. Co. v. Webb (Can.)*, 20-817.

d. Conversion by vendee.

Execution of mortgage to third person. — Where a vendee of personal property, who is in possession under an unrecorded conditional sale, mortgages the whole property, and not merely his interest therein, to a third person, who records the mortgage, the vendee is guilty of conversion, notwithstanding the fact that there is no manual transfer or removal of the property. *Ivers and Pond Piano Co. v. Allen (Me.)*, 8-128.

SALES IN BULK.

See FRAUDULENT CONVEYANCES, 3.

SALESMEN.

Lien of innkeeper on drummer's sample, see INNS, BOARDING HOUSES, AND APARTMENTS, 7.

SALOONS.

See INTOXICATING LIQUORS.
Saloon furniture as fixtures, see FIXTURES, 3.

SALVAGE.

What constitutes salvage services. — Services rendered in extinguishing a fire on a vessel are salvage services and may be recovered for as such, even though the vessel, at the time when the services were rendered, was undergoing repairs in a dry dock from which all the water had been let out, and the

fire originated on the land and was communicated to the vessel therefrom. The Steamship Jefferson (U. S.), 17-907.

The perils out of which a salvage service may arise are all of such perils as may encompass a vessel when on waters which are within the admiralty jurisdiction of the United States, and it follows that the right to recover for salvage services is not limited to services concerning a peril on the high seas or within the ebb and flow of the tide. The Steamship Jefferson (U. S.), 17-907.

What constitutes derelict property.—Property is derelict in the maritime sense of the word when it is abandoned without hope of recovery or without intention of returning. A mere quitting of a ship for the purpose of procuring assistance from shore, or with an intention of returning to her again is not an abandonment. The intention which determines the question, however, is the intention at the time the vessel is left. If at that time it is such as to constitute an abandonment, and salvors have taken possession, an intention subsequently formed to return and resume charge is not material. *Merrill v. Fisher* (Mass.), 17-937.

Right of master to call superior aid.—Where one set of salvors has agreed to save a vessel if they can within a reasonable time, but in spite of their honest efforts, either on account of their inefficient appliances, or bad weather, or other circumstances beyond their control, they are not making such progress as justifies a belief in their final success, the master of the vessel is not compelled, where superior aid can be secured, to wait until the last moment of such original salvors' efforts before calling in such superior aid, and take all the chances of final failure; but in contracting for and accepting such superior aid the parties making the contract therefor make it subject to all the existing rights of the original salvors, and in any such contract the property becomes responsible to them, regardless of any amount which may be promised the newcomers. The *Bayamo* (U. S.), 17-1156.

Right of salvors to exclusive possession.—In the case of salvors there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by her master and crew. In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but also the right to exclusive possession and control of it up to the time of the sale, and are not bound to give it up until they have been remunerated for the salvage services. In an ordinary case of disaster, however, where the vessel is not derelict, the salvors have not the right, as against the master, to the exclusive possession of it, even though the master may have left it temporarily, but upon his returning and claiming the vessel they are bound to give it up to him. *Merrill v. Fisher* (Mass.), 17-937.

In an action of replevin brought in a common-law court by the owner of a yacht to recover the same, where the defense is that

the yacht, after becoming a derelict, was saved by certain persons, and is in the possession of the defendant as agent for the salvors, and where the evidence is conflicting as to whether the vessel was abandoned without intention of returning, and also as to whether the salvors have been guilty of laches in enforcing their lien, those questions should be submitted to the jury, and it is error for the trial court to direct a verdict in favor of the plaintiff. *Merrill v. Fisher* (Mass.), 17-937.

Enforcement of salvage lien in common-law court.—A lien for salvage services, although generally enforceable only in a court of admiralty, will be recognized in the courts of common law, and the right of possession arising therefrom will be there protected. *Merrill v. Fisher* (Mass.), 17-937.

Elements of award for salvage.—An award for salvage should include damages suffered by the salving vessel and due to the necessities of the service, but not damages due to the pursuit of measures by the salving vessel which were so unskilful as to make it evident that ordinary skill and ability in handling the vessel were lacking. *Nanna v. Mystic* (Can.), 14-83.

Amount of award.—On a claim for salvage under a contract containing a proviso that if the vessel was not saved the libelants should have no pay, and where the salvage services were not perfected by the libelants, but by a second set of salvors called in by the master of the vessel, evidence examined and held to justify an award to the libelants of \$5,000, as compensation for the expense actually incurred by them and the actual work and labor which they performed and the risk and damage incurred, although they were not entitled to salvage except upon the net value of the property taken ashore. The *Bayamo* (U. S.), 17-1156.

Reduction of award on appeal.—In an action for the value of salvage services and damages for injuries sustained by the salving ship in rendering such services, evidence examined and held to show that the injuries were not caused by the necessities of the service but by unskilful seamanship and improper navigation, and that a judgment for such damages should therefore be substantially reduced. *Nanna v. Mystic* (Can.), 14-83.

The defendants' steamship, from Adelaide to London with a cargo of wool, broke down in the Red Sea, owing to damage to her propeller. She was picked up by the plaintiff's steamship, from Java to Amsterdam with a general cargo, and was towed in six days about 830 miles to safe anchorage in Suez Roads. The weather was fine, except towards the end of the towage, when the usual northerly wind and some sea were encountered, and during part of the towage varying currents were met with. The salving vessel lost three days and incurred some expense. The values were large, that of the salving vessel, cargo, and freight, £88,000 and that of the salvaged vessel, cargo, and freight, £269,700. In an action of salvage the sum of £10,000

was awarded. The defendants appealed on the ground that the amount was excessive. It was held by the Court of Appeal that the amount awarded could not be supported without doing injustice to those whose property was saved, for in the court below undue weight had been given to the value of the saved property, and the absence of serious danger, either to the salving or to the saved vessel, had not been sufficiently recognized. The award was therefore reduced to £6,000. *The Port Hunter* (Eng.), 20-558.

SAMPLES.

Acceptance of samples as acceptance of part of goods sold, see **FRAUDS, STATUTE OF**, 9 b (3).

Lien of innkeeper on samples of traveling salesmen, see **INNS, BOARDING HOUSES, AND APARTMENTS**, 7.

Taking possession for purpose of examination as acceptance of goods sold by sample, see **FRAUDS, STATUTE OF**, 9 b (1).

SANITARY DISTRICTS.

See **DRAINS**.

SANITARY LAWS.

See **HEALTH**.

SATISFACTION.

See **ACCORD AND SATISFACTION; RELEASE AND DISCHARGE**.

Contract of employment subject to satisfaction of employer, see **MASTER AND SERVANT**, 1 c (1).

SATURDAY.

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SAVING LIFE OR PROPERTY.

Acts done in effort to save life or property as contributory negligence, see **NEGLIGENCE**, 7 d.

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SCENIC RAILWAYS.

Liability for injury to passengers, see **CARRIERS, 6 e (1)**.

SCHEDULES.

Effect of failure to schedule debts in bankruptcy proceeding, see **BANKRUPTCY**, 9.

SCHOOLS.

1. **NATURE AND CREATION OF SCHOOL DISTRICTS**, 1394.

2. **OFFICERS OF SCHOOL DISTRICTS**, 1394.

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 Regulation of car fares for children attending public school, see **CARRIERS**, 2 b.
 Right of parent to recover for expulsion of child from public school, see **PARENT AND CHILD**, 1 d.
 Running of statute of limitations against school district, see **LIMITATION OF ACTIONS**, 6 b.
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 School districts as subject to garnishment, see **GARNISHMENT**, 2.
 Validity of statute requiring water closets in schools, see **HEALTH**, 2 b.

1. NATURE AND CREATION OF SCHOOL DISTRICTS.

School district as municipal corporation. — A school district is a municipal corporation within the meaning of a rule that the power of taxation is a legislative power which cannot be delegated except to municipal corporations. *Smith v. Board of Trustees* (N. Car.), 8-529.

Power of legislature to create school district. — The North Carolina legislature has power to create a special school district within the precincts of a county, to incorporate its controlling authorities, to confer upon such authorities certain governmental powers, and, when the statute is accepted and sanctioned by a vote of the qualified electors within the prescribed territory, to delegate to the school authorities power to levy a tax and issue bonds in furtherance of the corporate purpose. *Smith v. Board of Trustees* (N. Car.), 8-529.

The North Carolina statute creating a graded school district within certain defined boundaries, establishing a board of school trustees, authorizing the trustees to levy a tax and issue bonds for school purposes, and providing that the statute shall become effective when its provisions are accepted by the qualified voters of the district at an election held for that purpose, is a valid exercise of legislative power. *Smith v. Board of Trustees* (N. Car.), 8-529.

Change of boundaries as passing title to school property in new district. — Where a new school district is created including within its boundaries a school house or other real estate belonging to a previously existing district, such real estate becomes the property of the new school district. *Pass School Dist. v. Hollywood City School Dist.* (Cal.), 20-87.

How legality of organization may be questioned. — The legality of the formation of a school district can be determined only in a direct proceeding and cannot be questioned in a suit to enjoin the payment of taxes to the treasurer of the district. *School District v. Fremont County* (Wyo.), 11-1058.

2. OFFICERS OF SCHOOL DISTRICTS.

Liability of sureties on bond of clerk for conversion of tuition funds. — The clerk of a board of education is not authorized, nor is it made his duty by statute, to receive and become the custodian of tuition funds belonging to the board, and the board is not empowered by the Ohio statute to make a rule conferring such authority or imposing such duty on the clerk of the board; and where, pursuant to such a rule, the clerk of the board is permitted to and does receive and have the custody of tuition funds, which he fails safely to keep and account for, sureties on his statutory bond are not liable for his default. *State, use of Board of Education, etc., v. Griffiths* (Ohio), 6-917.

Liability of officers for personal injuries to pupil. — A city board of education, which is given by law the management and control of the public schools of the city, is liable for personal injury sustained by a pupil in consequence of the defective condition of a school building, where it negligently permitted the building to be occupied and used for school purposes with knowledge of its unsafe or defective condition; and this is so though the power to repair school buildings and keep them in a suitable condition is given to other officers, where the power to close the schools is vested solely in the board of education, as the negligence of the board consists of its action in allowing the building to be used and occupied for school purposes. *Wahrman v. Board of Education* (N. Y.), 10-405.

While the board of education of a city is liable for its own negligence, the doctrine of *respondet superior* does not apply to it, and it is not liable for the negligent acts of any of its subordinate officers or servants. *Wahrman v. Board of Education* (N. Y.), 10-405.

De facto officers. — If a school district had been duly laid out, and upon a petition of one-fourth of the qualified voters thereof the ordinary ordered an election to determine the question of local taxation, but also included in his order that trustees for the school district should be elected, which was done, and the county board of education, although it did not order the election of such trustees, recognized and approved the persons elected as such and caused them to be commissioned, and they acted as trustees under such commissions, they were *de facto* officers, and their actions as such, which *de jure* officers would be authorized to perform under the law, could not be collaterally attacked as void on account of the manner of their election. *De Loach v. Newton* (Ga.), 20-342.

After the trustees of a school district were thus elected and commissioned, and upon the expiration of the terms of two of them the board of education of the county ordered an election to be held to select successors for them: *semble*, that the persons so selected for the new terms, whether the same as those originally elected or not, were *de jure* trustees on being duly commissioned. *De Loach v. Newton* (Ga.), 20-342.

3. SCHOOL DISTRICT ELECTIONS.

Power to order election. — The Act of Aug. 23, 1905 (Acts 1905, p. 425), as amended by the Act of Aug. 21, 1906 (Acts 1906, p. 61), provides for the laying out of counties into school districts by the county boards of education, and that such boards shall order an election for trustees in the respective districts so laid out. Whenever the citizens of any school district, in a county not levying a local tax for educational purposes, wish to supplement the funds received from the state school fund by levying a tax for educational purposes, they shall present to the ordinary a petition from one-fourth of the qualified voters of the district, and thereupon the ordinary shall order an election to determine the question of local taxation. There is no provision in either of said acts for the ordinary to order an election to determine whether a school district shall be laid out, or for the purpose of electing trustees in such a district. *De Loach v. Newton* (Ga.), 20-342.

Sufficiency of petition for election. — When considered as a whole, the petition on which the ordinary of Tattnall county ordered an election in the school district of that county known as the Claxton-Hagan district was in substantial compliance with the law, and the election so ordered and held was not void on the ground that such petition furnished no basis for the order, so as to authorize an injunction to be granted against the levy of the local tax in such school district by virtue of the election. *De Loach v. Newton* (Ga.), 20-342.

The petition to the ordinary for the purpose of calling an election to determine the question of levying a local school tax in a district should be signed by the petitioning voters themselves. There is no provision for an attorney at law to present a petition, signed only by him, as the representative of a number of voters. The signature of one acting as an attorney cannot take the place of the signature of the voters. *De Loach v. Newton* (Ga.), 20-342.

In the present case a petition was signed by persons purporting to constitute one-fourth of the qualified voters of the district. A copy of this was attached to an additional petition to the ordinary, signed by certain persons as attorneys for the petitioners. The latter petition was not a substitute for, or in lieu of, a petition by the voters, and the persons named in it also signed the other petition. This mere duplication of petitions did not operate to invalidate the original petition signed by the requisite number of voters. *De Loach v. Newton* (Ga.), 20-342.

Validity of election under North Carolina statute. — Under the North Carolina statute creating a new school district and directing that the election for trustees shall be conducted under the laws governing the elections for cities and towns, and the statute providing that a new registration may be ordered by city or town authorities, but that unless a new registration is so ordered

it shall be sufficient for the registrars to revise the registration books so that they shall show an accurate list of the electors previously registered and still resident, and keep open their books at stated periods in order that any new electors may be properly registered, the election of trustees for such school district is not rendered invalid by the fact that no new registration was ordered for the entire electorate of the new district. *Smith v. Board of Trustees* (N. Car.), 8-529.

4. STATUTORY REGULATION OF SCHOOLS.

a. Separation of races.

Validity of statutes requiring separation. — A state statute making it unlawful to maintain or operate any college or school where persons of the white and colored races are educated together is a valid police regulation, and does not deny the equal protection of the law or deprive any citizen of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. *Berea College v. Commonwealth* (Ky.), 13-337.

A statutory provision making it unlawful for any institution of learning to receive persons of the white and colored races for instruction except in separate and distinct branches of the institution not less than twenty-five miles apart is unreasonable and oppressive, and not a legitimate exercise of the police power. *Berea College v. Commonwealth* (Ky.), 13-337.

b. Vaccination as prerequisite to school attendance.

Validity of statutes. — A statute providing that no person not vaccinated shall be admitted to the public schools is a health law and a valid enactment under the police power. *Viemeister v. White* (N. Y.), 1-334.

The Ohio statute authorizing and empowering the boards of education of each school district "to make and enforce such rules and regulations to secure the vaccination of, and to prevent the spread of smallpox among the pupils attending or eligible to attend the schools of the district as in its opinion the safety and interests of the public require," is a valid enactment, not repugnant to the constitution of the state of Ohio, or violative of the Fourteenth Amendment to the Constitution of the United States. And under the power thereby conferred, boards of education, in the exercise of a sound discretion, may exclude from the public schools all children who have not been vaccinated. *State ex rel. Milhoof v. Board of Education* (Ohio), 10-879.

The enactment of the Ohio compulsory vaccination statute by the general assembly was but a reasonable exercise of the police power of the state, and under its provisions the validity of the action taken by a board of education in excluding from the public schools all children who have not been vac-

cinated, or who do not furnish a physician's certificate excusing them from vaccination, does not depend upon the actual existence of smallpox in the school district or community, or upon an apprehended epidemic of that disease. *State ex rel. Milhoof v. Board of Education (Ohio)*, 10-879.

The Pennsylvania statute requiring the exclusion from the public schools of children who have not been vaccinated is a valid exercise of the state's police power. *Stull v. Reber (Pa.)*, 7-415.

The Pennsylvania statute requiring the exclusion from the public schools of children who have not been vaccinated does not violate the prohibition of the state constitution against local and special legislation regulating the affairs of school districts. *Stull v. Reber (Pa.)*, 7-415.

Inasmuch as it is generally recognized that it is within the police power of a state to pass a statute making vaccination a prerequisite to the right to admission to the public schools, it is no ground for declaring such a statute invalid, as authorizing an unjustifiable trespass upon the reserved rights of citizens, that in the future the legislature may possibly require the pupils of public schools to submit to inoculation with antitoxin or serum for diphtheria, tuberculosis, cancer, etc. *Stull v. Reber (Pa.)*, 7-415.

The Pennsylvania statute requiring the exclusion from the public schools of children who have not been vaccinated does not contravene the provisions of the state constitution requiring the maintenance of a system of public schools wherein all children above the age of six years may be educated. *Stull v. Reber (Pa.)*, 7-415.

A municipal corporation having general police powers to pass ordinances and make regulations for the promotion of health or the suppression of disease, has no power to pass an ordinance excluding from the public schools all children who have not been vaccinated within seven years, thus making vaccination a condition precedent to receiving an education. *People ex rel. Jenkins v. Board of Education (Ill.)*, 14-943.

Construction of statute. — In construing the Pennsylvania statute requiring the exclusion from the public schools of children who have not been vaccinated, sections 11 and 12 thereof should not be read together, as their objects are distinctly different, the former section dealing with the immediate danger arising from the present existence of the disease of smallpox and the latter section being cautionary and prospective legislation designed to prevent the appearance of the disease in the future. *Stull v. Reber (Pa.)*, 7-415.

Injunction to restrain enforcement of statute. — It is no ground for the issuance of an injunction restraining the enforcement, in the schools of a given community, of a statute requiring the exclusion from the public schools of children who have not been vaccinated, that the community has enjoyed immunity from smallpox for a period of forty years. *Stull v. Reber (Pa.)*, 7-415.

c. Compulsory education.

Indians as citizens within North Carolina constitution. — Indians are citizens of a state and are subject to its general laws unless specially excepted, and the provision of the constitution of North Carolina giving the general assembly power to enact that every child of sufficient mental and physical ability shall attend the public schools between certain ages, embraces Indians as well as whites and blacks. *State v. Wolf (N. Car.)*, 13-189.

5. REGULATIONS BY SCHOOL BOARDS.

a. In general.

Power to make regulations in general. — Under the New York consolidated school law, the state superintendent of public instruction has implied authority to establish regulations for the management of the public schools, subject only to the restriction that they must be reasonable in character and must not conflict with the laws or public policy of the state. *O'Connor v. Hendrick (N. Y.)*, 6-432.

Regulations as to course of study. — The school authorities of this state have the power to classify and grade the scholars in their respective districts and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and such reasonable rules and regulations as they may think needful. They may also require prompt attendance, respectful deportment, and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers. *School Board District v. Thompson (Okla.)*, 19-1188.

Prohibiting pupils from playing football. — A school board has power to prohibit high-school pupils from playing football on a team purporting to represent the school or in a game purporting to be played under the auspices of the school; and this power is not limited to football played on the school grounds. *Kinzer v. Directors, etc. (Ia.)*, 6-996.

Regulations against secret societies among pupils. — A rule adopted by a city board of public education providing that teachers in the high schools shall deny to any secret societies, known as Greek letter fraternities, that may exist in their schools, all public recognition, including the privilege of meeting in the school buildings, and that no member of such a society shall be permitted to represent a school in any literary or athletic contest or in any other public capacity, is not unreasonable and does not violate the natural rights of the members of such society or amount to an unlawful discrimination against them. *Wilson v. Board of Education (Ill.)*, 13-330.

Interference by court with regulations. — A court ought not to interfere with the exercise of discretion on the part of a school board as to what is a reasonable and necessary rule for the government of schools under its jurisdiction, unless it is clearly shown that the board has exceeded its power. *Kinzer v. Directors, etc.* (Ia.), 5-996.

A board of education having control of the public schools of a city, and charged with the duty of establishing such rules and regulations as in its opinion may be necessary for the maintenance of a proper system of discipline in the several schools, has a discretion in determining what rules and regulations are necessary under the circumstances, and its action in this regard will not be reviewed by the courts unless there is a clear abuse of discretion. *Wilson v. Board of Education* (Ill.), 13-330.

b. Vaccination as prerequisite to school attendance.

Power of municipal health officer to direct exclusion. — In the absence of an ordinance, rule, or regulation for the exclusion from a public school of unvaccinated children in the event a smallpox epidemic exists or is reasonably apprehended in the vicinity of such school, the health commissioner of a municipality has no power, upon declaring smallpox to be epidemic in the vicinity of a school, to direct the exclusion therefrom of all children who have not been vaccinated in accordance with the provisions of an ordinance which is invalid because it makes vaccination a condition precedent to the right to receive an education. *People ex rel. Jenkins v. Board of Education* (Ill.), 14-943.

Power of school board to enact. — The resolution of a school board excluding from attendance at school children not vaccinated is a proper exercise of its statutory powers to control and manage public schools. *Hutchins v. School Committee* (N. Car.), 2-340.

Validity of regulation. — Whether the rule or regulation adopted by a board of education under favor of the provisions of the Ohio compulsory vaccination statute is a reasonable rule or regulation, is to be judged of in the first instance by the board of education, and the courts will not interfere, unless it is clearly shown that there has been an abuse of official discretion. *State ex rel. Milhoof v. Board of Education* (Ohio), 10-879.

c. Dress of teachers.

Validity of regulation prohibiting teachers from wearing sectarian garb.

— A regulation by the state superintendent of public instruction prohibiting teachers in the public schools from wearing a distinctively sectarian garb while engaged in the work of teaching is lawful and reasonable. *O'Connor v. Hendrick* (N. Y.), 6-432.

Operation and effect of regulation. — A regulation by the state superintendent of public instruction prohibiting teachers in the

public schools from wearing a distinctively sectarian garb while teaching, applies prospectively to teachers under valid pre-existing contracts, and as so applied is not open to the objection that it annuls those contracts. *O'Connor v. Hendrick* (N. Y.), 6-432.

6. RELIGIOUS EXERCISES IN SCHOOLS.

Scope of constitutional provision. — The purpose of the provision of the Kentucky constitution that no portion of any fund or tax raised for educational purposes "shall be appropriated to, or used by or in aid of any church, sectarian, or denominational school," is not to regulate the curriculum of the schools of the state, but is to prevent the appropriation of the public money to aid schools maintained by any church or any sect of religionists. *Hackett v. Brooksville Graded School District* (Ky.), 9-36.

Offer of prayer as violation of constitutional provision. — Where prayer is offered incidentally at the opening of a public school, and children opposed to attending while prayer is being offered are not compelled to do so, the school is not a "place of worship" and its teachers are not "ministers of religion," within the meaning of the provision of the Kentucky constitution that no person shall "be compelled to attend any place of worship, or contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion," notwithstanding the fact that public prayer is public worship. *Hackett v. Brooksville Graded School District* (Ky.), 9-36.

A public school is not converted into a "sectarian school," within the meaning of the provision of the Kentucky constitution prohibiting the appropriation of public funds for the use of sectarian schools, by the fact that a nonsectarian prayer is offered by the teachers at the opening of school each morning. *Hackett v. Brooksville Graded School District* (Ky.), 9-36.

Reading from Bible as violation of constitutional provision. — Within the meaning of the Kentucky statute providing that no books of sectarian character shall be used in any common school, and that no sectarian doctrine shall be taught therein, the King James translation of the Bible is not of itself a sectarian book, and the reading thereof, without note or comment by teachers, is not a sectarian instruction; nor does such use of the Bible make a schoolhouse a house of religious worship. *Hackett v. Brooksville Graded School District* (Ky.), 9-36.

A public school teacher who repeats the Lord's Prayer and the Twenty-third Psalm as a morning exercise is not teaching a sectarian or religious doctrine. *Billard v. Board of Education* (Kan.), 2-521.

It is a violation of the provision of the Illinois constitution guaranteeing "the free exercise and enjoyment of religious profession and worship without discrimination" (art. 2, § 3) for the teachers of a public school to read daily to the pupils during school hours portions of the Bible, and to

cause the pupils to join in repeating the Lord's Prayer and in singing a devotional hymn. *People v. Board of Education* (Ill.), 19-220.

7. TEACHERS IN PUBLIC SCHOOLS.

a. Right to inflict corporal punishment.

In general. — An assistant teacher in a public elementary school has authority to inflict corporal punishment on a pupil if the punishment inflicted is moderate, is not dictated by any bad motive, is such as is usual in the school, and such as the parent of the child might expect that the child would receive if it did wrong; and the fact that, by the regulations of the school, assistant teachers are forbidden to inflict corporal punishment, or that on account of a bodily infirmity of the pupil, unknown to the teacher, the result was more serious than would have been caused to a normal child, does not render the assistant teacher liable in an action by the pupil for assault. *Mansell v. Griffin* (Eng.), 12-350.

b. Right to compensation.

Services rendered in violation of rule as to wearing sectarian garb. — A teacher in a public school is not entitled to compensation for services rendered by her while wearing a sectarian garb after the establishment of a regulation prohibiting teachers from wearing such garb, though the services were rendered under a valid contract executed before the establishment of the regulation. *O'Connor v. Hendrick* (N. Y.), 6-432.

An order prohibiting the wearing of sectarian garb by teachers in public schools, which is promulgated by the state superintendent of public instruction on an appeal taken to him under the New York statute, is not, as to teachers who are not parties to the proceedings, a judicial decision or adjudication which will preclude them from bringing a subsequent action at law for services rendered by them while violating the order. *O'Connor v. Hendrick* (N. Y.), 6-432.

c. Revocation of license to teach.

Power of legislature to provide for revocation. — The legislature, in the exercise of its power to regulate public schools, may provide a general system of licenses for persons desiring to engage in teaching, and may authorize the revocation of any such license by the county superintendent of public instruction for certain prescribed causes, inasmuch as a license to teach school has none of the elements of a contract, and does not confer an absolute right, but only a personal privilege to be exercised under existing restrictions, and such restrictions as may thereafter be reasonably imposed. *Stone v. Fritts* (Ind.), 14-295.

Validity of statutes providing for revocation. — The Indiana statute giving the county superintendent of public instruction power to revoke for certain causes licenses to teach theretofore granted by him-

self or predecessors or thereafter granted by the state superintendent of public instruction, does not deny to a teacher whose license is so revoked, access to the courts for any injury done him in person, property, or reputation, in violation of the state constitution. *Stone v. Fritts* (Ind.), 14-295.

Such statute is not invalid as clothing a ministerial officer with judicial power, since in revoking a license to teach the county superintendent does not exercise judicial power in violation of constitutional provisions. *Stone v. Fritts* (Ind.), 14-295.

Construction of charges in proceedings to revoke. — A charge against a public school teacher in a proceeding before the county superintendent to revoke his license that he has refused, without good reason, to board in the community, and on that account is unable to reach his school so as to begin daily sessions of school at a reasonable time, is, in substance, a charge that the accused has failed to open school at a reasonable hour, and the allegation that he has boarded at a place remote from the school is subject to be struck out on motion before the county superintendent and affords no ground for injunctive relief against the revocation of his license. *Stone v. Fritts* (Ind.), 14-295.

Lack of interest and general neglect of duty as ground for revocation. — Charges against a public school teacher in a proceeding to revoke his license before the county superintendent, showing a lack of interest in his work, and a general neglect of his duty as a teacher, and of the business to which his efforts should be directed, are within the terms of the Indiana statute authorizing the revocation of teachers' licenses by the county superintendent for specific causes, and the action of the county superintendent in respect to such charges will not be interfered with by the courts. *Stone v. Fritts* (Ind.), 14-295.

Refusal to attend institutes as ground for revocation. — The Indiana statute providing for township and county institutes for teachers, and commanding their attendance and authorizing a teacher's license to be revoked for general neglect of the business of his school, forms the basis of a charge against a teacher in a proceeding to revoke his license that he has refused without reason to attend the preliminary township institute and the monthly township institute. *Stone v. Fritts* (Ind.), 14-295.

Review of proceedings for revocation by courts. — Under the Indiana statute authorizing the county superintendent of public instruction to revoke for certain enumerated causes licenses to teach, he can revoke only for some statutory cause, and if he attempts to proceed upon grounds wholly outside the statute his action will be without jurisdiction, and upon a sufficient showing a court of equity may intervene to prevent a threatened revocation of a license; but if the superintendent proceeds to hear a charge on grounds fairly within the statute, the accused must follow the procedure provided in the school laws, and, if aggrieved by the de-

cision of the county superintendent, must seek relief by appeal to the state superintendent of public instruction. *Stone v. Fritts* (Ind.), 14-295.

The jurisdiction of a county superintendent to pass upon the question of the revocation of a teacher's license, being shown, allegations in a complaint seeking equitable relief against his action in revoking the license, that he is biased and has no judicial capacity, are without force. *Stone v. Fritts* (Ind.), 14-295.

8. PUPILS IN PUBLIC SCHOOLS.

a. Admission.

What pupils are entitled to free tuition. — Under the Kentucky statutes, the privilege of free tuition in the public schools of a city of the fourth class is limited to children who are *bona fide* residents of the city. *Board of Education v. Foster* (Ky.), 3-692.

A resident child of nonresident parents held not a *bona fide* resident within the statute restricting the benefits of the school system to *bona fide* residents. *Board of Education v. Foster* (Ky.), 3-692.

Under the Nebraska statute providing that the public schools of a district "shall be free to all children between the ages of five and twenty-one years, whose parents or guardians live within the limits of said district," the foster parent of a child of school age is entitled to maintain mandamus to compel the board of education to admit such child to attendance, without the payment of tuition, in the public schools of the city and district in which such foster parent is a *bona fide* resident. To be entitled to such relief, it is not necessary that the foster parent shall have legally adopted the child under the forms of the statutes of adoption. *McNish v. State ex rel. Dimick* (Neb.), 12-986.

b. Suspension or expulsion.

Grounds for suspension or expulsion. — Under the Nebraska Annotated Statutes school boards are authorized to suspend or expel pupils from the public schools for gross misdemeanors or persistent disobedience, without notice to such pupils or their parents and without formal trials. *Vermillion v. State ex rel. Englehardt* (Neb.), 15-401.

Mandamus as remedy to review expulsion. — Mandamus is a proper remedy to review the action of a school board in expelling a pupil, and in such a proceeding the court may inquire into the power of the board to adopt the rule under which the expulsion was made, notwithstanding the statute permitting an appeal to the county superintendent of schools. *Kinzer v. Directors, etc.* (Ia.), 6-996.

Mandamus is the proper proceeding to review the action of a school board in expelling a pupil. *Vermillion v. State ex rel. Englehardt* (Neb.), 15-401.

Method of proof on mandamus. — Although in obtaining information or evi-

dence of the misconduct of a pupil, a school board may adopt any mode of procedure which it deems best, such misconduct can, in an action against such board to procure the reinstatement of such pupil, be proved only by witnesses cognizant of the facts. *Vermillion v. State ex rel. Englehardt* (Neb.), 15-401.

Disposition of case on mandamus. — In mandamus proceedings to review the action of a school board in expelling a pupil, the court, if it upholds the validity of the rule under which the expulsion was made, will not review the board's findings that the plaintiff violated the rule and that an apology tendered by him was insufficient, but will leave the pupil to his statutory remedy of an appeal to the county superintendent of schools. *Kinzer v. Directors, etc.* (Ia.), 6-996.

9. SCHOOL TAXES.

Who may restrain payment of tax. — The board of commissioners of a county does not have such an interest in special school district taxes as will enable it to maintain a suit to enjoin the payment of such taxes by the county treasurer or tax collector to the treasurer of the school district. *School District v. Fremont County* (Wyo.), 11-1058.

SCIENCE.

Opinion evidence on matters of science not related to facts proven, see CRIMINAL LAW, 6 n (7).

SCIENTER.

Allegation of scienter in action for injuries caused by explosion, see EXPLOSIONS AND EXPLOSIVES, 6 a.

Knowledge of relationship as element of incest, see INCEST, 1 a.

Vicious propensities of animals, see ANIMALS, 2 g.

SCIENTIFIC FACTS.

Duty to instruct servant as to scientific facts, see MASTER AND SERVANT, 3 d (1).

Judicial notice of, see EVIDENCE, 1 h.

SCIRE FACIAS.

Enforcement of liability on recognizance, see BAIL, 9.

Revival of judgments, see JUDGMENTS, 14.

SCOPE OF EMPLOYMENT.

Liability of master for acts of servant, see MASTER AND SERVANT, 4.

SCROLL.

See **SEALS.**

SEA.

See **WATERS AND WATERCOURSES.**

SEALS.

Authority of partner to execute sealed instrument in name of firm, see **PARTNERSHIP**, 5 a.

Effect of release under seal, see **RELEASE AND DISCHARGE**, 6.

Liability of undisclosed principal on contract under seal, see **AGENCY**, 3 g (2).

Omission of notarial seal from affidavit, see **AFFIDAVITS**.

Presumption of consideration in sealed instrument, see **CONTRACTS**, 1 d.

Prohibiting use of state seal for advertising, see **CONSTITUTIONAL LAW**, 8.

Recital of seal without actually affixing seal or scroll, see **DEEDS**, 1 b (2).

Statutory abolition of seals, see **RELEASE AND DISCHARGE**, 6.

Use of state seal as trademark, see **CONSTITUTIONAL LAW**, 9 b.

Word "seal" after signature as sufficient seal. — A mortgage with the word "seal" printed after the signature of the mortgagor is a sealed instrument. *Philip v. Stearns* (S. Dak.), 11-1108.

Where in a suit in ejectment the type-written transcript of the record shows that a deed was introduced in evidence, with the word "Seal" inclosed in parenthesis following the names of the grantors signed to the deed, an objection that the deed was without a seal is not sustained. *Cross v. Robinson Point Lumber Co.* (Fla.), 15-588.

Letters "(L. S.)" after signature as sufficient seal. — When the letters "L. S." inclosed with parenthesis, thus (L. S.), appear opposite the signature of the maker of a promissory note in the usual place for the seal but with no reference to it in the body of the instrument, whether written or printed, it is evidence of a purpose to make a sealed instrument. *Langley v. Owens* (Fla.), 11-247.

The character or device (L. S.) printed or written appearing in the usual place for the seal opposite the signature of the maker of a note is not ambiguous, since it has a definite legal meaning and effect when so used; and such character or device does not merely indicate the place where the seal should be put, since when it is so used the statute makes it effective as a seal, and such a character or device is a scrawl or scroll affixed as a seal within the meaning of the statute. *Langley v. Owens* (Fla.), 11-247.

A promise in writing to pay money executed with the character or device (L. S.) printed or written opposite the name of the promisor in the usual place for the seal, has a definite meaning and legal effect, and it

should be presumed that the maker intended it to have such proper legal meaning and effect, nothing to the contrary appearing by the instrument as executed. *Langley v. Owens* (Fla.), 11-247.

Scrawl or scroll as sufficient seal. — Under the Florida statute providing "that a scrawl or scroll, printed or written, affixed as a seal to any written instrument, shall be effectual as a seal," a scrawl or scroll affixed as a seal to the signature of the maker of a promissory note is effectual as a seal, and when such scrawl or scroll, printed or written, appears affixed to the maker's signature in the place usually occupied by the seal, it is, in the absence of anything in the note showing a contrary intention and in the absence of fraud, sufficient to give it effect as a seal. *Langley v. Owens* (Fla.), 11-247.

Sufficiency of seal as question of law. — Where there is no dispute as to the character or device used in the execution of a written instrument, it is for the court to determine whether the device as used constitutes a seal. *Langley v. Owens* (Fla.), 11-247.

Sealing by one of several parties as creating sealed instrument as to others. — A contract signed by the plaintiff and another, with but one seal to the signatures, and that opposite the name of the other party, is not a contract under seal as to the plaintiff, and any action in a court of law against the plaintiff to recover on the contract must be based on a simple contract, and not on a specialty. *Baltimore Pearl Hominy Co. v. Linthicum* (Md.), 20-1325.

Seal after signature as establishing character of instrument. — The mere fact that a seal appears after the signature of the maker of a promissory note, without any acknowledgment or recognition of the seal as such in the body of the note, does not establish its character as a sealed instrument. *Matter of Pirie* (N. Y.), 19-672.

SEAMEN.

1. **WHO ARE SEAMEN**, 1400.
2. **CONSTRUCTION OF AGREEMENT**, 1401.
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 - a. Medical treatment for seamen, 1401.
 - b. Discharge of seamen, 1401.
4. **RIGHTS OF SEAMEN AS AGAINST THIRD PERSONS**, 1402.

1. **WHO ARE SEAMEN.**

Within English Employers' Liability Act of 1880. — The definition of the word "seaman" in the English Merchant Shipping Acts of 1854 and 1894, ought not to be imported into the Employers' Liability Act of 1880, which excludes seamen from its operation. *Macbeth & Co. v. Chislett* (Eng.), 17-102.

In an action under the English Employers' Liability Act of 1880, to recover damages for

personal injuries, where the evidence shows that the plaintiff was injured while employed on board a steamship, owned by the defendants, in helping to unmoor and warp the ship from one berth to another across a large dock in Liverpool; that the ship was taken across by means of a tug and a rope, and was at no moment entirely free from a quay, and did not use her steam or any motive power of her own; and that the plaintiff was not one of the ship's crew and had not been to sea for several years, a recovery by the plaintiff cannot be defeated on the ground that he is a seaman, and, therefore, excluded from the operation of the Employers' Liability Act. *Macbeth & Co. v. Chislett* (Eng.), 17-102.

2. CONSTRUCTION OF AGREEMENT.

Termination of voyage. — Where a fireman signs an agreement for a voyage not exceeding one year from Cardiff to any ports within certain limits, and the agreement provides that the voyage shall end at such port as may be required by the master, and the ship leaves Cardiff, loads cargo in the Black Sea, and goes to Southampton, where she discharges the whole of her cargo, and the fireman claims his discharge and wages at Southampton, but the master requires him to go on to Cardiff, the true construction of the agreement is that the voyage is a voyage of the ship and not of the cargo, that the voyage does not end at Southampton, and that the fireman is bound to go on to Cardiff. *Board of Trade v. Baxter* (Eng.), 9-501.

Under seamen's articles "for a voyage not exceeding two years duration. . . to end at such port in the United Kingdom . . . as may be required by the master," the voyage may come to an end without any express election by the master, and although, if the voyage has in fact so come to an end, the master cannot prolong its continuance by requiring the seaman to go on to a further port, yet the mere facts that the ship has discharged her cargo, that she has arrived in a home port, and that she has there taken on board bunker coal required for a future voyage, do not conclusively show that the voyage has so terminated. *Haylett v. Thompson* (Eng.), 20-849.

Where a neutral merchant vessel is captured, during war, by one of the belligerent powers, and is shortly thereafter destroyed by the captor, there is a "loss" within the provision of the English Merchant Shipping Act that where the service of a seaman terminates before the date contemplated in the agreement by reason of the loss of the ship he shall be entitled to wages up to the time of such termination, but not for a longer period, though the capture without destruction might not constitute a loss. *Sivewright v. Allen* (Eng.), 6-65.

3. MUTUAL RIGHTS AND DUTIES OF SHIP OWNER AND SEAMEN.

a. Medical treatment for seamen.

Duty of master to furnish. — It is the duty of a ship owner to provide proper medi-

cal treatment and attendants for seamen suffering an injury in the service of the ship, and it is the duty of the master where a serious accident occurs, to exercise reasonable judgment as to putting into the nearest available port; but the question as to what constitutes the performance of these duties must be determined with reference to the facts of each particular case. *Krelly v. Kenilworth* (U. S.), 7-202.

Extent of liability of owner. — An injured seaman cannot hold a vessel and the owner liable for expenditures made by others on his behalf, which he is under no obligation to repay, and which were made after he had been cured so far as ordinary medical means were concerned. *Krelly v. Kenilworth* (U. S.), 7-202.

Sufficiency of evidence of failure to perform duty. — Evidence reviewed, in a libel by an injured seaman for failure of the vessel's master to give him due care and attention, and held to show that though the master underestimated the gravity of the injury, he was not guilty of negligence, either in his diagnosis or his treatment, or in refusing to put into the nearest port for medical attention. *Krelly v. Kenilworth* (U. S.), 7-202.

b. Discharge of seaman.

Right to discharge before termination of voyage. — The master of a vessel has no right to discharge a seaman before the termination of the voyage unless he is disqualified for further service or is guilty of a serious breach of the ship's discipline. *Boston v. Ocean Steamship Co.* (Mass.), 14-945.

Right of seaman to recover for wrongful discharge. — A seaman who, being ready and willing to perform his contract, is unjustifiably discharged by the master, is entitled to recover from the owner of the vessel for such wrongful discharge. *Boston v. Ocean Steamship Co.* (Mass.), 14-945.

Consent to discharge as defense to action for wrongful discharge. — The fact that a seaman consented to being discharged before the termination of the voyage upon condition of receiving a full month's wages, which were not paid, is no defense to an action for the discharge. *Boston v. Ocean Steamship Co.* (Mass.), 14-945.

Measure of damages for wrongful discharge. — In an action by seamen for breach of their contract, they are entitled to recover wages from the time of the breach until the final decision of the Court of Appeal, and are also entitled to an allowance for maintenance as damages for the breach, where it appears that during a state of war between the two nations they signed a contract at a neutral port to serve on a neutral merchant vessel on a voyage of a specified duration to any ports within the prescribed geographical limits; that at the time of signing the seamen knew that the vessel had a cargo of coal, which was contraband, but did not know that it was destined to a belligerent port; and that upon the arrival of the vessel at the neutral intermediate port the seamen learned for

the first time that the vessel was going to a belligerent port with the contraband cargo, whereupon they refused to proceed further on the voyage; and this though the belligerent port was within the geographical limits of the voyage, and though the seamen were convicted by a court of competent jurisdiction at the intermediate port and imprisoned on a charge of having impeded the progress of the vessel by refusing to go to sea. *Palace Shipping Co. v. Caine* (Eng.), 9-526.

Although the damage ordinarily suffered by the wrongful discharge of a seaman is the loss of time until by the exercise of a reasonable diligence further employment can be obtained, yet where the seaman is deprived by such wrongful discharge of the benefit of a contract under which the owner of the vessel is bound to transport him to the port of shipment, the expenses incurred in returning to such port form part of the damages to which the seaman is entitled. *Boston v. Ocean Steamship Co.* (Mass.), 14-945.

Receipt of wages by discharged seamen as release or accord and satisfaction. — An unsealed order by the master of a vessel directing the owner to pay to a discharged seaman five days' wages does not constitute a release of the seaman's claim. Nor does such order, if not accepted by the seaman, constitute an accord and satisfaction. *Boston v. Ocean Steamship Co.* (Mass.), 14-945.

Where the evidence is conflicting, it is a question of fact whether a seaman who was illiterate, without money, and away from home, agreed, after having been wrongfully denied further recognition as a member of the crew, to receive a week's wages in full satisfaction of his claim for the wrongful discharge. *Boston v. Ocean Steamship Co.* (Mass.), 14-945.

4. RIGHTS OF SEAMEN AS AGAINST THIRD PERSONS.

Exemption of wages from seizure on process. — Under the provision of the federal statute that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court," a seaman's wages are exempt from seizure not only by writs of attachment issued after judgment but by other proceedings in aid of execution. *Wilder v. Inter-Island Steam Nav. Co.* (U. S.), 15-127.

SEARCHES AND SEIZURES.

See **GAME AND GAME LAWS**, 6; **GAMING AND GAMING HOUSES**, 4; **INTOXICATING LIQUORS**, 9.

Competency of evidence obtained by unlawful search and seizure, see **CRIMINAL LAW**, 6 n (1).

Constitutionality of search and seizure clause of liquor laws, see **INTOXICATING LIQUORS**, 3 e.

Immunity from unreasonable searches and seizures, see **CONSTITUTIONAL LAW**, 12.

Procuring search warrant as malicious prosecution, see **MALICIOUS PROSECUTION**, 1 a.
Seizure and destruction of unwholesome or adulterated articles of food, see **FOOD**, 4.

Validity of statute authorizing issuance of warrant on affidavit made on information and belief. — There is nothing in the constitution of Indiana which forbids the issuance of a search warrant based upon an affidavit on information and belief and not setting out the facts upon which the belief is founded, and, consequently, the provision of the Indiana statute of 1907 relative to intoxicating liquors which authorizes the issuance of a search warrant on such an affidavit cannot be held unconstitutional. *Rose v. State* (Ind.), 17-228.

Sufficiency of information for warrant. — An information is insufficient to justify the issuance of a search warrant if it fails to disclose facts and circumstances on which the informant bases his suspicion that an offense has been committed which renders it proper to issue a warrant. *Rex v. Kehr* (Ont.), 6-612.

In actions for the abatement of liquor nuisances, an affidavit made on information and belief and not otherwise corroborated does not state the facts required by the statute and confers no jurisdiction on the court to issue a search warrant. *State ex rel. Register v. McGahey* (N. Dak.), 1-650.

Sufficiency of description of premises in warrant and affidavit. — A search warrant and the affidavit therefor which describe the place to be searched as the "room, house, outhouse, yard, garden, and appurtenances thereto belonging, occupied by said Samuel A. Rose, and situated upon lot thirty, on Market street, in the original plat of New Bedford, now Monon, in Monon township, White county, Indiana," are sufficient as regards their description of the premises to be searched. *Rose v. State* (Ind.), 17-228.

Review of proceedings. — An appellate court may grant a writ of certiorari to bring up for review a search warrant and the proceedings in which it has been issued, and may quash the warrant if it is shown to have been issued improperly. *Rex v. Kehr* (Ont.), 6-612.

SEARCH WARRANTS.

See **SEARCHES AND SEIZURES**.

SEASHORE.

See **WATERS AND WATERCOURSES**, 3 a.
Ownership of tide lands, see **STATES**, 1.

SEAWORTHINESS.

See **SHIPS AND SHIPPING**, 2 c.

SECONDARY EVIDENCE.

See EVIDENCE, 5.

SECOND CONVICTION.

Cumulative punishment, see CRIMINAL LAW, 2 b.

SECOND COUSIN.

Relationship disqualifying judge to act, see JUDGES, 4 b (3).

SECOND TRIAL.

Validity of second trial after appeal, see CRIMINAL LAW, 5 b.

SECRECY.

Proceedings of grand jury, see GRAND JURY, 6.

SECRETARY OF STATE.

Right to additional compensation when acting as governor, see STATES, 2 a.

SECRETARY OF WAR.

Jurisdiction over navigable waters, see WATERS AND WATERCOURSES.

SECRET SOCIETIES.

Power of school board to prohibit secret societies among pupils, see SCHOOLS, 5 a.

SECTARIANISM.

Power of school board to prohibit public school teachers from wearing sectarian garb, see SCHOOLS, 5 c.

SECURITY.

Collateral security, see PLEDGE AND COLLATERAL SECURITY.

Requiring security for fines, see FINES, 1 b.
State securities, see STATES, 6.

SECURITY FOR COSTS.

See COSTS, 10.

SEDUCTION.

1. CIVIL LIABILITY FOR SEDUCTION, 1403.
2. CRIMINAL LIABILITY FOR SEDUCTION, 1403.

- a. Statutes creating offense, 1403.
- b. Nature and elements of offense, 1403.
- c. Prosecution and punishment, 1404.
 - (1) Indictment, 1404.
 - (2) Defenses, 1404.
 - (3) Evidence, 1404.
 - (4) Cancellation of bond given to stay prosecution, 1404.

Aggravation of damages in breach of promise cases, see BREACH OF PROMISE OF MARRIAGE, 2 c f.

Limitation of action for seduction of daughter, see LIMITATION OF ACTIONS, 4 a (2) (a).

Marriage to stop prosecution for seduction as procured by duress, see MARRIAGE, 3 a.

1. CIVIL LIABILITY FOR SEDUCTION.

Right of action of woman seduced against seducer. — Except where there are confidential relations or peculiar circumstances, a woman has no right of action for seduction against her seducer. *Welsund v. Schueller* (Minn.), 8-1115.

Use of force and want of consent as defense to action by woman seduced. — In an action under a statute authorizing a seduced woman to recover damages from her seducer, the fact that the intercourse was effected by force and against the plaintiff's will is no defense. *Velthouse v. Alderink* (Mich.), 15-1111.

2. CRIMINAL LIABILITY FOR SEDUCTION.

- a. Statutes creating offense.

Validity of statute. — The provision of the Texas seduction statute that if the parties marry each other at any time before the accused pleads to the indictment, the prosecution shall be suspended but not dismissed, and shall be continued on the docket from term to term for two years and within that time shall be revived for any abandonment of the wife, or misconduct on the part of the defendant that would, broadly stated, be ground for divorce, is void both as being contrary to the bill of rights guaranteeing to every person accused of crime a speedy public trial, and as making abandonment or conduct authorizing a divorce the equivalent of the crime of seduction. *Waldron v. State* (Tex.), 14-342.

- b. Nature and elements of offense.

Sufficiency of promise of marriage. — The crime of seduction is not complete unless the illicit intercourse is had under promise of marriage. The promise must be an unconditional one. It must be of such character and made under such circumstances that the one to whom it is made might reasonably rely upon it. A promise conditional upon pregnancy as the result of such illicit intercourse is not such promise. *Russell v. State* (Neb.), 15-222.

Who is "unmarried female." — A

woman who has been married and divorced is not an "unmarried female" within the meaning of the Virginia statute (Code, 1904, § 3667) making it a felony to seduce an unmarried female of previous chaste character. Such statute, being highly penal, must be strictly construed. *Jennings v. Com.* (Va.), 17-64.

Nature of offense of encouraging seduction. — Encouraging illicit intercourse between a girl and her seducer after she has been seduced is not encouraging the seduction of the girl, within the meaning of the Children's Act 1908, § 17, making it an offense for any one having the care and custody of a girl under sixteen years of age to encourage her seduction. The word "seduction" as used in the statute means inducing a girl to surrender her chastity for the first time. *Rex v. Moon* (Eng.), 19-442.

c. Prosecution and punishment.

(1) Indictment.

Necessity and sufficiency of corroboration of prosecutrix before grand jury. — Under the Alabama statute providing that no indictment for seduction shall be had on the uncorroborated testimony of the woman (Code 1907, § 7776), an indictment cannot be sustained merely by showing that witnesses other than the woman were before the grand jury. It must appear that her testimony was corroborated. *Allen v. State* (Ala.), 19-867.

(2) Defenses.

Infancy. — Infancy is not a defense to a prosecution for seduction under a promise of marriage. *State v. Brock* (Mo.), 2-768.

Unaccepted offer of marriage. — The obtaining of carnal knowledge by means of a false or feigned promise to marry completes the crime of seduction. Consequently a subsequent unaccepted offer of marriage though admissible for the purpose of showing the good faith or falsity of the original promise to marry, is not a defense to a prosecution for seduction. *Williams v. State* (Miss.), 15-1026.

(3) Evidence.

Presumption of chastity of prosecutrix. — Under the provision of the South Carolina statute, that no conviction for seduction shall be had "if on the trial it is proved that such woman was at the time of the alleged offense lewd and unchaste," the chastity of the prosecutrix is presumed in the first instance, and is not required to be proved by the state as one of the ingredients of the crime. *State v. Turner* (S. Car.), 17-88.

Admissibility of evidence of specific acts of lewdness on part of prosecutrix. — In a prosecution for seduction, evidence of specific acts of lewdness on the part of the prosecuting witness is incompetent. If the prosecuting witness was of good repute for chastity prior to the alleged seduction she is within the protection of the statute.

The evidence upon this point should be confined to general reputation for chastity. *Russell v. State* (Neb.), 15-222.

Admissibility of prosecutrix's teacher's certificate to show reputation for chastity. — A teacher's certificate held by the prosecutrix at the time of the alleged seduction is not competent evidence of reputation for chastity. *Russell v. State* (Neb.), 15-222.

Necessity of corroboration of prosecutrix. — Under the South Carolina statute which forbids a conviction for seduction on the uncorroborated testimony of the woman charged to have been seduced, the state, in a prosecution for that crime, must prove beyond a reasonable doubt, with evidence corroborative of the testimony of the prosecutrix, that the latter was induced to have unlawful sexual intercourse with the accused by means of his deception and promise of marriage, and where there is no evidence corroborative of the testimony of the prosecutrix on this material issue, the defendant is entitled to the direction of a verdict of acquittal. *State v. Turner* (S. Car.), 17-88.

Sufficiency of corroboration of prosecutrix. — The Alabama statute providing that no indictment for or conviction of seduction shall be had on the uncorroborated testimony of the woman (Code 1907, § 7776) does not require corroboration as to every material fact which is a necessary element of the offense. The corroborative evidence is sufficient if it extends to a material fact and satisfies the jury that the woman is worthy of credit. *Allen v. State* (Ala.), 19-867.

The requirement of the Nebraska statute that the evidence of the female in a criminal prosecution for seduction must be corroborated relates both to the act of illicit intercourse and the promise of marriage, and the existence of one of these facts does not necessarily prove the existence of the other, or furnish the corroboration required by the statute. *Russell v. State* (Neb.), 15-222.

The circumstances relied upon as corroborating the evidence of the prosecuting witness in such a prosecution as to the promise of marriage must point so plainly to the truth of her testimony and be of such probative force as to equal the testimony of a disinterested witness. *Russell v. State* (Neb.), 15-222.

(4) Cancellation of bond given to stay prosecution.

Discovery of evidence of innocence of accused as ground for cancellation. — The discovery, after execution of a bond under the Georgia Penal Code to stop a prosecution for seduction, by the person charged therewith, of proof exonerating him from the crime, is not ground for the cancellation of such bond. *Griffin v. Griffin* (Ga.), 14-866.

SEIZIN.

Necessity to right to dower, see *DOWER*, 1.

SEIZURE.

See SEARCHES AND SEIZURES.

Foreign vessels, see INTERNATIONAL LAW.

Neglected animals, see ANIMALS, 5.

Unwholesome or adulterated articles of food, see FOOD, 4.

SELECTION.

Filing selection list, see PUBLIC LANDS.

Selecting jurors, see JURY, 4.

SELF-CRIMINATION.

Compelling accused to try on garment, see CRIMINAL LAW, 6 n (1).

Ground for refusal of discovery, see DISCOVERY.

Privilege of witnesses, see WITNESSES, 4 g.

Using shoes of accused to identify tracks, see CRIMINAL LAW, 6 n (1).

Waiver of privilege, see WITNESSES, 45 c.

SELF-DEFENSE.

See ASSAULT AND BATTERY, 1 e; HOMICIDE, 5 b.

Plea of self-defense in action for assault and battery, see ASSAULT AND BATTERY, 2 c.

SELF-EXECUTING CONSTITUTIONAL PROVISIONS.

See CONSTITUTIONAL LAW, 24.

SENATORS.

See UNITED STATES.

Nomination of senators, see ELECTIONS, 1 c.

SENTENCE.

See CRIMINAL LAW, 7 b; EMBEZZLEMENT, 6.

SEPARABLE PROVISIONS.

Effect of ordinance valid in part and void in part, see MUNICIPAL CORPORATIONS, 5 f (1).

SEPARATE APPEALS.

See APPEAL AND ERROR, 5 a.

SEPARATE PROPERTY OF MARRIED WOMEN.

Effect of decree of divorce, see DIVORCE, 6 c.

Right to curtesy in wife's equitable separate estate, see CURTESY, 3.

SEPARATE TRIALS.

Right of joint defendants, see CRIMINAL LAW, 6 e.

SEPARATION.

Agreement of separation as barring right to dower, see DOWER, 2 b.

Contracts inducing separation of husband and wife, see CONTRACTS, 4 a.

Separation of husband and wife as forfeiture of homestead, see HOMESTEAD, 6.

Separation of jurors, see JURY, 7 c.

Separation of white and colored passengers, see CARRIERS, 6 b.

Separation of white and colored races in public schools, see SCHOOLS, 4 a.

SERVANT.

See MASTER AND SERVANT.

SERVICES.

See MASTER AND SERVANT, 1 d.

Character of action for services as proceeding *in personam*, see ACTIONS.

Compensation for extra services, see MASTER AND SERVANT, 1 d.

Compensation for salvage services, see SALVAGE.

Compensation for services generally, see WORK AND LABOR.

Competency of physician to testify as to nature of services rendered to deceased person, see WITNESSES, 3 c (2).

Contract for services distinguished from sale, see FRAUDS, STATUTE OF, 9 a.

Contract of employment as affected by statute of frauds, see FRAUDS, STATUTE OF, 10.

Husband's right to wife's services, see HUSBAND AND WIFE, 3 a.

Legal services rendered to infant as necessities, see INFANTS, 2 a.

Liability of married woman for services rendered to husband, see HUSBAND AND WIFE, 5.

Limitation of actions for services, see LIMITATION OF ACTIONS, 4 a (2) (a).

Loss of services as damages for breach of contract, see DAMAGES, 9 b.

Loss of services during infancy as element of damage for personal injuries to infant, see DAMAGES, 9 c.

Parent's right to child's services, see PARENT AND CHILD, 1 c.

Partner's right to compensation for services to firm, see PARTNERSHIP, 4 a.

Part performance of oral contract for services, see FRAUDS, STATUTE OF, 1 d (1).

Physicians' and surgeons' right to recover for professional services, see PHYSICIANS AND SURGEONS, 4.

Proof of value, see EVIDENCE, 8 b (2).

Recovery for services rendered under verbal contract, see FRAUDS, STATUTE OF, 1 d (5).

Surviving partner's rights to compensation for services, see **PARTNERSHIP**, 7.

Venue of action for services rendered, see **VENUE**, 1.

Verbal promise to pay for services to a third person, see **FRAUDS**, **STATUTE OF**, 6 a.

Work performed by purchaser as part payment for goods purchased under verbal contract, see **FRAUDS**, **STATUTE OF**, 9 b (4).

SERVICE OF PROCESS.

See **SUMMONS AND PROCESS**.

Want of personal service of process as ground for vacating judgment, see **JUDGMENTS**, 9 d.

SERVIENT TENEMENTS.

See **EASEMENTS**.

SERVILE LABOR.

Selling groceries on Sunday as servile labor, see **SUNDAYS AND HOLIDAYS**, 1 b.

SET-OFF AND COUNTERCLAIM.

1. SET-OFF.

a. In general.

b. In action against joint defendants.

c. In actions by and against executors and administrators.

d. Pleading.

e. Set-off in equity.

2. RECoupMENT.

3. COUNTERCLAIM.

Action by servant for wrongful discharge, see **MASTER AND SERVANT**, 1 c (2).

Action to recover money deposited, see **BANKS AND BANKING**, 5 c.

Allowance of set-off in suit for accounting, see **ACCOUNTS AND ACCOUNTING**.

Application of equitable doctrine, see **GARNISHMENT**, 3 b.

Dismissal of action after set-off filed, see **DISMISSAL, DISCONTINUANCE, AND NON-SUIT**, 1 d.

Mutual debts set off in bankruptcy, see **BANKRUPTCY**, 10.

Necessity of special plea, see **GARNISHMENT**, 3 b.

Pleading statute of limitations in reply to counterclaim, see **LIMITATION OF ACTIONS**, 8 b (1).

Plea of recoupment as acknowledgment of debt, see **LIMITATION OF ACTIONS**, 5 d.

Rent as set-off against taxes and improvements, see **EJECTMENT**, 8 b.

Right to set off debts against claimant for trespass, see **TRESPASS**, 2 c.

Set off against taxes, see **TAXATION**, 7.

Set off of judgments in equity, see **JUDGMENTS**, 13.

1. SET-OFF.

a. In general.

Set-off of claim assigned to defendant. — In an action to recover a debt due from the defendant to the plaintiff, the defendant is entitled to set off a debt originally due from the plaintiff to a third person who has assigned it to the defendant. *Bennett v. White* (Eng.), 19-321.

In action by nonresident against resident. — In an action on contract by a nonresident against a resident the defendant may have an equitable set-off of a claim against the plaintiff for the breach of another contract between them. *Ewing-Merkel Electric Co. v. Louisville Light, etc., Co.* (Ark.), 19-1041.

Set-off in dissolution of national bank against assignee of stockholder. — Upon the dissolution of a national bank, the claim of a stockholder's assignee to a distributive share of the corporate assets is not subject to a set-off on account of a debt due by the assignor to the bank, where it appears that, though the debt was created before the assignment of the stock, the stock was assigned before the bank commenced to liquidate. *Bridges v. National Bank* (N. Y.), 7-285.

Right of set-off not subordinate to right of exemption. — The right of set-off is not subordinate to the right of exemption from execution, and except for the rule that a claim in contract cannot be set off against one founded in tort, the defendant in an action for damages for the conversion of personal property exempt from execution would be entitled to set off against any judgment for the plaintiff a judgment held by him against the plaintiff. *Caldwell v. Ryan* (Mo.), 14-314.

Set-off of claim of damages for a tort. — Under the Missouri statute providing that "if any two or more persons are mutually indebted in any manner whatsoever, and one of them commence an action against the other, one debt may be set off as against the other, although such debts are of a direct nature," the demands to be set off must come under the classification of debts, and a demand of damages for a tort is not a debt embraced within the statute. *Caldwell v. Ryan* (Mo.), 14-314.

Right of defendant to waive tort and set off claim in assumpsit. — The defendant in an action at law on a liquidated demand may set off the value of goods belonging to him which have been converted by the plaintiff to his own use, as he has the right to waive his action for damages against the plaintiff for the tort and to bring *indebitatus assumpsit* for the value of the goods converted. *Tidewater Quarry Co. v. Scott* (Va.), 8-736.

b. In action against joint defendants.

Set-off of individual claim of one defendant. — A plea which proposes to set off an individual demand of one of two de-

fendants against a joint demand of the plaintiff is bad, since demands, to be the subject of set-off must be mutual between all the parties to the action. *Priest v. Dodsworth* (Ill.), 14-340.

In a suit against the two makers of a promissory note, a plea by one maker setting up his individual demand against the plaintiff is not relieved of the objection that it attempts to set up an individual demand against a joint demand, by the fact that the other defendant pleads separately that he signed the note as surety, each plea being required to be complete in itself and form a distinct issue. *Priest v. Dodsworth* (Ill.), 14-340.

Individual claim of one defendant growing out of same transaction. — In an action against the maker and indorser of a promissory note, joined in the same suit, the indorser may set off an individual claim against the plaintiff growing out of the transaction which gave rise to the execution of the note. *Wilson v. Exchange Bank* (Ga.), 2-597.

c. In actions by and against executors and administrators.

Necessity of presentation of claim used as set-off for allowance or rejection. — In Washington, under Pierce's Code, section 1093, in an action brought by an executor or administrator, a demand against the estate may be offset to the extent of plaintiff's recovery without presentation for allowance or rejection under Pierce's Code, section 2531. The section first referred to expressly authorizes a set-off or counterclaim in an action brought by an executor or administrator. *Mendenhall v. Davis* (Wash.), 17-179.

Set-off of debt created to administrator since decedent's death. — It is an established rule in courts of law, if executors sue for a debt created to them since the testator's death, the defendant cannot set off a debt due to him from the testator. If the defendant could not set off in such case neither could the executor, if he was the defendant, for the rule must be mutual. *Rich v. Hayes* (Me.), 8-304.

Set-off by administrator of claim with which decedent had no connection. — An administrator cannot offset against a judgment rendered upon a liability of the decedent another judgment on a claim with which the decedent had no connection in his lifetime, purchased by the administrator with the funds of the estate for that purpose after the death of his intestate. *Rich v. Hayes* (Me.), 8-304.

Set-off of judgment recovered by administrator in individual capacity. — In an action against an administrator, the defendant held to have no right, under the Maine statutes, to set off a judgment awarded to the defendant in an individual capacity. *Rich v. Hayes* (Me.), 8-304.

d. Pleading.

Formality with which set-off must be pleaded. — The object of the Virginia statute providing that "in a suit for any debt, the defendant may, at the trial, prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise," is simply to give the plaintiff more particular information of the ground of defense than is generally disclosed by a plea, so as to enable the parties to prepare more intelligently for the trial, and so as to prevent surprises which would result in injustice, but the statement of the set-off does not constitute the issue to be tried, and it is not intended that the particulars of the claim or the ground of defense shall be set forth with the formality or precision of a declaration or plea. *Tidewater Quarry Co. v. Scott* (Va.), 8-736.

e. Set-off in equity.

In action by nonresident. — In an action by a nonresident against a resident, a court of equity may permit the defendant to set off a claim against the plaintiff in order to prevent irremediable injustice, though there is no such mutuality between the two claims as is required by the statute regulating the right of set-off. *Porter v. Roseman* (Ind.), 6-718.

2. RECOURSEMENT.

Charge of court in action against owner and contractor for price of building materials. — In an action against two builders and a contractor for building materials sold and delivered, where the evidence tends to show that the plaintiff agreed to furnish materials to the contractor as rapidly as wanted, and that all of the defendants were liable for payment, and the jury are instructed that the contractor is entitled to recoup against the plaintiff's claim such sum as they find "the defendant" lost by reason of the delay in furnishing the materials, it is not erroneous to refuse an instruction that the builders are entitled to recoup such sum as the jury may find "the defendants" lost by reason of such delay. *Oldenburg v. Dorsey* (Md.), 5-841.

3. COUNTERCLAIM.

Claim accruing since commencement of action. — In an action to foreclose a chattel mortgage upon grain the defendant mortgagor cannot interpose a counterclaim based on an alleged conversion by the plaintiff of property other than that covered by the mortgage, where such conversion has occurred since the commencement of the action. The only cause of action which can be interposed as a counterclaim, is one which existed and was owned by the defendant at the time of the commencement of the action. *Strehlow v. McLeod* (N. Dak.), 17-423.

In action for slander. — The North Dakota statute permitting a defendant to

plead a counterclaim does not authorize one slander to be set up against another, although both were uttered at the same time and place and in the same conversation. *Wrege v. Jones* (N. Dak.), 3-482.

Counterclaim in action by administrator. — Under the Washington statutes, the defendant in an action brought by an administrator on a contract may interpose as a counterclaim a demand against the intestate which belonged to the defendant at the time of the intestate's death and which matured prior to the commencement of the action, though it did not mature until after the intestate's death. *Fishburne v. Merchants Bank* (Wash.), 7-848.

Counterclaims based on inconsistent legal theories. — Under the Wisconsin statute authorizing a defendant to set up "as many defenses and counterclaims" as he may have, "whether they be such as were formerly denominated legal or equitable, or both," a defendant may set up counterclaims based on inconsistent legal theories, unless they are so repugnant in fact that the proof of one disproves the other. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Under the Washington statute providing that in an action brought by an administrator demands against his intestate which belonged to the defendant at the time of the intestate's death may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased, the defendant in such an action may set up as a counterclaim a demand of the prescribed nature which was not filed with the plaintiff as administrator within the time prescribed by statute, but such counterclaim is limited in its effect to the extinguishment of the claim sued on, and the defendant is not entitled to judgment over against the estate for any excess. *Fishburne v. Merchants Bank* (Wash.), 7-848.

Failure of plaintiff to reply to counterclaim. — In an action by a corporation against its managing agent for an accounting, where the defendant sets up a counterclaim to which the plaintiff does not reply, the defendant is entitled to a judgment for the amount thereof, and therefore it is error for the court on finding that the defendant has fully accounted for the money received by him, not to find also in his favor for the amount of his counterclaim. *Maggie Gold Min. Co. v. Sherman* (S. D.), 20-595.

Failure to move to strike out improper counterclaim. — It seems that where an improper counterclaim is interposed by the defendant in an action the plaintiff may object on the trial to the introduction of any evidence in its support, even though he has replied to it and has failed to make any motion to strike it out. *Strehlow v. McLeod* (N. D.), 17-423.

SETTLEMENT.

See ACCOUNTS AND ACCOUNTING; COMPROMISE AND SETTLEMENT.

Disaffirmance of marriage settlement by infant, see INFANTS, 2 b (1).
Paupers' settlement, see POOR AND POOR LAWS.
Power of insurance agent to settle claims for premiums, see INSURANCE, 2 b.

SEVENTH DAY BAPTISTS.

Application of Sunday laws to Seventh Day Baptists, see SUNDAYS AND HOLIDAYS.

SEVERAL CONTRACTS.

Partial invalidity, see CONTRACTS, 4 a.

SEVERAL WRITINGS.

As constituting one transaction, see FRAUDS, STATUTE OF, 3.

SEWAGE.

Liability for discharging sewage into stream, see WATERS AND WATERCOURSES, 3 b (5).

SEWERS.

Liability of municipality for injuries in construction, maintenance, and repair of sewers, see MUNICIPAL CORPORATIONS, 9 b (2).

SEXUAL INTERCOURSE.

See ADULTERY; FORNICATION; INCEST; RAPE; SEDUCTION.
Criminal conversation, see HUSBAND AND WIFE, 7.
Illicit sexual intercourse as consideration for promise of marriage, see BREACH OF PROMISE OF MARRIAGE, 2 a.
Proof by wife of nonaccess of husband, see BASTARDS; EVIDENCE, 2.
Proof by wife of nonaccess of husband before marriage, see DIVORCE, 5 a.
Refusal of sexual intercourse as desertion, see DIVORCE, 2 c.
Soliciting sexual intercourse as a tort, see TORTS.

SHACKLES.

Right to be free from shackles during trial, see CRIMINAL LAW, 6 c (5).

SHADE TREES.

Compensation to abutting owner for destruction of shade trees in streets, see STREETS AND HIGHWAYS, 3 d.
Right to plant in streets, see STREETS AND HIGHWAYS, 5 c.

SHADOWING.

See DETECTIVES.

SHALL.

Meaning of word "shall" in statute, see STATUTES, 4 d.

SHARES.

Corporate stock, see CORPORATIONS, 8 a (2).

SHARING PROFITS.

Sharing profits as element of partnership, see PARTNERSHIP, 1 a.

SHELLEY'S CASE, RULE IN.

Application of rule to devises, see WILLS, 8 c (12).

Jurisdiction in which rule obtains. — The rule in Shelley's Case is a part of the common law of Iowa, being enforceable as a rule of property. *Doyle v. Andis* (Ia.), 4-18.

Effect of limitation over on operation of rule. — A devise construed and held to give an estate in fee under the rule in Shelley's Case, the operation of the rule not being prevented by the limitation over. *Tyson v. Sinclair* (N. Car.), 3-397.

Application to personalty. — In construing trusts created by a settlement of personal property, whether created voluntarily or upon a valuable consideration, there is no inflexible rule of law requiring the rule in Shelley's Case to be applied, but the intention of the settlor or donor as expressed in the instrument itself will be carried out. *Sands v. Old Colony Trust Co.* (Mass.), 12-837.

SHELL FISH.

See FISH AND FISHERIES.

SHERIFFS AND CONSTABLES.

1. TENURE OF OFFICE, 1409.
2. POWERS, DUTIES, AND LIABILITIES, 1409.
3. DEPUTIES, 1410.

Duty to collect fines, penalties, and forfeitures, see FINES, 1 a.

Liability for false imprisonment, see FALSE IMPRISONMENT.

Right of constable to recover reward, see REWARDS.

Right of sheriff to subrogation, see SUBROGATION, 1 b.

Validity and effect of sheriff's deed, see EXECUTIONS, 8.

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1. TENURE OF OFFICE.

Removal for failure to prevent lynching of prisoner. — A sheriff is guilty of "neglect" for which he may be removed from office (Const. Ala. 1901, § 138) where he fails to see to it that the jail is made as secure against attack as the circumstances will permit in order to protect from mob violence a prisoner whose crime has excited great popular indignation, especially when the probability that the prisoner will be lynched has been suggested to him. *State v. Cazalas* (Ala.), 19-886.

2. POWERS, DUTIES, AND LIABILITIES.

Liability for failure to execute process. — A sheriff is not liable for his failure to return an execution within the time prescribed by statute, if such failure is due to his obedience of instructions given him by the execution creditor's attorney of record. *Bickham v. Kosminsky* (Ark.), 4-978.

In a suit on a sheriff's bond for failure to execute or return final process, the presumption is that the plaintiff has been damaged to an amount equal to the execution, and the burden is on the defendants to mitigate the damages or show that the plaintiff was not injured by the breach of official duty. But in a suit for damages for failing to execute an attachment or other mesne process, there is no such presumption, and the burden is on the plaintiff, who must allege and prove actual damages in order to recover on the bond. *Beek, etc., Hardware Co. v. Knight* (Ga.), 2-9.

Right to demand indemnity bond. — Under the Arkansas statute relative to the levying of executions on personal property a constable in whose hands an execution has been placed for levy cannot arbitrarily demand an indemnity bond from the judgment creditor in every case, but is entitled to such bond only where an adverse claim is actually made to the property upon which he has levied or proposes to levy, or where such circumstances exist as would justify a prudent person in apprehending litigation relative thereto; and in demanding the bond the officer must act in good faith. *Mayfield Woolen Mills v. Lewis* (Ark.), 16-1041.

A constable who has levied an execution upon personal property found in the possession of the judgment debtor and admitted by the latter to be his property, is not justified in demanding an indemnity bond from the judgment creditor, and in refusing to sell the property without such bond, simply because he has heard that the judgment debtor contemplates filing a petition in bankruptcy, or because he thinks that some of the property may belong to another person although no adverse claim thereto has been made. *Mayfield Woolen Mills v. Lewis* (Ark.), 16-1041.

Effect of seizure of property in bankruptcy proceedings. — It seems that in an action against a constable and the sureties on his official bond to recover the statutory penalty for refusal by the officer to sell prop-

erty levied upon under execution, it would be a complete defense to show that the property in question was seized under bankruptcy proceedings, instituted by the judgment debtor, before the arrival of the day to which the execution sale had been adjourned. *Mayfield Woolen Mills v. Lewis* (Ark.), 16-1041.

Liability for wrongful sale. — In an action for the wrongful sale of attached property, where it appears that the original seizure of the property was unauthorized and wrongful, the subsequent sale under orders of the justice's court can be justified only by showing that the plaintiff's rights were adjudicated before ordering a sale. *Albie v. Jones* (Ark.), 12-433.

In an action against a constable and the sureties on his bond for the unlawful sale of the plaintiff's property in attachment proceedings to which the plaintiffs were not made parties, the defendants cannot justify under writs of attachment, although regular upon their face, against other parties. *Albie v. Jones* (Ark.), 12-433.

Effect of subsequent determination that proceedings are void. — In an action against a constable and the sureties on his bond for the unlawful sale of the plaintiff's property in attachment proceedings to which the plaintiffs were not made parties, the record of a suit in chancery against the plaintiffs and others for the purpose of having declared void the deed of trust under which the plaintiffs claimed to be the owners of the property sold under the attachment, which suit resulted in a decree adjudging the deed to be valid and the attachment judgments to be void, is not competent evidence upon the question of the jurisdiction of the officer in selling the plaintiff's property, as that question must be determined according to the facts existing at the time of the seizure and sale. *Albie v. Jones* (Ark.), 12-433.

Recital in sheriff's deed as evidence of authority. — A recital in a sheriff's deed, that the sale of the property was made by virtue of an execution issued out of the Circuit Court, is sufficient to show that the officer had authority to sell, although it would be well and productive of convenience for the sheriff to recite in his deed both the judgment and execution under which he acted, thereby pointing to his authority to sell, and facilitating the purchaser in tracing his title. *Johnson v. McKinnon* (Fla.), 14-180.

Rearrest of prisoner released without authority. — It is the duty of a sheriff who has released a prisoner from jail without lawful authority, to retake such prisoner on his own motion, under the original order of commitment, and no formal proceedings in the district court are necessary for that purpose. *Campion v. Gillan* (Neb.), 16-319.

Construction of penal statute giving action against officer. — The Arkansas statute which authorizes an action against a constable and the sureties on his official bond to recover a penalty for the neglect or refusal of the officer to sell property levied upon under an execution, is highly penal.

and its terms should not be extended by construction to cases not within its plain meaning. *Mayfield Woolen Mills v. Lewis* (Ark.), 16-1041.

Action against defaulting bidder after expiration of term of office. — A sheriff whose term of office has expired may sue to recover from a defaulting bidder the difference between the amount of his bid at a sale held by the sheriff during his term of office and the amount realized at a subsequent sale of the property. *Dickson v. McCartney* (Pa.), 18-500.

3. DEPUTIES.

Effect of illegal agreement as to compensation. — A deputy sheriff, duly appointed and entitled by statute to receive from the sheriff a certain compensation, may recover the full statutory amount notwithstanding an illegal agreement with the sheriff to serve for a less sum. In such case the rule that a party to an illegal contract cannot enforce any right under it is not applicable because the claim is under the statute and not under the illegal contract. *Bodenhofer v. Hogan* (Ia.), 19-1073.

SHERIFF'S DEEDS.

Reformation of sheriff's deeds, see REFORMATION OF INSTRUMENTS.

SHERMAN ACT.

See MONOPOLIES AND CORPORATE TRUSTS, 4.

SHIPPERS.

Persons loading cars as licensees on railroad grounds, see RAILROADS, 8 e (3).

SHIPPING FACILITIES.

Discrimination by carrier, see CARRIERS, 4 h.
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SHIPS AND SHIPPING.

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2. CHARTER PARTIES, 1411.
 - a. Distinction between demise and contract of affreightment, 1411.
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Rights and duties of ship owner as to seamen, see SEAMEN, 3.

Taxation of vessels, see TAXATION, 3 f.

1. WHAT ARE APPURTENANCES OF VESSEL.

In general. — On a sale of vessels, its appurtenances and necessities, only those things will be considered appurtenances and necessities which are really necessary to the vessel in carrying on its accepted business; and there is no implied warranty that duplicates shall be furnished. *Gazzam v. Moe* (Wash.), 5-650.

Disused crank shaft and rudder. — The crank shaft and rudder of a steam vessel, which are not in use and are not necessary to the operation of the vessel but have been displaced by similar appliances, do not pass to the purchaser under a sale of the vessel, its appurtenances, and necessities. *Gazzam v. Moe* (Wash.), 5-650.

2. CHARTER PARTIES.

a. Distinction between demise and contract of affreightment.

In general. — A distinguishing feature between a demise of a vessel and a contract of affreightment is that under a demise the lessee assumes the duties and liabilities, in a large measure at least, of the owner, while under a contract of affreightment the agreement is for a special service to be rendered by the owner of the vessel. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Presumption against demise. — In construing a charter party, the presumption primarily is against a demise, and the contract is to be construed as one of affreightment, unless the terms show a clear intentment to the contrary. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Intention of parties. — Subject to the rule that in case of doubt as to its nature a charter-party must be held to be a contract of

affreightment rather than a demise, the instrument must be construed in the same manner as other contracts, and the true intention of the parties, when ascertained, must prevail. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Clause of covenant and not of demise. — A clause in a charter-party consists exclusively of words of covenant and not of demise, where it provides that the first party "does covenant and agree on the freighting and chartering of the said vessel unto" the second party "for one voyage." *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Use of word "chartering." — The word "chartering," in a charter-party, does not necessarily mean the letting of a ship by way of demise, but is consistent with the idea of a contract of affreightment. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Use of word "hire." — The use of the term "hire" in a charter-party is not inconsistent with the idea of a contract of affreightment, especially where it is used only in a covenant on the part of the charterer for the payment of the stipulated freight. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Use of terms "acceptance" and "delivery" of vessel. — Where a charter-party provides for the "acceptance" of the vessel by the charterer and for the "delivery" of the vessel to the owner at the port of destination, the use of the terms "acceptance" and "delivery" indicates almost conclusively an intention on the part of the parties that the contract shall be a demise. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Meaning of word "freighting." — As used in a charter-party, the word "freighting" signifies the loading with goods or other commodities for transportation. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Effect of provision imposing duties upon owner. — Where a charter-party contains provisions implying that the owners shall have an oversight of the ship and shall see that it is kept in proper condition during the voyage, and that they shall engage in freighting the vessel with the understanding that no goods shall be laden thereon except such as the charterer shall designate, the provisions indicate that a contract of affreightment is intended and are inconsistent and incompatible with the idea of a demise. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Effect of provision imposing duties upon charterer. — A provision in a charter-party that the charterer shall pay all the wages of the crew, excepting the captain, all port charges and labor bills, and furnish all necessary provisions, fuel, etc., during the whole of the voyage, militates strongly against the idea that the contract is one of affreightment only. *Grimberg v. Columbia River Packers' Assoc.* (Oregon), 8-491.

Effect of provision that charterer shall "employ" vessel only in lawful trade. — While a covenant in a charter-party that the charterer shall "employ" the vessel only in lawful trade militates strongly against the idea that the contract is one of affreightment only, the charterer may reasonably make such a covenant without taking a demise of the vessel. *Grimberg v. Columbia River Packers' Assoc. (Oregon)*, 8-491.

Contract held to be one of affreightment. — The provisions of a charter-party considered, and held, when construed as a whole in connection with the presumption against a demise and in the light of the fact that the instrument contains no technical terms of demise, to show that the contract is one of affreightment and not of demise, notwithstanding the fact that the instrument contains certain provisions strongly indicative of a demise. *Grimberg v. Columbia River Packers' Assoc. (Oregon)*, 8-491.

Charter-party amounting to demise. — Where the terms of a charter-party provide that the owner is to "deliver" the yacht to the charterer, and that the charterer is to "furnish all supplies, also a marine and fire insurance, also insure the yacht against the perils of war, and return her in as good condition as when she was received," the charter party amounts to a demise of the yacht, though the owner is to pay the crew's wages provided they do not exceed a specified sum per month. *Auten v. Bennett (N. Y.)*, 5-620.

b. Renunciation of contract of affreightment.

What constitutes. — The justifiable abandonment of a vessel during a voyage, with the intent not to return to her or to complete the voyage, must be regarded as a renunciation of the contract of affreightment, even if not a repudiation of its terms as binding. *The Eliza Lines (U. S.)*, 4-406.

Liability for freight after renunciation. — Where, after such an abandonment, the vessel and her cargo are taken by salvors to a port other than the port of destination, the cargo owners have a right to decline to be bound further by the contract and to procure the sale of the cargo at such port, instead of permitting the master to complete the voyage and earn the contract freight; and this though the master files a libel against the cargo and cargo owners, for freight and general average one hour before the cargo owners file a libel against the cargo for possession. Hence, where *pro rata* freight has been allowed as a charge against the proceeds of sale, in admiralty proceedings instituted after the abandonment and salvage, it is erroneous to charge the cargo owners personally with the net freight that would have been earned had the voyage been completed. *The Eliza Lines (U. S.)*, 4-406.

c. Liability of owner of vessel.

Where vessel is unseaworthy at commencement of voyage. — A ship owner

whose ship is unseaworthy at the commencement of a chartered voyage is liable to the charterer only for an injury to the cargo caused directly by the unseaworthiness of the vessel, and not for an injury caused by a peril of the sea excepted in the bill of lading and not the result of the unseaworthiness of the vessel. The ship owner is not reduced to the position of a common carrier by the unseaworthiness of his vessel so as to be liable for all damage occasioned the cargo even by excepted causes of peril. *The Europa (Eng.)*, 13-505.

d. Liability of charterer of vessel.

Application of statute limiting liability of "owner." — In the English Merchant Shipping Act of 1894 limiting the liability for loss or damage caused by the negligent or improper navigation of a vessel operated by the servants of the owner, the word "owner" includes persons operating a vessel under a charter by demise, and the latter may claim the limitation of liability prescribed by the act in favor of the owners of vessels. *Jackson v. Blanche (Eng.)*, 11-29.

e. Cancellation of charter party.

Exercise of right to cancel. — The plaintiffs chartered to the defendants a ship which was to go with all convenient speed to Newcastle, New South Wales, and there load a cargo of coals which the freighters bound themselves to ship. The defendants had the option to cancel the charter party if the ship had not arrived ready to load at Newcastle by Dec. 15, 1907. The ship was detained and did not arrive at Newcastle till June 15, 1908, whereupon the charterers canceled the charter party. Meanwhile the plaintiffs had called upon the defendants to exercise as soon as December 15 had passed their option to cancel. The defendants refused to do so, and the plaintiffs brought this action for damages for breach of contract on the ground that the defendants ought to have exercised their option as soon as Dec. 15, 1907, had passed and they had been called upon to do so, or within a reasonable time afterwards; and that inasmuch as they had declined to elect within a reasonable time from that date the option was gone: Held, by Bray, J., and by the Court of Appeal, that the owners were bound to send the ship to Newcastle; that there was nothing to show that the charterers were not to have the full benefit of that obligation because the ship could not get there by the named date; and that the charterers could not be called upon to exercise their option to cancel the contract until the ship had arrived at Newcastle. *Moel Tryvan Ship Co. v. Andrew Weir & Co. (Eng.)*, 20-583.

3. LIABILITY FOR NEGLIGENCE.

Injury by displacement waves. — In an action to recover damages for the death of the plaintiff's intestate by drowning through the negligent operation of the defendant's

steamboat causing waves or swells which cap-sized the smaller vessel carrying the intestate, where it is admitted that the steamboat was being operated in the usual and normal way and the theory of recovery is that the accident was caused by the failure of the defendant's servants to exercise due care and to stop the steamboat after the discovery of the intestate's peril, no liability exists unless the defendant's servants are shown to have seen the smaller vessel and to have known of its peril; and counts in the complaint averring that the smaller vessel was plainly visible but not that it was seen, and averring that it was seen but not that its peril was obvious or known to the defendant's servants, are demurrable. *Daniels v. Carney* (Ala.), 12-612.

Pleading. — In such an action, a count in the complaint failing to aver that the servant or servants of the defendant who were operating the steamboat at the time of the accident were acting within the scope of their authority is insufficient and demurrable. *Daniels v. Carney* (Ala.), 12-612.

4. CARRIAGE OF GOODS.

Exemptions from liability. — Evidence that a cargo has been damaged by sea water does not of itself tend to establish that such damage was caused by a peril of the sea within a provision in the bill of lading exempting the carrier from liability for damage caused by "the dangers and accidents of the seas." *The Folmina* (U. S.), 15-748.

Burden of proof where exemption is claimed. — In such a case, the carrier must sustain the burden of proof that the damage was occasioned by a peril of the sea by showing that the efficient cause which permitted the sea water to enter was a sea peril, and where the evidence does not disclose such efficient cause, the doubt as to the cause of the entrance of the sea water must be resolved against the carrier. *The Folmina* (U. S.), 15-748.

Contribution in general average between owners of cargo. — Where a cargo of coal takes fire by spontaneous combustion, without fault on the part of the shippers or the owners of the vessel, and the water used in extinguishing the fire damages the whole cargo of coal, the owners of the coal are entitled to contribution in general average for their loss in the extinguishment of the fire, as a sacrifice voluntarily made by them for the common advantage of all. *Green Shields v. Stephens* (Eng.), 13-245.

5. CARRIAGE OF PASSENGERS.

Criminal liability for negligent loss of life of passenger. — In a criminal prosecution against the captain of a vessel for manslaughter for the negligent loss of human life by fire on his vessel, evidence as to the point in the vessel's course at which the fire was first discovered held to raise a question of fact for the jury, and to support a finding

against the contention of the defendant. *Van Schaick v. United States* (U. S.), 14-456.

What prosecution must prove. — In a prosecution against the captain of a vessel under the federal statute providing that "every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed . . . shall be deemed guilty of manslaughter," it is only necessary for the United States to prove that the defendant was a captain of the vessel in question, and that he was guilty of misconduct, negligence, or inattention to his duties on such vessel, by reason of which human life was destroyed; and since intent is not an element of the offense, malice need not be proved, and it unnecessary to show that the acts or omissions which caused the loss of life were wilful or intentional. *Van Schaick v. United States* (U. S.), 14-456.

Duty of captain of vessel. — The law places upon the captain of a vessel personally the duty of seeing that his vessel has sufficient protection against fire, and the filing of a certificate signed by the United States inspectors certifying that the vessel has been duly inspected and is permitted to navigate at the time a fire occurs, does not exculpate the captain of the vessel from criminal liability for a failure of duty on his part. *Van Schaick v. United States* (U. S.), 14-456.

The master of a wooden vessel carrying quantities of exposed combustible materials and thronged with hundreds of excursionists unaccustomed to travel is bound to exercise a greater degree of watchfulness and care than is required of the commander of a steel vessel carrying comparatively experienced passengers. *Van Schaick v. United States* (U. S.), 14-456.

Presumption of negligence. — Where fire breaks out on an excursion steamboat sailing in quiet inland waters with no *vis major* or unusual disturbance of the elements, and in half an hour afterwards ninety per cent. of the persons on board are either drowned or burned to death, the calamity is necessarily due to negligence, and not to inevitable accident. *Van Schaick v. United States* (U. S.), 14-456.

Maintenance of efficient fire drill. — The provision of the United States statutes requiring in substance that the captain of a vessel shall maintain an efficient fire drill is violated where the station bills posted on the vessel fail to assign the members of the crew to their places in case of fire or disaster, and the captain for more than a month prior to the destruction of the vessel by fire fails to call the crew to quarters and to drill them as to the duties of firemen, or to exercise them in swinging out the life boats or in using the pumps or in testing the hose. *Van Schaick v. United States* (U. S.), 14-456.

The captain of a vessel is not relieved of his duty to maintain an efficient fire drill by instructing the crew in respect to their duties as firemen, by the fact that the crew is composed of raw and ignorant material, the per-

sonnel of which is constantly changing. *Van Schaick v. United States (U. S.)*, 14-456.

Where there is no systematic effort on a vessel to comply with the requirements of the law as to fire drills, and the vessel is afterwards destroyed by fire without any effective activity on the part of the captain or crew to mitigate the disaster or save the lives of the passengers, it cannot be said that if the captain had assigned to each man his post in case of fire, and systematically instructed the crew in their duties under such circumstances, the progress of the flames would not have been arrested or stayed. *Van Schaick v. United States (U. S.)*, 14-456.

Evidence of failure to supply fire hose. — Evidence from which a jury is authorized to find that no fire hose connected the port standpipe or the standpipe on the promenade and hurricane decks of a vessel with the fire pumps, is sufficient to support a finding of negligence in that respect or on the part of the captain of the vessel, contributing materially to the destruction of the vessel by fire and the loss of life thereon. *Van Schaick v. United States (U. S.)*, 14-456.

Failure to inspect fire hose. — The unexcused negligence of the captain of a vessel in leaving fire hose exposed to fog and dampness without use or testing for thirteen years, in connection with the fact that it burst the moment water was turned on to extinguish a conflagration, is sufficient evidence to sustain a verdict finding the captain guilty of neglect and inattention to duty in failing to see that the fire-fighting apparatus was maintained in efficient order and ready for immediate use. *Van Schaick v. United States (U. S.)*, 14-456.

Failure to inspect life preservers. — On the question of the criminal liability of the captain of a vessel in failing to exercise ordinary care to see that the life preservers were in fit condition for use, where there is evidence that on the day of the burning of the vessel, many of the life preservers went to pieces as soon as taken from the racks, and that others which were adjusted proved inadequate, as persons wearing them were seen to sink and when brought up were dead, an instruction to the jury that they must assume that the life preservers originally furnished were sufficient, and that it was for the jury to say whether the life preservers were out of condition, and if so whether it was due to any fault of the defendant who was required to exercise only reasonable care regarding them, and that if through his negligence any persons wearing the life preservers were forced by the fire into the water where they were drowned, then the jury must find that the life preservers were so insufficient through the defendant's neglect that they contributed nothing to the efforts of such persons to support themselves in the water, is a fair statement of the issue, and a finding against the defendant on the evidence will not be disturbed. *Van Schaick v. United States (U. S.)*, 14-456.

6. USE OF NAVIGABLE WATERS.

Limitation of right to use. — The right of the public to the use of the waters of a navigable harbor is limited to user for the purposes of navigation and fishery and matters incidental thereto, and any right of navigation claimed over such waters must be a right incidental to the navigation of the person claiming it, and not a right incidental to the navigation of others; and therefore a colliery owner has no right to moor a coal hulk in a public harbor for the purpose of supplying coal therefrom to merchant vessels entering the harbor. *Denaby, etc., Collieries v. Anson (Eng.)*, 20-801.

7. AUTHORITY OF MASTER TO BIND OWNER.

Presence of managing agent of owner. — The authority of a master of a vessel to bind the owners *in personam* falls within the law of principal and agent excepting when such authority arises *ex necessitate*, and there is no authority *ex necessitate* in the master of the vessel to pledge the owner's credit where the owner or his managing agent is either at the port of the ship's anchorage, or so near it as to be reasonably expected to intervene personally. *May v. Hurley (N. J.)*, 18-874.

SHOOTING.

See ASSAULT AND BATTERY; HOMICIDE; WEAPONS.

SHOP.

Burning shop, see ARSON, 1.
Contract for location of railroad shops, see RAILROADS, 4 d.
Injuries caused by crowd in department store, see NEGLIGENCE, 2.

SHORE.

See WATERS AND WATERCOURSES, 3 a.

SHOWS.

See THEATRES AND PUBLIC RESORTS.

SIDE TRACKS.

See RAILROADS.

SIDEWALKS.

See STREETS AND HIGHWAYS.
Right to lien for construction of sidewalks, see MECHANICS' LIENS.
Validity of ordinance requiring removal of ice and snow, see MUNICIPAL CORPORATIONS, 5 f (2).

SIGNAL LIGHTS.

Neglect to display light, see **COLLISION**.

SIGNALS.

Duty to give signal of approaching street cars at crossings, see **STREET RAILWAYS**, 8 a (5).

Failure to hear fog signals as evidence of negligent navigation, see **COLLISION**.

Warnings of approach of trains, see **RAILROADS**, 8 b (3).

SIGNATURE.

Amending certificate of commitment by adding signature of clerk, see **CRIMINAL LAW**, 4.

Descriptive words appended to signature to check as notice of trustee character to draw, see **CHECKS**, 1.

Effect of signature as supplying omission of grantor's name from deed, see **DEEDS**, 2 a.

Formal requirement in execution of wills, see **WILLS**, 3 c.

Fraudulently procuring genuine signature, see **FORGERY**, 1 a.

Memorandum required by statute of frauds, see **FRAUDS**, **STATUTE OF**, 3 d.

Name of foreman of grand jury printed on indictment, see **CRIMINAL LAW**, 6 j (1).

Necessity for broker to sign contract for sale of real estate, see **BROKERS**, 1 a.

Necessity of filing signature of notary public, see **ACKNOWLEDGMENTS**.

Necessity of signature to return on execution, see **EXECUTIONS**, 2.

Necessity of signing indictment, see **INDICTMENTS AND INFORMATIONS**, 3.

Necessity of signing testimony given before police magistrate, see **CRIMINAL LAW**, 6 m (10).

Requisites of signature to fire insurance policy, see **INSURANCE**, 5 e (3).

Signing of bills by executive, see **STATUTES**, 1 e.

Signing of bills by legislative officers, see **STATUTES**, 1 d.

Signing deeds, see **DEEDS**, 1 b (1).

Specific performance of unsigned contract, see **SPECIFIC PERFORMANCE**, 3 f (5).

Mark as subject of expert testimony.

— A mark made as a substitute for signing one's name is a written signature, and as such is the subject of expert testimony. *Ausmus v. People* (Colo.), 19-491.

SIGNS.

See **ADVERTISEMENTS**; **STREETS AND HIGHWAYS**.

SILENCE.

Silence of accused as evidence of guilt, see **CRIMINAL LAW**, 6 n (4), 6 n (11) (a).

SIMILAR TRANSACTIONS.

Proof of in action for fraud, see **FRAUD AND DECEIT**, 4.

SISTER.

Meaning of word "sister" in statute, see **STATUTES**, 4 d.

Right of illegitimates to inherit, see **DESCENT AND DISTRIBUTION**, 5 b.

SITUS.

Situs of personal property for taxation, see **TAXATION**, 3 b.

SKATING RINKS.

Power of municipality to regulate or suppress skating rinks, see **MUNICIPAL CORPORATIONS**, 4 e.

Regulation of hours for operation, see **THEATRES AND PUBLIC RESORTS**, 1.

Skating rink as nuisance, see **NUISANCES**, 1 b.

SKILL.

Betting on games of skill, see **GAMING AND GAMING HOUSES**.

Specific performance of contracts involving special skill, see **SPECIFIC PERFORMANCE**, 3 d.

SLANDER.

See **LIBEL AND SLANDER**.

SLANDER OF TITLE.

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SLAUGHTER HOUSE.

Statutory regulation of, see **CONSTITUTIONAL LAW**, 5 c.

SLAVES.

Hard labor for violating municipal ordinance as involuntary servitude, see **CRIMINAL LAW**, 7 a (1).

Legitimacy of children. — The child of slave parents whose mother died during slavery is illegitimate, and is not in legal contemplation the brother of a child of the same

father and a woman with whom the father lived as man and wife during slavery, and with whom he continued to live up to and after the Alabama statute legalizing their marriage. The latter child is legitimate and cannot inherit from the former. *Johnson v. Shepherd* (Ala.), 5-143.

SLEEPING-CAR COMPANIES.

See **CARRIERS**, 7.

SLOT MACHINES.

See **GAMING AND GAMING HOUSES**.

SLOUGH.

Use of water of slough for irrigation, see **IRRIGATION**.

SMALLPOX.

Smallpox hospital as nuisance, see **HOSPITALS AND ASYLUMS**, 3.

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SMELTERS.

Statutory regulation of hours of labor in smelters, see **LABOR LAWS**, 1 a.

SMOKE.

Liability of railroads for injuries by smoke from locomotives, see **RAILROADS**, 7 b. Prohibiting emission of smoke within corporate limits, see **MUNICIPAL CORPORATIONS**, 4 d (3).

Smoke as nuisance, see **NUISANCES**, 1 b.

SNOW.

Validity of ordinance requiring removal of snow from sidewalks, see **MUNICIPAL CORPORATIONS**, 5 f (2).

SOCIETIES AND UNINCORPORATED ASSOCIATIONS.

1. INITIATION.

2. EXPULSION FROM MEMBERSHIP.

3. ACTIONS BY AND AGAINST UNINCORPORATED ASSOCIATIONS OR MEMBERS THEREOF.

1. INITIATION.

Liability of supreme lodge for injuries received in initiation in subordinate lodge. — The supreme lodge or tent of a fraternal association organized as a corporation, possessing exclusive jurisdiction and control over all subordinate tents or lodges, and having by-laws requiring the officers of such subordinate tents to carry out, in the initiation of members, the ritual established and promulgated by the supreme tent, is liable in damages for injuries sustained by a person while undergoing initiation in a subordinate tent in accordance with such ritual, as the officers and members of the subordinate tent conducting the initiation and following the directions of the ritual are the lawfully constituted agents of the supreme tent. *Thompson v. Supreme Tent*, etc., (N. Y.), 12-552.

2. EXPULSION FROM MEMBERSHIP.

Remedy of member wrongfully expelled. — An action to recover damages for causing the wrongful expulsion of the plaintiff from society may be maintained without first exhausting the remedy by appeal to the tribunals of the society. *St. Louis, R., etc., Co. v. Thompson* (Tex.), 19-1250.

The remedy of a person who has been wrongfully expelled from membership in a voluntary unincorporated association is by an action for damages, and not by mandamus to compel his restoration to membership. *Doyle v. Burke* (R. I.), 16-1245.

Damages for wrongful expulsion. — In an action to recover damages, exemplary as well as actual, for causing the expulsion of the plaintiff from a beneficial society, it is proper to permit the plaintiff to testify that he is married and has a family. *St. Louis, R., etc., Co. v. Thompson* (Tex.), 19-1250.

3. ACTIONS BY AND AGAINST UNINCORPORATED ASSOCIATIONS OR MEMBERS THEREOF.

Capacity to sue and be sued. — In the absence of an enabling statute an unincorporated association cannot be sued in the association name. *Karges Furniture Co. v. Amalgamated Woodworkers Local Union* (Ind.), 6-829.

Voluntary unincorporated associations, not engaged in some business enterprise, can neither sue nor be sued in the association name, but actions in which such associations are involved must be brought in the names of the members. *St. Paul Typothetæ v. St. Paul Bookbinders' Union* (Minn.), 3-695.

The *St. Paul Typothetæ* held to be an unincorporated association without capacity to sue in the association name. *St. Paul Typothetæ v. St. Paul Bookbinders' Union* (Minn.), 3-695.

The *St. Paul Bookbinders' Union No. 37* held to be an unincorporated association without capacity to be sued in the association name. *St. Paul Typothetæ v. St. Paul Bookbinders' Union* (Minn.), 3-695.

Effect of statute authorizing action against firm in firm name. — The Minnesota statute providing that when two or more persons associate in any business, transacting the business under a common name, they may be sued by that name, applies only to business associations and authorizes actions against, but not by, such associations. *St. Paul Typothetæ v. St. Paul Bookbinders' Union* (Minn.), 3-695.

Proof of constitution of association. — On the trial of an action brought to charge the defendant with liability as a member of an unincorporated association, where the plaintiff offers in evidence a paper purporting to be the constitution of the association, and a person who is admitted to be a member of the association and to have been its secretary for a number of years, is permitted to testify, without objection, that the paper offered is the constitution of the association and that it has been kept in the archives thereof and acted under as a constitution, the defendant's objection to the admission of the paper in evidence, on the grounds that no proof has been offered of an organization of any society that has adopted such ostensible constitution, and that the paper has never been recorded in the record books of the society as its constitution, is properly overruled. *Tarbell v. Gifford* (Vt.), 17-1143.

Proof of defendant's membership. — In an action brought to charge the defendant with liability as a member of an unincorporated agricultural society, proof that the defendant was an exhibitor at the annual fair of the society, and entered his exhibit at the secretary's office on the first day of the fair, and paid one dollar, and received a tag or card for his exhibit, and also a ticket headed "Membership Ticket," which he used as an admission ticket only and surrendered at the close of the fair, is not conclusive as to the defendant's membership in the society, even though the constitution of the society provides that any person may become a member of the society for one year by paying one dollar, which payment shall entitle him to exhibit at the annual fair of the society, and to receive one ticket of admission, and to vote at all meetings and elections of the society, where there is nothing to show that the defendant had any knowledge of the constitution, and where the ticket which he purchased, aside from its heading, did not indicate any privilege in the purchaser other than that of admission to the fair. In such a case the defendant should be permitted to show, if he can, that the ticket was delivered to and taken by him as an admission ticket to the fair only, and that he did not read the ticket and supposed that it was nothing more than such an admission ticket, and the exclusion of evidence offered by the defendant for that purpose constitutes reversible error. *Tarbell v. Gifford* (Vt.), 17-1143.

Admissibility of record of association's meetings. — On the trial of an action brought to charge the defendant with liability as a member of an unincorporated association, a book purporting to contain a rec-

ord of the doings of the association at its meetings, when properly identified by the secretary of the association, is admissible in evidence on behalf of the plaintiff for the purpose of showing the organization and doings of the association, even though it does not appear that the defendant knew of the meetings referred to therein, or attended any of them, or signed the by-laws, or had knowledge of any constitution of the association. *Tarbell v. Gifford* (Vt.), 17-1143.

SOCIETY.

Loss of society of child as element of damage, see DAMAGES, 9 c.

Loss of society of wife as element of damage, see HUSBAND AND WIFE, 3 a.

SOIL.

Ownership of soil in highway, see STREETS AND HIGHWAYS, 6.

Ownership of soil in private way, see PRIVATE WAYS.

SOLDIERS.

Exemption of veterans from occupation taxes, see LICENSES, 3.

Preference of veterans as officers or employees of municipalities, see MUNICIPAL CORPORATIONS, 14.

Preference of veterans in appointment of public officers, see PUBLIC OFFICERS, 3 a (3).

SOLE AND UNCONDITIONAL OWNERSHIP CLAUSE.

See INSURANCE, 5 g (2).

SOLICITATION.

Commission of crime procured at solicitation of complaining witness, see PHYSICIANS AND SURGEONS.

Prohibition of soliciting of business on railroad trains, see CARRIERS, 2 a.

Prohibition of soliciting of patients by physicians, see PHYSICIANS AND SURGEONS, 1 a.

Soliciting sexual intercourse as a tort, see TORTS.

SOLICITORS.

Sufficiency of verification of bill by affidavit of solicitor, see INJUNCTIONS, 3 c (2).

SOVEREIGNTY.

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SPECIAL APPEARANCE.

See APPEARANCES.

SPECIAL ATTORNEY.

Employment to assist prosecuting attorney, see CRIMINAL LAW, § 1; PROSECUTING ATTORNEYS.

SPECIAL DAMAGES.

Necessity of pleading, see DAMAGES, 10 b.
Necessity of special damage to constitute actionable libel, see LIBEL AND SLANDER, 1 c.
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SPECIAL OR LOCAL ASSESSMENTS.

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Street sprinkling assessments, see MUNICIPAL CORPORATIONS, 3 e.

1. CONSTITUTIONALITY OF STATUTES.

Statute authorizing adjoining municipalities to unite in making improvement. — A statute which authorizes adjoining municipalities to unite in making an improvement partly in each, the cost to be apportioned between such municipalities (Hurd's Ill. St. 1909, p. 480), violates a constitutional provision (Const. Ill. 1870, art. IX, § 9) authorizing local improvements in municipalities to be paid for "by special assessment or by special taxation of contiguous property." *Loeffler v. Chicago* (Ill.), 20-335.

Statute imposing personal liability on abutting owner. — As special assessments for local improvements can be justified only upon the theory of benefit to the abutting property, a statute providing for such an assessment must be held unconstitutional in so far as it authorizes a personal suit against an abutting owner for the recovery of the assessment, and subjects all his real and personal property, wherever situated, to execution in satisfaction of any judgment that may be obtained. Such provisions violate the principle forbidding the taking of property without compensation. *Brookings v. Natwick* (S. Dak.), 17-1254.

Constitutional prohibition against delegation of power to levy taxes. — Assessments for local improvements are not prohibited by the provisions of the Montana constitution (art. 5, § 36, and art. 12, § 4) that the legislature shall not delegate to any special commission, etc., any power to levy taxes, and that the legislature shall not levy taxes in any county or municipality for county or municipal purposes. Such provisions relate only to taxation for general governmental purposes. *Bellings Sugar Co. v. Fish* (Mont.), 20-264.

Constitutional requirement that all taxes be uniform. — A special assessment for local improvements is not a tax within the meaning of a constitutional requirement that all taxes shall be uniform throughout the state. Nor does the levy of such an assessment constitute taking property without due process of law. *Arnold v. Knoxville* (Tenn.), 5-881.

Power of legislature to create improvement districts in cities. — The legislature of Tennessee has the constitutional power to provide by statute for the creation of improvement districts in cities, and to authorize the levying of special assessments for local improvements in such districts; and the cities coming within the provisions of

such a statute have the power to pass valid ordinances for its enforcement. *Arnold v. Knoxville* (Tenn.), 5-881.

Constitutionality of Indiana statute.

— The Indiana statute providing for the improvement of streets and special assessments for the cost thereof is not in violation of any provision of the federal or state constitutions. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

2. NATURE OF IMPROVEMENTS FOR WHICH ASSESSMENTS MAY BE LEVIED.

What is "local improvement." — A local improvement is one which by reason of its being confined to a locality enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality. *Loeffler v. Chicago* (Ill.), 20-335.

Nature of question as to local improvement. — The question whether an improvement is local in character so that it may be made by special assessment is one of fact, but the determination of the local authorities is subject to review by the courts. *Loeffler v. Chicago* (Ill.), 20-335.

Single sewer in two municipalities. — A sewer partly in one municipality and partly in another, for the use and benefit of both, is one continuous improvement and not two separate and distinct improvements. *Loeffler v. Chicago* (Ill.), 20-335.

Water pipe laid under roadbed of public street. — A water pipe laid under the roadbed of a public street is in no sense an appendage to or a part of the adjoining lots, and the requirement that the property owners shall lay the same at their own expense cannot be supported under the police power. *Doughten v. Camden* (N. J.), 5-902.

Sprinkling of street. — A provision in a municipal charter that the entire or part of the cost of sprinkling a street may be assessed upon the property adjacent thereto in proportion to the benefits resulting to each lot, is unconstitutional, because the money value of such property is not enhanced by the sprinkling of the street. *Kalamazoo v. Crawford* (Mich.), 16-110.

3. PROPERTY SUBJECT TO ASSESSMENT.

Liability of exempt corporation to assessment for local improvements. — A provision in the charter of a corporation exempting its property from "all taxation, state, county, municipal, and special," does not exempt such property from assessment for local improvements. *Paving District v. Sisters of Mercy* (Ark.), 15-347.

Right of way of railroad. — The right of way of a railroad is not subject to an assessment for a street improvement, and the court will enjoin a threatened sale thereof for failure to pay such an assessment. *Southern California R. Co. v. Workman* (Cal.), 2-583.

A railroad right of way abutting on a street is subject to assessment for the improvement of such street although a part of

the right of way is occupied by the street to be improved. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

The right of way of a railroad abutting on an improved street is not exempt from a proportionate share of the special tax for the improvement as deriving no benefit therefrom. *Heman Construction Co. v. Wabash R. Co.* (Mo.), 12-630.

Under an ordinance providing for special taxes for the improvement of streets and expressly imposing a portion of the expense upon "all property" in the district fronting upon or adjoining the improvement, a portion of a railroad right of way fronting on a street so improved is subject to the tax and cannot be relieved thereof on the theory that the tax can only be enforced against the right of way, and that to do this would be against public policy and in violation of a constitutional provision exempting public highways from taxation. *Heman Construction Co. v. Wabash R. Co.* (Mo.), 12-630.

Reversion in right of way of railroad. — Whether the fee or reversion in the land acquired by a railroad for a right of way can be assessed for local improvements and sold for failure to pay the assessment, *quære*; but if such right exists, it is not in any way affected by an injunction against the sale of the right of way of the railroad. *Southern California R. Co. v. Workman* (Cal.), 2-583.

Property owned by school district. — A constitutional provision exempting school districts from "taxation" is not infringed by a statute authorizing the making of a special assessment on lots owned by a school district, as exemption from taxation does not mean exemption from special assessments. *In re Howard Avenue* (Wash.), 12-417.

There is nothing in the charter or ordinances of the city of Seattle, Wash., exempting school districts from special assessments. *In re Howard Avenue* (Wash.), 12-417.

Under a statute providing for a special assessment of benefited property within the assessment district, and not expressly excepting any property, either public or private, public school lots situated in the district and benefited by the improvement are subject to the assessment. *In re Howard Avenue* (Wash.), 12-417.

County as abutting owner of property improved by municipality. — A statute authorizing a certain county officer to sign applications for the improvement of streets in a municipality, in cases where the county is an abutting owner, cannot be construed as imposing any liability upon the county to pay special assessments levied by the municipality for such improvements. *Lagrange v. Troup County* (Ga.), 16-885.

Where a statute gives a general power to municipal authorities to assess against the property abutting on streets improved a specified percentage of the cost of such improvements, and provides for the collection of such assessment by a levy and sale of the property assessed, and there is no provision clearly authorizing such assessment against public

property, there is an implied exemption of the property of the county from such assessment. *Lagrange v. Troup County* (Ga.), 16-885.

Discretion of city councils in assessing benefits upon opening of street. — Where a city council, in assessing the benefits upon the opening of a city street, restricts the assessment district to the length of the street and to 300 feet on each side of it, there is no such abuse of discretion as will justify the courts in setting the assessment aside. *Power v. Detroit* (Mich.), 5-645.

4. MUNICIPAL ORDINANCES.

Record of vote of city council. — The record of the vote of a city council ordering a street improvement sufficiently shows the vote therein where it is recorded on sheets of roll calls prepared for the purpose, though a detailed statement of the vote is not set out in the general record book. *Nixon v. Burlington* (Ia.), 18-1037.

Statement of method of construction. — A resolution of the necessity of paving a street, which describes the proposed pavement as one to be constructed of brick and forty-eight feet wide, without mentioning the foundation, is in compliance with the Iowa statute (Code, § 810) which requires a statement of the method of construction. *Nixon v. Burlington* (Ia.), 18-1037.

Passage of resolution that improvement is necessary. — The Iowa statute providing that street improvements shall not be ordered unless three-fourths of all the members of the council shall assent thereto (Code, § 793) refers only to the order for the improvement, and does not require such majority for the adoption of a resolution that the improvement is necessary and fixing a date for its final consideration. *Nixon v. Burlington* (Ia.), 18-1037.

5. CONTRACT FOR MAKING IMPROVEMENT.

Effect of invalid provisions in contract. — Provisions in a paving contract as to what laborers shall be hired, and as to where material shall be purchased, while no doubt invalid, cannot be objected to by a person against whom a special assessment has been made on account of such paving where the evidence affirmatively shows that the provisions have not in any manner increased the cost price of the work, and objection is not made until after the work is done and the benefits are received. *Diver v. Keokuk Sav. Bank* (Ia.), 3-669.

Provision that contractor pay for repairs. — A provision in a municipal contract by which the contractor is required to pay a sum into the city treasury as a special fund to cover the cost of repairs to the work within a specified time after its completion is a mere guaranty of good work on the part of the contractor and does not in fact burden the property holder, in the form and guise of a special tax, for reconstruction, in violation of the city charter. *Allen v. Labsap* (Mo.), 3-306.

Interest of member of city council in contract. — Where the work under a municipal contract has been performed and accepted by a city and no fraud is shown, a taxpayer cannot successfully resist payment therefor because the contract was entered into in violation of a statute providing that no member of a city council shall be interested in a contract for work to be performed by the municipality. *Diver v. Keokuk Sav. Bank* (Ia.), 3-669.

Effect of violation of terms of contract as to time of completion of work. — Where a municipal contract provides for deductions from the moneys payable thereunder if the contractor fails to complete the work within a specified time and there is no city ordinance specifying a definite time for the completion of the work, a violation of the contract time limit is not fatal to the validity of tax bills levying the cost of the work against abutting property if the work is completed within a reasonable time. *Allen v. Labsap* (Mo.), 3-306.

Bill to enjoin letting of contract. — Where a proceeding for a local improvement is unauthorized and void, a taxpayer may maintain a bill in equity to enjoin the letting of the contract, though all the questions raised by the bill could have been urged against the application to confirm the assessment. *Loeffler v. Chicago* (Ill.), 20-335.

6. AMOUNT OF ASSESSMENT AND APPORTIONMENT.

Assessment in excess of benefits. — An assessment against private property for a public improvement is invalid when in substantial excess of the benefits derived by the property. *Iowa Pipe, etc., Co. v. Callanan* (Ia.), 3-7.

Deduction of value actually acquired by municipality. — In fixing the amount of an assessment of the benefits on the opening of a city street, the amount for which the city sells a building on the land taken should be deducted from the assessment against the owner, but the failure to make such deduction does not make such assessment wholly void, as it can be remedied by a simple mathematical calculation. *Power v. Detroit* (Mich.), 5-645.

Effect of ordinance directing assessment of cost per lineal foot. — A municipal ordinance ordering a street improvement and providing that the cost of the "improvement shall be assessed per lineal foot against the real estate abutting" thereon does not prevent the assessment of real estate according to the benefits, the board of trustees of the town having power by statute to make the assessment conform to the special benefits received. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

Assessment of definite sum per front foot for water pipe. — The imposition upon lands adjoining a public street in which is laid a pipe for the distribution of water for the use of a city and its inhabitants, of a fixed definite sum per front foot, to be paid

by the owner for the expense of such pipe, cannot be supported under the power of general taxation, or under the power to tax property benefited by a local public improvement because of, and not in excess of, benefits. *Doughten v. Camden* (N. J.), 5-902.

7. ASSESSMENT PROCEEDINGS.

a. In general.

Strict compliance with statute required. — The provisions of the Missouri statutes providing for the levy by a city of a special assessment for street improvement must be strictly complied with. *Sedalia v. Donohue* (Mo.), 4-89.

Delegation of power to levy assessment. — The power of a municipality under the Missouri statutes to order a street improvement and to levy an assessment therefor cannot be delegated by the city to the city clerk. *Sedalia v. Donohue* (Mo.), 4-89.

Necessity for enabling ordinance or resolution. — Where a general statute authorizing municipalities to levy special assessments for street improvements prescribes specifically the entire procedure to be followed in making the levy, the municipality may make a valid assessment by proceeding in the manner prescribed by statute, without passing an enabling ordinance or resolution. *Martin v. Oskaloosa* (Ia.), 3-651.

b. Notice in assessment proceedings.

Sufficiency. — Different public improvements may be legally noticed in a single notice of assessment. *Iowa Pipe, etc., Co. v. Callanan* (Iowa), 3-7.

Effect. — The notice of street assessments required by the Indiana statute (Burns 1901, § 4294) as to the time and place of hearing upon the report of the board of trustees of an incorporated town, and the publication of the notice when made, give the board complete jurisdiction over the person of each landowner within the taxing district. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

c. Form and contents of assessment.

Assessment roll in one part payable at once. — An assessment of benefits on the opening of a city street will not be set aside because the assessment roll is made in one part, payable at once, instead of in several parts payable in several successive years. *Power v. Detroit* (Mich.), 5-645.

Levy of assessment before cost of improvement is known. — Under the Missouri statutes vesting in a city the power to order a street improvement and levy an assessment therefor, a levy of assessment for such improvement cannot be made in an ordinance providing for the improvement but must be made after the cost of the improvement is known. *Sedalia v. Donohue* (Mo.), 4-89.

Report of street improvements and adoption thereof. — Under the Indiana statute an amended report of street improvements submitted by the engineer and substan-

tially the same as the former report, but making more specific and certain the description of certain lots of land, and an assessment of benefits by the board of trustees of the town in accordance with such report are valid, notice of the time and place of hearing on such amended report having been given according to the statute and no one appearing to make objection thereto; and the fact that the board of trustees adopted the report of the engineer on the night it was reported from committee does not render such adoption invalid. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

Collateral attack on determination of board of trustees. — The determination of the board of trustees of a town that abutting property has received special benefits from a street improvement, is conclusive against collateral attack, the owners affected having had their right to a hearing in the matter. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

Reassessment in case of irregularity in first assessment. — Under the Iowa code, a municipality may make a reassessment where it has proceeded irregularly in making a special assessment which it was authorized by law to make. *Martin v. Oskaloosa* (Ia.), 3-651.

d. Curative acts.

Effect where tax has been declared void. — Where suit has been brought against a property owner for the recovery of a tax, and it has been duly and finally adjudged that the tax is invalid and that no recovery can be had thereon, no legalizing statute subsequently enacted will operate to nullify the effect of that judgment, and subject that property owner to another suit for recovery upon the same demand. *McManus v. Hornaday* (Ia.), 2-237.

Necessity for reassessment where tax has been declared void. — Under sections 834 and 835 of McClain's Code, providing that when, by reason of any omission or irregularity in proceedings, a special tax or assessment is invalid or of doubtful validity, a municipal council may reassess and relevy the same with the same force and effect as an original levy, a city council may not, after a tax levied by them for street improvements has been adjudged void by the courts, proceed by ordinance to declare its former acts in reference to such improvements legal and valid, and thus avoid the effect of the adverse adjudication, without making any provision for a reassessment or relevy of the tax. *McManus v. Hornaday* (Ia.), 2-237.

e. Appeals from assessments.

Failure to appeal from assessment. — Failure to appeal to the District Court from the decision of a city council ordering certain street improvements and levying assessments pursuant to the Iowa statute authorizing such an appeal for the purpose of determining all questions touching the validity of the assessments (Code, § 824), is a waiver of the right

to question the assessments, unless the council was wholly without jurisdiction in the premises. *Nixon v. Burlington* (Ia.), 18-1037.

8. ENFORCEMENT AND COLLECTION.

Defenses. — A special tax bill for street paving is not void because the contractor who did the paving failed to observe the "eight-hour" law of the city. *Curtice v. Schmidt* (Mo.), 10-702.

Where an ordinance authorizing the paving of a street does not fix a time limit for the completion of the work, the failure of the contractor to complete the work at the time required by the paving contract is no defense to special tax bills issued for the cost of the improvement. *Curtice v. Schmidt* (Mo.), 10-702.

The provision of a city charter which requires an abutting owner to file with the board of public works within sixty days any objections or defenses to special bills for street paving issued against his property or be barred of such defenses is unconstitutional and void as depriving the landowner of his property without due process of law. *Curtice v. Schmidt* (Mo.), 10-702.

Penalties and interest. — An abutting owner who neglects or refuses to pay any portion of his assessment of benefits on the opening of a city street, and who litigates the right of the city to collect any portion of such assessment, is liable, upon such portions of the assessment as are held to be valid for the penalties and interest prescribed by law for the nonpayment of taxes. *Power v. Detroit* (Mich.), 5-645.

When payment of assessment in full may be required. — Under the Indiana statute an owner of abutting property who does not file the agreement provided for by the statute may be required to pay an assessment for improvements in full when made, and the contractor or his assignees may collect the same by suit. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

Rendition of personal judgment against defendant. — In an action against a railroad company to collect assessments of benefits for street improvement made under the Indiana statute on real estate owned by the defendant, the court has power to render a personal judgment against the defendant. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

Liability of municipality on assessment certificate. — Where a special assessment certificate issued by a municipality in payment for a public work is not enforceable against the abutting owner because of the invalidity of the assessment, the municipality is liable for the amount thereof, notwithstanding a provision in the contract for work that the certificate shall be received in full payment and without recourse to the municipality. *Iowa Pipe, etc., Co. v. Callanan* (Ia.), 3-7.

Attorney's fees. — The Indiana statute providing that if the property owner refuses

to pay a special assessment against his property for street improvements, the contractor may recover, in addition to the assessment, a reasonable attorney's fee, is not in violation of the federal or state constitutions. *Pittsburgh, etc., R. Co. v. Taber* (Ind.), 11-808.

9. REMEDIES OF PROPERTY OWNER.

Relief in equity against illegal assessment. — Where an entire special assessment is illegal, no tender by the owner of the property assessed is necessary before seeking equitable relief. *Iowa Pipe, etc., Co. v. Callanan* (Ia.), 3-7.

10. ASSESSMENTS AS "TAXES."

Word "taxes" in written contract as including special assessments. — The word "taxes" has two well-recognized meanings, one inclusive and the other exclusive of special assessments for local improvements. Which meaning is intended where the word is used in a written contract must be determined by the context. *Chicago Great Western R. Co. v. Kansas City N. W. R. Co.* (Kan.), 12-588.

Where a company owning a line of railroad grants to another company a right to the joint use thereof for a term of 999 years in consideration of the payment of a stated annual sum, to be increased by interest upon any amount expended for permanent improvements by the owner by joint consent, the contract further providing that the expense of maintaining the property shall be divided in proportion to the use of it, and that "taxes on property jointly used shall be included in the cost of maintenance," the word "taxes" as so used is to be construed as including special assessments. *Chicago Great Western R. Co. v. Kansas City N. W. R. Co.* (Kan.), 12-588.

SPECIAL PROCEEDINGS.

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SPECIAL VENIRE.

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Premises subject to agreement for party wall, see **PARTY WALLS**, 3.

1. GROUNDS OF RELIEF.

Inadequacy of remedy at law. — When an action at law for damages will not answer the justice of the case and an action for specific performance will do so, the action for specific performance will lie. *O'Donnell v. Chamberlain* (Colo.), 10-931.

2. DISCRETION OF COURT.

General rule. — The enforcement of a contract by a decree for its specific performance rests in the sound discretion of the court, which will be exercised in accordance with established principles of equity. *Marks v. Gates* (U. S.), 12-120.

A court of equity may always so mould its decree as to measure out justice to all concerned, and the question whether a specific performance will be decreed in a given case is always addressed in the first instance to the sound judicial discretion of the court whose aid is invoked. *Phalen v. United States Trust Co.* (N. Y.), 9-595.

Discretion not arbitrary or capricious. — In Illinois the discretion with which a chancellor is vested in a suit for specific performance to grant or deny relief is a legal and not an arbitrary discretion. He may deny relief only when the facts are doubtful, or the contract is so uncertain that injustice might arise, and where no such condition exists the Supreme Court will refuse to enforce a decree denying relief. *Ullsperger v. Meyer* (Ill.), 3-1032.

Where an application for specific performance is addressed to the sound legal discretion of the court, and the relief will not be decreed as a matter of course, the discretion is not arbitrary or capricious, but is controlled by the established principles of equity; and where a contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award damages for its breach. *Marshall v. Keach* (Ill.), 10-164.

Inadequacy of consideration. — Mere inadequacy of consideration is not of itself

ground for withholding specific performance of a contract; but if the consideration is grossly inadequate and the contract is made without knowledge of the nature of the property to be affected, and where a contract requires one party, in consideration of \$1,000 and the cancellation of a debt of \$11,000 not shown to have been collectible, to transfer to the other, one-fifth of all property of every description that the former may during his lifetime acquire in Alaska, by whatever means, and it appears that property so acquired amounts to more than \$750,000, no equitable principle is violated in denying specific performance of the contract and leaving the parties to their legal remedies. *Marks v. Gates* (U. S.), 12-120.

3. WHAT CONTRACTS WILL BE SPECIFICALLY ENFORCED.

a. Antenuptial contracts.

Contract containing covenant to leave property by will. — It is no ground for refusing specific performance of an antenuptial contract that the contract contains covenants on the part of one of its parties to leave property by will to one of the parties to the marriage. *Phalen v. United States Trust Co.* (N. Y.), 9-595.

In an action by a husband for specific performance of an antenuptial contract whereby the plaintiff's father agreed to make testamentary provision for him, there is no force in the contention that to give effect to the contract would be to treat it as a testamentary instrument which the plaintiff is precluded from enforcing because he interposed no objections to the probate of his father's will. *Phalen v. United States Trust Co.* (N. Y.), 9-595.

Right of husband to specific performance of antenuptial contract. — A husband may maintain a suit in equity to compel complete specific performance of an antenuptial contract whereby his father agreed to make a testamentary provision for him. *Phalen v. United States Trust Co.* (N. Y.), 9-595.

Where specific performance would defeat object of contract. — In an action by a husband for specific performance of an antenuptial contract whereby his father agreed to make testamentary provision for him, where it appears that the testator, instead of making an absolute bequest as required by the contract, made a bequest in trust for the benefit of the plaintiff during his life with remainder over to his heirs at law, and it further appears that the plaintiff's habits are such as to endanger the safety of the fund which he claims, to the injury of his wife and children, or if for any other reason a court of equity may deem it inequitable or unjust to decree specific performance, the court, in the exercise of its discretion, may withhold a decree the effect of which would be to defeat the very object for which the contract was made. *Phalen v. United States Trust Co.* (N. Y.), 9-595.

b. Contracts of guaranty.

Agreement to make a valid contract.

— A court of equity will not take jurisdiction to compel the specific performance of a verbal agreement to make a valid contract of guaranty where it would not reform such a contract defectively reduced to writing through mutual mistake. *Rowell v. Smith* (Wis.), 3-773.

c. Contracts to construct or maintain.

Executory contract to construct levee.

— A court of equity will not decree specific performance of an executory contract to construct a levee, as there is no method by which its decree can be enforced. *Leonard v. Board of Directors* (Ark.), 9-159.

Agreement by canal company to maintain levee and ditch. — Where a corporation vested with the power of eminent domain institutes a condemnation proceeding to acquire land for its drainage canal, and during the pendency of the proceeding the landowner conveys the land to the corporation pursuant to a compromise effected between the parties, and the deed contains a stipulation binding the grantee to erect and maintain a levee and ditch, the stipulation is a valid contract between the parties which a court of equity may enforce specifically, whether or not it is strictly speaking a covenant. *Sanitary District v. Martin* (Ill.), 10-227.

Where a condemnation proceeding instituted by a corporation vested with the power to acquire land for its drainage canal is compromised by the conveyance of the land to the corporation, and the deed contains an agreement binding the grantee to maintain a levee and ditch on its own land for the benefit of the grantor, it is no defense to an action by the grantor for specific performance of the agreement that the grantee does not own the land upon which it will be necessary to construct the levee and ditch, as its power of eminent domain gives it the right to condemn such land if necessary. *Sanitary District v. Martin* (Ill.), 10-227.

Award of damages in lieu of performance. — In an action by the grantor in a deed executed in compromise of a condemnation proceeding to compel specific performance of an agreement by the grantee to construct a levee and ditch for the grantor's benefit, where the court finds that the cost of the levee and ditch would be so much in excess of the benefit that it would be unjust and inequitable to decree specific performance, it may award damages instead of performance. *Sanitary District v. Martin* (Ill.), 10-227.

d. Contracts involving skill, judgment, and technical knowledge.

Contract relating to operation of railroad. — While equity will not ordinarily decree the specific performance of contracts requiring continuous acts involving skill, judgment, and technical knowledge, contracts

relating to the operation of railroads may be specifically enforced. *Taylor v. Florida East Coast R. Co. (Fla.)*, 14-472.

e. Personal property contracts.

Contract for sale and purchase of securities. — A contract for the purchase of certain specified securities may be specifically enforced in equity at the instance of the purchaser on the ground that the latter's remedy at law would be inadequate, where the purchaser could not go into open market and purchase other securities which would answer the same purpose as the securities bargained for, and where the damages sustained by the purchaser by a breach of contract could not be estimated in an action at law. *O'Donnell v. Chamberlain (Colo.)*, 10-931.

Contract for delivery of chattels. — Specific performance of a contract for the delivery of chattels will not be granted, in the absence of a showing that like property cannot be readily obtained and that complainant cannot be fully compensated in damages, even though the chattels are particularly adapted to the use contemplated by the contract. *Lewman & Co. v. Ogden Bros. (Ala.)*, 5-265.

f. Real property contracts.

(1) Discretion of court.

In general. — It is a matter in the sound discretion of the court to decree specific performance of a contract to convey land. *Wilbur v. Toothaker (Me.)*, 18-1190.

(2) Certainty required.

General rule. — A contract for the sale of lands, of which a court of equity will enforce specific performance, must be certain in its terms; and that certainty required has reference to the parties contracting, the terms of the sale and the description of the property, and whenever the property to be conveyed cannot be identified as the property referred to in the contract, specific performance will be denied. *Halsell v. Renfrow (Okla.)*, 2-286.

Failure to recite county and state where land is situated. — In an action for the specific performance of a contract for the sale of realty, a memorandum of sale containing the terms of the contract, dated at Portland, Oregon, where the parties reside, and describing the property by lot numbers in a certain plat, but without reciting the county and state in which the property is situated, is nevertheless sufficiently definite to support a decree for specific performance, when it is taken in connection with an admission in the answer that the defendant is the owner of the lot named "in Multnomah county, Oregon," the county in which the city of Portland is situated. *Flegel v. Dowling (Ore.)*, 19-1159.

(3) Options to purchase land.

In general. — The essential feature of an option contract that gives the holder of the option the right to refuse to purchase,

does not prevent the specific enforcement of the contract by him. *Mier v. Hadden (Mich.)*, 12-88.

A unilateral written contract for the sale of land, based upon a valuable consideration, may be specifically enforced. *Aiple-Hemmelmann Real Estate Co. v. Spelbrink (Mo.)*, 14-652.

When specifically enforced. — Equity will enforce specifically an option contract for the sale of land where the purchaser, relying on the contract, has entered into a contract to sell the land purchased and would be liable in an action for damages for failure to complete the sale. *Mier v. Hadden (Mich.)*, 12-88.

Contract held not lacking in mutuality. — An option contract for the purchase of land is not lacking in mutuality so as to prevent its specific enforcement by reason of the fact that, by its express terms, the purchaser is given his choice of an action at law or specific enforcement, while the vendor is not, and that the purchaser's damages are stipulated while the vendor's are not. *Mier v. Hadden (Mich.)*, 12-88.

Refusal to perform before demand. — The right of the holder of an option, based on a valuable consideration, to the specific enforcement thereof, is not lost by the fact that the vendor refuses to perform the contract before the purchaser demands performance. *Mier v. Hadden (Mich.)*, 12-88.

Contract signed only by defendant. — An option contract for the sale of land founded upon a consideration may be enforced in equity, though signed only by the party sought to be charged thereby. *Cummins v. Beavers (Va.)*, 1-986.

(4) Oral contracts.

Where there has been a sufficient part performance. — Where a purchaser under a parol contract has been placed in possession and has held under the contract and paid all or part of the purchase money and made valuable permanent improvements upon the land, and such possession has been actual and exclusive, and not as a tenant of the vendor, he may maintain his bill in a court of equity for specific performance. *Ratliff v. Sommers (W. Va.)*, 1-970.

(5) Contract not signed by purchaser.

In general. — Specific performance of a contract to sell land signed by the vendor may be enforced at the suit of the purchaser though he did not sign the contract. *Flegel v. Dowling (Ore.)*, 19-1159.

The vendor in a contract for the sale of lands who has signed a written memorandum of the same cannot defeat specific performance of the contract upon the ground of want of mutuality, based upon the fact alone that the vendee did not also sign the memorandum. *Ullsperger v. Meyer (Ill.)*, 3-1032.

(6) Necessity of tender of purchase price.

Where time of payment is of the essence of the contract. — Where a contract

for the sale of land provides that the purchase money shall be paid by a specified day, when the vendor is to execute a deed, and that if not so paid the contract shall be void, and further declares that this provision for payment is of the essence of the contract, the vendee is not entitled to specific performance unless he pays or tenders the money on the day specified, and thus puts the vendor in default. *Thompson v. Robinson* (W. Va.), 17-1109.

What will excuse absence of tender.

— Though the petition in a suit by a purchaser for the specific performance of a contract for the sale of land contains no good allegation of a legal tender of the purchase price, it states such a case as in equity will excuse a better tender, leaving the rights of the parties to be adjusted and enforced by appropriate decree, where it alleges part payment, an extension of time for the balance, wrongful possession and use of the premises and enjoyment of the rents and profits by the defendants, and the plaintiff's readiness and willingness to pay what is due the defendants after the deduction of compensation for the use of the premises during the time of the withholding of possession. *Harris v. Greenleaf* (Ky.), 4-849.

Allegation in bill of willingness to pay. — The purchaser in a contract for the sale of land may maintain a suit for its specific performance, though he has made no formal tender of the unpaid balance of the purchase price, if, other equitable requirements being satisfied, he alleges in his petition that he is ready and willing to pay, and shows a sufficient excuse for not having made a formal tender. *Harris v. Greenleaf* (Ky.), 4-849.

(7) Where vendor's wife refuses to join in deed.

In general. — A court of chancery will not specifically enforce a contract for the sale of real estate against a married man whose wife, uninstituted by him, refuses to join in the deed for the purpose of conveying her inchoate dower, especially if the vendee knew at the time of the contract that the vendor was married, unless the vendee is willing to pay the full amount of the purchase money and to accept from the vendor alone a deed containing the covenants stipulated for in the contract, the vendee being left to his remedy at law for the recovery of damages resulting from the existence of such dower right. *Aiple-Hemmelmann Real Estate Co. v. Spelbrink* (Mo.), 14-652.

(8) Contract to convey homestead.

Contract of husband where wife signs duplicate before repudiation. — Specific performance may be had of a married man's contract to convey land containing the family homestead, where it appears that though the contract was originally signed by the husband only, the wife signed a duplicate in her husband's possession before the con-

tract was repudiated on the ground of her nonjoinder, and that at the date when the conveyance should have been made the husband and wife joined in the execution of a deed which was duly tendered to the purchaser. *Kettering v. Eastlack* (Iowa), 8-357.

(9) Agreement to sell by one of several tenants in common.

Enforcement against cotenants. — An agreement by one tenant in common to convey the whole of the joint property cannot be enforced against the cotenants, but may be enforced against him as to his interest in the premises. *Moore v. Garigietti* (Ill.), 10-560.

Purchase money where cotenants refuse to join in conveyance. — In an action by a purchaser to enforce the specific performance of a contract to sell land, where it appears that the vendor owns only two-fifths of the land contracted to be sold, a decree directing the vendor to convey his interest should only require the purchaser to pay two-fifths of the purchase price stipulated in the contract. *Moore v. Garigietti* (Ill.), 10-560.

(10) Inadequacy of consideration.

In general. — Mere inadequacy of consideration, if agreed upon by the parties without fraud, is not sufficient to defeat a decree for the specific performance of a contract for the sale of lands. *Ullsperger v. Meyer* (Ill.), 3-1032.

(11) Effect of increase in value of land.

After payment on account of purchase money. — The purchaser in a contract for the sale of land is not precluded from maintaining a suit for its specific performance because the land has increased in value, where such increase has taken place after he has paid a part of the purchase price and the delay in offering to pay the balance is neither unreasonable nor due to bad faith. *Harris v. Greenleaf* (Ky.), 4-849.

(12) Who may enforce contract.

Assignee of purchaser. — A contract to sell land may be assigned by the purchaser, and may be enforced specifically by the assignee. *Moore v. Garigietti* (Ill.), 10-560.

(13) Who may be required to perform.

Purchaser from vendor with notice. — One purchasing property with notice that his grantor has previously contracted to convey it to another may be compelled to perform the contract in the same manner and to the same extent as his grantor would have been liable to do had he not transferred the legal title. *Drake v. Brady* (Fla.), 17-1033.

Purchaser from vendor without notice. — The specific performance of a contract to convey land is impossible where the vendor has sold the land to a third person who is free from all equities. *Halsell v. Renfrow* (U. S.), 6-189.

- (14) Where contract price to be fixed by appraisers.

In general. — Where a contract is entered into between a water company and a city for the construction of waterworks and their operation for twenty years, by which the company agrees to give the city the option to purchase the works at the end of the term at a price based on their productive worth, to be determined by four appraisers chosen by the parties and the fifth to be chosen by the four, on condition that the city shall give notice of its intention to buy before the expiration of the term, and the city gives the notice, but subsequently refuses to appoint the appraisers and to complete the purchase, an equity exists in the water company, which entitles it to a specific performance of the contract, and this remedy is more complete and efficient than any it has at law. *Castle Creek Water Co. v. Aspen* (U. S.), 8-660.

Absence of remedy at law. — Where a city has refused to perform its contract to purchase waterworks of a company, at a price based on their productive worth, to be determined by appraisers, the water company has no remedy at law as complete and efficient as the specific performance of the contract in equity. *Castle Creek Water Co. v. Aspen* (U. S.), 8-660.

Fixing of price by court. — Where, in a contract for the sale of real estate at a price to be fixed by appraisers to be chosen by the parties, the stipulation for the appraisers is not a condition or the essence of the agreement, but is subsidiary or auxiliary to its main purpose and scope, and the parties cannot be left or placed *in statu quo* by a refusal to enforce performance, a court of equity may determine the price itself, or by its master or by appraisers of its own selection, and may enforce specific performance of the agreement of sale. But where the stipulation for the appraisers is a condition or the essence of the contract, and a refusal to enforce it will leave the parties in their original situations when the contract was made, a court of equity will not enforce specific performance of it. *Castle Creek Water Co. v. Aspen* (U. S.), 8-660.

- (15) Provision in contract for liquidated damages.

Conversion of contract in optional contract. — The fact that liquidated damages are provided for as a part of a contract to convey land does not convert the contract into an optional one under which the obligor is entitled to relieve himself from the duty of specific performance by paying the specified damages, where it is apparent that the intention was that the obligor should convey and that the provision for damages was simply a means of securing the conveyance. *Kettering v. Eastlack* (Iowa), 8-357.

- (16) Evidence.

Requirement of clear and convincing evidence. — A contract is not proved by

clear and convincing evidence within the rule as to specific performance, where it rests on the testimony of a single witness, a man well advanced in years, that he heard a conversation twenty-five years before in which the alleged vendor agreed to sell the land to the plaintiff. *Wilbur v. Toothaker* (Me.), 18-1190.

Parol evidence where description of land is insufficient. — Where a sufficient description is given in the contract, parol evidence may be resorted to in order to fit the description to the thing, but where an insufficient description is given or where there is no description, such evidence is inadmissible. A court will never receive parol evidence both to describe the land and to apply the description.

Sufficiency to show notice to vendor's grantee. — Evidence reviewed, in an action by the purchaser to enforce specific performance of a contract for the sale of land and to cancel a deed to the land made by the defendant to a third person, and held sufficient to show that the third person was not an innocent purchaser. *Crotty v. Effler* (W. Va.), 9-770.

In action between heir and devisee in settlement of will contest. — In an action by an heir at law for the specific performance of a contract between him and the residuary devisee whereby the latter agreed to convey to the former an interest in the land devised in consideration of a promise to refrain from contesting the will, evidence examined and held to entitle the plaintiff to a decree. *Grochowski v. Growchowski* (Neb.), 15-300.

4. ANCILLARY RELIEF OF INJUNCTION AND DECREE FOR DAMAGES.

General rule. — Where a court of equity properly acquires jurisdiction of a cause to enforce specific performance of a contract, the court will proceed to administer complete justice by adjudicating all matters properly presented and involved in the case. Injunctions, both mandatory and restraining, may be granted and damages may be awarded upon proper allegations and proofs when necessary to do complete justice. *Taylor v. Florida East Coast R. Co.* (Fla.), 14-472.

Where complainant is not entitled to specific performance. — The ancillary relief of an injunction in aid of specific performance will not be granted when the contract is of such a nature that the complainant is not entitled to the principal relief sought. *Lewman & Co. v. Ogden Bros.* (Ala.), 5-265.

Temporary injunction. — In a proceeding for the specific performance of a contract a temporary injunction against the breach of the contract will not be granted unless the allegations of the bill of complaint warrant a decree of specific performance, and it also appears that an injunction is appropriate and just. *Taylor v. Florida East Coast R. Co.* (Fla.), 14-472.

Compensation in lieu of performance. — A court of equity will not grant

pecuniary compensation in lieu of specific performance unless the case presented is one for equitable interposition such as would entitle the plaintiff to performance but for intervening facts, such as the destruction of the property, the conveyance of the same to an innocent third person, or the refusal of the vendor's wife to join in a conveyance. *Marks v. Gates* (U. S.), 12-120.

Enhancement of damages. — On appeal from a decree awarding damages in lieu of specific performance of an agreement by the defendant to construct a levee and ditch for the protection of the plaintiff's land, where it appears that after the institution of the action but before the rendition of the decree the plaintiff sold the land to a third person, the decree will not be reversed on the ground that the sale was merely colorable, and was for the purpose of giving to the land a fictitious value, if the evidence shows that the damages were not assessed upon this value but upon other evidence in the case. *Sanitary District v. Martin* (Ill.), 10-227.

5. PLEADING AND PRACTICE.

a. Parties.

Necessity for joinder of proper parties. — Specific performance ought not to be decreed unless all the proper parties are before the court. *Phalen v. United States Trust Co.* (N. Y.), 9-595.

Purchaser and divorced wife of vendor as parties defendant. — A bill for specific performance may be maintained by the vendor of land against his purchaser and against the vendor's divorced wife, though the proper remedy is an action of assumpsit to enforce the payment of the purchase money, where the purchaser's refusal to perform is based on the contention that the decree for alimony in favor of the divorced wife is a lien on the land covered by the contract of sale. *Kerr v. Kerr* (Pa.), 9-89.

b. Pleading.

Action at law for recovery of damages. — Where the pleadings show that an action is one at law for the recovery of damages for the breach of contract, the plaintiff cannot claim the right to have specific performance decreed. *Todd v. Bettingen* (Minn.), 8-960.

Allegation of offer to perform. — In an action by the holder of an option to purchase land for specific performance of the contract, a bill which offers to pay the price and to bring into court the amount thereof to be paid on delivery of a conveyance, is a sufficient allegation of an offer to perform. *Mier v. Hadden* (Mich.), 12-88.

Failure to allege agreement as to time of performance. — In a suit by the purchaser to enforce the specific performance of a contract for the sale of land, the complaint is defective if it fails to allege the time agreed upon for the performance of the contract, but the defect should be met with a motion to make the complaint more definite

and certain, and cannot be reached by demurrer, as in the absence of an allegation of a definite time the law presumes that the contract was to be performed within a reasonable time. *Phillips v. Jones* (Ark.), 9-131.

Amendment of answer. — In an action by the vendor for the specific performance of a contract to convey land, where there is nothing in the contract requiring the plaintiff to show a perfect title in himself at the time of making the contract, it is proper for the trial court to refuse to permit the defendant to amend his answer by inserting an allegation that the plaintiff did not have the title at the time the contract was made. *Kettering v. Eastlack* (Iowa), 8-357.

c. Defences.

Failure of consideration. — The vendor of land sold in exchange for corporate stock cannot defeat specific performance of the contract by showing that the corporation is a *de facto* one merely, where there was no express or implied warranty that the corporation was a *de jure* one, and there is no claim that there was fraud or deception of any kind on the part of the purchaser of the land in the making of the contract, or that the property of the corporation was not worth the value placed upon it in the contract, or that any judgments or debts existed against the corporation or the purchaser of the land, and it appears that the corporation can be converted into a *de jure* one by the filing of its certificate of organization with the proper officer. *Marshall v. Keach* (Ill.), 10-164.

Laches. — A suit for specific performance is barred by laches where it is not brought until twenty-four years after the alleged contract was made and after the death of the alleged vendor. *Wilbur v. Toothaker* (Me.), 18-1190.

Misrepresentations by defendant. — Misrepresentations, in order to constitute a defense to a suit for the specific performance of a contract, must have been relied upon by the defendant. Unless an untrue statement is believed and acted upon, it occasions no legal injury. *Crotty v. Effer* (W. Va.), 9-770.

Effect of waiver of lack of mutuality. — The defendant in an action for specific performance cannot set up a lack of mutuality in the contract, where by his conduct he has clearly waived the defect. *Marshall v. Keach* (Ill.), 10-164.

Stipulation of contract which has been waived. — In an action for the specific performance of a contract, where it appears that the parties have waived the stipulation that time should be of the essence, the stipulation cannot be set up to defeat the relief sought. *Marshall v. Keach* (Ill.), 10-164.

d. Evidence.

Must be clear and convincing. — A decree for specic performance will not be granted unless the evidence of the making of the contract is clear and convincing. *Wilbur v. Toothaker* (Me.), 18-1190.

Evidence foreign to issue. — Where a bill for the specific performance of a contract for the sale of land is drawn upon the theory of enforcing the contract against the defendant irrespective of his wife's inchoate dower in the land, there being no prayer for the deduction of the value of such inchoate dower, evidence as to the value of such dower right is foreign to the issues and a decree making such deduction is not responsive to the pleadings. *Aiple-Hemmelmann Real Estate Co. v. Spelbrink* (Mo.), 14-652.

e. Decree.

When sufficiently definite. — Where it is contemplated by a contract to sell land that interest on deferred payments shall run from the completion of the contract by the execution of the conveyance, a decree for specific performance of the contract is sufficiently definite upon that point if it specifies when the deed is made and requires that the notes and mortgage for deferred payments shall be executed, as it will be implied that interest is to run from the execution of the notes. *Ruzicka v. Hotovy* (Neb.), 9-1058.

f. Appeals.

Effect of appeal. — Where a decree for specific performance requires the plaintiff to deposit money or securities in court within a specified time as a condition precedent to the enforcement of the decree against the defendant, and the defendant, within the time limited for making such deposit, appeals from the decree and supersedes it, the time allowed for making the deposit is thereby extended until a like time after the decree becomes again enforceable. *Ruzicka v. Hotovy* (Neb.), 9-1058.

Provisions not prejudicial to appellant. — In a suit by the purchaser to enforce specific performance of a contract to sell land, a provision, in a decree in favor of the plaintiff, that the plaintiff shall secure deferred payments by a mortgage on the premises, is not prejudicial to the defendant, and the decree will not be disturbed on appeal on account of such provision, where the plaintiff has not appealed therefrom. *Ruzicka v. Hotovy* (Neb.), 9-1058.

SPECTATORS.

Misconduct of spectator as ground for discharging jury in criminal case, see CRIMINAL LAW, 6 l.

SPECULATION.

Taking option for speculation as fraud, see VENDOR AND PURCHASER, 1 e.

SPECULATIVE DAMAGES.

In condemnation proceedings, see EMINENT DOMAIN, 7 c (4).

SPECULATIVE TESTIMONY.

See EMINENT DOMAIN, 9 j.

SPEECH, LIBERTY OF.

See CONSTITUTIONAL LAW, 17.

SPEED.

Regulating speed of automobiles, see MOTOR VEHICLES, 1 b.

Speed of cars as evidence of negligence, see RAILROADS, 8 b (2); STREET RAILWAYS, 8 a (3).

SPEEDY TRIAL.

Right of accused, see CRIMINAL LAW, 6 c (1).

SPELLING.

Effect of errors in spelling, see FORGERY, 1 a; FRAUDS, STATUTE OF, 3 e (2).

Misspelling of name in signing will, see WILLS, 3 f.

SPENDTHRIFTS.

Validity of spendthrift trusts. — A testator may create for the benefit and enjoyment of the devisee a trust estate, and such a provision may, if so intended by the testator, limit the right of alienation by the devisee, and its liability for his debts. *Mattison v. Mattison* (Ore.), 18-218.

An equitable life estate in which the beneficiary has absolute rights but which is inalienable by him and beyond the reach of his creditors may be created by appropriate language. *Mason v. Rhode Island Hospital Trust Co.* (Conn.), 3-586.

Invalid where donor is beneficiary. — A person cannot put his property beyond the reach of liability for his future debts by creating a spendthrift trust in his own favor. *Petty v. Moores Brook Sanitarium* (Va.), 19-271.

Deed held insufficient to create trust. — A deed which conveys an absolute estate in fee simple to the grantee and gives him the right of possession and of managing and controlling the property and of receiving the whole income thereof without let or hindrance and of the unlimited enjoyment of the same, and neither appoints a trustee nor creates a trust estate, falls short of the requirements of the rule as to the creation of spendthrift trusts, although the conditions of the deed are that the property shall not be liable for any of the debts of the grantee for a period of thirty years and that the grantee shall have no power to sell, encumber, or dispose of said property during that period except by last will and testament. *Kessner v. Phillips* (Mo.), 3-1005.

Mode and terms of creation.—A spendthrift trust is one created to provide a fund for the maintenance of the beneficiary and at the same time to secure it against his improvidence or incapacity, and it is not necessary that the beneficiary should be denominated a spendthrift, or that all the qualifications and restrictions incident to such trusts should be imposed by the instrument creating it, or that there should be a gift over on the termination of the trust; and where the language is sufficient to create such a trust, no inquiry can be made as to whether the beneficiary is in fact a spendthrift. *Wagner v. Wagner* (Ill.), 18-490.

Intention to create.—An intention to create a spendthrift trust appears in a will by which the testator bequeaths property to trustees to hold, manage, and pay the income to the testator's sons at such times and in such amounts as the trustees in their discretion shall deem proper, the trustees also being authorized at their discretion, to sell any part of the trust property and pay the proceeds to the beneficiary, and to terminate the trust at any time. *Wagner v. Wagner* (Ill.), 18-490.

Effect of intention to create.—Where it appears, on a consideration of a will, that it was the intention of the testator to create a spendthrift trust, effect will be given to that intention. *Wagner v. Wagner* (Ill.), 18-490.

Implication of provision against alienation or liability for debts.—In an equitable life estate a provision against alienation or liability to creditors need not be in express terms, but may be implied from the general intention of the donor, to be gathered from the terms of the trust in the light of all the circumstances. *Mattison v. Mattison* (Ore.), 18-218.

Active trust, effect of power to dispose of fund by will.—A testamentary trust, the trustees of which are authorized to pay to the beneficiary after he reaches the age of twenty-one years, for and during his natural life, or any part, or none, of the income of the trust funds, at their discretion, is valid and active during the life of the beneficiary, and will not be terminated upon a suit brought by him; and the fact that the beneficiary is given power to dispose of the trust fund by will does not enlarge his interest in the fund. *Mason v. Rhode Island Hospital Trust Co.* (Conn.), 3-586.

SPIRITUALISM.

Belief in spiritualism as evidence of mental incapacity, see **WILLS**, 4 e (3).

SPITE FENCES.

See **FENCES**, 1 b.

SPLITTING CAUSES OF ACTION.

See **ACTIONS**; **SALES**, 6 c (1).

SPONTANEOUS COMBUSTION.

See **EXPLOSIONS AND EXPLOSIVES**, 6 a.

SPRING GUNS.

Causing death of trespassers, see **HOMICIDE**, 5 b.

Spring guns as nuisance, see **NUISANCES**, 1 b.

SPRINGS.

Damages for destruction of spring, see **DAMAGES**, 9 c.

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SPRINKLING.

Power of municipality to incur expense for sprinkling streets, see **MUNICIPAL CORPORATIONS**, 3 e.

Sprinkling assessments, see **SPECIAL OR LOCAL ASSESSMENTS**, 2.

SPOUSE.

See **HUSBAND AND WIFE**.

SPUR RAILROADS.

Condemnation of right of way, see **EMINENT DOMAIN**, 4 b.

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Possession by, see **ADVERSE POSSESSION**.

STABLES.

See **LIVERY STABLE KEEPERS**.

Stables as nuisance, see **NUISANCES**, 1 b.

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Identification of accused by blood stains, see **CRIMINAL LAW**, 6 n (2).

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Implied warranty, see **SALES**, 4 a.

STAMPS.

See **TRADING STAMPS**.

Failure to affix revenue stamp to deed, see **DEEDS**, 2 d.

STANDARD POLICY.

See **INSURANCE**, 5 e (1).

STANDING JURORS ASIDE.

See **JURY**, 6 b.

STANDING TIMBER.

Sale of, see **FRAUDS**, **STATUTE OF**, 4 b (2).

STARE DECISIS.

1. IN GENERAL.

2. APPLICATION OF DOCTRINE TO CONSTITUTIONAL QUESTIONS.

3. BINDING EFFECT OF DECISION AS AFFECTED BY STATUS OF COURT.

4. MISCELLANEOUS CASES OF APPLICATION OF DOCTRINE.

1. IN GENERAL.

Adherence to doctrine. — The doctrine of *stare decisis* is salutary, and should be adhered to. *Mabardy v. McHugh* (Mass.), 16-500.

Limitations of doctrine. — The doctrine of *stare decisis* does not prevent re-examination and correction of principles previously declared, but it is the province of the court to declare the law and not to legislate by overruling decisions which correctly expound the prevailing practice of the jurisdiction. *Commonwealth v. Walsh* (Mass.), 13-642.

Decision by divided court. — A decision rendered by four of the judges of an appellate court composed of eight judges, a fifth judge concurring merely in the result of the decision, and the remaining three judges dissenting, is not, beyond the case wherein it is rendered, decisive of the proposition decided therein, and is not binding as a precedent. *Kalamazoo v. Crawford* (Mich.), 16-110.

2. APPLICATION OF DOCTRINE TO CONSTITUTIONAL QUESTIONS.

In general. — Decisions on constitutional questions that have long been considered the settled law of the state should not be lightly set aside, though the court as presently constituted might reach a different conclusion if the proposition were an original one. *State v. Frear* (Wis.), 20-633.

Effect of acquiescence in decision by legislature. — When a decision of a court of last resort determining the constitutionality of a statutory provision has been acquiesced in by the legislature and the people for a considerable period of time, and rights have become settled thereunder, and no beneficial result will be obtained by overruling such decision, the court will not reopen the question. *Walling v. Bown* (Idaho), 2-720.

Where decision has been acted on by legislature. — A decision by the Supreme

Court of a state on a question of constitutional law is binding on the legislature, and where such decision has often been cited with approval and has been acted on by the legislature in enacting a statute, the court will adhere to it and uphold the constitutionality of the statute unless the doctrine enunciated is vicious in principle or dangerous in its tendency. *State v. Frear* (Wis.), 20-633.

Effect of plain error in previous decisions. — The doctrine of *stare decisis* does not require that a state court of last resort shall adopt the construction placed by its previous decisions on the state constitution, if such construction is plainly and palpably erroneous, though it has been asserted, reasserted, and acquiesced in for many years. *Arnold v. Knoxville* (Tenn.), 5-881.

3. BINDING EFFECT OF DECISION AS AFFECTED BY STATUS OF COURT.

Decisions of inferior courts. — The doctrine of *stare decisis* does not require a state court of last resort to enforce a decision of an inferior state court with respect to the construction of a state statute, which decision has been expressly disapproved and overruled by the court of last resort. *Sedalia v. Donohue* (Mo.), 4-89.

An Ontario Divisional Court is the court of last resort on appeal from a County Court, and should on such an appeal give an independent judgment without regard to a previous decision of a Divisional Court. *Mercier v. Campbell* (Ont.), 10-503.

4. MISCELLANEOUS CASES OF APPLICATION OF DOCTRINE.

Decision establishing rule of property. — When an earlier decision of the Nebraska Supreme Court has established a rule of property, which has been relied upon for many years as the foundation of real estate titles, the court will not overturn such rule notwithstanding the fact that it cannot assent to the reasoning upon which it is based. *Grandjean v. Beyl* (Neb.), 15-577.

Interpretation of old statutes as applicable to new statutes. — If it appears from the codification of a state statute law that it was the intention of the legislature to change radically, or to add materially to previous statutory provisions, the decisions of the courts as to prior statutes should not be regarded as binding in the interpretation of such provisions of the code as are new or fundamentally different. *Martin v. Oskaloosa* (Ia.), 3-651.

Judicial dictum distinguished from obiter dictum. — An expression of opinion upon a point argued by counsel and deliberately passed upon by the court, though it is not essential to a disposition of the case, is, if it is dictum at all, judicial dictum as distinguished from mere obiter dictum, the latter of which is an expression originating alone with the judge who writes the opinion, as an argument or illustration. *Rhoads v. Chicago, etc., R. Co.* (Ill.), 10-111.

STATE BANKS.

See **BANKS AND BANKING.**

STATE COURTS.

See **COURTS, 2 c.**

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1. **INTEREST, JURISDICTION, AND POWERS GENERALLY, 1432.**
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Ownership of fish and game, see **GAME AND GAME LAWS, 1.**

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Parole act as encroachment on powers of governor, see **CRIMINAL LAW, 7 a (1).**

Police power of states, see **CONSTITUTIONAL LAW, 5.**

Power of Congress to prescribe rules for state courts, see **EVIDENCE, 22.**

Power of federal courts to enjoin state officers from enforcing state statutes, see **INJUNCTIONS, 2 d (4).**

Power of governor to appoint police judges, see **JUDGES, 1.**

Power of governor to create public office, see **CONSTITUTIONAL LAW.**

Power of governor to remit fines, see **FINES, 3.**

Power of governor with respect to extradition, see **EXTRADITION.**

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Prohibiting use of state arms or seal for advertising, see **CONSTITUTIONAL LAW, 8.**

Right of state to require payment in excess of amount due, see **PAYMENT, 4 b.**

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Right to contest validity of will, see **WILLS, 7 e (1).**

Right to divert water from adjoining state, see **WATERS AND WATERCOURSES, 3 b (3).**

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Taxation of state bonds, see **TAXATION, 2 a.**

Validity of state statute affecting interstate commerce, see **INTERSTATE COMMERCE, 4.**

Validity of state statute passed prior to enabling act of Congress, see **INTERSTATE COMMERCE, 2 b (3).**

1. **INTEREST, JURISDICTION, AND POWERS GENERALLY.**

Interest in earth and air within domain. — A state in its quasi-sovereign capacity has an interest, independent of and behind the titles of its citizens, in all the earth and air within its domain, and has not, by entering into the Union, agreed to submit

to injury from outside sources to its *quasi-sovereign* interests, or renounced the right to make reasonable demands for the protection of those interests. *Georgia v. Tennessee Copper Co.* (U. S.), 11-488.

Ownership of tide lands. — A state has power to invest a private person with the ownership of tide lands subject to no restrictions except those imposed by the state and federal constitutions. *Sequim Bay Canning Co. v. Bugge* (Wash.), 16-196.

Effect of concurrent jurisdiction over boundary river. — Though the states of Washington and Oregon have concurrent jurisdiction over the Columbia river, a citizen of Washington who, under authority and license from that state, takes fish in a purse net from the Columbia river within the territorial limits of Washington, is not subject to prosecution in Oregon under an Oregon statute making it a criminal offense to fish with purse nets in the Columbia river. *Nielson v. Oregon*, 212 U. S. 315, reversing 16 Ann. Cas. 1113.

Right to engage in works of internal improvement. — The Kansas statute providing for the construction, operation, and maintenance of an oil refinery by the state is void as violating a prohibition of the state constitution that the state shall never be a party in carrying on any works of internal improvement. *State ex rel. Coleman v. Kelly* (Kan.), 6-298.

2. GOVERNOR AND OTHER OFFICERS.

a. Rights and powers.

Legislative functions of governor. — The governor of a state, while engaged in considering bills which have passed both houses of the legislature and which are presented to him for approval or disapproval is acting in a legislative capacity and not as an executive. *Luckens v. Nye* (Cal.), 20-158.

Power of governor to modify statute by agreement with person benefited. — The governor of a state has no power, at the time of approving an act of the legislature appropriating money to pay a claim against the state, to qualify it by an agreement with the claimant that a sum less than the amount appropriated shall be received in full satisfaction. Such an agreement is wholly void and does not estop the claimant from demanding payment in full, though it is on the faith of the agreement that the governor signs the bill. *Luckens v. Nye* (Cal.), 20-158.

Power of governor to order discharge of prisoner. — Under the constitution and laws of Nebraska, the governor of the state has no authority to order a sheriff to discharge a prisoner who is in his custody under judgment of the court. *Campion v. Gillan* (Neb.), 16-319.

Right of secretary of state to additional compensation when acting as governor. — The secretary of state, when called upon in accordance with the constitution to act as the governor of the state, is entitled to the compensation attached to both

offices. *State ex rel. Chatterton v. Grant* (Wyo.), 2-382.

Judicial powers of secretary of state.

— The secretary of state of Iowa, in determining whether state printing has been done in compliance with statute, acts within his statutory *quasi-judicial* powers, and his decision is in the nature of an adjudication which cannot be assailed collaterally. *State v. Young* (Ia.), 13-345.

b. Judicial control.

Liability to mandamus in general. — Mandamus does not lie to compel the governor of a state to perform a duty which is political or executive and which involves discretion in the manner of its performance. *State ex rel. Irvine v. Brooks* (Wyo.), 7-1108.

Mandamus to compel performance of ministerial duties. — The duty imposed by the Wyoming statute upon the governor of the state to issue a certificate of election to the person whom the state canvassing board has declared to have received the highest number of votes for the office of state treasurer is purely ministerial and its performance may be compelled by mandamus. *State ex rel. Irvine v. Brooks* (Wyo.), 7-1108.

Under the Kentucky statute providing that certain officers including police judges shall have commissions issued to them by the governor, it is the duty of the governor to issue a commission to a person appointed police judge by a city board of council according to statute to fill a vacancy in that office, and the duty being ministerial in nature, mandamus will lie to compel its performance. *Traynor v. Beckham* (Ky.), 3-388.

Review of acts by certiorari. — The power of removing dispensary officers, vested in the governor of South Carolina by statute, is essentially governmental or executive in its nature, and an action of his in this regard is beyond the control of the judiciary and hence is not reviewable by certiorari from the Supreme Court. *State ex rel. Rawlinson v. Ansel* (S. Car.), 11-613.

3. LEGISLATURE.

Appointment of committees. — The house of delegates of West Virginia has no power, by its independent action, to raise a committee of investigation, with power to sit during the recess of the legislature after the close of the session of the legislature. *Ex p. Caldwell* (W. Va.), 11-646.

Adoption of rules of procedure. — The legislature has the power to adopt its own rules of procedure and to change them at any time and without notice. *French v. Senate* (Cal.), 2-756.

Interference with by court. — The courts have no power to interfere with the exercise by either branch of the legislature of its power to expel a member, no matter how arbitrary or unfair such expulsion may be. *French v. Senate* (Cal.), 2-756.

Effect of adjournment. — A court cannot issue an effective mandate against a branch of the legislature which has adjourned

its regular session *sine die*. *French v. Senate* (Cal.), 2-756.

Qualifications of members. — Persons who hold a state office in Georgia, except justices of the peace and officers of the militia, are ineligible to membership in the general assembly of that state. *McWilliams v. Neal* (Ga.), 14-626.

Where a person by reason of holding a state office other than justice of the peace or officer of the militia at the time of his election as a member of the Georgia general assembly is ineligible to membership in that body, the fact of his ineligibility does not work an ouster from the first office, but affects only his right to take a seat as a member of the general assembly. *McWilliams v. Neal* (Ga.), 14-626.

Expulsion of member. — The section of the California constitution providing that any member of the legislature who is bribed is guilty of a felony, and that upon conviction he shall be disqualified from holding public office, does not limit the power of the legislature under the constitution to expel a member for bribery to those cases in which the member has been convicted of the crime of bribery. *French v. Senate* (Cal.), 2-756.

There is no constitutional provision giving a member of the legislature the right to a trial and an opportunity to be heard upon charges made against him in such body, and where the member has been expelled by the legislature in the due exercise of a power given it by the constitution such member has not been deprived of his right to office without due process of law within the meaning of the Federal Constitution. *French v. Senate* (Cal.), 2-756.

Resolution for expulsion of member. — A resolution of the legislature resulting in the expulsion of a member has no effect upon his rights further than to terminate his right to sit as a member of such body and does not resemble a bill of attainder. *French v. Senate* (Cal.), 2-756.

4. COURTS.

Power of Congress over. — Congress could not, even if it intended to do so, compel the state courts to take jurisdiction of actions brought under the Federal Employers' Liability Act of 1908 (Act of April 22, 1908, c. 149, 35 St. L. 65, Fed. 81, Am. Supp. 1909, p. 584). No part of the judicial power of the United States, when it is to be exercised in the form of an original plenary action, can be vested in any court not created by the United States; and even if it were otherwise, and Congress had power to authorize a state court to entertain such an action, it would not follow that the jurisdiction must be assumed. *Hoxie v. New York, etc., R. Co.* (Conn.), 17-324.

5. TREASURY.

Audit as condition precedent to disbursement of funds. — Disbursements of

money from the state treasury must be preceded by an audit by the secretary of state. *Wadhams Oil Co. v. Tracy* (Wis.), 18-779.

A legislative enactment, so far as it authorizes payment of money out of the state treasury without constitutional audit, violates section 2, article VI., Const., making the secretary of state *ex officio* state auditor. *Wadhams Oil Co. v. Tracy* (Wis.), 18-779.

6. BONDS.

Determination of validity of state bonds. — The Arkansas statute providing for the payment and cancellation by the state treasurer of all outstanding valid bonds of the state, except those of a specified issue, is not objectionable as requiring bondholders to submit their bonds to the treasurer for final determination as to their validity, as his adverse decision is in no wise binding upon the bondholders but is subject to revision by the courts. *Tipton v. Smythe* (Ark.), 8-521.

Validity of stolen bond in hands of bona fide purchaser. — A coupon bond of the state of South Carolina, valid in its inception, is a negotiable security, as to which the issuing state incurs the same responsibilities as individuals or corporations in respect to their negotiable securities, and the title of a *bona fide* purchaser of such a bond before maturity is in no wise affected by the fact that the bond was surrendered to the state treasurer by an antecedent holder and subsequently stolen and put in circulation, although the theft of the bond was made possible by the failure of state officers to cancel the surrendered bond in accordance with statute. *Ehrlich v. Jennings* (S. Car.), 13-1166.

Effect of constitutional prohibition in such case. — To hold that a state bond which has been redeemed by the state and then stolen and reissued, is valid against the state in the hands of a *bona fide* purchaser for value before maturity, does not result in increasing the debt of the state in violation of a constitutional prohibition. *Ehrlich v. Jennings* (S. Car.), 13-1166.

7. PROPERTY.

Title vested in state board. — A state board empowered to take and hold the title to property for state purposes does not own such property in any proprietary sense. It is state property, to all intents and purposes, the same as in the case of title thereto being formally vested in the state. *Milwaukee v. McGregor* (Wis.), 17-1002.

8. CLAIMS OF.

Against insolvent. — The claim of a state for the amount of its loss under an insurance policy and the unearned premium thereon is not entitled to priority over other claims against an insurance company which has been declared insolvent upon a bill filed for that purpose and to wind up the affairs of which a receiver has been appointed. *State v. Williams* (Md.), 4-970.

9. CONTRACTS.

Right to breach contract. — A state, like an individual or private corporation, may refuse to keep its engagements; and the board of public lands and buildings in Nebraska, as a governmental agency having full authority in all matters relating to the management of the penitentiary, is vested with power to determine whether a contract for the leasing of convict labor shall be kept or broken. The action of the members of the board in the matter is the action of the state and their determination is its determination. *State ex rel. Davis v. Mortensen* (Neb.), 5-292.

10. ACTIONS AGAINST.

Necessity for authorization. — A sovereign state cannot be sued in its own courts without its consent, and the Nebraska constitution permitting such suits is not self-executing, and does not authorize a suit against the state in the absence of enabling legislation. A statute giving consent to suit in certain specified cases does not authorize suit in other cases. *State ex rel. Davis v. Mortensen* (Neb.), 5-291.

Liability for tort. — Neither the state, nor any of the subdivisions through which it operates, is liable for torts committed by public officers, save in definitely excepted classes of cases. The exemption is based upon the sovereign character of the state and its agencies, and upon the absence of obligation, and not on the ground that no remedy has been provided. *Claussen v. Luverne* (Minn.), 14-673.

Mandamus as remedy to enforce contract of state board. — A mandamus will not issue against the members of a state board to compel specific performance of a contract made by them for the leasing of convict labor, as the proceeding is in substance an action against the state to enforce performance of a contract made by it. *State ex rel. Davis v. Mortensen* (Neb.), 5-291.

A mandamus does not lie against the members of a state board of public lands and buildings to compel specific performance of a contract for convict labor, which purports to be not their contract, but the contract of the prison warden, which imposes no duties or obligations upon them, and with the enforcement of which they have not interfered. *State ex rel. Davis v. Mortensen* (Neb.), 5-291.

11. STATE FAIRS.

Appropriation of public funds. — A state fair is a public purpose for which the money of the state may be appropriated by the legislature; and a statute making such an appropriation is valid, though it designates an existing private corporation as the state's agent for the disbursement of the money appropriated, where it requires the corporation's treasurer to give bond, defines his powers, places him under the control of the state, and requires that any surplus left after the expenditures authorized by the act have been made shall be returned to the state

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1. ENACTMENT.

a. Constitutional requirements as to bills.

When joint resolution is insufficient. — A joint resolution of the legislature in ordinary form, having no title or enacting clause and not being introduced by bill, though approved by the governor, is precluded from having the force and effect of a law by the provisions of the Montana constitution that (Const., §§ 19, 20, 23) "no law shall be passed except by bill," that "the enacting clause of every law shall" be in a prescribed form, and that the subject of every law "shall be clearly expressed in its title. *State v. Cunningham* (Mont.), 18-705.

Amendments as affected by constitutional limitation of time for introduction of bills. — Under the Michigan constitution requiring bills to be introduced within a certain time from the commencement of a session of the legislature, when a bill providing for a board of auditors for a certain county is introduced in reasonable time and referred to a committee and is reported within the time limit substituting another county for that originally named, the substitution is not germane to the original bill and the amended bill does not answer the requirements of the

constitution. *People ex rel. Board of Supervisors v. Loomis* (Mich.), 3-751.

Notice of local bills. — The provision in the Alabama constitution that no local law shall be passed on any subject unless a prescribed notice is given is mandatory, and is applicable to legislation of a local character, which, by the constitution, it is made the duty of the legislature to adopt. *State v. Sayre* (Ala.), 4-656.

The provision of the Alabama constitution that no local law shall be passed unless notice has been given of an intention to apply for its enactment, which notice shall state the substance of the proposed law, is satisfied by a notice which gives the essence, abstract, or compendium of the proposed law. *Uniontown v. State* (Ala.), 8-320.

What is a local law of which notice is required. — The Alabama statute creating a judicial district to be composed of certain counties is a local statute within the meaning of a provision of the state constitution defining a local law. *State v. Sayre* (Ala.), 4-656.

b. Lapse of time before passage.

Act not prematurely passed. — The New York statute imposing a tax upon transfers of stock, held not open to the objection that it was prematurely passed before it had been on the desks of the members of the legislature in final form for a period prior to its passage, required by the state constitution. *People ex rel. Hatch v. Reardon* (N. Y.), 6-515.

c. Final passage of bill.

Vote on bill after third reading. — The final passage of a bill, within the meaning of the provision of the Montana constitution that upon the final passage of a bill the vote shall be taken by ayes and noes, and entered on the record, is the vote by which each house adopts the bill after it has passed its third reading. Where a bill has been passed in one house and amended and passed in the other, the vote on the adoption of the amendment by the house in which the bill originated need not, under such constitutional provision, be taken by ayes and noes and entered on the journal. *Johnson v. Great Falls* (Ont.), 16-974.

d. Signature of presiding officers.

Constitutional requirement of signature mandatory. — The provision of the Illinois constitution that every bill which passes both houses of the legislature shall be signed by the speakers thereof is mandatory, though the signatures of the speakers are not conclusive evidence that the bill was properly passed, and a bill which has not been signed by the president of the senate is not a valid legislative enactment. *Lynch v. Hutchinson* (Ill.), 4-904.

Noting fact of signature on journal. — The provision of the Tennessee constitution that "no bill shall become a law until it

... shall have been signed by the respective speakers in open session, the fact of such signing to be noted on the journal," is directory as to the provision for noting on the journal the signing of bills, and acts bearing the signature of the speakers and approved by the governor will be treated as properly passed unless the contrary is shown by the journals. *Home Telegraph Co. v. Nashville* (Tenn.), 11-824.

Reading of title before signing. — When the legislative records are silent as to whether the title of a bill was publicly read immediately before it was signed by the presiding officer of each house as required by the constitution, the presumption is that the requirement was complied with. *Adams v. Clark* (Colo.), 10-774.

e. Action on bill by executive.

Signature as evidence of approval. — When a bill passed by the legislature has been signed by the governor, his signature is conclusive evidence that the bill was approved and has become a law. *Luckens v. Nye* (Cal.), 20-158.

Disapproval of part of bill. — The governor of a state has no power to approve in part and disapprove as to the residue a bill other than one containing several items of appropriation of money, where the constitution (Const. Cal., art. 4, § 16) provides that if he approves a bill he shall sign it, but if not, he shall return it with his objections, and if he neglects to sign or return a bill for ten days, it shall become a law without his signature, but that in the case of an appropriation bill containing several items, he may approve some of the items and object to the others. *Lukens v. Nye* (Cal.), 20-158.

Computation of time for action on bill. — In the absence of a statute to the contrary, the day upon which a bill passed by the legislature is presented to the governor of the state must be excluded in computing the time allowed him by the constitution for consideration of and action on the bill. *Carter v. Henry* (Miss.), 6-715.

The provision in the Mississippi constitution allowing the governor "five days (Sundays excepted)" to consider and act upon a bill passed by the legislature and presented to him for signature means that after the bill is presented to him he shall have five full days (excluding Sunday) of twenty-four hours each within which to act. *Carter v. Henry* (Miss.), 6-715.

Waiver of time for action on bill. — The time allowed a governor for the consideration of legislative bills is a matter of privilege with him and he can waive the privilege and notify the legislature that the bill may become a law without his signature. *Hunt v. State* (Ark.), 2-33.

Evidence of signing. — The courts, in determining whether a particular law does not exist, may avail themselves of any means of information, including allegations of respective counsel in their pleadings, and may accept the pleadings as presenting the ulti-

mate truth of the question relating to the signing of a bill by the governor, where the pleadings are in accord with the governor's proclamation showing that the bill was signed and with the bill itself showing the erasure of the signature. *Powell v. Hays* (Ark.), 13-220.

Proof of veto. — The veto of a bill passed by the legislature may be proved only by the legislative records on which vetoes are required by the Indiana constitution to be entered (Const., art. 5, § 14). It is not competent to show by extrinsic evidence that the governor vetoed the bill, but that by accident, mistake, or fraud no record was made of that fact. *State v. Wheeler* (Ind.), 19-834.

Veto after approval by governor. — A bill signed by the governor in the exercise of his discretion with the intent of approving the same in the manner provided by the constitution to make the bill effective as a law, becomes a law, and is not subject to veto by himself or his successor, even where the signed bill has not been filed in the office of the secretary of state, and the time allowed for the governor's consideration of the bill has not expired. *Powell v. Hays* (Ark.), 13-220.

f. Legislative journals as evidence.

A court may refer to the journal of either house of the legislature for the purpose of ascertaining whether a bill was passed in the manner prescribed by a mandatory provision of the constitution, and should be recognized as law, though the bill is *prima facie* a valid law, in that it is valid on its face, has been signed by the presiding officer of each house, has been approved and signed by the governor, and has been deposited with the secretary of state in his office. *Palatine Ins. Co. v. Northern Pacific R. Co.* (Mont.), 9-579.

The courts will not take judicial notice of the legislative journals to the extent of searching them at the suggestion or request of counsel in order to ascertain whether a particular statute was passed with the constitutional formalities, where no evidence has been offered to impeach it. *People v. Braun* (Ill.), 20-448.

Failure to show adoption of amendment by constitutional majority. — If an enrolled act of the legislature was duly signed by the president of the senate and the speaker of the house and approved by the governor, and deposited in the office of the secretary of state, it was not competent to attack its validity on the ground that the legislative journals showed that the bill originated in the house, was there passed by a constitutional majority and transmitted to the senate, where it was amended and passed by a constitutional majority and then transmitted to the house, where the senate amendment was concurred in, but failed to show that this was done by a constitutional majority. *De Loach v. Newton* (Ga.), 20-342.

Absence of record of names of legislators voting. — Under the Montana constitution, a purported enactment by the legislature is not law if the journal of the senate

shows affirmatively that no record was made of "the names of those voting" on a bill in that house. *Palatine Ins. Co. v. Northern Pacific R. Co.* (Mont.), 9-579.

Vote on suspension of reading of bill.

— Where the constitutionality of a state statute is attacked on the ground that the journal of the senate does not show that two-thirds of the quorum present voted in favor of the suspension of the reading of the bill at length when it was signed by the presiding officer, as required by the state constitution, but it appears from the journal that a motion to dispense with the reading was passed by a yeas and nays vote of twenty-one to naught, the names of the senators voting being given, it will be presumed, in the absence of any affirmative showing to the contrary by the journal, that there were only twenty-one senators present when the vote was taken and the bill signed. *Uniontown v. State* (Ala.), 8-320.

g. Publication of statutes.

After approval by people. — The provision of the Wisconsin constitution (art. 7, § 21) that no general law shall be in force until published, and the statutory provision (St. 1898, § 329) that publications shall be made immediately after the passage and approval of general laws, do not require publication of a statute after its approval by a vote of the people where the statute is complete when approved by the governor, and is published subject to the submission to the people for adoption or rejection, the word "approval" in the statute referring to executive approval. *State v. Frear* (Wis.), 20-633.

Variance between printed and enrolled statute. — Where there is a variance or repugnancy in terms, between the printed copy of a statute published under the authority of the state, and the original enrolled act signed by the presiding officers of the two houses of the general assembly, approved by the governor, and deposited with the secretary of state, the latter controls. *State v. Groves* (Ohio St.), 17-361.

2. CONSTITUTIONALITY AND VALIDITY IN GENERAL.

Enacting clause. — The provision of the Tennessee constitution that "the style of the laws of this state shall be, 'Be it enacted by the general assembly of the state of Tennessee,'" is mandatory. *State ex rel. Gouge v. Burrow* (Tenn.), 14-809.

An enacting clause containing the words "Be it enacted by the general assembly of Tennessee" is, notwithstanding the omission of the words "the state of," a substantial compliance with such constitutional requirement. *State ex rel. Gouge v. Burrow* (Tenn.), 14-809.

Province of court and legislature. — Under the constitutional provision that "Where a general law can be made applicable, no special law can be enacted," it is

for the legislature to determine whether or not a general law is applicable to a given emergency. *Weston v. Ryan* (Neb.), 6-922.

In the administration of justice the courts must be controlled by the laws constitutionally enacted by the legislature, and it is not within the province of the courts to criticize the policy of the legislature in enacting laws dealing with the liquor traffic. *Sopher v. State* (Ind.), 14-27.

Presumption in favor of statute. — The presumption always is that an act of the legislature is constitutional; and when the constitutionality of an act depends upon the existence or nonexistence of some fact or state of facts, the determination thereof is primarily for the legislature, and courts will acquiesce in the legislature's decision unless it appears to be clearly erroneous. *In re Spencer* (Cal.), 9-1105.

Effect of invalidity of part of statute. — If a duly enacted statute contains provisions that are invalid because in conflict with organic law, and such invalid portions may be severed, and the remainder of the statute may then be made effective for the purpose designed, and will not cause results not intended by the legislature, and it does not appear that the statute would not have been enacted without the invalid portions, the invalid portions of the act should be disregarded and the valid portions enforced if it can be done to effectuate the legislative intent. *Harper v. Galloway* (Fla.), 19-235.

An entire statute will not be declared invalid because of the invalidity of a single provision thereof, unless the valid and invalid provisions are so connected in subject-matter, meaning, or purpose, that it cannot be presumed the legislature would have passed the one without the other. *County Commissioners v. Pocomoke Bridge Co.* (Md.), 16-874.

Applying the principles above stated to the Maryland Act of 1865, entitled "An act to incorporate the Pocomoke Bridge Company," it must be held, first, that section 12 of that act, which requires the county commissioners of Somerset and Worcester counties to levy an annual tax on the assessable property of those counties and pay the same over to the president and directors of the bridge company, is invalid, in that the title of the act does not fairly indicate the legislation embraced in that section; second, that section 11 of the act, which authorizes all citizens, residents, and nonresident taxpayers of the two counties to pass over the bridge free of charge, is also invalid, since it cannot be presumed that the legislature would have conferred the privilege embraced in that section had it not been for the corresponding liability imposed on the counties by section 12; and, third, that the remainder of the act is valid, and the company is entitled to charge such toll as its president and directors may determine, not exceeding the rates named in the charter. *County Commissioners v. Pocomoke Bridge Co.* (Md.), 16-874.

Even if the provision of the Tennessee statute providing for the investigation of fires which authorizes the insurance commissioner or his deputies to enter upon and examine any building or premises where a fire has occurred, or any other building or premises adjoining the same, were to be held unconstitutional as an invasion of the right of the citizen to be secure from unreasonable searches and seizures, its unconstitutionality would not affect the validity of the statute as a whole, and this being so, the court will not pass upon the constitutionality of that provision of the act in a case where no entry upon, or search of, premises has been attempted. *Rhinehart v. State* (Tenn.), 17-254.

Indefiniteness of language. — A court will not hold a statute to be void for indefiniteness of language unless it finds itself unable to divine the purpose or intent of the legislature. *State v. Livingston Concrete Bldg., etc., Co.* (Mont.), 9-204.

Test of validity of curative act. — The test of the validity of a curative act is the authority of the legislature to confer the power or authorize the act as a matter of prospective legislation. *Hurley v. Hurley* (Va.), 18-968.

Void statute as exception to another statute. — Where a statute under which a contract with a municipality has been entered into is unconstitutional, but the subject-matter of the contract is neither *ultra vires*, illegal, nor *malum prohibitum*, and the municipality is estopped to set up the unconstitutionality as a defense, a provision in such statute that another statute shall not apply to contracts made under it must be read as an exception to such other statute and such statute does not apply to the contract. *Mt. Vernon v. State ex rel. Berry* (Ohio), 2-399.

3. CONSTITUTIONAL REQUIREMENTS AS TO TITLE AND SUBJECT-MATTER.

a. In general.

Constitutional requirement mandatory. — The provision of the South Dakota constitution that "no law shall embrace more than one subject, which shall be expressed in its title," is mandatory. *Garrigan v. Kennedy* (S. Dak.), 8-1125.

Object and purpose of constitutional requirement. — The object and purpose of the provision of the Missouri constitution that no statute shall contain more than one subject, which shall be clearly expressed in its title, are to prevent incongruous and disconnected matters, which have no relation to each other, from being joined in one act, and where all the provisions of the statute relate to the same subject, have a natural connection with it, and are the incidents or means of accomplishing it, the subject is single, and, if it is sufficiently expressed in the title, the statute is valid. *O'Connor v. St. Louis Transit Co.* (Mo.), 8-703.

The purpose of section 29 of article 3 of the Maryland constitution, providing that

"every law enacted by the general assembly shall embrace but one subject, and that shall be described in its title," is twofold: first, to prevent the combination in one act of several distinct and incongruous subjects; and second, that the legislature and the people of the state may be fairly advised of the real nature of pending legislation. To constitute a sufficient compliance with this constitutional provision, the title to an act should not only fairly indicate the general subject thereof, but should be sufficiently comprehensive in its scope to cover, to a reasonable extent, all of the provisions of the statute, and should not be misleading by what it says or omits to say. *County Commissioners v. Pocomoke Bridge Co. (Md.)*, 16-874.

Effect of long acquiescence in constitutionality of statute. — While long acquiescence in the constitutionality of a statute in respect of its title may properly be considered in determining the sufficiency of the title in a doubtful case, it cannot prevent inquiry into the constitutionality of the statute on the theory of estoppel, nor does it suffice to validate a statute which is clearly unconstitutional because of a defective title. *County Commissioners v. Pocomoke Bridge Co. (Md.)*, 16-874.

Title expressing more than one subject. — The question whether an act embraces more than one subject must be determined, not from the title but from the body of the act; and if the act embraces one subject only, the fact that the title expresses more than one does not render the act objectionable on the ground of plurality. A subject mentioned in the title, but not contained in the body of the act, will be treated as surplusage. *Monaghan v. Lewis (Del.)*, 10-1048.

Under a constitutional provision that no act "shall embrace more than one subject, and that shall be expressed in the title," plurality of title does not invalidate an act which deals with but one subject. *People v. McBride (Ill.)*, 14-994.

Subject of act less comprehensive than title. — Where the subject embraced in the body of an act is less comprehensive than, but is included within, the subject expressed in the title, the constitutional provision that each law shall embrace but one subject and matter properly connected therewith, which subject shall be expressed in the title, may not be violated, when the subject expressed in the title is not misleading. *Seaboard Air Line R. v. Simon (Fla.)*, 16-1234.

Expression of subject-matter of act in general terms sufficient. — The Delaware constitution does not require that the title of a statute shall do more than express in general terms the subject of the act. It is not necessary to go into details, or furnish an abstract, synopsis, or index of the contents of the act. *Monaghan v. Lewis (Del.)*, 10-1048.

Act embracing objects germane or relating to main subject. — A statute is not unconstitutional because more than one

object is contained therein where the objects are germane to the main subject, or relate directly or indirectly to the main subject, and have a mutual connection with and are not foreign to the subject of such statute, or when the provisions of the statute are of the same nature and come legitimately under one subject. *Ex p. Abrams (Tex.)*, 18-45.

Failure to express provision related to object set forth in title. — The true intent of the provision of the Texas constitution that no bill, except general appropriation bills, shall contain more than one subject, which shall be expressed in its title, is that the general ultimate object and subject of a statute shall be stated in its title, and not the details by which this object shall be accomplished. Where a provision is related to, and seeks to carry out or aid the dominant and declared object of a statute, failure to express it in the title does not render the statute unconstitutional. *Ex p. Abrams (Tex.)*, 18-45.

Title must be clearly insufficient to render act unconstitutional. — It is the province of the legislature to decide upon the title of a statute passed by it, and the statute should not be declared unconstitutional on the ground that its title fails to express clearly the subject of legislation, unless it is clearly violative of the constitutional provision requiring that its title shall clearly express its subject. *O'Connor v. St. Louis Transit Co. (Mo.)*, 8-703.

Effect of adoption of code containing otherwise invalid act. — Even if the Georgia Act of 1894, providing for the commitment of wayward, destitute, abandoned, or neglected children to a benevolent institution, now contained in the Civil Code, is subject to the objection that the body of the act contains matter different from what is expressed in the title, or that it refers to two subject-matters, such act, having been incorporated in the Code of 1895, became, by the adoption of that code, a valid law of the state, without reference to any defects of character above referred to that might have existed in the original act. *Kennedy v. Meara (Ga.)*, 9-396.

Title of amendatory act. — The title of an amendatory act is sufficient where it merely recites that it is "an act to amend an act entitled," etc., quoting the title of the act to be amended. It is not necessary that an independent title should be incorporated as a part of the amendatory act. *People v. Braun (Ill.)*, 20-448.

Act amending and re-enacting former act. — A legislative act described in its title as an act to amend and re-enact a certain former act, but making no reference in the enacting clause to the act referred to in the title and not purporting to re-enact and publish at length the act sought to be amended, is invalid because not conforming to a constitutional requirement that no law shall embrace more than one object, which shall be expressed in its title. *Beale v. Pankey (Va.)*, 12-1134.

b. Specific statutes.

Act prohibiting combinations in restraint of trade. — A statute entitled "An act to prohibit contracts or combinations . . . intended to prevent free competition in business" is not open to the objection that the subject is not expressed in the title merely because the language of the title is not used in the body of the act, either literally or in substance. It is sufficient if the act describes contracts or combinations which in and of themselves by their formation can have no other effect than to prevent or to tend to prevent free competition. *Knight, etc., Co. v. Miller (Ind.)*, 18-1146.

Act regulating holding of courts. — The purpose of the Alabama statute (Acts 1888-89, p. 64) which regulates and fixes the time of holding courts in the third and fifth judicial circuits, is sufficiently indicated in its title, although the title employs the word "holding" and the subject-matter relates to the "opening" of courts. The two words, as used in this connection, are synonymous. *Letcher v. State (Ala.)*, 17-716.

Act defining powers of courts in reference to delinquent children. — The Pennsylvania statute defining the powers of courts in reference to delinquent children is not unconstitutional as containing more than one subject, some of which are not expressed in the title. *Commonwealth v. Fisher (Pa.)*, 5-92.

Act relating to judicial sales. — The Washington statute (Laws 1899, p. 85) entitled "An act relating to the sales of property under execution, decrees, and orders of sale, and the confirmation of sheriffs' sales, and redemption therefrom," so far as it relates to the foreclosure of mortgages, violates the provision of the state constitution (art. 2, § 19) that "no bill shall embrace more than one subject, which shall be expressed in the title." *Bradley Engineering, etc., Co. (Wash.)*, 18-1072.

Act relating to attorneys. — The Missouri statute entitled "An act to prevent frauds between attorneys, clients, and defendants; making agreements between attorney and client a lien upon the cause of action," is not unconstitutional, either as containing more than one subject, or as having a title which fails to express clearly and sufficiently the subject of the statute. *O'Connor v. St. Louis Transit Co. (Mo.)*, 8-703.

Act relating to elections providing for trial and removal of elected officer. — Where a statute entitled "An act relating to elections," the purpose of which is to provide for the orderly election of public officers, contains sections providing for the trial and removal of an officer after he has been so elected and for the appointment of his successor, those sections are void as contravening the constitutional provision that "each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title." *Bell v. First Judicial District Court (Nev.)*, 6-982.

Act authorizing use of voting machines. — The Minnesota statute entitled "An act to authorize the use of voting machines at elections, and to authorize cities, villages, and towns to issue bonds to defray the cost of the purchase thereof, and to repeal existing laws relating to voting machines," is not rendered void for insufficiency of its title by the fact that the body of the statute, in providing for the purchase and use of voting machines under certain prescribed conditions and restrictions, creates a state "voting machine commission." *Elwell v. Comstock (Minn.)*, 9-270.

Municipal charter. — The act of the legislature of Texas granting the city of Texarkana a charter, and limiting the number of saloons in said city to not more than two in any half block, and creating and providing for a court to try offenses committed in the city does not violate the constitutional provision that no bill shall contain more than one subject. *Ex p. Abrams (Tex.)*, 18-45.

Act containing number of amendments to municipal charter. — The requirement that every legislative act shall embrace but one subject, which subject shall be expressed in its title, is not violated where thirteen different amendments to a municipal charter are approved by the legislature as a whole by a single concurrent resolution, the title to which states simply that it is a resolution "approving thirteen certain amendments to the charter" of that city. *In re Pfahler (Cal.)*, 11-911.

Classification of property for taxation. — The title of an act providing for the classification of property for taxation need not refer to the exemption of certain lands therein; but if the statute does so, it is not unconstitutional for this reason. *Monaghan v. Lewis (Del.)*, 10-1048.

The Delaware statute entitled "An act to classify real estate for the purpose of municipal taxation, and to exempt certain lands from municipal taxation within the city of Wilmington," approved May 28, 1898, is not unconstitutional as embracing more than one subject, or expressing more than one subject in its title, contrary to the provisions of the constitution. *Monaghan v. Lewis (Del.)*, 10-1048.

Statute of limitations. — The North Dakota statute is a valid and constitutional limitation act, and its title is sufficient. *State Finance Co. v. Mather (N. Dak.)*, 11-1112.

Act to prevent fraudulent sale of railway tickets. — The Washington statute designed to prevent a fraudulent sale of railway tickets to travelers is not unconstitutional as having a title that does not comprehend the subject-matter of the statute. *In re O'Neill (Wash.)*, 6-869.

Act making wife competent witness against husband. — A provision in a statute making a wife a competent witness against her husband is expressed in the title of the statute which refers to "the competency of certain evidence." *People v. Braun (Ill.)*, 20-448.

Act making certain acts of trespass criminal. — The Minnesota statute declaring certain acts of trespass upon state lands to be criminal offenses, which is entitled "An act regulating state lands and the product of the same, and to repeal certain acts and parts of acts," is not open to the objection that it is unconstitutional in that its subject is not sufficiently expressed in its title. *State v. Shevlin-Carpenter Co.* (Minn.), 9-634.

Criminal statute providing what shall be a defense. — A provision in a criminal statute that certain things "shall not be a defense" is within the title of the statute which states that the act provides "what shall be a defense." *People v. Braun* (Ill.), 20-448.

Act regulating punishment of death. — The Minnesota statute entitled "An act providing the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect, and declaring a violation of any of the provisions of this act to be a misdemeanor," is not rendered violative of the provision of the state constitution that no law shall embrace more than one subject, which shall be expressed in its title, by the fact that it makes it an offense for any newspaper to publish any account of an execution beyond the statement that the "convict was on the day in question duly executed according to law." *State v. Pioneer Press Co.* (Minn.), 10-351.

Act providing punishment for embezzlement. — An act providing for the punishment of embezzlement and declaring that embezzlement shall constitute larceny under certain circumstances is not unconstitutional because the title does not mention embezzlement. *Graves v. People* (Colo.), 2-6.

Prohibition of sale of intoxicating liquors. — The Florida statute prohibiting the sale of intoxicating liquors is not unconstitutional as embracing two subjects. *Cæsar v. State* (Fla.), 7-45.

The Kansas statute (Gen. St. 1909, § 4371, originally Laws of 1881, c. 128, § 16), entitled "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes," is broad enough as to title to cover a provision forbidding the maintenance of "any clubroom or other place in which any intoxicating liquor is received or kept for the purpose of use, gift, barter, or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever." *State v. Topeka Club* (Kan.), 20-320.

Local option statutes. — The Missouri local option law, entitled "An act to provide for the preventing of the evils of intemperance by local option in any county in this state and cities of twenty-five hundred inhabitants or more, by submitting the question of prohibiting the sale of intoxicating liquors to the qualified voters of such county or city; to provide penalties for its violation and for other purposes," if construed to forbid the

giving away of intoxicating liquors, as a mere act of courtesy or hospitality, would be in violation of a constitutional requirement that "no bill shall contain more than one subject, which shall be clearly expressed in its title." *State v. Fulks* (Mo.), 13-832.

Act regulating manufacture and sale of liquor. — The South Dakota "act to provide for the licensing, restriction, and regulation of the business of the manufacture and sale of spirituous and intoxicating liquors" is not rendered obnoxious to the provision of the state constitution that "no law shall embrace more than one subject, which shall be expressed in its title," by its provision that a married woman may recover damages resulting from the sale of intoxicating liquors to her husband, or by its provision that it shall be unlawful for persons engaged in the sale of intoxicating liquors to sell to intoxicated persons, to persons in the habit of getting intoxicated, or to minors. *Garrigan v. Kennedy* (S. Dak.), 8-1125. ff ff

The subject of the Indiana statute of Feb. 13, 1907 (Acts 1907, p. 27, § 8338 *et seq.*; Burns 1908), is that of the Act of 1875 (Acts 1875 (S. S.), p. 55), of which it is an amendment, and is expressed in the title of said Act of 1875 as follows: "An act to regulate and license the sale of spirituous, vinous, and malt and other intoxicating liquors." *Rose v. State* (Ind.), 17-228.

The provisions of sections two to fourteen of the above Act of 1907, in regard to the search, seizure, and destruction of intoxicating liquors unlawfully kept to be sold in violation of law, and in regard to what shall be *prima facie* evidence of certain facts in such cases, and what courts shall have jurisdiction, are germane to, properly connected with, and embraced in the subject expressed in the title of the above Act of 1875, of which the said Act of 1907 is an amendment, and are, therefore, constitutional. *Rose v. State* (Ind.), 17-228.

Act providing for meat and milk inspection. — An act entitled "An act to create the office of meat and milk inspector for the state of Montana, and prescribing his powers and duties and compensation therefor," is not, because one section requires the vendors of milk to procure a license from the milk inspector, void within the constitutional provision that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. *State v. McKinney* (Mont.), 1-579.

Act incorporating bridge company and authorizing tax for its benefit. — Applying the principles laid down in *County Commissioners v. Pocomoke Bridge Co.* (*supra*, 3, a.), to the Maryland Act of 1865, entitled "An act to incorporate the Pocomoke Bridge Company," it must be held that section 12 of that act, which requires the county commissioners of Somerset and Worcester counties to levy an annual tax on the assessable property of those counties and pay the same over to the president and directors of the bridge company, is invalid, in that the title does not fairly indicate the legislation

embraced in that section. *County Commissioners v. Pocomoke Bridge Co. (Md.)*, 16-874.

Establishment and maintenance of state fair. — The Kentucky statute providing for the establishment and maintenance of a state fair, held not violative of the constitutional provision that no law shall relate to more than one subject, which shall be expressed in the title. *Kentucky Live Stock Breeders' Assoc. v. Hager (Ky.)*, 9-50.

The Kentucky statute providing for the establishment and maintenance of a state fair, held not violative of the constitutional prohibition against special legislation. *Kentucky Live Stock Breeders' Assoc. v. Hager (Ky.)*, 9-50.

Act declaring when corporation deemed insolvent. — The amendment of 1883 to section 40 of the Kansas Corporation Act, providing that for the purpose of enabling creditors to prosecute actions against stockholders, a corporation shall be deemed dissolved when it has suspended business for more than one year, is not obnoxious to the constitutional provision requiring the subject of an act to be expressed in the title. *Manley v. Mayer (Kan.)*, 1-825.

Regulation of speed of automobiles. — Section 2 of the Illinois statute regulating the speed of automobiles and other horseless conveyances upon the streets and highways, held not in conflict with the constitutional requirement that no act shall embrace more than one subject, which shall be expressed in the title. *Christy v. Elliott (Ill.)*, 3-487.

Act relating to protection of game animals. — The title of a statute, "An act relating to the preservation, propagation, and protection of game animals, birds, and fish," etc., is broad and comprehensive enough to include within its meaning all kinds of deer within the state, whether wild or reduced to captivity. *State v. Weber (Mo.)*, 12-382.

Act providing for forfeiture for non-payment of rent. — The amendatory act to section 1020 of the Nebraska Code of 1875, providing for payment of rent and forfeiture at any time after default, is unconstitutional as not properly entitled, and as not repealing the section sought to be amended. *Godwin v. Harris (Neb.)*, 8-579.

Act relating to branding trees. — The provision of the Virginia constitution (art. 4, § 52) that "no law shall embrace more than one subject, which shall be expressed in its title," is not violated by a statute (Acts 1893-94, p. 513) entitled "An act to protect the owners of timber and logs from depredation," which provides for the adoption and recording of brands, that placing such brands on trees, etc., shall be deemed a change of ownership and possession, and that it shall be a felony for any one without the consent of the owner to cut a tree so branded. *Hurley v. Hurley (Va.)*, 18-968.

Act regulating licensing of barbers. — The matter of licensing a barber school is properly included within a statute entitled "An act to regulate the pursuit, business, art, and avocation of a barber, the licensing of

such persons to carry on such business, and to insure the better qualification of persons following such business, etc." *State v. Briggs (Ore.)*, 2-424.

Act providing for parole system. — The Parole Act (Hurd's St. Ill. 1908, p. 796) for the establishment of a system of parole is not subject to the objection that it embraces more than one subject in providing for the sentence and commitment of prisoners, a system of parole, and the compensation of the officers of said system. *People v. Joyce (Ill.)*, 20-472.

Act providing for investigation of fires. — The Tennessee statute entitled "An act to reduce the fire waste in Tennessee by providing for the investigation of fires, and to provide for the expense of such investigations" (Acts of 1907, c. 460, p. 1538), embraces but one subject, namely, the reduction of fire waste in Tennessee, which subject is sufficiently expressed in its title. The provisions of the statute for the investigation of fires, and the payment of the expenses of such investigations are simply the means by which the reduction of fire waste is to be accomplished, and, being germane to the subject of the act, they do not render it offensive to the constitutional provision that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title. *Rhinehart v. State (Tenn.)*, 17-254.

4. CONSTRUCTION AND INTERPRETATION.

a. In general.

Functions of court in construction of statute. — A court has no legislative powers, and cannot read into a statute something beyond the manifest intention of the legislature as gathered from the statute, its function being to determine the legislative intention from the language used in accordance with the established rules of statutory construction. *Ex p. Pittman (Neb.)*, 20-1319.

The courts must interpret the laws as they find them, and they should not usurp the functions of the lawmaking power, and by inadmissible construction or otherwise defeat the legislative will. *State v. Frear (Wis.)*, 20-633.

Determination of public policy. — A court is not at liberty, where doubt remains as to the intention of a penal enactment after it has been tested by the recognized canons of construction, to venture among warring opinions in the legislative domain in search of what it conceives to be public policy, as such practice would probably result in judicial legislation. *State v. Lowry (Ind.)*, 9-350.

Presumption as to knowledge and intent of legislature. — The legislature is presumed to know the general conditions surrounding the subject-matter of legislative enactment, and it will be presumed it knows and contemplates the legal effect that accompanies the language it employs to make effect.

tive the legislative will. *Cram v. Chicago, etc., R. Co. (Neb.)*, 19-170.

Verbal changes in codification. — Verbal changes in the codification of existing statutes will not affect their construction unless the alteration of language plainly requires it; but where the altered language used in the codification is clear and admits of but one interpretation, it must be followed, even though the legislative committee which had the matter i. charge adopted a resolution that the existing law should not be changed. *Commonwealth v. New York Central, etc., R. Co. (Mass.)*, 19-529.

Location of statute in code. — No inference or presumption as to the meaning of a statute will be drawn from its location in the codes, where the codes expressly provide that "the arrangement and classification of the several parts of said codes have been made for the purpose of convenience and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom." *Nelson v. Bank of Fergus County (U. S.)*, 13-811.

Effect of splitting up of statute in code. — Where the whole of a statute creating and defining a crime, fixing the venue of prosecutions, and prescribing the mode of procedure, has been incorporated into a revision or code, the force and effect of the statute are not impaired by the fact that it has been split up and its different sections placed under appropriate heads in different parts of the code. *State v. Lewis (N. Car.)*, 9-604.

Intention of draughtsman or individual legislators. — The opinions of individual legislators expressed on the passage of an act, their motives and the intention of the draughtsman, are too uncertain to be considered in construing the act. *Tennant v. Kuhlemeier (Ia.)*, 19-1026.

Applicability of statute to state. — Statutes in general terms do not affect the state if they tend in any way to restrict or diminish its rights or interests. The state may have the benefit of general laws but is not adversely affected by any unless it is so expressly provided. *Milwaukee v. McGregor (Wis.)*, 17-1002.

From what time operative. — The general rule is that a statute speaks from the time it goes into effect, whether that time is the day of its enactment or some future day to which the power enacting it has postponed the time of its taking effect. *State ex rel. Atkinson v. Northern Pacific R. Co. (Wash.)*, 17-1013.

In accordance with the above principle, it must be held that the act of Congress regulating the hours of labor of employees of interstate carriers (*Fed. St. Ann. 1909, Supp. p. 581*), which was passed on March 4, 1907, but which, by its express terms, did not take effect until one year after its passage, did not supersede the statute of the state of Washington on the same subject until March 4, 1908, and that the state statute was in full force and operation from June 12, 1907, the date of its enactment and taking effect, until

March 3, 1908. *State ex rel. Atkinson v. Northern Pacific R. Co. (Wash.)*, 17-1013.

Prospective operation. — A statute should be construed so as to operate prospectively only, unless the language is so clear as to preclude all questions as to the intention of the legislature. *Barker v. Hinton (W. Va.)*, 13-1150.

Although a repealing statute, so far as it provides for a change of procedure, applies to pending actions, a statute repealing a former statute under which the liability of a railroad company to an employee of a sleeping-car company was only that of employer to employee, and by such repeal making the liability to such employee that of carrier to passenger, cannot operate retrospectively, and a cause of action which became complete before the repeal of the former statute is governed by that statute. *Lewis v. Pennsylvania R. Co. (Pa.)*, 13-1142.

Territorial operation. — In case of doubt, a statute should be construed as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is *prima facie* territorial. *American Banana Co. v. United Fruit Co. (U. S.)*, 16-1047.

Inclusion of case not in existence at time of enactment. — A statute may include by inference a case not originally contemplated when it deals with a genus within which a new species is brought by a subsequent statute. Thus, a statute requiring saloons to be closed on legal holidays includes a day declared to be a legal holiday by a later statute. *People v. Kriesel (Mich.)*, 4-5.

Effect of existing decisions. — Where the Ontario Court of Appeal construes a statute under reference made to it by the lieutenant-governor in council, it will be guided, in giving its opinion, by settled decisions, and will not pass upon the correctness of the decisions unless they are conflicting. The decisions cannot be reviewed by the court as if the reference were an appeal from them or any of them. *In re Ontario Medical Act (Ont.)*, 7-369.

Statute applying in counties having specified population. — The statute which by its terms applies only in counties having a specified population will be construed as being limited in its application to the only county in the state having that population, though the county is not referred to by name. *People ex rel. Breckon v. Board of Election Com'rs (Ill.)*, 5-562.

b. Rules of construction.

Intention of legislature. — The intention of the legislature in passing a statute is the controlling consideration in determining its proper construction. *Venner v. Chicago City R. Co. (Ill.)*, 20-607.

In the construction of a statute, all the language should be considered, and such interpretation placed upon any word appearing therein as was within the manifest intent of

the body which enacted the law. *Rohlf v. Kasemeier* (Ia.), 17-750.

Secret intention may not be inferred.

— Where Congress makes no exception from a plain and certain declaration in an act, there is ordinarily a presumption that it intended to make none. A secret intention of the lawmaking body may not be assumed by the courts and interpreted into a statute whose language is plain and unambiguous, and does not express or necessarily imply any such intention. *United States v. Colorado*, etc., R. Co. (U. S.), 13-893.

Natural, common, or obvious meaning to be preferred. — The natural, common, or obvious meaning of the language of a law must be preferred, save in rare and exceptional cases, to a recondite signification evolved only by patient study and diligent search. *United States v. Colorado*, etc., R. Co. (U. S.), 13-893.

In construing a statute the intention of the legislature must be inferred in the first place from the plain meaning of the words used, and if the intention can be so arrived at the court cannot go further and apply other means of interpretation. *State v. Cudahy Packing Co.* (Mont.), 8-717.

Statutes in pari materia. — All statutes in *pari materia* must be taken together and treated as having formed in the minds of the enacting body parts of a connected whole, though considered at different dates. *Rohrer v. Hastings Brewing Co.* (Neb.), 17-998.

The Illinois statute authorizing elections on proposals to remove county seats (Laws 1872-1873, p. 309) and the general election law passed at the same session of the legislature (Laws 1872-1873, p. 380), both of which contain provisions respecting contests of such elections, being in *pari materia* and contemporaneous, are to be construed together as one act. *Devous v. Gallatin County* (Ill.), 18-422.

Rule of in pari materia inapplicable.

— The rule of in *pari materia*, that the language of statutes upon the same or similar subjects should have like interpretation, is inapplicable where the provisions of the later statute are positive and explicit, and the subjects of the statutes, the mischiefs at which they are leveled, and the remedies provided are radically different. Such doctrine does not subject the construction of the federal safety appliance acts to the language or the interpretation of the Federal Interstate Commerce Act. *United States v. Colorado*, etc., R. Co. (U. S.), 13-893.

The construction of the language of the federal safety appliance acts is not controlled by the language or by the interpretation of the terms of the Interstate Commerce Act. The two statutes are not in *pari materia*. *United States v. Colorado*, etc., R. Co. (U. S.), 13-893.

Construction which will render statute constitutional and valid. — It is the duty of a court to give a statute such a construction as will render it constitutional and valid, if that can be done without violence to

the language of the statute. *Western Union Tel. Co. v. State* (Ark.), 12-82.

The title "An act to revise the law in relation to the sentence and commitment of persons convicted of crime, and providing a system of parole, and to provide compensation for the officers of said system of parole," does not include an appropriation of money. The word "provide" may be interpreted as meaning "fix" or "establish," and it will be so construed in accordance with the rule that a statute susceptible of two constructions, one of which will sustain its constitutionality, will be so construed. *People v. Joyce* (Ill.), 20-472.

A statute which may be so construed as to make it either constitutional or unconstitutional will be given that construction which will make it constitutional. *Georgia Fire Ins. Co. v. Cedartown* (Ga.), 19-954.

A statute reasonably susceptible of two constructions, one of which will render the act void and the other valid, must be construed so as to render it valid. *State v. Frear* (Wis.), 20-633.

Consideration of objects and purposes of statute. — The words of a statute, if clear and unambiguous, will control, but while seeking to ascertain the legislative intent from the language used, it is necessary to remember the objects and purposes sought to be attained by the statute. *American Tobacco Co. v. Werckmeister* (U. S.), 12-595.

Consideration of original statutes. — It is a principle of statutory construction that, when the meaning of a statute is in doubt, it is well to resort to the original statute and there search for the legislative will as first expressed. *Taylor v. Caribou* (Me.), 10-1080.

In construing the Federal Safety Appliance Act of March 2, 1893, a court should look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and the act will not be held to displace the existing laws further than is fairly necessary to give the act place and operation. *St. Louis*, etc., R. Co. v. *Delk* (U. S.), 14-233.

Rule that statute be construed liberally. — Under the Kentucky statute, a court in determining what act may be punished under a statute must apply the rule that every statute shall be construed liberally with a view to promote its object, taking all ordinary words and phrases according to the common and approved use of the language. *Commonwealth v. Trent* (Ky.), 4-209.

Ambiguous statutes. — The rule for the construction of ambiguous statutes stated. *State ex rel. Coleman v. Kelly* (Kan.), 6-298.

Effect of absence of ambiguity. — A statutory provision "that nothing in this act shall be construed to mean that a right or cause of action is created in favor of said Foreman against said board; the intention being to give him the right to enforce any cause of action that he may have, either in law or equity," is so plain and unambiguous as to leave no room for interpretation.

Forman v. Sewerage, etc., Board (La.), 12-773.

Construction and interpretation have no function where the terms of the statute are plain and certain. In such a case Congress must be presumed to mean what it has plainly expressed. *United States v. Colorado, etc., R. Co.* (U. S.), 13-893.

Where the language of a statute is unambiguous and its meaning is evident, it must be held to mean what it plainly expresses, and no room is left for the application of artificial rules of construction and interpretation. *Lewis v. Pawnee Bill's Wild West Co.* (Del.), 16-903.

Maxim expressio unius est exclusio alterius. — A statute limiting a thing to be done in a particular manner, or by a prescribed person or tribunal, implies that it shall not be done otherwise, nor by a different person or tribunal. *Expressio unius est exclusio alterius.* *Taylor v. Taylor* (W. Va.), 19-414.

Statute in derogation of common law. — Statutes in derogation of the common law are to be strictly construed, and this is especially true where the statute is in derogation of common right and decency as well as the common law. *Perry v. Strawbridge* (Mo.), 14-92.

The Indiana statute prohibiting the sale, etc., of cigarettes, being in derogation of the common law, should, in so far as the meaning of its words is in doubt, be construed in accordance with the rule that the statutes are not presumed to make any alteration in the common law further or otherwise than their terms expressly declare. *State v. Lowry* (Ind.), 9-350.

Adherence to common law. — In construing a statute it will never be presumed that the legislature intended to make an innovation upon the common law further than the necessity of the case required, and the best rule of construction is to construe a statute as close to the reason of the common law as may be consistent with the terms employed. *O'Donnell v. People* (Ill.), 8-123.

Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention. *State ex rel. Morris v. Sullivan* (Ohio), 18-139.

Construction consistent with pre-existing rights. — If a statute is susceptible of two constructions, one consistent with pre-existing rights and the other in derogation thereof, the courts will give to it that construction which preserves the pre-existing rights. *State ex rel. Keller v. Grymes* (W. Va.), 17-833.

Giving effect to whole act. — It is a proper rule of construction that the entire act or instrument is to be examined, with a view of arriving at the true intention of each part, and that effect is to be given, if pos-

sible, to the whole instrument and to every section and clause. Courts favor a construction which will render every word operative, rather than one which makes some words idle and nugatory. *Bohart v. Anderson* (Okla.), 20-142.

Scope of proviso. — It is a cardinal rule of interpretation that a proviso does not extend beyond the scope of the principal clause of the statute. *Thomas v. Woods* (U. S.), 19-1080.

Cumulative effect of several rules. — Where a party contends for a particular construction of a statute, but this construction is found to be opposed to several rules of construction, the court, in reaching its ultimate conclusion against the construction contended for, will give cumulative effect to the force of these rules. *State v. Lowry* (Ind.), 9-350.

c. Punctuation.

Consideration in interpretation of statute. — Whatever may have been the case formerly in England, when statutes were enrolled upon parchment and enacted without punctuation, in Maine, where such practice has never obtained, there is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the interpretation of the statutes. *Taylor v. Caribou* (Me.), 10-1080.

Consideration in cases of doubt. — While the punctuation is subordinate to the text and can never control its plain meaning, yet in cases of doubt it may aid in its construction. *Taylor v. Caribou* (Me.), 10-1080.

d. Interpretation of words and phrases.

Use of term having well-known and fixed meaning. — It is a sound rule for the construction of statutes that whenever the legislature uses a term which has a well-known and fixed meaning in law, without defining or qualifying it, it must be supposed to use the term with that meaning. *Seery v. Fitzpatrick* (Conn.), 9-139.

Where a statute uses words which have a definite and well-known meaning, it will be presumed that they are used in the sense in which they were understood at common law, and the statute will be construed accordingly, unless a contrary intention clearly appears. *O'Donnell v. People* (Ill.), 8-123.

Word "brother" or "sister." — Whenever the word "brother" or "sister" is used in a statute, without limitation, it includes a half-brother or half-sister, as the case may be. *Seery v. Fitzpatrick* (Conn.), 9-139.

Words "may" and "shall" occurring in same statute. — The Wisconsin statute as to the distribution of the surplus of a life insurance company construed in accordance with the general rule of law as to the construction of the words "may" and "shall" when occurring in the same statute. *Equitable Life Assur. Soc. v. Host* (Wis.), 4-113.

Word "regulate" as meaning "make." — In construing a statute, the word "regulate" may be construed as meaning "make," where the intention of the legislature that it should have such meaning is clear. *Territory ex rel. Oahu v. Whitney* (Hawaii), 7-737.

Words "keep" and "own." — The provision of the Indiana statute prohibiting the sale, etc., of cigarettes which makes it unlawful to "keep" and "own" cigarettes does not make it unlawful for a person to keep or own cigarettes for his personal consumption. *State v. Lowry* (Ind.), 9-350.

Phrase "at the time of the passage of this act." — The words "at the time of the passage of this act" held to refer to the date of the taking effect of the act and not to the date of its approval. *Mills v. State Board* (Mich.), 3-735.

e. Changing, supplying, and omitting words.

In general. — A court may insert words in a statute or modify expressions contained therein, for the purpose of carrying out the legislative intent, where it is apparent from a reading of the statute that the omission of words or their insertion in the wrong place was merely an error or mistake. *Commonwealth v. Herald Pub. Co.* (Ky.), 16-761.

Criminal statute defective for failure to contain prohibition. — A criminal statute which is technically defective for failure to contain any express prohibition against the acts mentioned therein, or any express declaration that such acts are unlawful, will not be allowed to fail on that ground where the intention of the legislature to prohibit the acts in question is clear, but the omitted words necessary to perfect the statute will be supplied by the court in accordance with the settled rule of statutory construction. *Commonwealth v. Herald Pub. Co.* (Ky.), 16-761.

Substitution of "or" for "of." — In construing a statute, the court will substitute "or" for "of" when necessary to make full sense and avoid seeming inconsistency. *Kitchen v. Southern Ry.* (S. Car.), 1-747.

f. Recourse to title.

In general. — It is only where the meaning of a statute is doubtful that recourse may be had to its title for explanation, and the title cannot be used to extend or limit the positive language of the statute. *Lederer v. Colonial Investment Co.* (Ia.), 8-317.

The title of an act is no part of the act, and can be resorted to for the purpose of interpreting the act only in case of doubt. *Forman v. Sewerage, etc., Board* (La.), 12-773.

In construing the Federal Safety Appliance Act of March 2, 1893, regard should be had to the immediate purpose of the enactment, which in the title of the act is declared to be "to promote the safety of employees and travelers upon railroads, by compelling carriers engaged in interstate commerce to equip their cars with automatic couplers,"

etc. *St. Louis, etc., R. Co. v. Delk* (U. S.), 14-233.

Consideration of title and changes therein. — In construing the Indiana statute prohibiting the sale, etc., of cigarettes, and arriving at the intention of the legislature in passing it, the court will consider the title under which it originated and the changes of title made during the course of its passage, and will consider other incidents in its legislative history. *State v. Lowry* (Ind.), 9-350.

g. Contemporaneous practical construction.

Weight to be attached to. — Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law. *Rohrer v. Hastings Brewing Co.* (Neb.), 17-998.

In absence of ambiguity or doubt. — The aid of contemporaneous practical construction can be invoked only where the language of a statute is ambiguous or doubtful. The doctrine has no application where the language of the act and the intent of the legislature are plain. *Whittemore v. People* (Ill.), 10-44.

h. Conflicting provisions.

Last expression of legislative will. — Where there are two conflicting sections of a general compilation or code of statute laws, that section should prevail which is derived from a source that can be considered as the last expression of the lawmaking power in enacting separate statutes upon the same subject. *County Commissioners v. Jackson* (Fla.), 19-148.

Effect of compiling repugnant enactments. — The commissioners who compiled the General Statutes under the Act of 1903 were authorized "to revise, simplify, arrange, and consolidate all the public statutes of the state of Florida, which are general and permanent in their nature, and which shall be in force in this state at the time such commissioners shall make their final report." Under this authority if repugnant provisions of prior statutes are compiled and adopted in the general statutes it must be presumed that the repugnancy was overlooked and that it was the intention of the compilers and of the legislature to bring forward the latest expression of the legislative will. *County Commissioners v. Jackson* (Fla.), 19-148.

Order of arrangement of general statutes not material. — Sections 976 and 4108 of the general statutes of the state of Florida are conflicting, and as section 976 was the latest expression of the legislature in enacting separate laws upon the same subject, such section 976 must prevail even though section 4108 appears in the general statutes subsequent in place and numerical order. *County Commissioners v. Jackson* (Fla.), 19-148.

Effect of position in statute. — In construing a legislative act the position in the order of precedence of the several provisions

will be given due consideration, but there is no arbitrary rule which requires that a provision found in the latter part of the act shall necessarily be given an effect to repeal conflicting provisions in the earlier part of the act. *State ex rel. Ellis v. Mulhern* (Ohio), 6-856.

Effect of irreconcilable provisions in statute of vital interest. — Where conflicting provisions in a statute are irreconcilable, the court may, if the subject-matter is of minor interest, hold the whole act to be inoperative. But where the matter is of vital interest a court will seek such construction as will make the act enforceable, and in doing so will be governed by the apparent purpose and obvious policy and intent of the legislature as gathered from the whole act, even though it results in a disregard of a later provision. *State ex rel. Ellis v. Mulhern* (Ohio), 6-856.

First of two irreconcilable provisions given effect. — The Ohio statute in reference to the terms of public officers construed, and the first of two irreconcilable provisions given effect. *State ex rel. Ellis v. Mulhern* (Ohio), 6-856.

i. General and particular acts.

Act relating to particular subject preferred. — In the construction of statutes, an act relating to a particular subject will prevail over a contrary general act. *Deenen v. Unverzagt* (Ill.), 8-396.

j. Penal statutes.

Strict construction required. — The Indiana statute prohibiting the sale, etc., of cigarettes is a criminal statute, and should be strictly construed, and therefore an act will not be held to violate the statute unless it comes within its spirit as well as within its letter. *State v. Lowry* (Ind.), 9-350.

A penal statute is open to construction when there is reasonable uncertainty as to its meaning; and when there are two or more equally reasonable meanings, that one is to be regarded as expressing the legislative will which is least severe as regards previous conditions. The rule of strict construction of a penal law is subordinate to the rule of reasonable, sensible construction, having in view effectuation of the legislative purpose. *Weirich v. State* (Wis.), 17-802.

Purpose of act not to be defeated. — The rule as to the strict construction of the penal statutes does not require courts to go to the extent of defeating the purpose of the statute by a severely technical application of the rule. *Conrad v. State* (Ohio), 8-966.

While penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. *Wade v. United States* (D. C.), 17-707.

Act regulating and prohibiting certain acts. — That the Indiana statute prohibiting the sale, etc., of cigarettes was not designed to prohibit the act of smoking cigar-

ettes, or the act of having them in possession for the sole purpose of smoking, is shown by the fact that its title states that it is "an act to regulate and in certain cases to prohibit," as the word "regulate" is used in contradistinction to the word "prohibit," and if the statute is construed as prohibiting smoking it contains nothing which amounts to a regulation. *State v. Lowry* (Ind.), 9-350.

Smoking not prohibited. — The Indiana statute making it unlawful for any person to manufacture, sell, exchange, barter, dispose of, give away, keep for sale, own, or keep cigarettes, does not apply to the act of smoking cigarettes, or to the act of having them in possession for the sole purpose of smoking. *State v. Lowry* (Ind.), 9-350.

k. Adopted statutes.

In general. — In construing a statute adopted from another state, it will be presumed that the legislature intended that the statute should receive the construction given it by the courts of the state from which it was adopted, previous to its adoption, unless such construction conflicts with the spirit and policy of the laws of the adopting state. *Rhoads v. Chicago, etc., R. Co.* (Ill.), 10-111.

The adoption of a statute of another state, includes the interpretation which the courts of that state have put on the statute prior to such adoption. *Eadie v. Chambers* (U. S.), 18-1096.

Where a legislature adopts the statute of another state or country, it will be presumed that the construction theretofore placed upon the statute met with the approval of the legislature. *Knight v. Rawlings* (Mo.), 12-325.

Construction of courts of original state not necessarily followed. — The construction put upon a statute by the courts of the state from which it is borrowed is entitled to respectful consideration, but will not be followed when it does not appear to be founded on right reasoning. *A. O. H., Division No. 1 of Anaconda v. Sparrow* (Mont), 1-144.

Subsequent construction not adopted. — The adoption of a statute of another state before it has been construed does not adopt a construction subsequently put on it by the courts of that state. *Baumgarten v. Cohn* (Wis.), 18-1076.

The adoption of a statute from another state adopts it with the construction theretofore placed upon it by the Supreme Court of the state from which it is taken, and a construction that the court of such state subsequently places upon the statute has no more weight upon the construction to be given it in the state adopting it than the construction placed upon similar statutes by the courts of other jurisdictions. *Elias v. Territory* (Ariz.), 11-1153.

It cannot be contended that in construing a statute adopted from another state the construction placed upon the statute by the courts of such other state is authoritative

and binding, where it appears that the statute had not been construed by a court of last resort of that state before its enactment in the adopting state. *Rhoads v. Chicago, etc., R. Co.* (Ill.), 10-111.

Decision not construing statute.—The construction placed by the Arkansas Supreme Court upon the Arkansas statutes prior to their adoption in Indian Territory is binding upon the Court of Appeals of such territory. Accordingly the latter court will follow the decision of the former court that under the Arkansas corporation law persons cannot do business as a corporation until the articles of association are filed as provided by statute, but a decision of the former court as to the liability of stockholders for purchases made by them prior to the filing of such certificate is not binding on the latter court, such decision not being a construction of the statute. *Western Investment Co. v. Davis* (Ind. Ter.), 15-1134.

Where statute must be aided by common law.—Where a statute adopted from another state must be aided by the common law, the particular rule of the common law in force in the state adopting the statute is not to be determined authoritatively by the construction placed upon the statute by the courts of the other state. *Bliss v. Caille Brothers Co.* (Mich.), 12-513.

Where statute is not peculiar to state from which it has been adopted.—The rule that where a statute is adopted from another state the adoption carries with it the construction placed thereon by the courts of that state is a general rule, to which there are exceptions. Where the statute is not peculiar to the state from which it has been adopted, but other states have substantially the same statute, which their courts have construed differently, and when the construction placed upon it by the courts of the state from which it has been adopted is opposed to the weight of reason and authority, or against the general policy of laws of the domestic state, such construction will not be followed. *State v. Campbell* (Kan.), 9-1203.

1. Reference of construction to court.

Under Ontario statutes.—Under the Ontario statutes it is competent for the lieutenant-governor in council to refer to the Ontario Court of Appeal for construction, the Ontario statute making it unlawful for any person not registered to practice medicine, surgery, or midwifery for hire. *In re Ontario Medical Act* (Ont.), 7-369.

m. Time of taking effect.

Intention of legislature.—An express provision in a statute that it shall take effect on a certain day is controlling on the courts in the absence of anything in the statute to show an intention different from that expressed. The province of the courts is merely to ascertain and give effect to the intention of the legislature, and not to correct defective legislation. *State v. Roney* (Ohio), 19-918.

Taking effect "from and after" day

named. — A statute providing that it shall take effect "from and after" a day named takes effect on the day following the one mentioned. *State v. Roney* (Ohio), 19-918.

5. AMENDMENT.

Constitutional requirement that no law shall be amended by reference to title only.—The provision of the Illinois Primary Election Act amending a prior statute is void for failure to comply with the constitutional requirement that no law shall be amended by reference to its title only. *People ex rel. Breckon v. Board of Election Com'rs* (Ill.), 5-562.

A legislative act described in its title as an act to amend and re-enact a certain former act, but making no reference in the enacting clause to the act referred to in the title and not purporting to re-enact and publish at length the act sought to be amended, is invalid, because not conforming to a constitutional requirement that no law shall be amended with reference to its title, but shall be re-enacted and published at length. *Beale v. Pankey* (Va.), 12-1134.

A local option statute which adopts the general election law by reference to the title thereof and prescribes additional qualifications, does not violate a constitutional provision that laws shall not be revived or amended by reference to the title only. *People v. McBride* (Ill.), 14-994.

Application of constitutional provision that amended section be embodied in new act.—The provision of the Nebraska constitution that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," does not apply to an act which is complete in itself, though such act conflicts with prior statutes. *Weston v. Ryan* (Neb.), 6-922.

The amendment of 1883 to section 40 of the Kansas Corporation Act, providing that for the purpose of enabling creditors to prosecute actions against stockholders, a corporation shall be deemed insolvent when it has suspended business for more than one year, is not obnoxious to the constitutional provision forbidding the amendment to a section unless the new section contains the entire section as amended. *Manley v. Mayer* (Kan.), 1-825.

What is not an amendment within meaning of constitutional provision.—A section of a code "bringing forward" or "continuing in operation" as another section of the code a pre-existing statute is not an amendment within the meaning of a constitutional provision that no law shall be amended by reference to its title only, but is simply a recognition by the legislature of the pre-existing law as part of the law of the land at the time of the passage of the code, and an incorporation of such law into the code as a section thereof. *Palatine Ins. Co. v. Northern Pacific R. Co.* (Mont.), 9-579.

Incorporation of amendment in original act.—By virtue of an amendment of a

statute, the amending act becomes incorporated into the original act, and therefore a subsequent statute making a second amendment of the original act need not make special reference to the first amending act. *State Nat. Bank v. Memphis* (Tenn.), 8-22.

Amendment curing invalid section. — When a statute contains an invalid section, the objectionable features may be eliminated by an amendment made in the manner prescribed by a constitutional provision requiring that in an amendatory statute "the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length." *People v. De Blaay* (Mich.), 4-919.

Subsequent amendment of adopted statute. — Where a statute adopts a part or all of another statute by specific and descriptive reference thereto, such adoption takes the adopted statute as it exists at the time of the adoption, and does not include subsequent additions to or modifications of the statute, unless it does so by express intent. *State v. Leich* (Ind.), 9-302.

Where an adopting statute makes no reference to any particular statute or part of statute by its title or otherwise, but refers to the law generally which governs a particular subject, the reference includes not only the law in force at the date of the adopting statute, but also all subsequent laws upon the particular subject covered by the reference. *State v. Leich* (Ind.), 9-302.

Use of amendment to show attitude towards original act. — An amendment enacted many years after the original act cannot be used to show that the framers of the original statute would have enacted the valid portions of a statute independently of the invalid portions. *Commonwealth v. Hana* (Mass.), 11-514.

6. REPEAL.

Repeal by implication. — The repeal of a statute by implication is not favored, and it is only where two statutes relating to the same subject are so repugnant that both cannot be enforced that the one last enacted will repeal the former by implication. *Beha v. State* (Neb.), 2-846.

The Indiana statute of 1901, providing that a city may foreclose its lien for delinquent taxes against real property which has been offered for sale three times, is not repealed by implication by the statute of 1903, providing that land which has been offered for sale for delinquent taxes for two successive years without receiving the bid required by law can be sold for delinquent taxes to the highest bidder at a regular tax sale of 1904, as there is no conflict between the two statutes. *State v. Leich* (Ind.), 9-302.

Section 971 of the Iowa code prescribing the manner of giving notice in proceedings relating to special assessments in cities, had not repealed by chapter 29, Acts Twenty-eighth Assembly, providing that section 823 of the code and other sections shall govern special assessments in cities, "unless other-

wise specially provided," as the words quoted must be construed to refer to section 971, and, moreover, the repeal of a statute by implication is not favored in law. *Diver v. Keokuk Sav. Bank* (Iowa), 3-669.

Title of repealing act. — The title of an act providing for the classification of property for taxation need not express a purpose to repeal the former act, if the latter is inconsistent therewith, nor should it express a purpose to repeal all inconsistent acts, as a repeal of all inconsistent acts, by express words or by implication, is necessary to render effective the general purpose of the act to classify the property for the purposes of taxation. *Monaghan v. Lewis* (Del.), 10-1048.

Repeal by unconstitutional statute. — When a statute purporting to extend the operation of a local statute to the whole state and also to repeal the existing general law on the subject is unconstitutional in so far as it attempts to extend the local law to the entire state, no notice of such purpose being expressed in its title, the repeal of the general law is incidental to the affirmative enactment and both provisions fall, leaving the prior general law unrepealed. *People v. De Blaay* (Mich.), 4-919.

Absence of repealing clause in unconstitutional section. — Where the section of a statute purporting to amend a section of an earlier statute is unconstitutional and void, and there is no repealing clause, general or special, the section of the earlier statute is not repealed, modified, or in any way affected. *People ex rel. Farrington v. Mensching* (N. Y.), 10-101.

Repeal of special by later general act. — A prior special system of legislation or a special act for a particular locality is not repealed by a subsequent statute covering the general subject under which such prior special legislation falls, unless there is found in the subsequent act a direct indication of an intention to repeal the prior legislation, or unless there is a necessary inconsistency between the two acts. *Key v. Harris* (Tenn.), 8-200.

Later statute taking effect first. — Where a statute is inconsistent with another statute passed at a later date but taking effect first, and both are otherwise valid, the later statute repeals the earlier statute to the extent of inconsistency; but where the conflicting part of the later statute is unconstitutional, it does not have the effect of repealing by implication the former statute. *Ex p. Sohneke* (Cal.), 7-475.

Repeal and re-enactment by same act. — Where a statute is repealed and its provisions are at the same time re-enacted by the repealing act, the effect is that the earlier statute is not in fact repealed, but its provisions continue in active operation, so that all rights and liabilities incurred thereunder are preserved. *Haspel v. O'Brien* (Pa.), 11-470.

Application of repealing clause. — The repealing clause of the Indiana Public Offenses Act of 1905, whereby former laws

"within the purview" of that act were repealed, applied only to statutes relating to offenses covered in the body of the act, and not to existing laws in relation to cases not covered thereby. *Clark v. State* (Ind.), 16-1229.

Re-enactment of repealed statute by adoption. — To the extent that the general assembly in any act refers to the provisions of a repealed statute and adopts them, the repealed statute is re-enacted, and to that extent is as much the law as if its provisions were fully set out in the new statute. *Lyles v. McCown* (S. Car.), 17-436.

Specific statutes. — The provision in the Indiana statute of 1903, authorizing the appointment of a commission to compile, revise, and codify the statute laws, which directed that the commission should omit obsolete and repealed laws, had reference to such laws as had theretofore been repealed or become obsolete, but still appeared in certain compilations of the statutes, and not to any laws which might be repealed by the adoption of such acts as the commission itself might recommend. *Clark v. State* (Ind.), 16-1229.

Section 2771 Gen Stat. Minn. 1894 is not repealed by an act incorporating the village of Red Lake Falls. *Schmitz v. Zeh* (Minn.), 1-322.

The Nebraska act entitled "Food Commission" does not by implication repeal an act entitled "An act concerning imitation butter and imitation cheese," etc. *Beha v. State* (Neb.), 2-846.

Statutes — repeal — repugnant acts. — Sections 624 and 626, Wilson's Rev. & Ann. St. 1903 (art. 11, c. 15, St. Okla. 1893), were not repealed by section 4, chapter 7, page 107, Sess. Laws 1903. *Kuchler v. Weaver* (Okla.), 18-462.

7. PLEADING STATUTES.

When not necessary. — In an action upon a domestic public statute, not penal, the statute need be neither counted upon nor recited. *Leone v. Kelly* (Conn.), 1-947.

Complaint stating statutory cause of action. — A complaint states the statutory and not the common-law cause of an action when it sets out the facts bringing the case within the statute and omits the averments essential to such action at common law. *Leone v. Kelly* (Conn.), 1-947.

8. STATE AND FEDERAL STATUTES.

Suspension of state law. — A state statute on a subject which the states may regulate in the absence of federal legislation is not suspended by the mere enactment of a federal statute to take effect at a future time. The state statute remains in operation until the federal statute takes effect, and cases arising between the enactment and the taking effect of the federal statute are governed by the state law. *Peopie v. Erie R. Co.* (N. Y.), 19-811.

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1. CLASSIFICATION.

Trunk railway and street railway distinguished. — A trunk railway and a street railway distinguished within the meaning of the Kentucky constitution providing that certain requirements as to the construction of street railways shall not apply to trunk railways. *Diebold v. Kentucky Traction Co. (Ky.)*, 4-445.

2. MUNICIPAL CONSTRUCTION AND OWNERSHIP.

Underground street railways. — A statute authorizing a city to construct, purchase, own, and operate "street railways" within its corporate limits includes underground street railways. *Barsaloux v. Chicago (Ill.)*, 19-255.

Exclusive lease of subsurface railway. — A city authorized to lease a subsurface street railway owned by it may make an exclusive lease thereof the same as if it were a surface railway. *Barsaloux v. Chicago (Ill.)*, 19-255.

Construction of subways for street railroads. — Under an ordinance providing that the city shall deposit a certain fund "to be kept and used for the purchase and construction of street railways by said city," such fund may be used for the construction of subways for street railroads. *Barsaloux v. Chicago (Ill.)*, 19-255.

3. ORGANIZATION OF STREET RAILWAY CORPORATIONS.

When corporate existence begins. — The North Carolina statute provides that the persons associated in the formation of a street railway company shall constitute a corporation from the time of the filing of a proper certificate in the office of the secretary of state, and the statute contains no requirement that the stock shall be issued or paid up before a valid organization can be effected

or corporate action can be taken. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co. (N. Car.)*, 9-683.

Collateral investigation into validity of organization. — In an action by a street railway company against a railroad to restrain the defendant from interfering with the right of way claimed by the plaintiff, the defendant cannot object that the plaintiff's capital stock has not been issued and that no money has been paid thereon, or that the plaintiff, though incorporated to build a street railway, has built no part of the road in any town, but is only proceeding in the country and on a branch road before the construction of the main road; as these objections, even if valid, are not open to collateral investigation at the instance of the defendant. *Fayetteville St. Ry. v. Aberdeen, etc., R. Co. (N. Car.)*, 9-683.

4. NATURE AND EXTENT OF FRANCHISE.

Territorial limits for operation. — A street railway company chartered under a North Carolina general corporation law may operate "between different points in the same municipality, or between points in municipalities lying adjacent or near to each other, or between the territory lying contiguous to the municipality in which is the home office of said company," provided it does not "operate a line extending in any direction more than fifty miles from the municipality in which is located its home office." *Fayetteville St. Ry. v. Aberdeen, etc., R. Co. (N. Car.)*, 9-683.

Operation of broad-gauge and narrow-gauge railway in same street. — The operation of a broad-gauge railway and a narrow-gauge railway in the same street, necessitating double the trackage required by one road, does not create such inconvenience to the public by reason of the additional rails, which are required to be laid flush with the street, as would warrant a denial of the statutory power to maintain the separate tracks. *San Jose-Los Gatos, etc., R. Co. v. San Jose R. Co. (U. S.)*, 13-571.

Under the California statute providing that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal proportion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively," municipal authorities have power to grant to a railway company the right to construct and operate a broad-gauge railway, for not exceeding five blocks, in a street already occupied by another's narrow-gauge railroad. *San Jose-Los Gatos, etc., R. Co. v. San Jose R. Co. (U. S.)*, 13-571.

5. REPAIR OF STREETS.

Duty of company in absence of contract or statute. — A street railway company is bound to keep in proper repair those

portions of the streets occupied by its right of way, even in the absence of an express contract or statutory direction to that effect. *Reading v. United Traction Co. (Pa.)*, 7-380.

6. REGULATION AND CONTROL.

In general. — A street railway company operating its line under sanction of law is subject to municipal regulation in its use of the streets. *Indiana R. Co. v. Calvert (Ind.)*, 11-635.

Extent of operation of police regulations. — The police regulation of the District of Columbia requiring that "every street car in motion after sundown shall have two lights, one displayed at each end thereof," has no extraterritorial effect; and therefore in an action in the District of Columbia to recover for injuries sustained in the state of Maryland, the *lex loci* and not the *lex fori* governs. *Carter v. McDermott (D. C.)*, 10-601.

Ordinance regulating stops of suburban railway. — A suburban railway company which operates its cars upon its own right of way through a village cannot be compelled by mandamus to stop at a certain point in the village, under an ordinance requiring railroad and street cars which occupy public streets for the purpose of operating upon and along the same to stop at grade crossings of streets when any persons desire to enter or alight therefrom. Such ordinance is not a legitimate exercise of the police power, since it contains no provisions looking to the safety of other users of the highway; nor does it, by its terms, apply to railway companies which operate their cars upon their own right of way. Moreover, as applied to a suburban railway, such ordinance is contrary to public policy, as tending to destroy its usefulness as a means of inter-urban transportation and to prevent it from competing with steam railways for local traffic. *Excelsior v. Minneapolis, etc., R. Co. (Minn.)*, 17-550.

7. RULES AND REGULATIONS.

Right of company to make and enforce. — A street railway company may make and enforce reasonable rules to facilitate its business and to protect itself from fraud and imposition; and so long as these rules are not inconsistent with the rights of the public to transportation over the company's road, and do not impose unnecessary and unreasonable burdens upon the public, they will be enforced. *Little Rock R., etc., Co. v. Goerner (Ark.)*, 10-273.

8. LIABILITY FOR INJURIES FROM NEGLIGENCE.

a. General rights and duties.

(1) Right of way.

Rights of public and street railway equal. — A street railroad company has an equal right with the public to the use of the streets as street crossings. Neither has a

superior right to the other. *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 9-836.

(2) Degree of care required.

Company using electricity as motive power. — A street railway company employing electricity as a motive power is required to exercise the highest care to protect persons using the streets from the danger of being injured by the electric currents, and is liable for damages occasioned by failure to do so. *Metropolitan St. R. Co. v. Gilbert (Kan.)*, 3-256.

(3) Speed and control of cars.

Control required at street intersections. — It is negligence for a street railroad company to operate its cars at such a rate of speed as not to have them under control or be able to stop them readily as they approach intersecting streets, in case it may be necessary to avoid collision or prevent accident. *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 9-836.

More care is required in operating street cars at street intersections than at other points, and if a street railroad company at such intersections runs its cars at an excessive and unusual rate of speed, it is guilty of negligence. *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 9-836.

Rate of speed as negligence. — While under some circumstances a street railway company is not guilty of negligence in operating its cars at high speed, this is not the case where a car is approaching a street crossing in a thickly populated district and persons are apt to be struck unless the car is under control. *Wolf v. City, etc., R. Co. (Ore.)*, 15-1181.

It is not negligence to run a trolley car on a public highway at a rate of speed which is not incompatible with the lawful and customary use of the highway by others with reasonable safety. *Smith v. Public Service Corporation (N. J.)*, 20-151.

Evidence of rapid rate of speed. — The fact that after a collision between a street car and a wagon at a crossing the wagon was carried a distance of between forty and fifty feet and the car moved nearly half a block with its brakes applied, shows that before the collision the car was running "at quite a rapid rate" of speed. *Roanoke R., etc., Co. v. Young (Va.)*, 15-946.

When question of reasonable speed is for jury. — Where it may be inferred from the testimony that a car which struck the plaintiff's intestate at a street crossing was approaching the crossing at a speed of twenty-six or twenty-nine miles an hour, it cannot be said as a matter of law that the speed was reasonable, and consequently the question is properly submitted to the jury. *Wolf v. City, etc., R. Co. (Ore.)*, 15-1181.

Applicability of law governing speed of railroad trains. — The rule of law governing the speed of railroad trains at suburban street crossings is not applicable to an electric street car approaching a crossing in

a city. *Wolf v. City, etc., R. Co. (Ore.)*, 15-1181.

Evidence as to use of street.—Although no evidence is introduced, for the purpose of establishing negligence on the part of a street railway company in operating a car over a crossing at excessive speed, to show that the portion of the city surrounding the crossing was thickly populated, yet from the fact that seven persons were on the street at or near the crossing the jury may infer that the street was much used. *Wolf v. City, etc., R. Co. (Ore.)*, 15-1181.

(4) Lookout.

Duty to provide lookout.—Where rapidly moving cars propelled by electricity are operated in public streets it is incumbent upon those having charge of them to exercise care commensurate with the circumstances for the protection of others, and to this end to keep a lookout ahead of the car for persons and vehicles on the track. *Greene v. Louisville R. Co. (Ky.)*, 7-1126.

(5) Signals and warnings.

Delegation of duty to equip cars with red lights.—An imperative duty rests upon a street railway company to equip its cars with red lights for use after dark, and the duty is one which the company cannot delegate so as to escape liability for injuries suffered by one of its servants by reason of an omission or neglect on the part of the servant or agent intrusted by the company with the performance of the duty. *Carter v. McDermott (D. C.)*, 10-601.

Duty to give warning at street crossings.—A street railroad company should give proper warning of the approach of its car at street crossings, and if it fails to do so it is guilty of negligence. *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 9-836.

Timely warning of the approach of a trolley car must be given as will enable others to avoid any danger from it, and the non-performance of such duty in approaching a street crossing intended to be crossed is evidence of negligence, which, if the natural and proximate cause of the injury complained of, is actionable. *Smith v. Public Service Corporation (N. J.)*, 20-151.

(6) Violation of ordinances.

Violation of ordinance regulating speed negligence per se.—A municipal corporation may, within reasonable limits, regulate and prescribe the speed at which street cars may be operated over its streets, and when it has done so, by a valid ordinance, it is negligence *per se* for a street railroad company to run its cars at a speed exceeding that fixed by the ordinance. *Ashley v. Kanawha Valley Traction Co. (W. Va.)*, 9-836.

b. Collision with vehicles.

Rights of driver of vehicle along track.—While a person driving a vehicle

along the track of a street railway has no right to obstruct the track, and must exercise ordinary care for his own safety and the safety of others, he is not a trespasser, and has the right to anticipate that a proper lookout will be kept by those in charge of the street cars and that ordinary care will be exercised by them, as in the case of other vehicles, to avoid running into him. *Greene v. Louisville R. Co. (Ky.)*, 7-1126.

Driving along track not negligence per se.—It is not negligence *per se* to drive a vehicle along a street railway track without watching for the approach of cars from behind, and therefore where a person, while thus driving his wagon, is struck by an overtaking car, the questions of due care on his part and negligence on the part of the railroad company are for the jury. *Callahan v. Boston Elevated R. Co. (Mass.)*, 18-510.

Failure to use best of judgment not contributory negligence.—In an action against a street railway company for personal injuries sustained by the driver of a team who, after seeing a car about a hundred feet away, determined to try to get across the track and was struck in attempting to do so, it is not error to instruct the jury that if the plaintiff attempted to take what appeared to be the safest course to avoid a discovered danger, he was not guilty of contributory negligence because he did not use the best of judgment. *Deneen v. Houghton County St. R. Co. (Mich.)*, 13-134.

Failure of motorman to take last clear chance to avoid injury.—In an action by the driver of a vehicle who had negligently attempted to cross in front of a rapidly approaching electric car, a verdict for the plaintiff on the ground that after the motorman saw or should have seen the position of danger in which the plaintiff had placed himself, he could by the exercise of ordinary care on his part have avoided the injury, held not to be so plainly without evidence or so contrary to the weight of the evidence as to warrant the court in setting it aside. *Roanoke R., etc., Co. v. Young (Va.)*, 15-946.

Charge of court in crossing accident case.—In an action by the driver of a wagon for personal injuries sustained in a collision with a street car at a crossing, held that the instructions state the law correctly and that the evidence tended to prove all the facts upon which the instructions were based. *Roanoke R., etc., Co. v. Young (Va.)*, 15-946.

Charge of court as to care exercised by motorman.—In an action to recover damages for an injury resulting from the negligent operation of a street car, it is erroneous to instruct the jury that they should find for the defendant if they believe from the evidence that the motorman "brought into operation all the means at his command to prevent a collision with the plaintiff's vehicle," where there is evidence tending to show a want of due care in other respects on the part of the operators of the car. *Greene v. Louisville R. Co. (Ky.)*, 7-1126.

Evidence sufficient to carry plaintiff's case to jury. — In an action against a street railway company for personal injuries sustained in a collision between the defendant's car and the plaintiff's vehicle at a crossing, evidence tending to show fast running by the street car and a failure to decrease its speed before the collision occurred, and the testimony of the plaintiff that he heard no gong sounded, is sufficient to carry the case to the jury, on the question of the defendant's negligence. *Deneen v. Houghton County R. Co.* (Mich.), 13-134.

Evidence insufficient to show contributory negligence as matter of law. — In such an action, evidence examined and held insufficient to show that the plaintiff was guilty of contributory negligence as a matter of law. *Deneen v. Houghton County St. R. Co.* (Mich.), 13-134.

Defendant company held not liable. — Evidence considered in an action against a street railway for damages for a collision between a fire hose carriage going to a fire and a street car, and the defendant company held not liable. *Wood v. New Orleans R., etc., Co.* (La.), 8-983.

c. Injuries to pedestrians.

Duty of pedestrian to look and listen. — Duty of a person crossing a street railway track to look and listen. *Birmingham Ry., etc., Co. v. Oldham* (Ala.), 3-333.

The rule requiring pedestrians to stop, look, and listen before crossing the tracks of a steam railroad applies also to the tracks of an electric street railway. *Hornstein v. United R. Co.* (Mo.), 6-699.

Attempt to cross track in front of car. — It is not contributory negligence for a person to attempt to cross a street railway track in front of an approaching car, if in doing so he exercises that judgment and care which a reasonably prudent and careful person would exercise under like circumstances. *Ashley v. Kanawha Valley Traction Co.* (W. Va.), 9-836.

Care required in crossing track in country. — More action is required of a person in crossing the track of an electric railway in the country than is necessary in the city, as a higher rate of speed in the movement of electric cars is permissible in the open country than is allowable along the more crowded thoroughfares of the town. *Phillips v. Washington, etc., R. Co.* (Md.), 10-334.

Pedestrian walking on track. — In an action against a street railway company to recover damages for injuries resulting to the plaintiff through the act of the defendant in running one of its cars against the plaintiff while she was walking along the defendant's track, where the jury find in answer to interrogatories that the precautions taken by the plaintiff in looking and listening for the approach of cars constituted ordinary care and prudence, and it is clear from the facts found that, by the exercise of ordinary care while giving attention to his duties, the

driver of the car could have discovered the plaintiff's presence and her apparent ignorance of the impending danger in ample time to prevent an accident, a motion by the defendant for a judgment in its favor is properly overruled. *Indianapolis Traction, etc., Co. v. Kidd* (Ind.), 10-942.

Evidence held to show contributory negligence. — Evidence reviewed, in an action against an electric railway company to recover damages for personal injuries sustained by the plaintiff in crossing the defendant's track, and held sufficient to show that the plaintiff was guilty of such contributory negligence that it was proper for the trial court to direct a verdict for the defendants. *Phillips v. Washington, etc., R. Co.* (Md.), 10-334.

Contributory negligence question for jury. — Whether a pedestrian was guilty of contributory negligence in endeavoring to cross in front of a rapidly approaching street car is a question for the jury where according to the testimony of a witness the car was not dangerously near the point of crossing. *Wolf v. City, etc., R. Co.* (Ore.), 15-1181.

d. Injuries to children.

Duty of motorman to see and avoid injuring child. — The Florida statute imposing upon railroad companies the duty of exercising "all ordinary and reasonable care and diligence" to avoid inflicting personal injuries makes it the duty of a street railway motorman to see a child of tender years who is on or dangerously near the track and to use means strictly commensurate with the demands and exigencies of the occasion to avoid injuring such child. *Jacksonville Electric Co. v. Adams* (Fla.), 7-241.

9. REMOVAL OF OBSTRUCTIONS FROM TRACKS.

Liability for removal to other part of highway. — A street railway company finding an obstruction upon the tracks running upon a public highway may remove the same to another part of the highway without creating a nuisance and incurring liability. *Howard v. Union Ry. Co.* (R. I.), 1-217.

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1. DEFINITIONS.

Roadway of a street. — The roadway of a street is the portion used for horses and vehicles, and may be coextensive with the street. *J. Burton Co. v. Chicago (Ill.)*, 15-965.

Public highway. — The term "public highway," in the broad ordinary sense, includes every common way for travel by persons on foot or with vehicles rightfully used on highways, which the public have the right to use either conditionally or unconditionally, and, therefore, embraces toll roads. In a limited sense, however, the term means a way for general travel which is wholly public, and in that sense it does not include toll roads. *Weirich v. State (Wis.)*, 17-802.

The term "public highway" in a general law should be regarded as having been used by the legislature in its general sense unless there is some efficient reason for believing it was used in the limited sense. *Weirich v. State (Wis.)*, 17-802.

A general law, regulating the operation of automobiles upon public highways in the interest of the public safety, suggests the use of the term "public highway" in the general rather than the particular sense, since the danger of personal injury is quite as great and the immunity therefrom is quite as important as to travelers on the one as the other. *Weirich v. State (Wis.)*, 17-802.

2. ESTABLISHMENT OF PUBLIC ROADS.

a. By dedication.

Presumption of acceptance of dedication. — Where there is a conclusive presumption of the dedication of a highway and the road dedicated is a benefit to the public and not a burden, the acceptance essential to complete the dedication is conclusively presumed from general and long-continued use of the highway by the public for purposes of travel. *Riley v. Buchanan* (Ky.), 3-788.

What is not a dedication and acceptance. — Where residents along a section line mark out a road following a supposed line, and such road is generally traveled and improved by the town, such acts will not be for highway purposes of the land marked out, interpreted as a dedication and acceptance where it is found that it in fact departs from the true position of the section line. *Shanline v. Wiltsie* (Kan.), 3-140.

Presumption of extension of alley through block. — Where an alley is called for in an addition to a city, it will be presumed that it runs from one street to another. *Alexander v. Tebeau* (Ky.), 18-1092.

Effect of curative statute on defective dedication. — A defective statutory dedication of a street cannot be cured by a subsequent statute, so as to vest the title to the street in the city as against purchasers of lots on such street before the curative act is passed. *Sears v. Chicago* (Ill.), 20-539.

Proof by recitals in deeds. — Dedication of an alley is shown by recitals in deeds referring to the alley as one of the boundaries of the lots conveyed, by proof that the alley was used by the lot owners, and by a map found in the city engineer's office showing the alley as called for in the deeds, though it is not shown who filed the map. *Alexander v. Tebeau* (Ky.), 18-1092.

No distinction between streets and public roads. — In respect to the rights of the public in highways held under valid dedications and acceptances, and the powers of the legislature over the same, there is no distinction in West Virginia between the streets of incorporated cities and towns and country roads. *Hardman v. Cabot* (W. Va.), 9-1030.

Width of dedicated highway. — Where the owners of land build a bridge over a ravine and dedicate as a highway the bridge and a strip of land on each side of it, the highway includes the strips of land as well as the bridge. *Gloster v. Toronto Electric Light Co.* (Kan.), 6-529.

b. By prescription.

Presumption of dedication. — When a landowner permits the general public to use a way over the land as a highway for a great length of time under a notorious claim of right, the law raises a conclusive presumption of dedication to the public use. *Riley v. Buchanan* (Ky.), 3-788.

Where traveled highway departs from true line. — Where a legal highway

is established by the order of a county board along a section line but the road actually traveled departs from the true line at one place, such conditions, for however long continued, will not affect an abandonment of the public easement over the true course, or create by prescription or limitation a right of way over the track actually used for travel. *Shanline v. Wiltsie* (Kan.), 3-140.

Use of passageway through uninclosed woodland. — While ordinarily the use by the public of a passageway through uninclosed woodland is deemed permissive merely and not adverse to the owner's title, this may or may not be so, according to the circumstances. *Riley v. Buchanan* (Ky.), 3-788.

Width of highway by adverse user. — A public highway acquired by adverse user is not limited in width to the track made by passing vehicles, but its width is a question of fact to be determined by the character and extent of the user. *Arndt v. Thomas* (Minn.), 2-972.

c. By legal proceedings.

Laying out by highway commissioner. — In the absence of express statutory authority a highway commissioner having general authority to lay out highways has no power to lay out a highway extending over or into the navigable water of a lake for the purpose of making a wharf or landing for travelers going to or from the lake. *Commissioner of Highways v. Ludwick* (Mich.), 14-287.

Statutory requirements as to notice. — When a petition is duly presented to county commissioners for the laying out of a way, Revised Statutes, chapter 23, section 2, provides that the commissioners "shall cause thirty days' notice to be given of the time and place of their meeting, by posting copies of the petition, with their order thereon, in three public places in each town in which any part of the way is, and serving one on the clerks of such towns, and publishing it in some newspaper, if any, in the county." The same statute also provides that "the fact that notice has been so given, being proved and entered of record, shall be sufficient for all interested, and evidence thereof." *Lord v. County Commissioners* (Me.), 18-665.

Compliance with requirements as to notice. — Where on a petition for the writ of certiorari to quash the record of the proceedings of county commissioners in laying out a town way, and the record certified up showed that the commissioners found as a fact, and entered the same in their record, that it was "then and there satisfactorily proved to us that all the notices named in said order had been duly and seasonably published, served and posted, and that all the requirements thereof had been fully complied with," held that the record thus certified up showed a full compliance with the statute as to notice. *Lord v. County Commissioners* (Me.), 18-665.

Form of notice. — It has been the uniform practice in Maine in proceedings for the

laying out of ways, where the notice ordered to be given is to include a copy of the petition, not to copy the signatures of all the petitioners in the notice, but only the first with a statement of the number of the others. Such practice has continued so long, and been relied upon as sufficient so universally, that for reasons of public policy if for no other, it should now be regarded as a substantial and sufficient compliance with the statute. *Lord v. County Commissioners (Me.)*, 18-665.

Who is "occupant" of land entitled to notice. — The owner of a farm who is in actual possession and control of it is the "occupant" of the farm within the meaning of a statute requiring notice of a proceeding to lay out a road to be served personally on each occupant of the land through which the road will pass, though at the time he does not reside on the farm but in a village near by. *McCauley v. McCauleyville (Minn.)*, 20-828.

Adjournment of survey. — Presumption as to the adjournment of surveying operations. *Shanline v. Wiltsie (Kan.)*, 3-140.

3. ROADS AND STREETS IN MUNICIPALITIES.

a. Powers and duties of municipalities generally.

Legislative grant of power over. — A legislative grant to a municipal corporation of power over its streets and a provision that the power is exclusive forbids judicial interference with the exercise of the power except as the grant is controlled by other provisions of the statute or by judicial principles of law. *Indiana R. Co. v. Calvert (Ind.)*, 11-635.

Control of city over. — A city may control its streets so long as it uses them for the purpose for which they were dedicated, but it exceeds its power if it authorizes their use for other purposes. *Tacoma Safety Deposit Co. v. Chicago (Ill.)*, 20-564.

The fact that a street railway company enjoys contractual rights in the streets does not prevent the reasonable control and regulation of its property under the police power, it being assumed that such control was contemplated by the parties to the contract. *Indiana R. Co. v. Calvert (Ind.)*, 11-635.

Control of councils over. — In Indiana the common council of a city has absolute dominion over the streets and other highways of the city. *Valparaiso v. Spaeth (Ind.)*, 8-1021.

Discretion in exercise of power. — In the exercise of its delegated powers to grade and pave streets, the discretion of a municipality is final and cannot be controlled by the courts except where the power is exceeded or fraud is shown or there has been a manifest invasion of private rights. *Frostburg v. Wineland (Md.)*, 1-783.

Effect of ownership of fee in streets by city. — As the city of New York owns the fee in its streets, it has the right to grant or withhold, as it sees fit, rights in such streets other than for street purposes which

do not impair the public easement. *Fifth Ave. Coach Co. v. New York (N. Y.)*, 16-695.

Duty of city to improve streets. — A city holds its streets and other highways in trust for the public, and is in duty bound to improve them in such manner as will respond to the necessity and convenience of the public in their use as ways of passage. *Valparaiso v. Spaeth (Ind.)*, 8-1021.

Selection of paving material. — Under the provisions of the charter of Kansas City providing for the paving of the streets and payment therefor by special tax bills against the abutting owners, the material with which the street shall be paved may be selected by the resident property owners of the city who own a majority of the lands fronting on the street to be paved, by a petition signed by them and filed with the board of public works within ten days from the passage of the ordinance recommending that the paving shall be done. If no petition is filed in the time stated, the board of public works has the right to designate the paving material; and in computing the ten days within which the petition of the abutting owners is to be filed, Sunday should not be excluded. *Curtice v. Schmidt (Mo.)*, 10-702.

Arbitrary destruction of private property not a nuisance per se. — Where a municipality in exercising its powers to grade and pave streets arbitrarily undertakes to destroy as a nuisance private property which is not a nuisance *per se*, it transcends its powers, and its acts are within the corrective powers of a court of equity. *Frostburg v. Wineland (Md.)*, 1-783.

b. Establishing and changing grades.

When grading a municipal act. — The grading of a street by the street commissioner under the direction of the engineering department, pursuant to a resolution of the city council ordering the construction of sidewalks upon a grade to be "given by the city engineer" and paid for with municipal funds, is the act of the municipality. *Wallenberg v. Minneapolis (Minn.)*, 20-873.

Authority of councils to establish grades. — The city council of Minneapolis has, under the charter of that city, the authority to establish street grades, but in making the improvement cannot take, destroy, or damage private property without compensation. *Wallenberg v. Minneapolis (Minn.)*, 20-873.

Damages for change in grade. — Where a municipal corporation changes the established grade of one of its streets, an action lies by the owner of property abutting on such street for damages caused by such change in grade. *Crowe v. Charles Town (W. Va.)*, 13-1110.

Under the constitutional provision declaring that private property shall not be taken or damaged for public or private use without just compensation, a municipal corporation is not liable to an abutting lot owner for damages resulting to his property from the authorized lowering or raising of the grade of a public street from the natural surface to a

grade established by municipal ordinance in the first instance, where the change is reasonable and has not been negligently made. *Leiper v. Denver* (Colo.), 10-847.

Effect of petition for improvement. — A property owner, by petitioning for the grading of a street on which his property abuts, does not waive his right to compensation for the damage done his property by depriving it of lateral support in making the change of grade. *Wallenberg v. Minneapolis* (Minn.), 20-873.

c. Vacation of streets.

Power of legislature to vacate street.

— In the absence of a constitutional restriction, a legislature may vacate a street in a municipality. *Marietta Chair Co. v. Henderson* (Ga.), 2-83.

Delegation of power to municipality.

— The power to vacate a street in a municipality may be delegated to the municipal corporation. *Marietta Chair Co. v. Henderson* (Ga.), 2-83.

Inquiry into motives of councils.

— The courts will not ordinarily inquire into the motive of a city council in its exercise of a discretionary power to vacate streets which has been conferred upon it by the legislature. *Enders v. Friday* (Neb.), 15-685.

Effect of irregularities not jurisdictional in character. — Where a city council, acting under the provisions of the Nebraska annotated statutes, vacates a street or any part thereof, and by ordinance declares such vacation to be expedient for the public good, all the provisions of the statute being observed, such action by the council has all the force and effect of a judgment, and irregularities not jurisdictional in their character will not invalidate the vacation. *Enders v. Friday* (Neb.), 15-685.

Effect of vacation. — Where a street is vacated, the interest of the public therein ceases, and the owners of the fee may use the property without regard to the former servitude imposed upon it. *Marietta Chair Co. v. Henderson* (Ga.), 2-83.

Effect of general statute providing method for ascertaining damages. — The act of the Georgia legislature authorizing the closing of a street need not provide for the payment of compensation for damages to the property, there being a general statute providing a method for ascertaining such compensation. *Marietta Chair Co. v. Henderson* (Ga.), 2-83.

Effect of failure to institute proceedings to ascertain damages. — If the closing of a street results in a damage to private property, the owner thereof, by allowing the street to be closed without instituting proceedings to prevent it, waives his right to demand compensation as a condition precedent to the closing and is remitted to an action at law for damages. *Marietta Chair Co. v. Henderson* (Ga.), 2-83.

Damages for vacation of part of street. — Where part of a street is vacated, the general rule is that only those property

owners whose property abuts upon the vacated part of the street, and who are thus cut off from access to their property, are entitled to damages on account of such vacation. *Enders v. Friday* (Neb.), 15-685.

d. Sidewalks.

Uses to which municipality may put sidewalks. — While a municipality may authorize the reasonable use of a sidewalk in front of a building for the construction of an area way by which access to the basement may be had, it has no power to authorize the construction of an area way in such a manner as to work an injury to the property of an adjoining owner by making the walk in front of the latter's premises a landing place for those going to and from the basement. *Perry v. Castner* (Ia.), 2-363.

Necessity for notice to owners to construct sidewalks. — Where a municipal charter requires notice to be given to abutting owners to construct sidewalks at their own expense as a condition precedent to the right of the city to construct the sidewalks and assess the cost against the property benefited, failure to give such notice in the manner provided is fatal to the validity of the assessment against abutting owners for the construction of the sidewalks adjacent to their property. *Denver v. Dunning* (Colo.), 3-674.

Notice of removal of shade trees. — As an abutting owner is not entitled to compensation for shade trees removed from the public streets by the municipal authorities, in order to protect the sewerage system of a city, no notice of such removal is required to be given. *Rosenthal v. Goldsboro* (N. Car.), 16-639.

e. Sprinkling streets.

Implied power of municipality. — Under the statute authorizing municipalities to improve and repair their streets, a municipality has the implied power to sprinkle its streets, and in the exercise of that power it may take water from municipal waterworks without compensation, and may pay the necessary expenses of sprinkling out of the general funds of the municipality. *McAllen v. Hamblin* (Ia.), 6-980.

Assessment of cost on abutting land. — A statute authorizing a municipal corporation to pass an ordinance requiring the cost of street sprinkling to be assessed upon the abutting land in proportion to frontage is beyond the police power of the state and invalid. *Stevens v. Port Huron* (Mich.), 12-603.

4. RIGHT OF PROPERTY OWNER TO DAMAGES.

As to the right to damages for a change of grade of a street in a municipality, see 3 b, *supra*.

As to the right to damages for the vacation of a street in a municipality, see 3 c, *supra*.

Liability of city where improvement is not for a street use. — A city is not lia-

ble for injury to abutting property caused by any improvement of a street for street use where the work is properly done; but if the construction is not for a street use, even though it is for a public use, liability attaches to a city the same as to a railroad corporation. *In re Rapid Transit R. Com'r's* (N. Y.), 18-366.

Damages for subway under street. — Constructing a subway under a street for the passage of cars is not a street use, because it does not help the street for uninterrupted passage by men, animals, and vehicles, but is an exclusive occupation of a part of the street, and therefore the owners of the fee of the street are entitled to compensation for their property thus taken. *In re Rapid Transit R. Com'r's* (N. Y.), 18-366.

Liability of city for necessary disturbance of gas and water pipes. — A city is not liable in damages to a gas and water company for the necessary disturbance of its pipes in a street where the disturbance results from the construction of a viaduct over railroad tracks for the purpose of avoiding a dangerous grade crossing and does not amount to an abrogation or annulment of the company's right to maintain its system of pipes in the streets, though the ordinance under which the improvement is made provides for compensation to abutting owners, and though the city calls into exercise its right of eminent domain. *Scranton Gas, etc., Co. v. Scranton* (Pa.), 6-388.

Liability of city for negligence where improvement is made by county. — Where a county improves a city street by virtue of the authority conferred upon it by the Indiana statute, and the city consents to and orders the improvement in the manner prescribed by the statute, the city is liable for injury resulting from the negligent manner in which the work is done. *Valparaiso v. Spaeth* (Ind.), 8-1021.

Damages incidental to skilful construction of improvement. — A city is not liable in damages for any injury resulting to abutting property which is directly and necessarily incidental to the proper and skilful construction of a street improvement. *Valparaiso v. Spaeth* (Ind.), 8-1021.

Damages for construction of railway or highway. — Where an electric railway is constructed on a township highway, an abutting owner is not entitled to compensation because the grade is lowered, if done with the approval of the authorities, or because the railroad is placed at the side of the highway in proximity to his premises. *Austin v. Detroit, etc., Ry.* (Mich.), 2-530.

5. USE AND OBSTRUCTION OF ROADS AND STREETS.

a. Municipal regulation and control.

Trust affecting title of municipality. — The title of a city in its streets and other public grounds is held in trust for the public, whether it owns the fee or only an easement, and it cannot grant away the rights of the public, nor may private individuals

encroach on a street, with or without the consent of the municipality, to the detriment of the superior rights of the public. *Sears v. Chicago* (Ill.), 20-539.

Extent of municipality's right of control. — A city which owns the fee of its streets may allow any use of them that is consistent with the public object for which they are held, and it may regulate such use and fix a reasonable compensation to be paid therefor, with no other limitation than that the exercise of the power shall be reasonable and with due regard to the paramount right of the public. *Sears v. Chicago* (Ill.), 20-539.

Ordinance regulating use of space under surface. — An ordinance relating to the use of streets and alleys and the space under sidewalks which declares that no person shall use any space underneath the surface of any street or other public ground without a permit, and that no permit shall be issued for the use of space under the surface or roadway of any street or other public ground, prohibits the issuing of a permit to construct a vault under the surface of an alley. *J. Burton Co. v. Chicago* (Ill.), 15-965.

Even if the use of the word "roadway" in such ordinance has the effect of prohibiting the issuing of a permit for the use of space under a street or other public ground having not only a roadway but other surface, the court will not, in the absence of an allegation that there are no alleys in the city having no sidewalks, hold that alleys are not included in such prohibition. *J. Burton Co. v. Chicago* (Ill.), 15-965.

Erection of municipal electric plant. — A municipal corporation has no power to use part of a public street for the erection of a municipal electric light plant, and such use will be enjoined at the suit of an abutting landowner. *McIlhinny v. Trenton* (Mich.), 12-23.

Ordinance permitting use of city street as automobile race-course. — Under the New York statute making it unlawful to drive an automobile upon any highway in any city at a greater rate of speed than eight miles an hour, "except where a greater rate of speed is permitted by the ordinance of the city," a city ordinance which does not authorize the operation of automobiles generally at a greater rate of speed than that prescribed in the statute, but which merely gives permission to certain specified persons to use the city highway as an automobile race-course on a particular occasion, is not only invalid as a regulation of the speed of automobiles, but also operates to make the city a participant in the commission of the unlawful act of driving automobiles at an excessive rate of speed. *Johnson v. New York* (N. Y.), 9-824.

The charter right of a city "to regulate the use of streets and sidewalks by foot passengers, animals, and vehicles, to regulate the speed at which vehicles are propelled in the streets," etc., confers on it no power to grant to individuals the right to use a high-

way in a city on a certain occasion for an automobile race-course, to the exclusion of the public. *Johnson v. New York* (N. Y.), 9-824.

Ordinance forbidding playing of games. — A municipal ordinance forbidding playing games in the street held to have no application to boys running on the street while engaged in play. *Beaudin v. Bay City* (Mich.), 4-248.

b. Use by public generally.

Nature and extent of rights of public. — The right to use the public streets for the purpose of travel as well as all personal and property rights is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority, the state, whenever necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people. To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the state, called its police power, be used. *State v. Mayo* (Me.), 20-512.

Use of street constituting nuisance. — Although the question whether a particular use of a highway constitutes a nuisance is one of law, the declaration upon the subject of the board of supervisors of the county, which is vested with full jurisdiction in matters pertaining to public roads, is very persuasive. It is only where there has been a manifest abuse of power that the court will disregard the declaration of such board that a particular use of a highway constitutes an obstruction thereof. *Covington County v. Collins* (Miss.), 15-1072.

The county board of supervisors is warranted in declaring that the constant use of a traction engine upon a public highway for the purpose of hauling between two lumber mills from two to four wagons loaded with lumber, is dangerous to public travel, and is such an extraordinary use thereof as to render it unlawful. *Covington County v. Collins* (Miss.), 15-1072.

The fact that a large number of persons living along such highway have signed a petition to permit the use of the traction engine upon the highway, does not render such use lawful if the continual running of the engine is an unusual, unreasonable, and extraordinary use of the highway, and endangers the safety of any one who has the right to travel upon it. *Covington County v. Collins* (Miss.), 15-1072.

Liability of municipality for improper use. — A village in which coasting on bob-sleighs is carried on as a common practice, in the streets, and that does nothing to put a stop to it, is guilty of negligence and liable in damages for accidents to passersby. *Dudevoir v. Waterville* (Can.), 18-86.

Exercise of reasonable care by defendant. — The law affords no redress for injuries sustained by a person as an incident to the reasonable use of a highway by an-

other person who is exercising reasonable care. *Indiana Springs Co. v. Brown* (Ind.), 6-656.

Question of defendant's negligence for jury. — In an action by a pedestrian to recover damages for injuries sustained by falling over a block of ice alleged to have been placed by the defendant on the sidewalk of a public street, evidence examined and the question whether the presence of the ice at the place of the accident was due to the defendant's negligence held to have been properly submitted to the jury. *Merchants Ice, etc., Co. v. Bargholt* (Ky.), 16-965.

What constitutes gross negligence. — Testimony that on a dark night the defendant was riding in a buggy at a rapid gait on the public highway, without keeping a lookout for other travelers, whom he could have seen by the exercise of the most ordinary diligence, is sufficient to authorize the court to instruct the jury on the law of gross negligence. *Buxton v. Ainsworth* (Mich.), 5-146.

Meeting vehicles. — Though the law of the road requires the driver of a vehicle upon meeting another vehicle to turn to the right of the centre of the wrought portion of the highway, a driver who turns sufficiently far to the right to enable the other vehicle to pass in safety is not guilty of negligence contributing to a collision, though some portion of his vehicle may be to the left of the centre of the traveled part of the highway. *Buxton v. Ainsworth* (Mich.), 5-146.

Application of rule of road to fire engines. — The rule of the road, with relation to vehicles approaching a street crossing that the first to reach the crossing has the right to pass over first, applies to vehicles of every character, including fire engines and trucks, in the absence of legislative enactment or municipal regulation giving such vehicles superior rights. *Knox v. North Jersey St. R. Co.* (N. J.), 1-164.

Local custom affecting fire engines. — To entitle a plaintiff to prove that a fire truck has the right of way over street crossings by reason of a local custom, such custom must be averred in his declaration. *Knox v. North Jersey St. R. Co.* (N. J.), 1-164.

Right of way as between fire department and fire insurance patrol. — Construing the Louisiana statute granting the right of way through the streets of New Orleans to the fire department, with the statute granting a similar right to the fire insurance patrol, it is clear that whilst, as between the patrol and the public, such right is vested in the patrol, the right granted to the fire department is paramount to, and is wholly unaffected by, that granted to the patrol. *Coleman v. Fire Ins. Patrol* (La.), 16-1217.

Automobile race on city streets. — An automobile race or speed contest in a city highway is an unlawful use and obstruction of the highway, and is *per se* a nuisance, though it is held pursuant to permission expressly granted by the city, where the grant

of authority is invalid. *Johnson v. New York (N. Y.)*, 9-824.

Where an automobile race is held on a city highway pursuant to express authority unlawfully granted by the city, the illegality of the use of the highway does not render the city or the persons participating in the race, if they are at fault in the conduct of the race in no other respect, liable for an injury sustained by a spectator by reason of the deflection of an automobile running at a high rate of speed, where it appears that the spectator has come a considerable distance for the express purpose of seeing the race and with knowledge of the fact that the automobiles would be driven at the greatest speed of which they were capable. *Johnson v. New York (N. Y.)*, 9-824.

Grant of use of streets by city to corporation. — The grant by a city to a corporation, of the right to use the city streets under such conditions as may be imposed, creates a license and not a franchise. *Chicago v. Chicago Tel. Co. (Ill.)*, 12-109.

c. Use by owners of abutting properties.

Rights of abutting owners where city owns fee. — Where a city owns the fee in a street, abutting lot owners have the right of egress and ingress and an easement for light and air in addition to the right to use the street as a highway, but they have neither the possibility of reverter nor any title, right, or interest under which they can justify an exclusive appropriation of any portion of said street, either on the surface or above or below it, without the consent of the city. *Sears v. Chicago (Ill.)*, 20-539.

Necessary obstructions. — The right of the public to the unobstructed use of a street in all its parts is subject to such incidental and temporary or partial obstruction as manifest necessity may require. *John A. Tolman & Co. v. Chicago (Ill.)*, 16-142.

Obstruction of sidewalk by merchant. — When not restrained by ordinance, a merchant may use and temporarily obstruct the street and sidewalk in front of his premises in loading and unloading merchandise, if he does not unnecessarily and unreasonably interfere with the use thereof by the traveling public. The extent of the right thus to interfere with the free and uninterrupted use of the sidewalk by the public depends upon whether it is reasonably necessary for the individual to obstruct the same and whether the obstruction is reasonable with reference to the rights of the public. *John A. Tolman & Co. v. Chicago (Ill.)*, 16-142.

Use of skids on sidewalk. — For the purpose of facilitating the removal of such merchandise, skids may be used in a reasonable manner if reasonably necessary in the conduct of the merchant's business and if reasonable so far as the public is concerned. *John A. Tolman & Co. v. Chicago (Ill.)*, 16-142.

Where it appears that there is no method other than the use of skids or other mechanical appliances by which such merchandise can

be removed with less danger, obstruction, or inconvenience to the public, that without the use of such appliances the merchant cannot remove to and from his building the bulkier packages in which he deals, and that the use of skids prevents the storage of merchandise upon the sidewalk and enables the merchant to remove such merchandise in from one-half to one-tenth of the time that would otherwise be required, the use of such skids is not of itself unlawful or a nuisance. *John A. Tolman & Co. v. Chicago (Ill.)*, 16-142.

Whether the manner or extent of such use, the place in which it is exercised, or the conditions surrounding it are such as to make such use unreasonable and therefore unlawful is a question of fact to be determined in a judicial proceeding. *John A. Tolman & Co. v. Chicago (Ill.)*, 16-142.

The executive officers of a city have no right to interfere with the use of such skids except in the enforcement of an ordinance or in pursuance of judicial process. *John A. Tolman & Co. v. Chicago (Ill.)*, 16-142.

A statute declaring it to be a public nuisance "to obstruct or encroach upon public highways" does not apply to the reasonable use of such skids. *John A. Tolman & Co. v. Chicago (Ill.)*, 16-142.

Construction of overhead bridge. — The owner of lots abutting on opposite sides of the street may, under a license or permit from the city council, revocable at its pleasure, construct an overhead bridge for the purpose of transporting freight over the street and relieving the street of a serious obstruction to or interference with traffic along the street, the bridge being so constructed that its supports will not be in the street and so that it will not interfere with the light and air of adjoining abutting owners. *Kellogg v. Cincinnati Traction Co. (Ohio)*, 17-242.

Right to plant and grow shade trees. — Abutting owners in cities, towns, and villages own the land to the centre of the street subject to the easement of the city, and among their rights in the street is the right to plant and grow shade and ornamental trees, if not expressly prohibited by the city. *Cartwright v. Liberty Tel. Co. (Mo.)*, 12-249.

Shade trees growing in the street do not constitute a nuisance *per se* and only become so when they obstruct or interfere with the use of the street. *Frostburg v. Wine-land (Md.)*, 1-783.

Right of city to prohibit shade trees. — No one has the right or power to deprive a property owner of shade trees in the street in front of his premises except the city itself or such persons as it may lawfully authorize to do so; and even that power of the city is not absolute, but must be exercised with prudence and reason, and not wantonly or wilfully. *Cartwright v. Liberty Tel. Co. (Mo.)*, 12-249.

Effect of ordinance declaring trees a nuisance. — A municipal ordinance declaring shade trees to be a nuisance and an obstruction to the work of paving and curbing a highway, and directing their removal, is

conclusive, but a court of equity may enjoin their removal if in its opinion the trees in question do not constitute a nuisance. *Frostburg v. Wineland* (Md.), 1-783.

Removal of trees. — It is within the power of municipal authorities to remove shade trees from the streets of a city where the roots of such trees have penetrated into sewers and obstructed the city sewerage, and so long as the authorities proceed in good faith, and act neither wantonly nor maliciously, the courts will not interfere with the exercise of their discretion in that regard. Whatever damage results to the abutting owner in such a case is *damnum absque injuria*, and furnishes no ground for compensation or injunctive relief. *Rosenthal v. Goldsboro* (N. Car.), 16-639.

Right of public service corporation to remove trees. — A public service corporation has no right or power to mutilate or damage shade trees growing upon the streets of a city without some authority, general or special, granted to it by the city, in harmony with and recognizing the rights and interest of the property owners to and in the trees. *Cartwright v. Liberty Tel. Co.* (Mo.), 12-249.

d. Moving buildings along streets.

When not a nuisance. — Where the moving of buildings along the streets of a city is done with municipal authority and with due expedition, and without unreasonably obstructing public travel, or unduly invading private rights, a nuisance is not thereby created. *Indiana R. Co. v. Calvert* (Ind.), 11-635.

Power of councils to regulate. — Under the Indiana statute giving cities and towns exclusive power over their streets and providing that every city or town shall have "exclusive power, by ordinance, to control and care for its streets," and that whenever there is a grant of power or authority in the act and no method is provided for the exercise of such power or authority, the method may be prescribed by ordinance, the common council has the power reasonably to regulate by ordinance the use of its streets for the purpose of moving buildings. *Indiana R. Co. v. Calvert* (Ind.), 11-635.

The regulation of the moving of buildings in the streets of a city is a subject of public as well as of private interest, and it is peculiarly within the province of the common council of a city exercising legislative power over the use of the streets reasonably to regulate the conduct of parties in reference to the moving of buildings in the streets. *Indiana R. Co. v. Calvert* (Ind.), 11-635.

Destruction of public use not permitted. — The use of a street for moving houses is an extraordinary use, and may not be permitted so as to destroy the public use of the street or any impairment of vested rights. *Northwestern Telephone Exch. Co. v. Anderson* (N. Dak.), 1-110.

Damages for interruption of traffic of street railway company. — No recovery can be had by a street railway company

for damage caused it by the moving of a building in the streets and the consequent interruption of its traffic for a space of time reasonably necessary for the moving, it not appearing that the municipal ordinance regulating the moving of buildings in the streets, and the license issued by the city council in pursuance thereof under which the moving was done, were in excess of the city's authority. *Indiana R. Co. v. Calvert* (Ind.), 11-635.

Requiring street railway company to remove wires. — The requiring of a street railway company temporarily to raise or remove its wires so as to allow a building being moved in the streets to pass, and as a consequential effect to submit, with the rest of the public, to a disturbance of traffic in some degree, does not constitute a taking of property within the law of eminent domain giving a right to damages. *Indiana R. Co. v. Culvert* (Ind.), 11-635.

Liability for damage to wires. — A person licensed to move houses is liable for damage done by him to the wires and property of a duly authorized telephone company while moving the house. *Northwestern Tel. Exch. Co. v. Anderson* (N. Dak.), 1-110.

e. Unlawful construction of railroad.

Ejectment by abutting owner. — The laying of a steam railway longitudinally in a street, unless by authority of a legislative grant, express or implied, will be regarded as such exclusive and wrongful appropriation of the street to a purpose foreign to the easement as to sustain an action of ejectment by the abutting owner against the company. *Bork v. United N. J. R., etc., Co.* (N. J.), 1-861.

Township not estopped to object. — Acquiescence by township officers in the illegal construction of a street railroad in a public highway creates no estoppel as against the township to maintain a bill in equity for the removal of such railroad. *Bangor v. Bay City Traction, etc., Co.* (Mich.), 11-293.

f. Remedy for unlawful use or obstruction.

Criminal prosecution for nuisance. — An obstruction in a public highway constitutes a nuisance which a court may cause to be abated upon the conviction of the offender. *State v. Southern Indiana Gas Co.* (Ind.), 13-908.

Description or identification of highway. — In a proceeding to abate a nuisance consisting of an obstruction in a public highway, such highway should be described or identified in the complaint or indictment. *State v. Southern Indiana Gas Co.* (Ind.), 13-908.

An indictment for obstructing a highway must describe such highway by name, or otherwise identify it, so as to apprise the accused of the charge he is to answer, and, in case an abatement is ordered, to enable the officer charged with the execution of the order to act understandingly. *State v. Southern Indiana Gas Co.* (Ind.), 13-908.

Bill in equity for removal of street railroad. — Notwithstanding the Michigan statute which gave a legal remedy for an encroachment upon a highway, a township may maintain a bill in equity for the removal of a street railroad built on a highway without authority of law. *Bangor v. Bay City Traction, etc., Co. (Mich.)*, 11-293.

Effect of justification of obstruction. — Where a decree based on a consent verdict is entered requiring the removal of an obstruction in a public street and the obstruction is subsequently justified, a petition praying for an order declaring the decree no longer binding should be granted. *Marietta Chair Co. v. Henderson (Ga.)*, 2-83.

6. TITLE TO FEE IN SOIL OF HIGHWAY.

General rule. — In the absence of a showing to the contrary, the title and legal possession of an abutting owner presumably extends to the middle of the street. *Friedman v. Snare & Triest Co. (N. J.)*, 2-497.

The owners of land abutting on a highway presumptively own the fee of the soil under that half of the highway which is contiguous to their lands. *Seery v. Waterbury (Conn.)*, 18-73.

The title of one who buys a lot abutting on a street in which the city has only an easement extends to the centre of the street, subject only to the easement of the public therein, and the owner has the right to make any reasonable use of the street which does not interfere with the full enjoyment of the easement which is held for the use of the public. *Sears v. Chicago (Ill.)*, 20-539.

The allegation in a bill of complaint that the complainant is the owner and seized in fee of four blocks of land described, and that said blocks of land adjoin and abut on a public thoroughfare known as Stebbins avenue in the town of Manatee, states a *prima facie* case of the ownership of the soil to the middle of the street in front of said blocks of land; and, together with the further showing by said bill of complaint that two of these blocks of land lie on one side of said avenue directly across from and opposite to the other two blocks of land on said avenue, is a sufficient allegation and showing that the complainant's ownership extends across the whole street. *Seaboard Air Line Ry. v. Southern Investment Co. (Fla.)*, 13-18.

Rebuttal of presumption as to ownership of fee. — The presumption that the owners of land abutting on a highway own the fee of the soil under that half of the highway, being founded on the presumption that the land covered by the highway was originally granted by the adjoining owners in equal proportions, is rebutted where it appears that it was all granted by a single proprietor. *Seery v. Waterbury (Conn.)*, 18-73.

Acknowledgment and recording of plat under statute. — Where the title of a city to its streets is acquired by dedication of the owner in accordance with the statute relating to plats, the acknowledgment and

recording of such plat has the effect, both in law and in equity, of conveying to the city the fee simple title of that portion of the premises platted which is noted on the plat as donated to the public. *Sears v. Chicago (Ill.)*, 20-539.

Where a landowner has dedicated a street by making and recording a statutory plat, all purchasers of lots with respect to such plat are presumed to have notice that they acquire no right in the fee of the street so dedicated. *Sears v. Chicago (Ill.)*, 20-539.

Right to earth and minerals. — The fee owner of abutting property may remove gravel from a gravel bed within the limits of a country highway, when such an act does not cause an injury to the roadway and the gravel is not required for the purposes of grading or improving the same. *Glencoe v. Reed (Minn.)*, 2-594.

The Colorado statute providing that "all avenues, streets, alleys, parks, and other places designated or described as for public use on the map or plat of any city or town . . . shall be deemed to be public property, and the fee thereof be vested in such city or town," vests in a city a complete and perpetual title to such an estate or interest in "streets" as is reasonably necessary for street purposes, but does not vest a fee in the "land" occupied as streets so as to vest a title to ores and minerals under the streets. *Leadville v. Bohn Mining Co. (Colo.)*, 11-443.

Rights of owner whose title extends to centre of street. — The owner of a city lot whose title extends to the centre of the street has the right to make any use of the street which does not interfere with the proper enjoyment of the public easement therein. *Taconia Safety Deposit Co. v. Chicago (Ill.)*, 20-564.

Right of city to claim compensation for use of space under street. — A city cannot require compensation for the use of space under a sidewalk unless it owns the fee of the street, but it is otherwise if the city owns the fee of the street. *Tacoma Safety Deposit Co. v. Chicago (Ill.)*, 20-564.

The owner of a lot abutting on a street which the city owns in fee has no right to excavate and use a subway under the sidewalk, and the city may by ordinance require compensation for such use and the giving of a bond to indemnify the city against damage caused by the maintenance of such subway. *Tacoma Safety Deposit Co. v. Chicago (Ill.)*, 20-564.

An ordinance requiring any person who maintains any structure under a street to pay the city for the use thereof is valid as to owners of lots located on streets in which the city owns the fee, but it is invalid as to owners of lots abutting on streets in which the city has only an easement. *Sears v. Chicago (Ill.)*, 20-539.

Reasonableness of ordinance fixing terms of occupancy of such space. — An ordinance requiring compensation to be made by abutting owners for the use of space under the sidewalk is not unreasonable or dis-

criminary in requiring an abutting owner to give bond to secure the city against damage and providing for fixing the amount of compensation to be paid and exempting from its provisions persons occupying such space under previous ordinances. *Tacoma Safety Deposit Co. v. Chicago* (Ill.), 20-564.

Estoppel of city to claim compensation. — A city is not estopped to require compensation for the use by an abutting owner of the space under the sidewalk, merely because of having granted a permit to the abutting owner to erect a building according to plans providing for the use of such space. Such permit is at most a mere license as regards the space under the sidewalk. *Tacoma Safety Deposit Co. v. Chicago* (Ill.), 20-564.

7. DEFECTIVE AND UNSAFE STREETS AND HIGHWAYS.

a. Municipal corporations liable.

Township. — A township is not a municipal corporation within the meaning of a rule making municipal corporations liable for injuries caused by defects in highways, but is a mere *quasi*-corporation. *Wilson v. Ulysses Township* (Neb.), 9-1153.

A township organized under the Nebraska Township Organization Act is not liable to persons injured by reason of defects in a public highway within its limits. *Wilson v. Ulysses Township* (Neb.), 9-1153.

In the absence of express statute imposing a liability on townships for injuries sustained from defects in highways, such townships are not liable in a civil action for damages for neglect of public duty in failing to keep the highways in a safe and proper condition. *James v. Wellston Township* (Okla.), 11-938.

Basis of liability. — The liability of a municipality to individuals for damages for injuries caused by the neglect of the municipal authorities to keep the streets in proper repair arises out of the fact that it has the exclusive control of the streets, and has the power to provide the means for the proper performance of the duty of keeping them in safe condition. *Schigley v. Waseca* (Minn.), 16-169.

Power of legislature on question of liability of municipality. — The legislature may relieve a public corporation from such liability, or it may impose or recognize the liability upon such conditions as it thinks advisable. When conditions are thus imposed, an action cannot be maintained without showing performance of the conditions. *Schigley v. Waseca* (Minn.), 16-169.

Determination of liability by home-rule charter. — The condition upon which a municipality shall be liable for damages to individuals caused by the defective condition of a street or sidewalk is a matter which belongs properly to the government of municipalities, and may be determined and regulated in a home-rule charter. *Schigley v. Waseca* (Minn.), 16-169.

Statute exempting municipality from liability. — A city charter which exempts the city from all liability for injuries caused by defective streets, and limits the liability of the city officers to cases of injury resulting from their wilful neglect of duty, gross negligence, or wilful misconduct, violates the provision of the Oregon constitution (art. 1, § 10) which guarantees to every one a remedy by due course of law for injury to person, property, or reputation. *Batdorff v. Oregon City* (Ore.), 18-287.

b. Municipal duties and liabilities in general.

Measure of care required. — A municipal corporation is bound to exercise due and proper care to see that its streets and sidewalks are reasonably safe for travel by persons exercising ordinary care and prudence, but it is not required to have them so constructed as to secure absolute immunity from danger in using them. *Richmond v. Mason* (Va.), 17-194.

Defects in highways in annexed territory. — A municipal corporation is entitled to a reasonable time within which to make streets, sidewalks, and highways in an annexed or newly acquired territory reasonably safe for travel, and what constitutes a reasonable time for that purpose is a question for the jury, under proper instructions, and having regard to the circumstances of the particular case. *Richmond v. Mason* (Va.), 17-194.

In an action against a municipal corporation to recover damages for personal injuries alleged to have been caused by a defect in one of its highways, located in a territory recently annexed to the city, the exclusion of evidence, offered by the defendant, to show that sufficient time had not elapsed since the annexation of the territory in question to enable the city to render the streets and highways therein reasonably safe for travel, constitutes reversible error. *Richmond v. Mason* (Va.), 17-194.

Failure to close street undergoing repairs. — Where a city fails to close to travel a street which is undergoing repairs or improvement, it is its duty to see that the street is kept in a reasonably safe condition for public travel in view of the improvement and the work going on and of all the surrounding circumstances. *Peterson v. Seattle* (Wash.), 5-735.

Where street is being improved by contractor. — The rule that a municipality is not liable for the negligence of an independent contractor while engaged in the construction or repair of a street of which he has the exclusive control or charge, applies only where the contractor has such control of the street as to authorize him to prohibit its use by the public. *Norbeck v. Philadelphia* (Pa.), 16-430.

In an action against a city to recover damages for personal injuries caused by driving into a hole in one of its streets, where the evidence shows that the street in question was being improved by a contractor at the

time of the accident, but that the city, in its contract for the improvement, reserved the right to compel the contractor to keep a good, safe, and sufficient roadway on some part of the street open at all times for public use during the progress of the work, and also that the work was performed under the surveillance of the city police and of an inspector who reported daily to the city, a request for binding instructions to the jury in favor of the defendant, on the theory that the negligence which caused the accident was that of an independent contractor, is properly refused. *Norbeck v. Philadelphia* (Pa.), 16-430.

Measure of care as affected by locality of street. — While it is the duty of villages and cities to maintain their sidewalks and crosswalks in a reasonably safe condition, the care and precaution which would constitute reasonable diligence with reference to the repair and safety of a walk in a remote part of the town or village, where the walk is but little used, would not ordinarily amount to reasonable care and diligence with reference to a walk or crossing in the heart of a town where the entire population passes over it daily. *Miller v. Mullan* (Idaho), 19-1107.

A municipal corporation is not under the same rule of responsibility in respect to maintaining country roads or roads made by common travel as it is in respect to maintaining regular streets, and the municipality, having kept the traveled portion of a country road in repair, is not liable to a traveler who leaves the traveled portion of such road in endeavoring to get to another road about nine feet away, and is injured in passing over the intervening space which has never been used for travel or recognized in any way as a part of the highway. *Nelson v. Spokane* (Wash.), 13-280.

Consequential damages to building and contents. — The damage to a four-story brick building and its contents by the laying, by the city of St. Louis, of a sewer in an adjoining alley below the plane of the foundation of the building, after the owner knew in time to prop and protect his building that the sewer was to be laid, and that there was danger that it would cause his building to crack and settle, whereby the lot in its natural state would not have been caused to settle or crumble, but whereby the building was cracked and it and its contents were injured to the amount of tens of thousands of dollars, is, according to the decisions of the Supreme Court of Missouri, *damnum absque injuria*, and the owner is not entitled to any compensation therefor under the amended constitution of that state (art. 2, § 21), which provides that private property shall not be taken or damaged for public use without just compensation. *Johnson v. St. Louis* (U. S.), 18-949.

c. Defects involving liability.

(1) Defects in surface of highway.

Rut in dirt road. — A city is not bound to keep its dirt roads free from ordinary

ruts of a temporary nature, made by the wheels of heavy wagons, and therefore is not liable for injuries sustained by a person by stepping into such a rut in alighting from a street car. *Clifton v. Philadelphia* (Pa.), 10-537.

Evidence reviewed, in an action against a city to recover damages for personal injuries sustained by the plaintiff by stepping into a rut in one of the dirt roads of the city, and held to show that the trial court erred in refusing to direct a verdict for the defendant. *Clifton v. Philadelphia* (Pa.), 10-537.

Slight depression in sidewalk. — A municipality is not, as a matter of law, responsible for injuries arising from slight depressions or difference in grade in sidewalks, except when the depression is peculiar and especially calculated to result in injury to pedestrians. *Terry v. Perry* (N. Y.), 20-796.

Where a depression in a sidewalk is so slight that as a matter of law it is not ordinarily sufficient to support a recovery against the municipality for injuries to a pedestrian tripping thereon, evidence that others tripped on it is competent to show that there is something peculiar about the depression, making it dangerous to such an extent that an ordinarily prudent person with knowledge thereof would repair the defect. *Terry v. Perry* (N. Y.), 20-796.

Defectively covered coal hole. — It is the duty of a city to see that coal holes known to it to exist in the sidewalks are safely covered, and in an action for injuries caused by stepping into a coal hole, the cover of which would tip up when trodden on unless it was fastened inside, the jury are warranted in finding that the city would not allow the cover to remain in such condition after it had or in the exercise of proper care might have had notice of the defect. *Keating v. Boston* (Mass.), 19-464.

(2) Obstructions.

Stepping-stone on sidewalk. — A stepping-stone on the sidewalk near the curb is not an unlawful obstruction of the street *per se*, and a municipality is not bound to remove the same, nor liable for a failure to light the street so as to show the presence of the stone, or to put a policeman on guard by it to warn pedestrians. *Wolff v. District of Columbia* (U. S.), 1-967.

Hitching-posts. — In an action against a municipal corporation to recover damages for injuries sustained by a plaintiff in falling over a hitching-post located near the curb in a public street, the contributory negligence of the plaintiff, under the evidence, held to be a question for the jury. *District of Columbia v. Duryee* (D. C.), 10-675.

Contractor's barricade. — Where, in repairing a street, a contractor places upon the crossing a barricade so weather-stained as to be inconspicuous at night, and fails to provide a red lantern as required by city ordinance, and the barricade, either from its rickety condition or from being run against by passers who do not see it, is frequently

upset and lying flat on the pavement, where it serves no useful purpose, but is dangerous to travelers on the street, the obstruction being on the street is the result of the negligence of the contractor, entailing upon him responsibility for the injury to a person who in the night is tripped up by it. *Weber v. Union Development, etc., Co. (La.)*, 12-1012.

(3) Failure to light.

No general duty in absence of statute. — Where the charter of a city gives it power to provide for lighting streets, but does not require it to exercise such power, there is no general duty devolved upon the city to light the streets that will make its failure to do so actionable negligence. *Daytona v. Edson (Fla.)*, 4-1000.

(4) Defective bridges.

Bridge without limits of municipality. — Although a bridge is situated on a road a considerable distance from a municipality, yet if the city assumes the control and ownership thereof, it will be legally bound to use ordinary diligence to keep it in a reasonably safe condition. *Mackay v. Salt Lake City (Utah)*, 4-824.

Accident occurring before approach to bridge was reached. — In an action to recover damages for personal injuries suffered by a person driving along a highway, in consequence of the negligence of the county in permitting a bridge to remain in a defective and dangerous condition, where the petition does not allege the creation or maintenance of a nuisance, and where the evidence shows that the accident occurred before the approach to the bridge was reached, the plaintiff cannot contend that "the question of liability does not turn on where the accident happened, but does turn on the question of what caused it." *Wilson v. Wapello County (Ia.)*, 6-958.

Where a county is bound to repair bridges, but not ordinary roadways, it is proper, in an action against it to recover for personal injuries caused by a defective bridge to a person driving along the highway, to instruct the jury that if they find as a fact that the accident occurred before the horses entered upon the approach to the bridge and while still traveling upon the common roadway, the plaintiff is not entitled to recover. *Wilson v. Wapello County (Ia.)*, 6-958.

(5) Construction of subway tunnel.

Injury to abutting owner. — Any agency, even when properly used in a street, not for the improvement thereof but to promote a business enterprise of the city, which injures the property of abutting owners imposes a liability on the city; and therefore the city is liable for such injuries caused by sinking a shaft in a street in order to remove earth from a subway tunnel which the city is constructing under the street. *In re Rapid Transit R. Com'rs (N. Y.)*, 18-366.

Lateral support of buildings. — The owner of a building which is injured by the

loss of lateral support caused by the construction of a subway tunnel under the adjacent street, though he does not own the fee in any part of the street, is entitled to compensation for the injury by virtue of the New York Rapid Transit Act (Laws 1891, c. 4, § 39), authorizing the city of New York to construct the subway, and providing that the city may condemn the "rights, privileges, franchises, and easements, whether of owners, or abutters or others" interfered with by the construction and operation of the subway. *In re Rapid Transit R. Com'rs (N. Y.)*, 18-366.

(6) Trees on sidewalks.

Injury caused by falling of dead limb. — A municipality is not liable at common law for injuries resulting to a person walking on one of its streets from the falling of a dead limb of a tree overhanging the street. *Miller v. Detroit (Mich.)*, 16-832.

The Michigan statute which provides for the recovery of damages against municipal corporations for injuries caused or sustained by reason of defective public highways, streets, bridges, sidewalks, crosswalks, or culverts, does not render a municipality liable for injuries resulting to a pedestrian from the falling of a dead limb of a tree standing in one of its streets. The presence of a dead limb on a tree overhanging a public highway does not constitute a defect in the highway, either with the common understanding of the term or within the meaning of the statute, which, being in derogation of the common law, must be strictly construed. Moreover, the fact that the various specific portions of the highway, such as sidewalks, culverts, and bridges, are mentioned in the title of the statute, clearly indicates that it was intended to refer only to the physical highway and its method of construction, maintenance, and repair. *Miller v. Detroit (Mich.)*, 16-832.

The charter of the city of Detroit, which gives the municipal authorities power to direct and regulate the planting and to provide for the preservation of ornamental trees, does not impose upon the city any liability for such an accident as that above mentioned. *Miller v. Detroit (Mich.)*, 16-832.

d. Concurring causes.

Rule that city is liable. — Where two causes combine to produce an injury, both in their nature proximate, the one being a defect in a city street and the other some accident for which neither party is responsible, such as the accident of a horse running away beyond control, the city is liable, provided the plaintiff was not at fault and the injury would not have been sustained but for the defect in the street. There can be no recovery if the accident be caused by the unskillfulness or want of care of the plaintiff or his driver, or if it can be shown that the plaintiff by any want of care directly caused the accident. *Janes v. Tampa (Fla.)*, 11-510.

An allegation that a city wrongfully and negligently permitted lumber, brick, stone,

and building materials to occupy more than was necessary, to wit, more than one-half of one street and a large portion of another street at the intersection of the two streets, and to so remain after the city had notice thereof, and during the night, without being enclosed with any fence or without any lighted lanterns or other sufficient protection or signals placed thereon or about the same to guard such lumber, brick, stone, and building materials, or to denote the presence thereof, and that plaintiff's team during the nighttime becoming frightened by the whistle of a locomotive, became temporarily unmanageable by reason of such obstruction of the street, and came in contact with and struck upon and against such lumber, brick, stone, and building materials, and by reason thereof plaintiff's horse was killed and another injured without fault or negligence on the part of the plaintiff, states a cause of action, since if the injury would not have been sustained but for the obstruction in the street caused by the negligence of the city, and there was no negligence or fault on the part of the plaintiff or his servant, the city is liable. *Janes v. Tampa* (Fla.), 11-510.

Where a person, while walking along a city street, is overcome by vertigo, or some other condition superinduced by disease, and, on reaching out for a small tree in the boulevard, falls on a pile of rails negligently permitted to remain there by the city, and receives injuries from which he immediately dies, the proximate cause of his injury consists not only of his dazed condition, which is not negligence, but also of the negligence of the city in permitting the obstruction on the sidewalk; and such injury being one which the city could have reasonably anticipated as likely to follow from its negligent act, it is liable therefor. *Woodson v. Metropolitan St. R. Co.* (Mo.), 20-1039.

Rule restricting liability. — Within the rule and exception that the special, statutory liability of a municipality for defects in a highway exists only as to those using the highway in the ordinary manner for purposes of travel and that a runaway horse is not within that use, but that such liability may exist as to one driving along a street in an ordinary manner and coming into immediate contact with a defect therein on account of a sudden or spasmodic movement of the horse, causing a momentary loss of control on the part of the driver, a horse which shies at an electric car and then runs uncontrolled a distance of about ninety feet before plunging through an open bridge, cannot be said to have been only momentarily uncontrolled so as to subject the municipality to liability for failure to guard properly the open bridge. *Ehleiter v. Milwaukee* (Wis.), 2-178.

e. Persons entitled to protection.

Children at play. — A boy running along a street while engaged in play, as where he is trying to catch another boy, if he is in fact traveling in a proper manner, is a traveler on the highway and within the protec-

tion of a statute giving a right of action in favor of any person or persons sustaining bodily injury upon any of the public highways or streets in the state by reason of neglect of the authorities to keep the same reasonably safe and fit for travel. *Beaudin v. Bay City* (Mich.), 4-248.

Roller skaters. — While a city is under no obligation to make its sidewalks safe for roller skating, the mere fact that a person is injured by a defect in the sidewalk while using it for roller skating will not defeat a recovery for the injury. The test of liability is whether the sidewalk is safe for ordinary use. *Collins v. Philadelphia* (Pa.), 19-072.

Bicyclists. — Under a statute requiring municipalities to keep the highways safe and convenient for drivers, no duty is imposed to keep the highways safe and convenient for bicycles. *Fox v. Clarke* (R. I.), 1-548.

A bicycle rider may recover, as any other traveler, for a breach of statutory duty in reference to a highway, but not for a defect which would not have caused injury to an ordinary traveler. *Fox v. Clarke* (R. I.), 1-548.

Since ordinary travel includes the use of a street by one riding a bicycle, it follows that a city is bound to use reasonable care to keep its streets reasonably safe for the use of bicycles; but if its streets are reasonably safe and convenient for travel generally, it is not liable for a failure to make special provisions required only for the safety and convenience of persons using bicycles thereon. *Molway v. Chicago* (Ill.), 16-424.

In an action against a city to recover for personal injuries resulting from a fall from a bicycle, alleged to have been caused by a defect in the street, requests by the defendant for instructions to the jury that ordinary travel does not include the use of a street by one riding a bicycle thereon, and that the city is not liable even though the street was not reasonably safe for travel by a person riding a bicycle thereon, if it was reasonably safe for travel thereon by persons riding in vehicles such as wagons, carriages and other similar vehicles, are properly refused. *Molway v. Chicago* (Ill.), 16-424.

f. Contributory negligence.

(1) Degree of care required.

General rule. — A pedestrian traveling the streets of a city is bound to exercise reasonable care, and to avoid obstructions which he can easily discover and avoid. *Woodson v. Metropolitan St. R. Co.* (Mo.), 20-1039.

Right of pedestrian to assume that sidewalk or roadway is safe. — All that is required of a pedestrian upon the street is ordinary care, and this does not necessitate his looking constantly where he treads. He may run to catch a car, and when doing so, and about to cross an intervening car track, upon which an electric car may be coming at any time, he may without negligence divide his attention between the car he is bent on catching and the intervening car track. He is not bound to be looking constantly at

his feet and has the right to assume that the roadway is safe for travel. *Weber v. Union Development, etc., Co. (La.)*, 12-1012.

A pedestrian is entitled to the free use of any portion of the sidewalk which is open for public use, and has the right to assume that it is free from obstructions and in a reasonably safe condition for travel; and if, because his attention is attracted by an external object or because his mind is distracted, he fails to notice an obstruction at a point where he is not required to expect it, and he sustains an injury by falling over it, it is the province of the jury to say whether he was guilty of such contributory negligence as disentitles him to recover. The same rule applies whether his attention is diverted by an external object or by the concentration of his thoughts upon some absorbing question. *Merchants Ice, etc., Co. v. Bargholt (Ky.)*, 16-965.

Use of sidewalk for communication with street. — The use of a sidewalk by the owner of a lot for communication with the street is equally legitimate as the use for passing longitudinally along it, and no higher degree of care is required in the former than in the latter use. *Schindler v. Schroth (Cal.)*, 2-670.

Obstruction in plain sight and easily avoidable. — Where a person while proceeding to cross a street falls on a pile of railway rails negligently left in a space between the paved part of the sidewalk and the curb, but in plain sight and easily avoidable, he is guilty of contributory negligence as a matter of law, if he is in his normal condition and has his senses at the time. *Woodson v. Metropolitan St. R. Co. (Mo.)*, 20-1039.

Attempt to drive over ground not part of highway. — A person driving a wagon along the traveled portion of a country road, who attempts, in order to escape the dust, to drive from the track in which he is traveling to another track about nine feet distant, and without investigating the intervening ground which is not used as a road, is guilty of contributory negligence defeating any right of recovery by his wife for an injury sustained by her by reason of the upsetting of his wagon between the two roadways. *Nelson v. Spokane (Wash.)*, 13-280.

(2) Knowledge of defect.

Knowledge barring recovery. — A person cannot recover for injuries resulting from a fall which was occasioned by a depression in a sidewalk of cement blocks, one of the blocks in the middle of the walk having sunk about one and a half inches at one end, where such person was familiar with the locality and had frequently seen the depression, and where the accident happened during the daytime, though others had previously tripped at the same place, and though a municipal officer had tripped there and turned his ankle and had reported the facts to the trustees of the municipality. *Terry v. Perry (N. Y.)*, 20-796.

Use with knowledge of defect not contributory negligence per se. — It is

not contributory negligence *per se* for a person to use a highway which he knows to be defective, unless the defect is obviously of such character that no person exercising ordinary prudence would use the highway at the place where it exists. *Missouri, etc., Tel. Co. v. Vandervort (Kan.)*, 6-30.

Availability of less convenient highway. — Where a person is injured while using with due care a highway which he knows to be defective, the fact that he might have used another and safer but less convenient highway does not render him guilty of contributory negligence. *Missouri, etc., Tel. Co. v. Vandervort (Kan.)*, 6-30.

(3) Walking in roadway.

Crossing street between crossings. — It is not negligence as a matter of law for a pedestrian to cross a public street at a point where there is no crosswalk. The use of public streets between crossings is not limited solely to animals and vehicles, and such use by footmen does not necessarily constitute negligence if due caution is exercised. *Southern Bell Tel., etc., Co. v. Howell (Ga.)*, 4-707.

A pedestrian in a street is not confined to the regular crossing, but may walk upon any part of the street or traverse it diagonally without thereby forfeiting his right to recover for injuries occasioned by a defect in the street. *Weber v. Union Development, etc., Co. (La.)*, 12-1012.

Walking in gutter because of muddy condition of sidewalk. — A pedestrian in a city street who leaves the sidewalk, which is neither obstructed nor unsafe but merely muddy or in a disagreeable condition to walk on, and resorts to that part of the street constructed for a gutter, and while so using and passing along the gutter, steps and falls into a sewer inlet necessary, as a matter of common knowledge, to drain the gutter, is guilty of contributory negligence barring any right to recovery for the injuries sustained. *Mitchell v. Richmond (Va.)*, 12-1015.

g. Notice of defect.

Requirement of written notice. — The legislature may legally provide that ten days' written notice to the city, prior to the accident, of the existence of a defect in a street or sidewalk, shall be a condition precedent to liability for damages caused thereby to individuals. *Schigley v. Waseca (Minn.)*, 16-169.

Absence of actual notice. — In order to hold a village liable for an injury sustained through a defect in a street crossing, of which defect it had no actual notice, it should be shown that the defect was so obvious and existed for such a length of time as to indicate that the authorities knew, or ought to have known, of the danger, and had known it long enough to have repaired it. *Miller v. Mullan (Idaho)*, 19-1107.

Evidence reviewed in an action against a municipality to recover damages for personal injuries caused by a defective sidewalk, and

held to justify a trial court in submitting to the jury the question whether the defect had existed a sufficient length of time prior to the accident to constitute a constructive notice to the municipality. *Allen v. West Bay City* (Mich.), 6-35.

Evidence "rumors" inadmissible. — The evidence of "rumors" as to the condition of a sidewalk or street crossing is not admissible in an action against a city or village for damages sustained on account of a defective walk. *Miller v. Mullan* (Idaho), 19-1107.

Where no patent or obvious defect is apparent. — The municipalities of this state cannot be held chargeable with notice of the time when and conditions under which a wooden sidewalk or crosswalk will cease to be safe for pedestrians, merely on account of age and consequent decay, where no patent and obvious defect is apparent. *Miller v. Mullans* (Idaho), 19-1107.

In order to impose liability on the municipality for injuries sustained on a crosswalk by reason of the rotten and decayed condition of the lumber and boards out of which the walk was constructed, and where there is no particular or specific patent defect, it must appear that the condition of the walk was such that danger might reasonably be apprehended at any time, and that a reasonably prudent person would have repaired it and guarded against the danger. *Miller v. Mullan* (Idaho), 19-1107.

h. Notice of injury.

Signature to notice. — The notice of injury required by the Iowa statute as a prerequisite to a right of action against a municipality for injuries caused by a defective street or highway need not be signed by the person injured. *Sollenbarger v. Lineville* (Ia.), 18-991.

Sufficiency of specification of place of injury. — The provision of the statute that such notice must specify the place of the injury, is not satisfied by a notice which specifies the place merely as "on West Third Street," that street being three-quarters of a mile long. *Sollenbarger v. Lineville* (Ia.), 18-991.

It is error to submit to the jury the sufficiency of such a notice of injury where the statute provides that notice specifying the place of injury shall be given in writing, and the notice given merely states that the injury occurred on a certain street, which the evidence shows was three-quarters of a mile long. *Sollenbarger v. Lineville* (Ia.), 18-991.

Oral testimony as to contents of written notice. — In an action against a municipality for personal injuries caused by a defective highway, oral testimony as to the contents of the written notice of injury, required by the Wisconsin statute to be served upon the municipality, may be given by the person who drew the notice; and the facts that the witness fails to produce a memorandum made by him in respect to the notice

and that he gave a somewhat different version of the contents of the notice in a deposition taken before the trial, do not render his testimony inadmissible. *Garske v. Ridgeville* (Wis.), 3-747.

Notice held sufficient. — A notice to the municipality of personal injuries caused by a defective highway considered and held sufficient to comply with the Wisconsin statute. *Garske v. Ridgeville* (Wis.), 3-747.

i. Pleading.

General allegations of negligence. — Municipal corporations are required to exercise reasonable diligence in repairing defects in streets and sidewalks after the unsafe condition is known or ought to have been known to them or to their officers having authority to act for them. It is essential to liability in such cases to allege in the declaration facts showing negligence on the part of the corporation, and a mere general allegation that the corporation negligently suffered and permitted a street or sidewalk to remain out of repair without alleging knowledge of the defect, the time it was permitted to remain out of repair, or other facts showing negligence on the part of the municipal body, will not be sufficient. *Daytona v. Edison* (Fla.), 4-1000.

Variance. — Where a petition alleges that the plaintiff's decedent was killed by an obstruction on the sidewalk on the west side of C. street in the defendant city, and that the sidewalk was in a dangerous condition by reason of such obstruction, and had been so for a long time, and the proof shows that the obstruction was on the parkway between the paved walk and the curb, and not elsewhere, there is no fatal variance, since the word "sidewalk," in general, means that part of the street intended for pedestrians, and includes all the space between the building line and the curb, pedestrians being entitled, as of right, to use all such space unless specially restricted by ordinance. *Woodson v. Metropolitan St. R. Co.* (Mo.), 20-1039.

j. Evidence.

Use of highway by others without injury. — In an action against a municipality for personal injuries caused by a defective highway, it is not erroneous to exclude evidence offered by the defendant for the purpose of showing that other persons drove over the *locus in quo* about the same time without having any trouble. *Garske v. Ridgeville* (Wis.), 3-747.

Evidence of other accidents. — In an action against a city to recover damages for personal injuries alleged to have been caused by a defect in one of its sidewalks, where the evidence shows that the defect, consisting of a slight difference in level between two parts of the walk, was of such a trivial character that it was not naturally dangerous, and must almost inevitably occur in the many street miles of a city unless a grievously burdensome degree of care and expense

is to be exacted, a nonsuit is proper, notwithstanding there is evidence in the record that other persons had tripped and fallen over the same obstruction. While evidence of other accidents due to the same cause may suffice to prevent a nonsuit in an evenly balanced case, where the question as to defendant's negligence is debatable, it is not sufficient of itself to sustain a charge of negligence and to lay the foundation for damages because of the maintenance of some particular construction of pavements, sidewalks, or buildings. There must also be evidence of such a fundamental condition of the thing under scrutiny as will at least permit the inference that the party complained of has failed to discharge the duties reasonably and fairly imposed on him by law. *Gastel v. New York (N. Y.)*, 16-635.

Unsafe condition of sidewalk at other points in vicinity.—In a case where there is no dispute as to the particular place at which an injury occurred on a sidewalk or crosswalk, evidence of the defective or unsafe condition of the sidewalk at other places within that vicinity is incompetent and inadmissible, except it be in a case where it is claimed that the defect was not a special one, but was due rather to the general decayed and bad condition of the whole walk, of which the particular place where the injury was suffered was a part. *Miller v. Mullan (Idaho)*, 19-1107.

Obstruction which caused accident.—In an action against a municipal corporation to recover damages for injuries sustained by the plaintiff in falling over a hitching-post, the post itself is admissible in evidence before the jury when accompanied by testimony identifying the post and describing its physical environment as it stood in the ground. *District of Columbia v. Duryee (D. C.)*, 10-675.

Sufficiency to sustain verdict for plaintiff.—Evidence reviewed in an action against a municipal corporation to recover damages for personal injuries resulting from the unsafe condition of the street, and held to justify the jury in finding a verdict for the plaintiff. *Peterson v. Seattle (Wash.)*, 5-735.

In an action against a city to recover for personal injuries resulting from a fall from a bicycle alleged to have been caused by a defect in the street, evidence examined and held sufficient to sustain a verdict for the plaintiff. *Molway v. Chicago (Ill.)*, 16-424.

Immaterial errors in rejection of evidence.—Where, in an action against a city for injuries received by a pedestrian while walking in a gutter it appears as a matter of law that the plaintiff was guilty of contributory negligence, it is immaterial whether the trial court erred in rejecting evidence offered by the plaintiff to prove that the city had repaired the place where the accident occurred, and that similar accidents had happened in the vicinity. *Mitchell v. Richmond (Va.)*, 12-1015.

k. Charge of court.

Assumption of facts not proven.—Instructions, in an action against a city to recover for personal injuries sustained by the plaintiff by stepping into a hole in the sidewalk, examined and held not open to the objection that they assumed facts not proven. *Elliott v. Kansas City (Mo.)*, 8-653.

Erroneous instruction as to measure of care.—In an action against a municipal corporation to recover damages for injuries sustained by the plaintiff in falling over a hitching-post in the street, the instruction examined and held to state erroneously the measure of care and caution required of the plaintiff at the time he received the injury. *District of Columbia v. Duryee (D. C.)*, 10-675.

Meaning of "ordinary care."—In an action against a city to recover damages for personal injuries suffered by the plaintiff in falling through a hole in the sidewalk instructions as to the meaning of the term "ordinary care," as applied to the duty of a city to keep its streets in a safe condition, and regarding the power of the city to delegate the duty of repair to abutting owners, examined and held to be substantially correct. *Arkansas City v. Payne (Kan.)*, 18-82.

Erroneous omission of word "reasonably."—Where the village asked the court to give the jury an instruction on the question of its negligence in reference to sidewalks and streets, which instruction contained the following sentence: "A village is not guilty of negligence for a failure to build sidewalks on all its streets, but when it has constructed a walk it must be kept in a reasonably safe condition," it was error for the court to strike out the word "reasonably" and then give the requested instruction as thus modified. Municipalities are not insurers of the condition of their streets and walks, and the most that can be required is to maintain them in a "reasonably safe" condition. *Miller v. Mullan (Idaho)*, 19-1107.

Instruction ignoring principal point in dispute.—In an action against a municipal corporation to recover damages for injuries sustained by the plaintiff in falling over a hitching-post, an instruction requested by the defendant held properly refused as ignoring the principal point in the dispute, viz., the condition of the hitching-post before and at the time of the accident. *District of Columbia v. Duryee (D. C.)*, 10-675.

Absence of pleading or evidence to sustain requested instruction.—In an action to recover damages for personal injuries sustained by the plaintiff while driving along a defective highway, it is not erroneous to refuse to instruct the jury that the plaintiff is not entitled to recover if his injury was due to a defective harness, where there is nothing in either the pleadings or the evidence to show that the harness was defective. *Missouri, etc., Tel. Co. v. Vanderwort (Kan.)*, 6-30.

In action for injuries sustained in falling over covering of coal hole. — In an action against a city for damages for injuries sustained by a pedestrian in falling on the covering or lid of a coal hole on a sidewalk, where the evidence is conflicting as to the distance the covering extended above the surface of the sidewalk, an instruction for the plaintiff which predicates negligence on the part of the defendant on a finding that the defendant neglected its duty in allowing the covering and lid of the coal hole to be, on the date of the accident and prior thereto, "in an unsafe and dangerous condition for travel thereon on account of the covering and lid of said coal hole extending above the level of the sidewalk," is not erroneous as ignoring the distance the covering of the hole extended above the surface of the sidewalk, and in any event the defendant, by asking for an instruction framed in similar terms, is precluded from complaining of the instruction given for the plaintiff. *Smart v. Kansas City (Mo.)*, 13-932.

In such an action, an instruction to the jury that "if you further believe from the evidence that defendant . . . city either knew of said condition of said coal hole, or by the exercise of ordinary care or caution could have known thereof in time to have had reasonable opportunity to have repaired said defect, if any, or had a reasonable opportunity to have caused the same, if any, to have been repaired in time to have prevented the accident, . . . but failed and neglected to do so, . . . you will find for the plaintiff," is not erroneous as making the defendant an insurer of the safety of its streets and sidewalks. *Smart v. Kansas City (Mo.)*, 13-932.

In action for injuries sustained in falling over hitching-post. — In an action against a municipal corporation to recover damages for injuries sustained by the plaintiff in falling over a hitching-post in the street, the evidence examined and held insufficient to justify the court in instructing the jury that where said hitching-post was located was a corner of the street where pedestrians usually crossed, and where such obstruction would have been quite unusual, or in asking the jury to decide whether at a particular intersection of streets the public only uses as a crossing way such portions of the ground as are within the direct sidewalk lines, or in asking the jury to determine whether the public had at the particular place in question traveled a crossing way outside of the various sidewalk lines, or in asking the jury to determine whether that particular kind of a post should have been permitted "in that part of the sidewalk that was the established part, for the purpose of crossing the street." *District of Columbia v. Duryee (D. C.)*, 10-675.

In action for injuries caused by fall of awning. — In an action to recover for personal injuries caused by the fall of an awning upon the plaintiff while the latter was walking along a public street in a city, an instruction that if the use of the side-

walk was made dangerous to the plaintiff and others under the conditions that existed on the day of the accident by the awning being left in a lowered condition, and if it would have been safe if the awning had been raised, then it was the defendant's duty to adopt the safe method, and if he knew, or in the exercise of ordinary care could have known, that such a wind was blowing and beating upon the awning as to make it dangerous when down, then he was guilty of negligence, is not objectionable as imposing upon the defendant an absolute duty to use the safer of two methods in the management of the awning, and thus taking from the jury the question whether the conduct of the defendant was conformable with the requirements of ordinary care and prudence under the circumstances of the case. Nor is it objectionable as assuming, without proof, that the wind at the time of the accident was dangerously high. *McCrorey v. Thomas (Va.)*, 17-373.

In such an action, where it appears that the awning was erected by an independent contractor, but had been turned over to the defendant, and accepted by him, a year or more prior to the accident, a request for an instruction that the defendant is not liable if the awning was erected by an independent contractor and turned over to the defendant in apparently good condition, unless it further appears that some defect existed in it at the time, or subsequently developed therein, which should have been discovered by the defendant in the exercise of ordinary care, or that the awning was negligently used or managed, is properly refused. Not only would such an instruction tend to mislead the jury as to the burden of proof upon the question of negligence, but it would also present an immaterial fact for their consideration, viz., the erection of the awning by the independent contractor. *McCrorey v. Thomas (Va.)*, 17-373.

1. Province of jury.

When submission of case to jury proper. — In an action against a city to recover damages for personal injuries caused by the condition of a street, which, at the time of the accident, was being improved by a contractor, where the evidence shows that the hole which caused the accident was four feet long, two feet wide, and hub deep, and had existed for at least three months in a part of the street which had been opened to the public, and was filled, at the time of the accident, with slush of the color of the road, so as not to be easily seen or distinguished, it is proper to submit the case to the jury. *Norbeck v. Philadelphia (Pa.)*, 16-430.

While it is a matter of common knowledge that board sidewalks and crossings ordinarily used in villages and cities of this state will rot and decay in course of time, still the length of time in which they will become dangerous and unsafe is so indefinite and uncertain, and subject to so many influences either advancing or retarding the process of decay, that no fixed and definite length of

time can be established as a specific time at and after which the walk will become unsafe. The question of the unsafe condition of the walk caused by reason of age and decay is purely a question of fact, to be submitted to the jury in each specific case, depending upon the special circumstances of the particular case. *Miller v. Mullan* (Idaho), 19-1107.

Erroneous submission of case to jury.

— The question submitted to the jury in an action for injury to a child caused by a defective sidewalk, as to the care and diligence required by the municipality in reference to a sidewalk, held to be erroneously submitted. *Beaudin v. Bay City* (Mich.), 4-248.

Questions for jury under conflicting evidence. — In an action against a municipal corporation to recover damages for personal injuries resulting from the unsafe condition of the street, where the evidence is conflicting, it is for the jury to determine whether the defendant was guilty of negligence, whether its negligence was a proximate cause of the plaintiff's injury, and whether the plaintiff was guilty of contributory negligence. *Peterson v. Seattle* (Wash.), 5-735.

Question of frequency of inspections.

— The question of the frequency of the inspections and examinations of sidewalks and street crossings that should necessarily be made by municipal authorities is a question of fact to be determined by the jury under the particular conditions and circumstances of each case. *Miller v. Mullan* (Idaho), 19-1107.

m. Damages.

Effect of statement of amount claimed in declaration. — In an action against a municipal corporation to recover damages for injuries sustained by the plaintiff in falling over a hitchingpost, it is not error for the court to caution the jury that there can be no recovery of damages beyond the amount named in the declaration. *District of Columbia v. Duryee* (D. C.), 10-675.

Effect of filing claim for lesser amount. — In an action against a municipality for damages for injuries sustained by reason of a defect in a bridge, the plaintiff is not precluded from recovering damages actually sustained by the fact that he has previously filed a claim against the municipality for a lesser amount of damages. *Mackay v. Salt Lake City* (Utah), 4-824.

n. Action over against wrongdoer.

Right of action against abutting owner. — A municipal corporation has the right to be reimbursed by the abutting owner or occupier for damages paid by it for personal injuries caused by the defective condition of its sidewalks, unless the primary liability is upon the municipality for failure to perform its duty in respect to the premises. *New Castle v. Kurtz* (Pa.), 1-943.

Liability of owner of leased property.

— Where an areaway and trapdoors are placed in a sidewalk for the exclusive benefit of an abutting building, the owner, who has

control of the building and its maintenance and the actual possession of a part thereof, is, notwithstanding the fact that he has let offices and storerooms therein, liable for injuries resulting from his failure to maintain such trapdoors in a reasonably safe condition for passersby. *Seattle v. Puget Sound Improvement Co.* (Wash.), 14-1045.

Pleading in action by municipality.

In an action by a municipality to obtain reimbursement from an abutting owner of the amount of damages paid by the municipality for personal injuries resulting to a pedestrian from defective trapdoors in the sidewalk in front of the defendant's premises, a complaint alleging that the defendant maintained such trapdoors for his own benefit, that such trapdoors were wrongfully raised above the surface of the sidewalk, and that they were worn smooth and slippery and were dangerous, is sufficient to permit of a recovery by the plaintiff, since the negligence alleged is that of the defendant and not of the plaintiff. *Seattle v. Puget Sound Improvement Co.* (Wash.), 14-1045.

o. Liability of highway officers.

Malfeasance of officer. — Want of means to make repairs will not relieve highway officers from liability for injuries caused by defects in a highway, where the condition of the highway is the result of malfeasance of the officer. *Batdorff v. Oregon City* (Ore.), 18-287.

Nonfeasance of officer. — Where an injury is sustained in consequence of the nonfeasance of a highway officer in failing to perform the duties required of him, the want of available funds to make repairs will exonerate him. *Batdorff v. Oregon City* (Ore.), 18-287.

p. Liability of abutting owners.

Maxim res ipsa loquitur. — In the absence of any issue as to a nuisance, the liability of the owner of a building for damages to a traveler on the highway, caused by the falling of an awning attached to the building, is to be determined upon the principles of negligence in accordance with the maxim "*res ipsa loquitur*," and not upon the doctrine of the insurance of safety. *Waller v. Ross* (Minn.), 10-715.

Where a pedestrian traveling along a highway is injured by the fall of an awning attached to a building, the maxim *res ipsa loquitur* applies, and the burden is upon the owner of the awning to disprove the existence of negligence by evidence that it was erected and maintained with ordinary and reasonable care. *McCrorey v. Thomas* (Vt.), 17-373.

Deposit of building materials on highway. — Abutting owners have the right to deposit in the street building materials required for the improvement of abutting property, but such a right must be legally exercised and is subject to regulation in the public interest. *Friedman v. Snare & Triest Co.* (N. J.), 2-497.

An abutting owner who stores materials in the street is not under ordinary circumstances charged with a duty to render such materials safe for persons who attempt to use them for their own purposes. *Friedman v. Snare & Triest Co.* (N. J.), 2-497.

Limitations of right to deposit materials. — As a general rule, owners of property abutting on a street in a city may use such parts of the street as are necessarily for the enjoyment of their property. This right of use includes the right temporarily to deposit in the street material necessary for the construction, erection, or repair of a building, in the absence of municipal regulations to the contrary. But the right to deposit such material for the erection or repair of a building must not interfere with the right of the public to use the street, or unreasonably interfere with the rights of an adjacent property owner, and such material must not remain in the street an unreasonable length of time. *Culbertson v. Alexander* (Okla.), 10-916.

In an action against an abutting owner to recover damages sustained by the plaintiff, an adjoining owner, by reason of the act of the defendant in storing building materials in the public street, the questions whether the material remained in the street an unreasonable time, and whether reasonable care was exercised to prevent interference with the property or business of the plaintiff, are questions of fact for the jury to determine under all the circumstances of the case. *Culbertson v. Alexander* (Okla.), 10-916.

Use of building materials by children for play. — The fact that building materials lying in a street may be attractive to children as a place for play, does not impose upon an abutting owner the duty so to arrange the materials as to render them safe for such use. *Friedman v. Snare & Triest Co.* (N. J.), 2-497.

There is nothing in the mere existence of building materials as an obstruction in the street that denotes an invitation to the passerby or child to use the same for his own purposes. *Friedman v. Snare & Triest Co.* (N. J.), 2-497.

Duty of owner out of occupancy as to ice on sidewalk. — The owner of property out of occupancy, with the sidewalk in proper repair and the property properly constructed and in good repair, is not bound to keep a watch over the sidewalk to prevent the formation of ridges of ice upon it, and cannot be held liable for injury consequent upon a sudden accumulation of ice. *New Castle v. Kurtz* (Pa.), 1-943.

8. IMPROVEMENT OF PUBLIC ROADS.

Mandamus to supervisors. — The provisions of the Michigan statute (Act No. 419, Local Acts 1899, as amended by Act No. 335, Local Acts 1901) relating to the control and improvement of the roads of Saginaw county and the raising of funds to pay therefor are inconsistent with, and repeal by implication, so far as Saginaw county is concerned, the general statute of the state

(sections 26 and 27, Act No. 230, Public Acts 1895) providing for a township system of roads; and mandamus will lie against a supervisor of a township in Saginaw county to compel him to spread upon the rolls of his township certain county road taxes as ordered by the county board of supervisors under authority of the later statute. *Board of Supervisors v. Hubinger* (Mich.), 4-792.

STRIKES.

See **LABOR COMBINATIONS**, 7.

Delay in delivery of telegram caused by strike, see **TELEGRAPHS AND TELEPHONES**, 7 b.

Inducing breach of contract, see **INTERFERENCE WITH CONTRACT RELATIONS**.

STRIKING OUT.

See **DEPOSITIONS**, 8.

Effect of striking out evidence as curing error in its admission, see **APPEAL AND ERROR**, 15 d (4); **CRIMINAL LAW**, 6 n (6).

Evidence received without objection, see **CRIMINAL LAW**, 6 n (1).

Insufficient plea of former jeopardy, see **CRIMINAL LAW**, 5 e.

Irresponsive answers by witnesses, see **WITNESSES**, 4 f.

Motion to strike out defense not demurred to, see **TRIAL**, 1.

Motion to strike out evidence competent in part, see **EVIDENCE**, 19.

Striking out defenses, see **PLEADING**, 4 a (7).

Striking out testimony as hearsay, see **CRIMINAL LAW**, 6 n (1).

Striking referee's report from files, see **REFERENCES**.

SUBCONTRACTORS.

Right to lien, see **MECHANICS' LIENS**, 3.

SUBDIVISION.

Summoning jury from subdivision of county, see **JURY**, 4 b.

SUBJACENT SUPPORT.

See **ADJOINING LANDOWNERS**.

Limitation of action for injury to subjacent support, see **LIMITATION OF ACTIONS**, 4 a (2) (a).

Right to surface support, see **MINES AND MINERALS**, 3.

SUBJECT.

Conformity of title with subject of statute, see **STATUTES**, 3.

Singleness of subject of statute, see **STATUTES**, 3.

Subject of ordinance expressed in title, see **MUNICIPAL CORPORATIONS**, 5 f (1).

SUBJECT-MATTER.

Jurisdiction of subject-matter, see JUDGMENTS, 2.

SUBLETTING.

See LANDLORD AND TENANT, 3 c.
Termination of lease by subletting, see LANDLORD AND TENANT, 3 g.

SUBMISSION.

See ARBITRATION AND AWARD.
Controversy submitted on agreed facts, see AGREED CASE.

SUBMISSION TO JURY.

What issue may be submitted, see JURY, 1 d.

SUBORNATION OF PERJURY.

See PERJURY, 3.

SUBPOENA.

See SUMMONS AND PROCESS.
Disobedience of subpoena issued by district attorney as contempt of court, see CONTEMPT, 1 e.
Enforcing attendance of witnesses, see WITNESSES, 1 a.

SUBROGATION.

1. WHO MAY HAVE SUBROGATION, 1476.
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 - c. Agent having custody of funds of principal, 1476.
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Insurer subrogated to rights of insured, see INSURANCE, 5 1 (3); PARTIES TO ACTIONS, 1.

1. WHO MAY HAVE SUBROGATION.

- a. Sureties.

Sureties of defaulting deputy sheriff.

— Sureties of a defaulting deputy sheriff who have paid the amount of the latter's defalcation are thereby subrogated to the rights of

the sheriff, or of the state and county, as against persons into whose hands trust funds embezzled by the defaulting officer have come. *Hill v. Fleming* (Ky.), 16-840.

- b. Public officers.

Sheriff who has taken note in statutory form. — A sheriff, by paying, pursuant to an order of the County Court, the amount of a fine and costs for which he has taken a note with a surety not conforming to statutory requirements but valid as a common-law obligation, is not a volunteer and becomes subrogated to all the rights of the county against such note and surety. *Wilson v. White* (Ark.), 12-378.

- c. Agent having custody of funds of principal.

Where agent has paid principal in full. — There is no doubt that, where an agent for collection receives moneys for his principal, the moneys collected belong to the principal, and the latter can under certain circumstances reclaim and recover them in the hands of third persons. If, however, while the moneys of the principal are in the hands of the agent, they are stolen from him, and he, in discharge of his obligations as agent, pays the principal the amount of his indebtedness in other moneys, he becomes *ipso facto* legally subrogated to all rights of ownership which the principal had in the particular money stolen; and it cannot be urged as a defense by the person who has stolen the money (or by any one who would be liable to the principal in an action for or on account of the money stolen) that the action for its recovery should be brought by the principal and not by the agent. *Fitzpatrick v. Letten* (La.), 17-197.

- d. Persons interested in encumbered estates.

Holder of judgment paying prior mortgage. — The holder of a judgment lien who pays a prior mortgage is subrogated to the rights of the mortgagee; and the recording of the discharge of the mortgage will not necessarily defeat such subrogation except as to the intervening rights of third persons without notice. *Bennett v. First National Bank* (Iowa), 5-899.

- e. Persons advancing money to pay debts.

Money advanced to pay wages of laborers. — A person who advances money to a corporation to enable it to pay its laborers wages due them is not entitled to be subrogated to the liens of such laborers for their wages. *Bank of Commerce v. Lawrence County Bank* (Ark.), 10-211.

Party furnishing loan to pay off incumbrance. — Where the security given for a loan that is used to pay off an incumbrance turns out to be void, the party furnishing the loan is not a mere stranger or volunteer and will be subrogated to the rights of the holder of the lien which the loan was used to pay. *Hughes v. Thomas* (Wis.), 11-673.

f. Insurance companies.

Right to recover against railroad company causing loss. — Where a fire is caused by the negligence of a railroad, the insurance company which has paid the policy upon the property insured may maintain an action in the name of the owner against the railroad to recover the amount so paid, not exceeding the difference between the value of the property and the sum already paid by the railroad company to the owner. *Dyer v. Maine Cent. R. Co. (Me.)*, 2-457.

Accident insurance company. — An ordinary accident or casualty insurance policy is an investment contract giving to the owner or beneficiary an absolute right, independent of the right against any third party responsible for the injury covered by the policy; and, consequently, an accident insurance company which has paid to the insured the amount of such a policy is not thereby subrogated to the rights of the insured against a third person whose negligence or unlawful act caused the injury. If such a company desires to protect itself against loss due to the negligence of third persons, it must insert a clause in the policy expressly making the same an indemnity contract. *Gatzweiler v. Milwaukee Electric R., etc., Co. (Wis.)*, 16-633.

g. Railroad company.

Statute giving company benefit of insurance on property injured. — The Maine statute giving to a railroad company the benefit of insurance effected by the owner on property injured by fire communicated by a locomotive engine applies only to those cases where the liability of the company is created by statute and not by its own negligent act. *Dyer v. Maine Cent. R. Co. (Me.)*, 2-457.

2. AGAINST WHOM SUBROGATION MAY BE HAD.

Bank purchasing non-negotiable paper without inquiry. — Where a bank purchases spurious non-negotiable orders issued by a county auditor and fraudulently sold by him to the bank, and the county after paying the orders recovers from the surety on the auditor's bond the amount of its loss, the failure of the bank to discharge the duty of making the inquiries suggested by the non-negotiable character of the orders is an act of omission effective to occasion the loss, and entitles the surety to be subrogated to the remedy which the county had against the bank for the claim which the surety has been compelled to pay. *National Surety Co. v. State Savings Bank (U. S.)*, 13-421.

3. CONDITIONS AFFECTING EXERCISE OF RIGHT.

a. In general.

Prejudice to rights of innocent third persons. — Subrogation is not permitted where the party seeking it has intermeddled

with the affairs of the party against whom it is sought to be enforced, or where it would prejudice the rights of innocent third parties. *Title Guarantee, etc., Co. v. Haven (N. Y.)*, 17-1131.

Knowledge of existence of intervening lien. — The holder of a judgment lien who has paid a prior mortgage and caused it to be discharged of record, is not deprived of the right of subrogation by the fact that at the time of the payment and the discharge he knew of the existence of another lien superior to his lien, but inferior to the mortgage lien, if in fact he had no intention of waiving his right of subrogation. *Bennett v. First National Bank (Iowa)*, 5-899.

Right to interest. — The holder of a judgment lien who is subrogated to the rights of a prior mortgagee by reason of having paid the mortgage, is entitled to interest from the date of the payment, but is only entitled to interest at the rate which he has agreed to accept, though the mortgage provides for a higher rate. *Bennett v. First National Bank (Iowa)*, 5-899.

Joinder of parties in action for subrogation. — Where an action by creditors to be subrogated to a mortgage given by their debtor to indemnify the sureties on his bond as administrator fails as to some sureties because they have released the security in good faith, the creditors can have no relief as to the interest of the surety who did not join in the release, where such surety is dead and none of his heirs or legal representatives are made parties to the action. *Dyer v. Jacobway (Ark.)*, 6-393.

b. Payment in full of original claim or demand.

In general. — Where purchase money notes for land are secured by a vendor's lien, a surety or indorser of the notes, who has paid some of them, cannot claim by subrogation the right to enforce the lien until the other notes are paid. *Bank of Fayetteville v. Lorwein (Ark.)*, 6-202.

Where value of property negligently destroyed exceeds insurance. — Where an insurance company pays to the insured a loss occasioned by the wrong of a third party, and the value of the property destroyed exceeds the amount so paid, the insured may bring an action in his own name against the wrongdoer and recover the full amount of the loss. *Kansas City, etc., R. Co. v. Baker (Kan.)*, 1-883.

c. Time of assertion of right.

When too late to claim subrogation. — It is too late for creditors to claim subrogation to a mortgage given by their debtor to indemnify the sureties on his bond as administrator where they wait until twenty years after the sureties have released the security before seeking to assert the right. *Dyer v. Jacobway (Ark.)*, 6-393.

Delay in enforcing right for period less than that fixed by statute of limitations. — Where a person furnishes to a

widow having only a life interest in certain premises, money to pay off a pre-existing mortgage on such premises and takes from her, as security for the money, a mortgage on the premises with the understanding that the mortgage covers the fee, he is entitled to be subrogated to the rights of the first mortgagee. Such right of subrogation is not lost by delay in enforcing it for a period short of the statutory period of limitations where no rights of third parties have intervened. *Hughes v. Thomas* (Wis.), 11-673.

Effect of release of security. — Where an administrator has executed a mortgage on land to indemnify the sureties on his bond against liability, his creditors are not entitled to be subrogated to the sureties' rights under the mortgage after the latter have released the security in good faith and before any claim has been made upon them, and after the land has been conveyed to a *bona fide* purchaser for value, even though the principal debtor was insolvent at the time the release was executed. *Dyer v. Jacoway* (Ark.), 6-393.

d. Subrogation to tax liens.

In general. — There is nothing in the nature of a lien for taxes or assessments or in the fact that such lien exists in favor of a sovereign taxing power to prevent the application of the equitable doctrine of subrogation when justice demands it. *Title Guarantee, etc., Co. v. Haven* (N. Y.), 17-1131.

Effect of demand for personal money judgment. — The fact that a plaintiff seeking to be subrogated to the lien of a city upon land for assessments which he has paid, asks in his complaint for a personal money judgment against the defendant, does not bar his right to subrogation, upon the theory that a subrogee stands in the shoes of the original creditor, and that the city, as such creditor, could not obtain a personal money judgment against the landowner, where it appears that the landowner has sold the land since the assessments were paid. In such a case the purchase money in the hands of the defendant takes the place of the land, and the lien is deemed to be transferred thereto. *Title Guarantee, etc., Co. v. Haven* (N. Y.), 17-1131.

When allowed. — Where a contract has been entered into for the sale of land free and clear of all liens and incumbrances, and prior to the payment of the last instalment of the purchase price by the vendee certain assessments which are a lien upon the land are paid, not by the vendor, but by means of a forged check on a trust company, purporting to be signed by a person who is not a party to the contract for the sale of the land, but who has a deposit in the trust company, which check is paid by the trust company in the belief that the signature thereto is genuine, and where there is no evidence as to the identity of the forger, and the vendor of the land has no knowledge of the payment until after the event, the trust company, upon restoring the amount of the check to the deposit against which it was charged, is entitled to

be subrogated to the lien of the assessments so paid, and to enforce such lien upon the purchase money of the land in the hands of the vendor, by a suit in equity. Such subrogation, however, can be allowed only upon the assumption that the payment of the assessments was purely gratuitous and in no wise in discharge of any real or supposed obligation upon the part of the person whose name purported to be signed to the forged check or of the unknown forger, but was brought about solely by mistake induced by the forgery. If it should appear that the payment was not thus gratuitous, the right of subrogation could not be asserted. *Title Guarantee, etc., Co. v. Haven* (N. Y.), 17-1131.

Payment of taxes which are not a lien upon the land, under circumstances similar to those above considered, does not give the trust company any right of subrogation against the vendor. *Title Guarantee, etc., Co. v. Haven* (N. Y.), 17-1131.

SUBSCRIBING WITNESSES.

Attestation of wills, see *WILLS*, 3 e.

SUBSCRIPTIONS.

Liability on stock subscription, see *CORPORATIONS*, 8 a (1).

Power of municipality to subscribe to stock in private corporation, see *MUNICIPAL CORPORATIONS*, 4 e.

Necessity for acceptance of subscription to church building fund. — A subscription for the purpose of building a church is a mere offer, which does not become binding on the subscriber until it has been accepted. *Evangelish, etc., Gemeinde v. Pruess* (Wis.), 17-1074.

Effect of informalities in articles of incorporation of churches. — It seems that informalities existing in the articles of incorporation of a church afford no defense to an action by the church to recover on a subscription to its building fund. *Evangelish, etc., Gemeinde v. Pruess* (Wis.), 17-1074.

Effect of stipulation for particular method of acceptance. — The expenditure of money in the erection of a church building upon the faith of a subscription to the building fund may sometimes operate as an acceptance of the subscription so as to render it binding upon the subscriber, but it cannot have that effect where the subscription is conditional and where a different method of acceptance by the church is expressly stipulated for therein. *Evangelish, etc., Gemeinde v. Pruess* (Wis.), 17-1074.

Effect of uncertainty in evidence of acceptance. — In an action by a church to recover on a subscription to its building fund, where the evidence tending to show an acceptance of the subscription by the church before its withdrawal is uncertain, and is met by the positive testimony of the defendant that the subscription was not accepted, it is

error for the trial court to direct a verdict in favor of the plaintiff. *Evangelish, etc., Gemeinde v. Pruess* (Wis.), 17-1074.

SUBSTITUTE.

Liability of master for injuries to substitutes employed by servant, see **MASTER AND SERVANT**, 3 a.

Substitute judge, see **JUDGES**, 5.

Substituted parties, see **APPEAL AND ERROR**, 5 c; **PARTIES TO ACTIONS**, 2.

Substituted service, see **SUMMONS AND PROCESS**, 2.

Substituted trustees, see **MORTGAGES AND DEEDS OF TRUST; TRUSTS AND TRUSTEES**, 5.

Substituting guardian *ad litem*, see **INFANTS**, 3 f (2).

SUBSURFACE RAILWAYS.

See **STREET RAILWAYS**.

SUBSURFACE WATER.

Liability for diversion, see **WATERS AND WATERCOURSES**, 3 b (3).

SUBTERRANEAN WATERS.

See **WATERS AND WATERCOURSES**, 1.

Liability for diversion, see **WATERS AND WATERCOURSES**, 3 b (3).

SUBWAYS.

See **STREET RAILWAYS**.

Construction of subway under street as appropriation of land, see **EMINENT DOMAIN**, 6.

Liability of municipality for injuries in construction of rapid transit subway, see **MUNICIPAL CORPORATIONS**, 9 b (1).

Right of property owner to compensation for construction of subway under street, see **STREETS AND HIGHWAYS**, 4.

SUCCESSION.

See **DESCENT AND DISTRIBUTION**.

Continuance of corporate existence, see **CORPORATIONS**, 2 b; **INSURANCE**, 1 a.

SUCCESSION TAXES.

See **TAXATION**, 13.

SUCCESSIVE ACTIONS.

See **DISMISSAL, DISCONTINUANCE, AND NON-SUIT**, 2.

Breach of contract of employment, see **MASTER AND SERVANT**, 1 e.

SUCCESSORS.

Right of successors in interest to plead statute of limitations, see **LIMITATION OF ACTIONS**, 6 a (3).

Running of statute of limitations against successors in interest, see **LIMITATION OF ACTIONS**, 6 b (4).

SUDDEN DANGER.

Acts done in sudden danger as negligence, see **STREET RAILWAYS**, 8 a (6).

SUFFERING.

See **DAMAGES**.

SUFFRAGE.

See **ELECTIONS**.

SUGAR CANE MILL.

See **FIXTURES**, 3.

SUICIDE.

1. **CRIMINAL LIABILITY**, 1479.

2. **PRESUMPTIONS AND EVIDENCE IN CIVIL CASES**, 1480.

Charging attempted suicide as libel, see **LIBEL AND SLANDER**, 2 c.

Effect of compact for suicide, see **HOMICIDE**, 1.

Effect on right to life insurance, see **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, 7.

Liability for suicide caused by intoxication, see **INTOXICATING LIQUORS**, 8 a.

Verdict on inquest as evidence, see **CORONERS**, 2.

1. **CRIMINAL LIABILITY**.

Attempt to commit suicide. — An attempt to commit suicide is not an indictable offense in the state of Maine. *May v. Pennell* (Me.), 8-351.

Liability of accessory before the fact.

— Where a statute provides that accessories before the fact in felony may be prosecuted though the principal be not taken or tried, an accessory before the fact in a case of suicide is subject to the punishment for wilful murder though he was not present at the time of the suicide. *Commonwealth v. Hicks* (Ky.), 4-1154.

Conspiracy to commit suicide. — On the trial of an information under the Missouri statute which provides that "every person deliberately assisting another in the commission of self-murder shall be deemed guilty of manslaughter in the first degree," where the theory of the prosecution is that there was a conspiracy between the defendant and the deceased that each should commit suicide, it is

a valid defense that the defendant, before the commission of the act which resulted in the death of the deceased, abandoned his purpose of committing suicide and endeavored to persuade the deceased to do the same. In order to support such defense, it is not necessary to show that the deceased led defendant to believe in good faith that he had abandoned his purpose, and, therefore, an instruction which imposes the burden of proving such fact upon the defendant, and which also imposes upon defendant the burden of proving that the deceased killed himself of his own volition and not under the influence of the defendant's advice, counsel, or assistance, is erroneous. *State v. Webb* (Mo.), 16-518.

In such a case, a requested instruction that if the jury believe from the evidence that the defendant procured a pistol with which he and the deceased intended to commit suicide, and afterwards changed his mind and tried to escape from the consequences of such agreement, but that the deceased refused to permit him to escape therefrom, and, on account of physical weakness, the defendant could not by force leave the deceased, and the deceased did the shooting, then the defendant did not deliberately assist the deceased to commit suicide, and is not guilty of manslaughter in the first degree, is proper, and should be given. *State v. Webb* (Mo.), 16-518.

Evidence consisting of admissions, insufficient. — In a prosecution of a person charged with being an accessory before the fact to a suicide, where the only material evidence against the accused consists of admissions made by him out of court before the trial, the trial court is justified in giving a peremptory instruction to find the defendant not guilty, under a statute providing that an uncorroborated confession of a defendant, unless made in open court, will not warrant a conviction. *Commonwealth v. Hicks* (Ky.), 4-1154.

2. PRESUMPTIONS AND EVIDENCE IN CIVIL CASES.

Presumption in case of unexplained death. — In the case of death under circumstances which are not explained, the presumption is that the death was not caused by suicide, and the presumption will remain until overcome by evidence to the contrary. *Clemens v. Royal Neighbors* (N. Dak.), 8-1111.

Note written by decedent as evidence. — In an action on a benefit certificate containing a condition against suicide, where it appears that the insured met a violent death, a note which was found in the room with his body, which was in his handwriting and gave a direction as to his burial and other personal matters, is competent evidence on the question whether he committed suicide. *Clemens v. Royal Neighbors* (N. Dak.), 8-1111.

When question for the court. — In an action on a benefit certificate containing a condition against suicide, where the circumstances in evidence surrounding the death of

the insured all point to suicide, and there are no facts from which a different conclusion may be reasonably reached or inferred, it is proper to direct a verdict for the defendant. *Clemens v. Royal Neighbors* (N. Dak.), 8-1111.

SUIT CLUB.

See LOTTERIES.

SUIT MONEY.

See ALIMONY.

SUITORS.

Exemption for service of process, see SUMMONS AND PROCESS, 3.

SUITS.

See ACTIONS.

SULPHURIC ACID.

As inherently dangerous substance, see EXPLOSIONS AND EXPLOSIVES.

SUMMARY CONVICTIONS.

Petty offenses, see CRIMINAL LAW, 6 g.
Violation of municipal ordinances, see CRIMINAL LAW, 7 a (1).

SUMMARY JURISDICTION.

Compelling attorney to pay over client's money, see ATTORNEYS AT LAW, 3 c.

SUMMONS AND PROCESS.

1. IN GENERAL, 1481.
2. SUBSTITUTED SERVICE; SERVICE BY MAIL OR PUBLICATION, 1481.
3. EXEMPTION FROM SERVICE, 1482.
4. AMENDMENT OF PROCESS, 1482.

Abuse of process, see ABUSE OF PROCESS.

Actions by or against corporations, see CORPORATIONS, 10 d.

Amendment of summons as affecting statute of limitations, see LIMITATION OF ACTIONS, 4 b (2).

Effect of judgment against nonresident not personally served with process, see JUDGMENTS, 2.

Forcible entry and detainer, see FORCIBLE ENTRY AND DETAINER, 3.

Liability of sheriff for failure to execute process, see SHERIFFS AND CONSTABLES, 2.

Resisting process, see OBSTRUCTION OF JUSTICE.
 Resisting process as contempt of court, see CONTEMPT, 1 b.
 Service of summons on foreign corporation, see CORPORATIONS, 13 d (3).
 Service of process on partnership, see PARTNERSHIP, 5 b (2).
 Subpœna issued by insurance commissioners, see FIRES, 8.
 Subpœnas in proceedings to investigate violations of anti-trust act, see CONSTITUTIONAL LAW, 21.
 Summoning jurors, see JURY, 4.
 Use of abbreviations in subpœna, see ABBREVIATIONS.
 Validity of statute requiring foreign corporation to appoint representative to accept service, see CORPORATIONS, 13 c (3).
 Variance between writ and declaration, see PLEADING, 10.
 Want of service of summons as ground for equitable relief from judgment, see JUDGMENTS, 13.
 Want of personal service as ground for vacating judgment, see JUDGMENTS, 9 d.

1. IN GENERAL.

Service by counterpart writs on defendants in several counties. — The Tennessee statute providing for service by counterpart writs upon defendants located in counties other than the one in which the action is brought, does not apply where the action is a local action. *Nashville v. Webb* (Tenn.), 4-1169.

Waiver of process by voluntary appearance. — When a corporation which is under indictment voluntarily makes an appearance in court by its attorney and demurs to the indictment, it thereby waives a service of process upon it in the manner pointed out by statute. *Southern R. Co. v. State* (Ga.), 5-411.

Amendment of return. — An amendment to a sheriff's return as to a matter of fact must be made voluntarily and cannot be compelled. *Flynn v. Kalamazoo Circuit Judge* (Mich.), 4-1167.

Time as to which second process relates. — A second process to perfect service on joint defendants residing in another county may issue by way of amendment after the appearance term; and where service is made under such order, the same relates to the date of the filing of the petition, which will be treated as the commencement of the suit, even though such service be not perfected until after the expiration of six months from the dismissal of the first suit. *Cox v. Strickland* (Ga.), 1-870.

Waiver of defects in process. — A defect in a summons commencing an action in a court of record is not waived by pleading to the merits after the overruling of a motion to quash to which an exception has been made and made a part of the record. *Fisher v. Crowley* (W. Va.), 4-282.

Curing defective process. — The filing of the petition is treated as the commence-

ment of an action only when followed by due and legal service. If there be no process and no service and the plaintiff is guilty of laches, the writ becomes abortive and the court loses jurisdiction to issue process or to have service perfected. But if the plaintiff is active in his efforts to remedy the non-feasance of officers and endeavors to have process issue and service made, the jurisdiction of the court continues, to cure the defective process and to have service perfected, even after the first term. *Cox v. Strickland* (Ga.), 1-870.

Summons as part of record. — A summons in an action of trespass on the case is not a part of the record until made so by oyer. *Snyder v. Philadelphia Co.* (W. Va.), 1-225.

Quashing void summons on appeal. — A summons commencing an action in a superior court of general jurisdiction, materially defective in respect to time or place of return, to which objection has been taken in proper time and manner and preserved by exception, will be held void and quashed in a direct proceeding in the same action to reverse for the error of the trial court in refusing to quash it. *Fisher v. Crowley* (W. Va.), 4-282.

2. SUBSTITUTED SERVICE; SERVICE BY MAIL OR PUBLICATION.

Proceedings in which substituted service may be had. — Real estate situated within a state and fraudulently transferred to a nonresident may be reached by a constructive service of summons on the nonresident owner. *First Nat. Bank v. Eastman* (Cal.), 1-626.

Sufficiency of substituted service. — Where constructive service instead of personal service is authorized, there must be a strict compliance with statutory requirements. *Hinkle v. Lovelace* (Mo.), 11-794.

Where substituted service of process has been made under the Iowa statute permitting such service, the facts that the notice was left with the defendant's wife, who could neither understand, read, nor write the English language, and that the notice did not reach the defendant, do not constitute such unavoidable casualty or misfortune as to entitle him to a new trial. *Hass v. Leverton* (Iowa), 5-974.

Sheriff's return in case of substituted service. — Under the Iowa statute permitting substituted service of process, a return is sufficient which states that the notice was left with the "defendant's wife," though it does not designate her by name. *Hass v. Leverton* (Iowa), 5-974.

Service of process by mail. — Under a statute authorizing process to be served by mail, it is sufficient if it is deposited in the mail on the last day allowed by law for service, though it is not received by the other party until after that day. *Carlson v. Stuart* (S. Dak.), 18-285.

Effect of service by publication. — In cases where service of the summons by pub-

lication is authorized, and where all the statutory requirements have been duly complied with, service made in that manner is as effective for all purposes as personal service, the only distinction being that the statute allows a person so served to appear and answer to the merits at any time within a year after judgment has been rendered against him by default. *Emery v. Kipp* (Cal.), 16-792.

The Montana statute providing for the service of summons by publication in civil actions, where the person on whom the service is to be made resides out of the state, applies only to cases where under recognized principles of law suits may be instituted against nonresident defendants, and does not abrogate the common-law rule which requires personal service of summons in actions *in personam*. *Silver Camp Min. Co. v. Dickert* (Mont.), 3-1000.

Mistake in initial in publication. — Though the failure to insert the middle initial of the defendant's name in a summons by publication may not be a fatal error, the use of a wrong initial will not confer jurisdiction over the real party defendant. *D'Autremont v. Anderson Iron Co.* (Minn.), 15-114.

The publication of a summons to "George H. Leslie" confers no jurisdiction over George W. Leslie. *D'Autremont v. Anderson Iron Co.* (Minn.), 15-114.

Irregularity in affidavit to prove publication. — A decree rendered in a suit instituted under the overdue tax act will not be held void upon a collateral attack because of a mere irregularity in the affidavit filed to prove publication of the warning order. *Clay v. Bilby* (Ark.), 1-917.

Judgment after service by publication. — A service of summons by publication will not warrant a judgment *in personam*. *Silver Camp Min. Co. v. Dickert* (Mont.), 3-1000.

3. EXEMPTION FROM SERVICE.

Member of legislature. — In Nebraska a member of the legislature may in a proper case be served with summons while at the seat of government for the purpose of attending the legislative session. *Berlet v. Weary* (Neb.), 2-610.

Suitor attending court. — A suitor going to, attending, or returning from court, for the purposes of a case to which he is a party, is privileged from service of summons while so going, attending, or returning; and this privilege extends to all suitors, whether they are residents or nonresidents of the state. Such privilege should be allowed with a reasonable latitude, and in order to have the benefit thereof it is not necessary that a party going to or returning from court should take the most direct route. Reasonable deviations or delays are allowable, provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending, or returning from court. *Barber v. Knowles* (Ohio), 11-1144.

Nonresident witness. — A nonresident witness who is not a party to the action in which he is to appear as a witness is exempt from the service of civil process while going to, remaining at, and returning from, the court before which he is to testify. *Chittenden v. Carter* (Conn.), 18-125.

The rule making a nonresident witness who is also a party to the action in which he is to testify, subject to the service of civil process while within the state as such witness and party, will not be extended to a nonresident witness who is interested in the event of the action, but who is not a party thereto, either real or nominal. As regards such a witness, the general rule exempting nonresident witnesses from service of civil process while going to, remaining at, and returning from, court is applicable. *Chittenden v. Carter* (Conn.), 18-125.

Where a purchaser of stock transfers to the vendor, in payment therefor, the promissory note of a third person, with the agreement that when such note is collected any balance above the price of the stock shall be paid over to such purchaser, and that if the note is not collected the purchaser will either pay for the stock or return it, the vendor of the stock, in an action subsequently brought by him upon the note, must be regarded as the real as well as the nominal party plaintiff; and consequently, where the purchaser of the stock, in an action brought against him by a third person, files a plea in abatement alleging that he is a nonresident of the state, and that the writ was served upon him while he was attending court within the state as a witness in the action on the promissory note, an answer to such plea setting forth the facts with relation to the transfer of the note and the bringing of the action thereon by the transferee is demurrable. Such an answer shows, at most, that the defendant is interested in the event of the action on the note, and not that he is the real plaintiff therein so as to be subject to service of process while attending court as a witness. *Chittenden v. Carter* (Conn.), 18-125.

Nonresident defendant in criminal case. — Civil process cannot be served upon a nonresident who in obedience to the requirement of his bail bond is temporarily within the state to attend the trial of a criminal charge against him. *Martin v. Bacon* (Ark.), 6-336.

Resident of state attending federal court. — A resident of a state, while in attendance upon a federal court in a county other than that of his residence, either as a party or as a material witness, is exempt from the service of a summons in an action brought in that county, though his attendance is not in obedience to a subpoena. *Udnerwood v. Fosha* (Kan.), 9-833.

4. AMENDMENT OF PROCESS.

Power to permit amendment. — A summons commencing an action in a court of record cannot be amended in any substantial

particular unless the statutes authorize it. *Fisher v. Crowley* (W. Va.), 4-282.

The Michigan statute providing, in broad terms, that the court in which any action shall be pending shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as may be just, at any time before judgment is rendered therein, applies to summary proceedings for the recovery of real estate. *Gensler v. Nicholas* (Mich.), 14-452.

Changing capacity of party from representative to individual. — Under the New York statute it is within the power of the trial court to permit the summons and complaint in the action to be so amended as to show that the defendant is sued individually instead of in a representative capacity. *Boyd v. United States Mortgage, etc., Co.* (N. Y.), 10-146.

Eliminating one plaintiff. — A petition which contains two distinct causes of action in favor of different plaintiffs against the same defendant is defective, but the defect may be cured by an amendment eliminating one plaintiff and one cause of action. Such a defect is one of form and not of substance and must be taken advantage of by a special demurrer filed at the first term. *Georgia R., etc., Co. v. Tice* (Ga.), 4-200.

SUNDAYS AND HOLIDAYS.

1. SUNDAY LAWS, 1483.
 - a. Validity, 1483.
 - b. Construction, 1484.
 - c. Prosecutions for violations, 1484.
2. CONTRACTS MADE ON SUNDAY; PAYMENT ON THAT DAY, 1484.
3. JUDICIAL AND MINISTERIAL ACTS PERFORMED ON SUNDAY OR HOLIDAY, 1485.
4. HOLIDAYS, 1485.

Exclusion of Sundays and holidays in computing time, see *TIME*.

Including holiday in computing time for filing bill of exceptions, see *APPEAL AND ERROR*, 9 d.

Running trains on Sunday as affecting liability for injuries to passengers, see *CARRIERS*, 6 e (1).

Selling intoxicating liquors on Sunday, see *INTOXICATING LIQUORS*, 5 c.

Validity of note made on Sunday, see *CONFLICT OF LAWS*, 3 d (2).

1. SUNDAY LAWS.

a. Validity.

Statute having religious observance of Sunday for object. — Laws designating Sunday as a day of rest and prohibiting the performance of any labor thereon except works of necessity and charity are valid police regulations looking toward the health and welfare of the people, but a law designed to enforce the observance of Sunday as a

religious obligation and not as a civil duty is invalid under the Constitution of the United States. *District of Columbia v. Robinson* (D. C.), 12-1094.

The object of the statute enacted by the Maryland assembly of 1723 entitled "An act to punish blasphemers, swearers, drunkards, and sabbath breakers," etc., providing that "no person whatsoever shall work or do any bodily labor on the Lord's Day," containing provisions against sports and recreations on Sunday, and providing cruel and unusual penalties for blasphemy, is the enforcement of a strict religious observance of Sunday and not the cessation from labor on one day in seven and is opposed to the spirit of the present constitutional government and is invalid. *District of Columbia v. Robinson* (D. C.), 12-1094.

Such statute, having been on the books of the District of Columbia for over 100 years without any attempt having been made to enforce it, is repealed by implication by the numerous acts of Congress applying to the District and regulating Sunday observance. *District of Columbia v. Robinson* (D. C.), 12-1094.

As applied to persons celebrating seventh day as Sabbath. — The Minnesota statute prohibiting the sale of goods or property on Sunday is a legitimate exercise of the state's police power to enact sanitary measures, and is not, as applied to Jews who believe in and practice a religious doctrine holding that the seventh day of the week is the Sabbath, unconstitutional as interfering with the religious faith of such persons. *State v. Weiss* (Minn.), 7-932.

In a prosecution for keeping open a workhouse on the Lord's day for the purpose of doing business therein, it is no defense that the defendant conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day. *Commonwealth v. Kirshem* (Mass.), 10-948.

Statute directed solely against particular occupation. — The Washington statute prohibiting the carrying on of the business of barbering on Sunday is constitutional, even as to persons who conscientiously believe in the observance of the seventh day of the week; and this is so though the prohibition of the statute is directed solely against the particular occupation of barbering. *State v. Bergfeldt* (Wash.), 6-979.

An ordinance which prohibits all persons from keeping barber shops open on Sunday, and affects no other occupation, is not unconstitutional as being a special law, or as denying due process of law or the equal protection of the laws. *McClelland v. Denver* (Colo.), 10-1014.

A statute making it a misdemeanor to engage in the business of barbering on Sunday and providing for the first conviction a minimum penalty, is not unconstitutional for failing to provide a maximum penalty or as class legislation. *Stanfeal v. State* (Ohio), 14-138.

Discrimination in favor of certain trades held not unreasonable. — A

statute prohibiting the keeping open of butcher shops and other business places on Sunday, while authorizing confectionery and tobacco to be sold on that day, does not discriminate unreasonably between occupations and is constitutional. *State ex rel. Hoffman v. Justus* (Minn.), 1-91.

Effect of extension of closing period into Monday. — An ordinance which prohibits all persons from keeping barber shops open on Sunday is not invalid because the period of closing fixed by it is from twelve o'clock Saturday night until five o'clock Monday morning, for if the municipal authorities have no power to extend the closing period into Monday, the period after twelve o'clock Sunday night may be eliminated from the operation of the ordinance and the ordinance is still valid. *McClelland v. Denver* (Colo.), 10-1014.

b. Construction.

Works of necessity or charity. — The sale of fruit on Sunday is not a work of necessity or charity within an exception to an ordinance prohibiting sales on Sunday. *Gulport v. Stratakos* (Miss.), 13-855.

The continuance on Sunday of ordinary sales or deliveries of ice or fresh meat is not a work of necessity in a town within the meaning of the Sunday laws. *State v. James* (S. Car.), 16-277.

Running of regular trains as work of necessity. — The Georgia statute (Pen. Code, § 420) prohibiting the running of any freight train, excursion trains or other than the regular mail and passenger trains on Sunday, and the statute (Pen. Code, § 422) forbidding the pursuit by any one of his business or ordinary calling on Sunday, when not a work of necessity or charity, are in *pari materia* and to be construed together, and when thus construed make lawful, as a work of necessity, the running of regular mail and passenger trains on Sunday. *Southern R. Co. v. Wallis* (Ga.), 18-67.

Fruit as merchandise within meaning of statute. — A statute making it unlawful for any merchant, shopkeeper, or other person to keep open store, dispose of, sell, or barter any wares or merchandise, goods or chattels, is violated by keeping open a fruit stand and selling fruit on Sunday, as fruit is merchandise within the meaning of the statute. *Gulport v. Stratakos* (Miss.), 13-855.

What constitutes keeping open. — A workhouse is kept open within the meaning of a statute forbidding the keeping open of a workhouse on the Lord's day for the purpose of doing business therein, if the employees of the proprietor are permitted to enter and work therein, although the workhouse is closed to the public generally. *Commonwealth v. Kirshem* (Mass.), 10-948.

What is "servile labor." — The public selling of his wares by a groceryman is not "servile labor" within the meaning of a statutory provision that "it is a sufficient defense to the prosecution for servile labor on the first day of the week, that the de-

fendant uniformly keeps another day of the week as holy time, and does not labor on that day." *State v. Weiss* (Minn.), 7-932.

Sales not interfering with religious observances. — Under the Minnesota statute prohibiting the sale of goods or property on Sunday, a sale on Sunday is unlawful, though it is made in a quiet and orderly manner, and without seriously interfering with public religious observances. *State v. Weiss* (Minn.), 7-932.

Superintendence of theatre as labor. — To keep open, manage, and superintend a theatre and sell tickets therein on Sunday is labor within the meaning of an ordinance which provides that "every person who shall either labor himself, or compel his apprentice, servant, or any other person in his charge or control to labor or perform any work other than the household offices of daily necessity, or other work of necessity or charity, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor." *Topeka v. Crawford* (Kan.), 16-403.

c. Prosecutions for violations.

Complaint. — A complaint for the violation of an ordinance relating to labor on Sunday which alleges that the offense was committed on the ——— day of October, 1907, on the first day of the week, commonly called Sunday, is sufficiently specific as to time. *Topeka v. Crawford* (Kan.), 16-403.

Consolidation of warrants. — It is not error to consolidate several warrants charging a butcher and ice dealer with separate offenses of selling and delivering ice and meat to three different persons on the same Sunday. *State v. James* (S. Car.), 16-277.

Number of convictions. — Under the Texas statute relative to the observance of Sunday which provides that "any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employee of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined," the owner of a theatre which gives more than one exhibition on the same Sunday cannot be punished for each performance. One conviction under the statute for opening a place of business or amusement on Sunday is a bar to prosecutions for opening at other times on the same day. *Muckenfuss v. State* (Tex.), 16-768.

2. CONTRACTS MADE ON SUNDAY; PAYMENT ON THAT DAY.

Application of statute. — The statute prohibiting the doing of business on the first day of the week applies to the loaning of money on Sunday. *Jacobson v. Bentzler* (Wis.), 7-633.

Absence of voluntary agency in consummating contract on Sunday. — In order to defeat a contract on the ground that it was made on Sunday, it must be shown

that the party seeking to enforce it had some voluntary agency in consummating the contract on that day. A promissory note which bears date on another day of the week, but which was in fact signed by the maker and mailed to the payee on Sunday, is not void on that account, where the payee did not know that it was executed on Sunday and did not intend that it should be so executed. *Collins v. Collins* (Ia.), 16-630.

What constitutes making of loan on Sunday. — A loan on real property is made on Sunday and therefore is within the operation of the statute prohibiting the doing of business on that day, where a check for the money loaned is delivered to the borrower, written agreements expressing the conditions of the loan are executed and delivered, and a deed for the property given as security is executed, signed, and delivered, on Sunday, though the borrower does not receive the money on the check and the deed is not acknowledged and recorded until a subsequent date. *Jacobson v. Bentzler* (Wis.), 7-633.

Ratification of contract made on Sunday. — Under a statute prohibiting the doing of business on the first day of the week, a contract made on that day is void and is not susceptible of ratification on a subsequent day. *Jacobson v. Bentzler* (Wis.), 7-633.

Preliminary negotiations on Sunday. — Where negotiations for the sale and conveyance of land in New Jersey are had in Connecticut, on Sunday, between the vendor and the agent of the vendee, and the written memorandum required by the statute of frauds is signed by the vendor and delivered to the agent who in return delivers the vendee's check, made and dated on Saturday, for the first payment, and the memorandum embodies terms to which the agent is not authorized to agree, and it is not delivered to the vendee or assented to by him until Monday, the contract is made on Monday and is not invalid as a Sunday contract. *Burr v. Hirson* (N. J.), 20-35.

Failure to plead invalidity of contract. — In an action on a contract made on Sunday, the failure of the defendant to plead the invalidity of the contract does not preclude him from insisting that it cannot be enforced. *Jacobson v. Bentzler* (Wis.), 7-633.

Validity of payment made on Sunday. — A payment made on Sunday is as effective to discharge the debt as if made on any other day. *Campbell v. Davis* (Miss.), 19-239.

3. JUDICIAL AND MINISTERIAL ACTS PERFORMED ON SUNDAY OR HOLIDAY.

Distinction between Sunday and holidays. — The observance of the seventh day has a different meaning from observance of a "statutory holiday." With the former it is coeval with the creation, and, with the latter, with the date of the statute to which it owes its title. The history of the common law clearly indicates the character of the day and the respect and honor to which it is

entitled. It is different as to statutory holidays. They have not the sacredness of the Sabbath, and there may be legal business transacted on a statutory holiday not null, if there is silence when a person should speak and object. *State v. Duncan* (La.), 11-557.

Transaction of legal business on "legal holidays." — The days entitled "legal holidays" do not have the effect of rendering legal business null, if it takes place by consent or if an accused chooses not to timely urge what there may be in the objection. The objection is not timely nor in proper form urged for the first time in a motion in arrest of judgment. *State v. Duncan* (La.), 11-557.

Trial of criminal case on holiday. — Any objection by an accused person to the trial of his cause on the twenty-second of February, a legal holiday, is waived by a failure to object to proceeding with the cause when it is called for trial. *State v. Cook* (S. Car.), 13-1051.

An accused has no right to stand by and suffer proceedings to take place on a "statutory holiday," and after verdict, in a motion to quash, ask to have the proceedings reversed on the ground that it was a holiday. *State v. Duncan* (La.), 11-557.

Continuance on ground that trial is set for holiday. — The Iowa statute providing that no person shall be held to answer or appear in any court on certain specified holidays does not entitle the defendant in an action who has previously appeared and joined issue to continuance on the ground that the trial of the cause is set for one of such holidays. *Michel v. Boxholm Co-operative Creamery* (Iowa), 5-918.

Ministerial acts on Sunday. — The act of the clerk of a court in receiving and filing a summons in a civil action is a mere ministerial act and not within the statute prohibiting the transaction of judicial business on Sunday. *Havens v. Stiles* (Idaho), 1-277.

Summoning jurors in a criminal action under a special venue on Sunday is a ministerial act and not within the prohibitory Sunday laws. *State v. Gilbert* (Idaho), 1-280.

Publication of notice on Sunday. — The publication of a notice in a newspaper for four successive days is not vitiated by the fact that one of the days of publication is a Sunday. *Nixon v. Burlington* (Iowa), 18-1037.

4. HOLIDAYS.

Saturday as holiday. — The provision of a statute of the District of Columbia making Saturday afternoons half-holidays is not restricted in its application to negotiable instruments, but in effect constitutes Saturday afternoon in all respects a *dies non juridicus*. *Ocuppaugh v. Norton* (D. C.), 2-133.

Election day as holiday. — Less than an election held throughout the state is not a "general state election" falling within the terms of the Louisiana statute which enacts that all "general election" days shall be legal holidays. The same is true of paro-

chial elections held in the parishes and municipalities. *State v. Duncan* (La.), 11-557.

SUNSTROKE.

See **INSURANCE**, 8 a (4).

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1. NATURE OF CONTRACT.

In general. — A contract of suretyship is not that the obligee will see that the principal obligor pays his debts or fulfills his contract, but that the surety will see that the principal pays or performs. *American Bonding Co. v. Pueblo Investment Co.* (U. S.), 10-357.

2. FORMATION OF RELATION.

Who may become sureties. — The Ohio statute requiring that official or fiduciary bonds shall with certain exceptions be executed by surety companies instead of in-

dividuals is unconstitutional. *State ex rel. McKell v. Robins* (Ohio), 2-485.

Omission of principal to sign bond. — A guardian bond not executed by the principal, though not a statutory bond, is good as creating a common-law liability. *Matthews v. Mauldin* (Ala.), 4-344.

The omission of the name of the principal, as one of the signers of a bank cashier's bond, even where his name appears in the body of the bond as principal, is a mere technical defect, and will not release the sureties, except in case where the sureties sign upon conditions known to the obligee, that the bond is not to take effect until signed by the principal. *Clark v. Bank* (Okla.), 2-219.

Agreement of purchaser of land to pay debt due by vendor. — Where the purchaser of land enters into binding contractual relations with a third person by promising as part of the consideration for the purchase to pay him a debt due him by the vendor, the new promisor is the principal debtor as regards both his immediate promisee and the third person, so that any agreement made between the second promisor and the original promisee, prejudicial to the original promisor, operates to discharge the latter as in any case of an agreement between the principal debtor and the creditor where there is a surety. *Fanning v. Murphy* (Wis.), 5-435.

Where the purchaser of land entered into binding contractual relations with a third person by promising, as part of the consideration for the purchase, to pay him a debt due him by the vendor, such relations cannot be varied subsequently by any agreement between the vendor and the purchaser without the consent of the third person, though the relations are established without the knowledge of the latter. *Fanning v. Murphy* (Wis.), 5-435.

Qualifications of surety company. — As to the qualifications of a surety company as surety upon an appeal bond, see *Eichorn v. New Orleans, etc., R. Co.* (La.), 3-98.

Execution of bond by surety company. — As to the authority to sign an appeal bond in behalf of a surety company, see *Eichorn v. New Orleans, etc., R. Co.* (La.), 3-98.

3. NATURE AND EXTENT OF SURETY'S LIABILITY.

a. In general.

Construction of written contract. — Written language has the same significance, and its meaning is to be ascertained by the same rules of law, where it is found in a contract of surety as where it appears in other agreements. *American Bonding Co. v. Pueblo Investment Co.* (U. S.), 10-357.

In an action by a builder against a surety on a bond for the faithful performance of a building contract, certain provisions of the bond are construed and held not to constitute a waiver of the provision in the building contract prescribing the time and manner in

which the payments to the contractor should be made. *First Nat. Bank v. Fidelity, etc., Co.* (Ala.), 8-241.

True meaning expressed by contract governs. — An obligation of surety may not be extended or reduced by construction or by implication beyond the true meaning expressed by the contract. His agreement, like other contracts, must have a rational interpretation, which, while it carefully restricts his liability to that which he agreed to undertake, does not fail to hold him to that liability which by the plain terms of his agreement he promised to assume. *American Bonding Co. v. Pueblo Investment Co.* (U. S.), 10-357.

Effect of performance by surety after principal's default. — In an action against a surety on the bond of a lunatic's committee to recover for a default consisting of the committee's failure to make an investment ordered by the court appointing him, it is no defense that the investment was made by the surety after the entry of the order removing the committee for his default; and this is so though the order of removal was not final and appealable. *Graffin v. State, use of Ruckle* (Md.), 7-1061.

b. Scope of surety's undertaking.

Individual debt of executor to decedent. — An executor's sureties are liable for the amount of a debt owed by the principal to the decedent and with which he has been charged upon a settlement of his accounts, notwithstanding the executor's insolvency or the sureties' ignorance of his indebtedness or insolvency at the time of the execution of the bond. *United Brethren First Church v. Akin* (Oregon), 2-353.

Dereliction by public officer outside limits of official duties. — A public officer is personally, and may be even criminally, liable for malfeasance in office; but the sureties on his official bond are answerable only within the letter of their contract for the unfaithful performance of his official duties, and not for a dereliction outside of the limits of his official duties. *State, use of Board of Education, etc., v. Griffiths* (Ohio), 6-917.

c. Period covered by contract.

Defaults committed before execution of bond. — When the guardian files a new bond on the petition of the sureties on the old bond, the sureties on the new bond are liable for a conversion of the trust funds before the making of the new bond, upon the ground of the guardian's obligation to make true account. *Matthews v. Mauldin* (Ala.), 4-344.

Defalcation of bank official after expiration of term. — Where the bond of a bank official appointed for a definite term does not recite the length of term but refers to the fact of appointment, the sureties will not be held liable for a defalcation committed after the expiration of the term. *Blades v. Dewey* (N. Car.), 1-379.

Sureties on the fidelity bond of a cashier of a savings bank who has been elected or appointed for a definite term are not liable for defalcations committed by him after the expiration of such term, though the statute under which the bank is organized fixes no limit upon the cashier's tenure of office, but merely provides that he shall hold office at the pleasure of the board of directors, and though the bond is not limited by its terms to any particular period of time. *Ida County Savings Bank v. Seidensticker* (Iowa), 5-945.

Devastavit by guardian prior to approval of new bond. — When the sureties on the bond of a guardian petition the probate court that the guardian give a new bond, and a new bond is filed, the sureties on the old bond are liable for any *devastavit* prior to the approval of the new bond. *Matthews v. Mauldin* (Ala.), 4-344.

Effect of extension of term of public officer. — Where by a statute changing the date of an election, enacted after a county officer has given his official bond, his term of office is extended for a year, the sureties on such bond cannot be held liable by reason of any misconduct on his part occurring after the expiration of the time for which he was elected, notwithstanding the bond is conditioned for his good behavior during his continuance in the office "by virtue of said election," and the constitution provides that "county officers shall hold their offices for the term of two years, and until their successors shall be qualified." *Sparks v. Board of County Commissioners* (Kan.), 13-1064.

d. Amount of liability.

As determined by penalty of bond. — The liability of sureties on a constable's bond is properly limited to the amount of the penalty of the bond. The constable is liable for the full amount of the damages regardless of the amount of the bond, but the excess cannot be recovered in an action upon the bond against the sureties. *Albie v. Jones* (Ark.), 12-433.

4. DISCHARGE OF SURETY.

a. In general.

Act tending to increase surety's liability. — It is a settled rule that a surety on a bond will be released from liability by any act of the obligee that tends to increase his liability without his assent. *Woodruff v. Schultp* (Mich.), 16-346.

Indulgence to principal. — A creditor entitled to resort to a principal debtor and to a surety for the discharge of his claim owes no duty to the latter of active vigilance to collect the debt of the principal. The law imposes the duty of activity in such circumstances on the surety rather than on the creditor. *Fanning v. Murphy* (Wis.), 5-435.

Ordinarily a creditor owes a surety no active diligence. The obligation to see that the debt is paid, or that the principal performs, rests upon the surety and not on the creditor. *Hier v. Harpster* (Kan.), 13-919.

Payment to principal after defalcation. — The payment by the municipal officers to the city clerk, after a defalcation committed by him, of a sum due him by the city, will not discharge his sureties when such officers did not know of the defalcation though they might have discovered the same by the exercise of proper diligence. *Anderson v. Blair* (Ga.), 2-165.

Release of surety on bond of fiduciary. — A surety in a fiduciary's bond, desiring to be released therefrom, upon his own motion, can obtain such relief only by strict compliance with the statutory provision, prescribing the mode of procuring such release. *Taylor v. Taylor* (W. Va.), 19-414.

As section 10 of chapter 87, section 3302 [West Virginia] Code 1906, devolves upon the county court the duty and power of requiring and taking new or substitute bonds from fiduciaries, effecting by force of the provisions of section 11 of said chapter the release of a bond antecedently given by such fiduciary, the clerk of said court, not being expressly authorized by law to take such new or substitute bonds, has no power to effect such release by accepting a new bond. *Taylor v. Taylor* (W. Va.), 19-414.

Failure of plaintiff to disclose principal. — A surety upon a contract is not released because the plaintiff in an action thereon fails to inform the court that another party to the contract is the principal debtor. *Gates v. Tebbetts* (Neb.), 17-1183.

Omission of creditor to notify surety of litigation. — The plaintiff, who held a note signed by the defendant, as surety, presented it to the principal for payment. The principal, who was the cashier of a bank in which the plaintiff had a deposit, entered a credit in the plaintiff's pass-book of a sum equal to the amount due on the note, which was then surrendered and marked "paid." No money was deposited in the bank by the plaintiff, or by any one else, as a basis for the entry in the pass-book. Shortly afterward, the cashier having defaulted and died, a suit was brought by the receiver of the bank against the plaintiff, which pended more than three years, and in which it was held that the note was not paid and that the plaintiff was liable to the bank for the amount credited in her pass-book. The surety learned that the note had been surrendered and canceled but did not know of the circumstances of the surrender or that the matter of payment was in contest. No statement was made by the plaintiff to the surety that the note had been paid, nor did she give him the information that the note had been surrendered and marked "paid." Held, that the omission of the plaintiff to give the surety notice of the facts concerning the surrender of the note and of the contest as to its payment did not absolve the surety from liability on the note. *Hier v. Harpster* (Kan.), 13-919.

b. Alteration of principal's contract.

In general. — Any material alteration of a contract of suretyship, without the consent

of the surety, discharges him. *American Bonding Co. v. Pueblo Investment Co. (U. S.), 10-357.*

Alterations in a building contract, made by agreement between the principal contractor and the owner, whereby certain provisions of the contract are abrogated and other provisions substituted therefor, will operate to release a surety on the contractor's bond who has not assented thereto, even though they do not increase the expense to the owner. *Woodruff v. Schultz (Mich.), 16-346.*

Premature payments without surety's consent. — A surety on a contractor's bond for the faithful performance of a building contract is released from all liability where the builder, without the surety's consent and pursuant to an arrangement made with the contractor either at the time the building contract was executed or afterwards, pays the contractor considerable amounts of money in advance of the time provided by the contract for the making of the payments. *First Nat. Bank v. Fidelity, etc., Co. (Ala.), 8-241.*

The sureties on a contractor's bond conditioned for the faithful performance of a building contract, by the terms of which the contractor is to be paid in instalments as the work progresses, are released by the premature payment of an instalment to the contractor without their consent. *Glenn v. Jones (Cal.), 2-764.*

Premature payments by president of plaintiff corporation. — In an action by a builder, a corporation, against a surety on a bond for the faithful performance of a building contract, where the defendant has established the fact that the plaintiff made premature payments to the contractor, the evidence held to justify the trial court in finding against the plaintiff's contention that its president had no authority to agree to pay otherwise than according to the provisions of the contract. *First Nat. Bank v. Fidelity, etc., Co. (Ala.), 8-241.*

Evidence to show premature payments. — Evidence reviewed, in an action by a builder against a surety on a bond for the faithful performance of a building contract, and held to show that the surety was released from liability by reason of the action of the builder in paying the contractor considerable amounts of money in advance of the time provided by the contract for the making of the payments. *First Nat. Bank v. Fidelity, etc., Co. (Ala.), 8-241.*

c. Extension of time to principal debtor.

In general. — In the case of a principal debtor and a surety, any valid extension of the time of the payment of the debt, at the request of the former without the consent of the latter, discharges the surety. *Fanning v. Murphy (Wis.), 5-435.*

The acceptance by a creditor of the promissory note of the debtor for a debt secured by an undertaking of guaranty, by which the time of payment of the debt and the right of action thereon is suspended until the maturity of the note, discharges the guarantor

from liability. *American Iron, etc., Mfg. Co. v. Beall (Md.), 4-883.*

Extent of discharge by extension of time. — Where a wife as surety for her husband signs his note and secures it by a mortgage of her real estate, an agreement extending the time for the payment of the note which discharges her personal liability will discharge the mortgage security also. *Diehl v. Davis (Kan.), 12-548.*

Essentials of contract for extension. — The rule stated as to the essentials of a contract to extend the time whereby a surety is released. *Fanning v. Murphy (Wis.), 5-435.*

Absence of binding contract for extension. — A mere request for an extension of the due date of a debt at the contract rate of interest, and consent thereto, will not constitute a binding contract for the extension of the time releasing the surety. *Fanning v. Murphy (Wis.), 5-435.*

Effect of guarantor's consent to one extension. — A guarantor who has consented to one extension of time on the debt will not be deemed to have agreed to a further extension by a failure to reply to a letter from the creditor stating that the extension would be granted if satisfactory to the guarantor; and the guarantor is discharged by the further extension. *American Iron, etc., Mfg. Co. v. Beall (Md.), 4-883.*

d. Release of principal debtor or of his property.

Wrongful surrender of security. — The wrongful surrender by the obligee of security for the performance of the obligation guaranteed, without the knowledge of the surety, discharges the surety from liability entirely or *pro tanto*, according to the value of the security surrendered. *American Bonding Co. v. Pueblo Investment Co. (U. S.), 10-357.*

Extent of discharge by release of principal debtor's property. — The release by a creditor of property of the principal debtor available to satisfy the debt in part is not a discharge of the surety in full, but only to the extent of the value of the property released. *Lowe v. Reddan (Wis.), 3-431.*

Where principal is under legal incapacity. — While it is a general rule that a discharge of the principal releases the surety, an exception to the rule exists when one becomes surety for a married woman, minor, or other person incapable of contracting. In such a case, while the principal is discharged on account of his incapacity, the debt remains and its burden must be assumed by the surety. *Gates v. Tebbetts (Neb.), 17-1183.*

Withdrawal of void execution. — A surety is not released by the withdrawal of a void execution on the debtor's property. *Wilson v. White (Ark.), 12-378.*

Release by bank of claim on two notes of depositor. — The surety on a promissory note owing to a bank by a depositor is discharged to the extent of the

release by the bank of its indebtedness to the principal maker upon his open deposit account at the time the note becomes due; and when there are two notes of the same character and amount, both being due at the same time, one-half the value of the property of the principal released by the creditor should be applied to each note. *Lowe v. Reddan* (Wis.), 3-431.

e. Negligence of creditor.

Failure to sue principal. — Where a sheriff has, pursuant to an order of court, paid the amount of a fine and costs for which he has taken a note with a surety not conforming to statutory requirements but valid as a common-law obligation, the failure of the sheriff to sue the principal on the note or to present his claim against the principal's estate in bankruptcy does not discharge the surety. *Wilson v. White* (Ark.), 12-378.

Notice to the sheriff of a county by the surety on a note given for a fine and costs, to bring suit on such note, and the failure of the sheriff to bring such suit as provided for by statute, does not discharge the surety, where the sheriff has not paid the note to the county or become the owner thereof by subrogation and therefore has no authority to bring the suit in accordance with such notice. *Wilson v. White* (Ark.), 12-378.

Failure of municipal officers to discover shortage. — The negligent failure of municipal officers to discover a shortage in the accounts of a city clerk, and a publication by them of a report stating that his accounts for specified years are satisfactory, are not a defense to sureties on the official bond of the clerk subsequently given, when sued for a defalcation occurring after the execution of the bond. *Anderson v. Blair* (Ga.), 2-165.

Failure of owner to file building contract. — In an action on a bond executed by a surety company providing that a building company shall construct a certain work according to contract and save the obligee harmless from damage of any kind, which bond the obligee seeks to hold liable for damages arising out of a lien for materials for which the building company failed to pay, it is no defense that the obligee failed to comply with a statute providing that if the owner of land who enters into a contract for the erection of a building thereon shall fail to file the contract or a memorandum thereof in the office of the county clerk, materials furnished by all persons shall be deemed to have been furnished at the instance of such owner and be a lien on the land. *A. S. Ripley Bldg. Co. v. Coors* (Colo.), 11-269.

f. Fraud of principal.

Where creditor is innocent of fraud. — An executor's sureties are not discharged from liability by the fraud of the executor in procuring their execution of the bond when the beneficiaries of the estate are innocent of the fraud. *United Brethren First Church v. Akin* (Oregon), 2-353.

Notice to creditor of fraud after formation of contract. — A surety company which has signed a contract of suretyship for a building contractor cannot relieve itself of liability by notice to the obligee that it was induced to sign the bond by false representations made by the principal, of which statements the obligee was entirely ignorant, unless there is a stipulation in the bond to that effect; and it is immaterial that such notice is given before the work on the contract as to which the indemnifying bond is given has been actually commenced. *A. S. Ripley Bldg. Co. v. Coors* (Colo.), 11-269.

5. EFFECT OF JUDGMENT AGAINST PRINCIPAL.

Prima facie evidence against sureties.

— In an action against the sureties on a bond for the faithful performance of a working contract, the decree in a prior suit in chancery adjudging the principal to be liable in damages in a certain sum for a breach of the contract is *prima facie* evidence as against the sureties of the amount due under the bond, where it appears that the sureties were given an opportunity to defend the chancery suit but failed to do so. *Henry v. Heldmaier* (Ill.), 9-150.

Where sureties are not parties to action. — The sureties on a fiduciary bond are *prima facie* bound by a recovery against their principal for a default covered by the bond, even though they are not made parties to the suit wherein the recovery was had, and they can release themselves from the binding effect of the recovery only by showing that the judgment plaintiff was not entitled to recover at all or that the amount recovered by him was excessive. *Grafflin v. State*, use of Ruckle (Md.), 7-1061.

Proceedings against principal as evidence. — In an action for breach of the official bond of a lunatic's committee, it is competent to introduce in evidence the proceedings wherein the liability of the principal for the breach of his duty was established, and an auditor's report showing the amount which went into the committee's hands from the sale of certain securities belonging to the lunatic. *Grafflin v. State*, use of Ruckle (Md.), 7-1061.

6. ACTIONS AGAINST SURETIES.

Necessity for permission of court which appointed principal. — An action may be maintained against the sureties on a bond of a lunatic's committee without first obtaining permission of the court which appointed the committee. *Grafflin v. State*, use of Ruckle (Md.), 7-1061.

Surety's willingness to pay amount claimed into court. — It is no legal obstacle to the prosecution of an action against the principal and surety in a fiduciary bond that the surety is ready and willing to pay into court, to await the final result of the action, a sum sufficient to cover the consequences of the principal's alleged default. *Grafflin v. State*, use of Ruckle (Md.), 7-1061.

Bill in equity against sureties on bonds given at different times. — A bill by a ward against his guardian and several acts of sureties on his bonds, given at different times, is not liable to objection on the ground of misjoinder, multifariousness, and want of equity. *Matthews v. Mauldin* (Ala.), 4-344.

Particularity of declaration. — Where the condition of a bond is that the surety therein will pay such losses as may be sustained by a bank by reason of the fraudulent and dishonest conduct of its cashier, amounting to larceny, the bank, in an action on the bond, may either allege a breach of the bond in general terms, or set out the particular acts of its cashier through which it has sustained loss, and which, it claims, amounts to larceny. If the latter course is pursued, the declaration, in order to be sufficient, must aver all the essential elements of the crime of larceny. *Canton Nat. Bank v. American Bonding, etc., Co.* (Md.), 18-820.

In such an action, counts in the declaration which fail to show whether the defaulting cashier was guilty of larceny as principal or as accessory before the fact, or which fail to show that the money taken by the cashier belonged to the bank, are demurrable. *Canton Nat. Bank v. American Bonding, etc., Co.* (Md.), 18-820.

Assignments of breaches. — In an action against the surety on a bond, where several distinct breaches of the bond by the principal are alleged in the declaration, the assignment of each breach must be perfect in itself, and cannot be made by a reference to other breaches. *Canton Nat. Bank v. American Bonding, etc., Co.* (Md.), 18-820.

Necessity for showing time of alleged breaches. — Where by the express terms of a bond the undertaking of the surety is to pay such losses as may be sustained by the obligee by reason of larcenies committed by the obligee's employee during the term for which the bond is given, and discovered during said term or within three months after its expiration, a declaration in an action on the bond, brought more than three months after the expiration of the term, which fails to show when the breaches of the bond alleged therein were discovered, is demurrable. *Canton Nat. Bank v. American Bonding, etc., Co.* (Md.), 18-820.

When declaration not double. — In an action against the sureties on a bond for the faithful performance of a working contract, the declaration is not rendered double by the fact that after setting out the bond and the contract and averring a breach of the contract, it sets out the pleadings and the decree in a chancery case wherein the liability of the principal for damages resulting from the breach was established even though the proceedings in the chancery case are set out with greater fulness than is actually necessary. *Henry v. Heldmaier* (Ill.), 9-150.

Sufficient allegation of declaration that decree has not been performed or paid. — In an action against the sureties on a bond for the faithful performance of a working contract, where the declaration sets out the proceedings and a decree in a chan-

cery suit wherein the liability of the contractor for damages for breach of the contract was established, an allegation that the decree is in full force and effect and has not been reversed, appealed from, or set aside, is equivalent to an allegation that the decree has not been performed or paid. *Henry v. Heldmaier* (Ill.), 9-150.

Allegations of performance of condition precedent. — A declaration in an action against the sureties on a bond for the faithful performance of a working contract, sustained against a demurrer based on the ground that it fails to allege that the builder gave the contractor notice which was a condition precedent to the right to declare the contract forfeited. *Henry v. Heldmaier* (Ill.), 9-150.

Failure of clerk in entering judgment to certify that parties are sureties as error. — The failure of the clerk, in recording a judgment, to certify that certain of the defendants are sureties, where such is the fact, is reversible error, though not presented to the trial court. *Escribitt v. Michaelson* (Neb.), 10-1039.

7. CONTRIBUTION BETWEEN SURETIES.

Contribution between sureties justifying in different amounts. — The sureties in an official bond are liable to equal contribution on the default of the principal, though they justified in different amounts. *Board of Commissioners v. Dorsett* (N. Car.), 18-852.

Right of one surety to pay debt and claim contribution. — At all times after the maturity of an indebtedness for the payment of which there are a principal and sureties, any one of the latter may pay off the same for his protection and enforce his rights of subrogation and contribution. *Fanning v. Murphy* (Wis.), 5-435.

What constitutes payment under compulsion. — It is essential to the preservation of a surety's rights against his co-surety that he should pay the indebtedness under compulsion. But where after the default of the principal debtor, the surety pays without coercion but for the protection of his rights, the payment is in legal contemplation compulsory. *Fanning v. Murphy* (Wis.), 5-435.

Effect of payment of debt in form of purchase of securities. — If a surety for his own protection pays off a debt for which he is liable, but does so in the form of a purchase, taking an assignment of securities to himself or to another for his use, having in mind, however, only the better protection of his rights of subrogation and contribution, the transaction amounts to a payment as to such rights. *Fanning v. Murphy* (Wis.), 5-435.

Effect of statute of limitations where creditor has obtained judgment. — A surety is not relieved from his obligation to contribute by the failure of his co-surety to make payment until after the statute of limitations has run against their joint obligation, such obligation having been kept

alive as against the latter by a valid judgment in favor of the obligee. *Kelly v. Sproul* (Mich.), 15-1029.

The provisions of the Michigan statute of limitations relating to the barring of personal actions on contracts and to the right to recover from one of several joint contractors a debt barred as against the others, have no application to such a case. *Kelly v. Sproul* (Mich.), 15-1029.

Effect of becoming surety at request of cosurety. — The mere fact that a surety on a promissory note or other obligation becomes such at the request of a cosurety does not relieve him of liability to the latter for contribution, upon default by the principal. To relieve a surety from liability to contribution there must be a contract, express or implied, for such immunity. *Chappell v. John* (Colo.), 16-854.

What is not contract of indemnity as between sureties. — A mere statement made by a surety at the time when his cosurety signs the obligation at his request, that such cosurety will not be subjected to any loss by reason of signing the same, is simply an expression of opinion that the sureties will not be called upon to pay the obligation, and does not amount to an agreement or contract of indemnity so as to relieve the surety to whom it is made from liability to contribution. *Chappell v. John* (Colo.), 16-854.

Declaration of debtor to show that cosurety has made himself liable as principal. — In an action by one of two sureties on a promissory note, who has been compelled to pay the same, against his cosurety to recover the whole amount paid, on the theory that the defendant surety has made himself liable to the plaintiff as principal by taking a trust deed from the maker of the note as security, declarations made by the maker of the note ten days after the execution of the trust deed, regarding the purposes for which it was executed, are not admissible in evidence on behalf of the plaintiff as a part of the *res gestæ*. *Chappell v. John* (Colo.), 16-854.

Rights of surety in assets received by cosurety. — In such an action, where the evidence shows that the defendant surety has taken two deeds of trust from the maker of the note, the first to secure him on another obligation, and the second, covering the same property as the first and also additional property, as security for payment of the note, and has bought in the property covered by the second trust deed on foreclosure, for a nominal consideration, and then sold the same to a third party, the plaintiff is entitled to recover one-half of the reasonable value of the land bought by the defendant at the foreclosure sale and not included in the first deed of trust. *Chappell v. John* (Colo.), 16-854.

8. RIGHTS OF SURETY AS AGAINST PRINCIPAL.

Right to compel principal to pay. — A surety may, before payment, in equity, compel his principal to pay in exoneration. *Carr v. Davis* (W. Va.), 16-1031.

Where a debt is past due, the surety for its

payment has the right to file a bill in equity to compel the principal to pay the debt and thereby exonerate him. *Tillis v. Folmar* (Ala.), 8-78.

9. RIGHTS OF CREDITOR AGAINST PRINCIPAL.

Effect of extensions granted to surety. — When a mortgagor contracts with the mortgagor's grantee who has assumed the payment of the mortgage debt and become the principal, the mortgagor becoming the surety, for the extension of the time of payment, and after the contract of extension is made further conveyances of the property are made in which each grantee assumes the payment of the debt without reference to the contract of extension, the last grantee, who by assuming the mortgage contracts as a new principal to pay the debt, is not discharged from obligation to pay by the fact that its day of maturity has been extended without his knowledge. The last grantee is not bound by the contract of extension but may pay the debt according to his deed. By the contract of extension, the original mortgage debt is not extinguished and a new contract substituted. *Higgins v. Evans* (Mo.), 3-465.

Effect of discharge of surety. — An action upon a public officer's bond for his misconduct occurring after the sureties have been discharged by an extension of his term, may be maintained against the principal. *Sparks v. Board of County Commissioners* (Kan.), 13-1064.

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1. POWER OF TAXATION.

a. In general.

Power of taxation unlimited. — The power to impose taxes is of unlimited force. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. Succession of Levy (La.), 5-871.

The taxing power vested in the legislature is without limit, except such as may be prescribed by the constitution itself. Mercantile Inc. Co. v. Junkin (Neb.), 19-269.

Power is legislative. — The power to impose taxes is a legislative power. State ex rel. Taylor v. Guilbert (Ohio), 1-25.

Construction of British North America Act. — Subsection 2 of section 92 of the British North America Act of 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the province in order to the raising of a revenue for provincial purposes," is not in conflict with subsection 8 of section 91 of that act, giving the Parliament of Canada exclusive legislative authority in regard to the "fixing of and providing for the salaries and allowances of the civil and other officers of the government of Canada." Abbott v. Saint John (Can.), 12-821.

b. Constitutional restrictions.

On power of federal government. —

Under the Federal Constitution the only limitation on the power of the federal government to lay and collect license taxes is that they shall be for public purposes and shall be uniform throughout the United States. South Carolina v. United States (U. S.), 4-737.

Application of Fourteenth Amendment to Federal Constitution. — The fact that a mode of taxation has been in force for a very long time is of itself a strong reason against the belief that it has been overthrown by the Fourteenth Amendment to the Federal Constitution, and for leaving to the legislature any improvement that may be desired. Paddell v. New York (U. S.), 15-187.

Construction of constitutional provisions. — The maxim *Expressio unius est exclusio alterius* does not apply in the construction of constitutional provisions regulating the taxing power of the legislature. Mercantile Inc. Co. v. Junkin (Neb.), 19-269.

Taxation of persons acting as agents of state. — It is within the constitutional powers of the federal government to impose license taxes upon persons selling liquors, although such persons are acting as agents of a state which has engaged in the liquor traffic. South Carolina v. United States (U. S.), 4-737.

Constitutional requirement of uniformity. — A statute empowering cities of the third class to impose an annual street poll tax on male inhabitants between twenty-one and fifty years of age, except members of volunteer fire companies, is repugnant to the constitutional provision requiring uniformity of taxation, and a long-continued acquiescence in such statute by the people will not affect its invalidity. State v. Ide (Wash.), 1-634.

Statutes requiring taxes to be levied on "all debts due from solvent debtors," thus omitting from taxation debts due from insolvent debtors, is not in conflict with the constitutional provision requiring uniformity of taxation. Kingsley v. Merrill (Wis.), 2-748.

Section 9 of article 9 of the Illinois constitution requiring that municipal taxes shall be so laid that they shall be uniform in respect to both persons and property applies to the taxation of assessable property alone, and not to the taxation of such intangible rights as the use of the public streets. Harder's Fire Proof Storage, etc., Co. v. Chicago (Ill.), 14-536.

A municipal ordinance, passed in pursuance of statutory authority, imposing a license tax on vehicles using the streets for carrying persons or property does not violate a constitutional provision requiring such taxation to be imposed "by general law, uniform as to the class upon which it operates." Harder's Fire Proof Storage, etc., Co. v. Chicago (Ill.), 14-536.

Constitutional requirement of equal protection of the laws. — The taxation of

"debts due from solvent debtors" is not prohibited by the clause of the Federal Constitution declaring that no state shall deny to any one the equal protection of the laws. *Kingsley v. Merrill* (Wis.), 2-748.

Classification of subjects. — While reasonable classification is permitted for the purpose of taxation, without doing violence to the constitutional guarantee of equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and cannot be arbitrarily made without any substantial basis. Arbitrary selection cannot be justified by calling it classification. *Southern R. Co. v. Greene* (U. S.), 17-1247.

Statute imposing poll tax on certain males. — The Washington statute requiring all males between the ages of twenty-one and fifty years, outside of an incorporated city or town, to pay annually a road poll tax of two dollars, does not violate any provision of the state or federal constitutions, as taking property without due process of law, or as extending a special privilege or immunity to females and to males who do not come within the age limits prescribed for the subjects of the tax. *Thurston County v. Tenino Stone Quarries* (Wash.), 12-314.

The further provision of said statute that any person or corporation having persons employed liable to pay such poll tax, shall, upon demand by the tax collector, furnish a list of such employees and the amount of wages due each, and shall pay at once to the collector the amount of such poll tax if that amount shall be due the employee, is not invalid as taking property without due process of law in failing to make provision for testing the correctness of the employee's tax, inasmuch as the employer is not required to put upon the list the name of any employee not liable for the tax, and in view of the statute authorizing the bringing of an action for the collection of a poll tax, and affording an opportunity to test its legality. *Thurston County v. Tenino Stone Quarries* (Wash.), 12-314.

What is not double taxation. — The imposition of a license tax on vehicles using the streets of a city for carrying persons or property, in addition to the *ad valorem* tax on the vehicles as property, and a license tax on the right to pursue the occupation in which the vehicles are used, does not amount to double taxation. *Harder's Fire Proof Storage, etc., Co. v. Chicago* (Ill.), 14-536.

Excise taxes. — The constitutional limitation upon the taxing power is not applicable to excise taxes. *State ex rel. Taylor v. Guilbert* (Ohio), 1-25.

c. Construction of tax statutes.

Prior and contemporaneous legislation and subsequent interpretation. — A statute imposing taxes is not to be interpreted by its own language alone, but in connection with other prior and contemporaneous and subsequent practical understand-

ing of it by taxing officers and the public. *East Livermore v. Livermore Falls Trust, etc., Co.* (Me.), 13-631.

Strict construction against the state. — Tax statutes are to be construed strictly against the state, and especially are they to be construed so as to avoid double taxation unless their language interpreted according to recognized principles of statutory interpretation fairly compels a contrary construction. *East Livermore v. Livermore Falls Trust, etc., Co.* (Me.), 13-631.

2. PERSONS AND THINGS TAXABLE.

a. Public property and instrumentalities of government.

In general. — General terms and expressions in the constitution, or in the statute providing for the collection of taxes, are never allowed their full literal import if the effect of such construction is to require that to be done which the law does not authorize, or to violate a fundamental principle upon which the government is founded and operated. *Penick v. Foster* (Ga.), 12-346.

The general rule is that public property and the various instrumentalities of government are not subject to taxation. This immunity rests upon the most fundamental principles of government; being necessary in order that the functions of government be not unduly impeded, and that the government be not forced into the inconsistency of taxing itself in order to raise money to pay over to itself. *Penick v. Foster* (Ga.), 12-346.

The word "property" in that clause of the constitution of Georgia which declares that "all taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax," properly construed, does not require the taxing of public property or any of the lawful instrumentalities of government. *Penick v. Foster* (Ga.), 12-346.

Constitutions and statutes, in so far as they deal with the subject of taxation, are to be interpreted in the light of the fundamental principles above referred to. *Penick v. Foster* (Ga.), 12-346.

License fees received by municipalities. — A statute levying a tax of two per cent. on license fees for the sale of intoxicating liquors to be received by municipalities, the amount of such tax to be used in defraying the expense of maintaining a state hospital for inebriates, is merely an apportionment of such license fees between the municipalities and the state, and does not violate a constitutional provision exempting public property from taxation. *Leavitt v. Morris* (Minn.), 15-961.

Bonds to secure public debt. — There are not, in the tax laws of Georgia, any terms which expressly declare that the bonds of the state, or its various political subdivisions, are subject to tax, nor any language in such laws which clearly indicates that it was the intention of the general assembly to

subject these instrumentalities of government to taxation, either by the state or any county thereof. *Penick v. Foster* (Ga.), 12-346.

Bonds issued by a municipal corporation, as evidence of a loan made to it, are instrumentalities of the government which creates the municipal corporation. Laws providing for the collection of taxes will not be so construed as to authorize the collection of a tax upon such instrumentalities of government unless there is in the law clear language declaring that such was the intent of the law-making power. *Penick v. Foster* (Ga.), 12-346.

Bonds issued by a municipal corporation of Georgia in the hands of a resident of the state are not taxable by the state or any county thereof. *Penick v. Foster* (Ga.), 12-346.

A city may tax bonds issued by it where it has not surrendered its power of taxation by contract either express or implied. *Bank of Russellville v. City of Russellville* (Ky.), 19-410.

United States bonds. — A state cannot tax United States bonds owned by a national bank and held by it as part of its capital. *Old Nat. Bank v. State* (W. Va.), 6-115.

Checks or warrants for payment of interest on public debt. — Section 3701 of of the United States Revised Statutes, declaring that all stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from state or municipal taxation, does not exempt from state taxation, in the hands of holders, checks or warrants issued in compliance with section 3698 of the United States Revised Statutes, which requires that the secretary of the treasury shall cause to be paid out of any money not otherwise appropriated any interest falling due or accruing on any portion of the public debt authorized by law. *Hibernia Savings, etc., Soc. v. San Francisco* (U. S.), 4-934.

Where United States holds title to real property. — Where the purchaser of property from the United States government has paid only a small part of the purchase price, and the contract of sale expressly reserves to the government the title to the property and the right to declare a forfeiture of the contract as well as of all moneys paid on account thereof, if all of the conditions of the contract are not performed, the property is not subject to taxation for municipal purposes. *Mint Realty Co. v. Philadelphia* (Pa.), 11-388.

b. Real property.

Land subject to mortgage. — An owner of land subject to a mortgage may be taxed for the full value of his land without deducting the mortgage debt therefrom, such method of taxation not being violative of the Fourteenth Amendment of the Federal Constitution. *Paddell v. New York* (N. Y.), 15-187.

Liability of holder of mortgage. — A person holding a mortgage upon real estate as security for a debt, is under no obligations

to pay the taxes upon such property, unless there is some provision in the mortgage requiring him to do so. *Jones v. Black* (Okla.), 11-753.

Rights under oil and gas lease. — An oil and gas lease under which the lessee may exercise his rights so long as oil or gas may be found in paying quantities on the premises conveys such a mining right in the land that it can properly be taxed separately, and as such lease involves a freehold, it should be assessed as real property. *People ex rel. Carrell v. Bell* (Ill.), 15-511.

A right to drill for petroleum is included within a statute providing for the separate taxation of mining rights. *People ex rel. Carrell v. Bell* (Ill.), 15-511.

c. Personal property.

Shares in national bank. — A state may tax the stockholders in a national bank for the shares of the bank's stock owned by them. *Old Nat. Bank v. State* (W. Va.), 6-115.

A county has the power to tax the shares of stock of, and the real property owned by, a national bank, within the limitations prescribed by the federal statutes. *First Nat. Bank v. Douglas County* (Wis.), 4-34.

Notes and mortgages. — Notes and mortgages are property subject to taxation under the constitution and statutes of Wisconsin. *Kingsley v. Merrill* (Wis.), 2-748.

Personal property located on military reservation. — The taxing officers of Comanche county, Oklahoma, have the lawful right to levy and collect taxes on personal property belonging to private individuals and located on the Fort Sill military reservation, which is wholly within such county and constitutes a part thereof. The legislative power of the territory extends to all rightful subjects of legislation, and the only property which Congress has prohibited the territory from taking is the property of the United States. *Rice v. Hammond* (Okla.), 14-963.

Trademark. — A trademark is not property which may be assessed for taxation. *Com. v. Kentucky Distilleries, etc., Co.* (Ky.), 18-1156.

Cold storage refrigerator. — A cold storage refrigerator installed by the lessee of a building is not taxable to the lessee as personalty, where it is so annexed to the building that it could not be removed without material injury to the realty, and would then be a worthless mass, it being presumed to have been intended to become part of the realty, and not a trade fixture. *Squire & Co. Portland* (Me.), 20-603.

d. Licensees to sell liquor.

Taxation under federal statute. — The federal statute referring to the taxation of retail dealers in intoxicating liquors includes within its meaning persons applying for and receiving licenses to sell intoxicating liquors though they are simply the agents of another and have no interest in the profits of the business, provided the principal is not entitled to exemption from the tax imposed.

South Carolina v. United States (U. S.), 4-737.

e. Income.

Civil officers of government. — A civil or other officer of the government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides. *Abbott v. St. John* (Can.), 12-821.

Imposition by state of tax on salary of officer of superior government. — An officer of the commonwealth of Australia, who resides in Victoria and receives his salary in that state, is liable to be assessed in respect of his official salary for an income tax imposed by the Victoria legislature. *Webb v. Outtrim* (Eng.), 7-84.

3. PLACE OF TAXATION.

a. in general.

Doctrine of equitable conversion. — The doctrine of equitable conversion should not be invoked merely to subject property to taxation, especially when the question is one of jurisdiction between different states. *McCurdy v. McCurdy* (Mass.), 14-859.

Assessment at home of property. — The intention of the laws of Montana providing for the assessment of property for taxation is that the property shall be assessed in the county which is its home. *Floweree Cattle Co. v. Lewis and Clark County* (Mont.), 8-674.

b. Personal property.

Taxation at situs of property in general. — Personal property, both tangible and intangible, may be separated from its owner, and he may be taxed on its account at the place where the property is, although not the place of his own domicile, and even if he is not a citizen or resident of the state which imposes the tax. *Buck v. Beach* (U. S.), 11-732.

The general rule is that tangible personal property is subject to taxation by the state in which it is, no matter where the domicile of the owner may be, and the rule is not affected by the fact that the property is employed in interstate transportation. *Old Dominion Steamship Co. v. Virginia* (U. S.), 3-1100.

Effect of attempt to escape taxation in state of residence. — The jurisdiction of a state to tax securities situated therein and owned by a nonresident is not conferred or strengthened by the fact that such nonresident sent the securities in question to the state attempting to impose the tax in an attempt to escape taxation in the state of his residence. *Buck v. Beach* (U. S.), 11-732.

Corporate stock and bonds. — Certificates of stock, bonds, and other evidences of indebtedness are taxable in the state where the owner resides, irrespective of the actual situs of the property. *Com. v. Williams* (Va.), 1-434.

As shares of stock are personality in the nature of choses in action, they are ordinarily taxable at the owner's domicile. *Judy v. Beckwith* (Ia.), 15-890.

The taxation in Iowa of the shares of stock of a foreign corporation owned by a resident of the state does not violate the provisions of the Iowa constitution. *Judy v. Beckwith* (Ia.), 15-890.

The mere physical location of capital stock owned by an executor in his official capacity is not the test of its liability to assessment for taxation, but the presence of the stock may aid in fixing the place in the state at which it must be assessed. *Com. v. Peebles* (Ky.), 20-724.

That a foreign corporation pays taxes on the property in the state of its origin does not affect the right of Kentucky to require the owner of capital stock residing in Kentucky to list the same for taxation. *Com. v. Peebles* (Ky.), 20-724.

That a foreign corporation pays taxes on the property in the state of its origin does not affect the right of Kentucky to require an executor of the deceased owner of capital stock qualifying in Kentucky to list the same for taxation. *Com. v. Peebles* (Ky.), 20-724.

Taxation of notes where parties thereto are nonresidents. — The taxation by a state of notes evidencing simple contract debts, where neither the party assessed nor the debtor is a resident of the state, and where no business is done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes, is not within the rightful power of the state and amounts to a taking of property without due process of law. *Buck v. Beach* (U. S.), 11-732.

Personal property in hands of agent. — The rule that the situs of intangible personal property follows the owner, and is taxable where he is, is subject to exceptions, and yields to the actual situs of the property where justice requires that it should, and thus choses in action or money in the actual custody of an agent who manages and invests the same is subject to taxation at the residence of such agent, though the beneficial owner is a nonresident. *Com. v. Peebles* (Ky.), 20-724.

Property employed in business. — Where a nonresident brings personal property within the state for the purpose of using it in the performance of a contract for the construction of a railroad, the property is not in transit, and is subject to taxation. *Eoff v. Kennefick-Hammond Co.* (Ark.), 10-63.

Property held by consignee as warehouseman. — Property held by a consignee as a warehouseman for nonresidents, which is shipped to him from without the state and held by him for an indefinite period for distribution upon sales made and orders given by the owners, is taxable to him under the Iowa statutes, though he has no authority to sell it, and such taxation does not constitute an interference with interstate commerce, as the property cannot be said to be "in transit." *Merchant's Transfer Co. v. Board of Review* (Iowa), 5-1016.

Property held in trust. — The Ohio statute providing that the property of persons residing within the state shall be the subject of taxation does not authorize a tax upon property held by a resident of Ohio as trustee when he does not exercise his office of trustee within the state, and the trust property and the beneficiaries are outside the state. *Goodsite v. Lane* (U. S.), 2-849.

Property of lunatic. — Under the Virginia statutes, choses in action owned by a lunatic are taxable at the domicile of the committee, and not at the domicile of the debtor or at the place where the committee was appointed. *Hurt v. Bristol* (Va.), 7-679.

Live stock temporarily in county. — As to the place of taxation, under the Montana statute, of live stock temporarily in the county, see *Flowerree Cattle Co. v. Lewis and Clark County* (Mont.), 8-674.

c. Real property.

Land lying in two counties. — Under the West Virginia statute relative to taxation, a tract of land of less than one thousand acres lying partly in one county and partly in another should be assessed in the county in which lies the greater part in value of the tract; but in applying this rule the relative values of the portions of the tract lying in the respective counties are to be determined as of the date when the assessment is made, and, consequently, a tax deed will not be set aside for an alleged violation of the rule where the only evidence offered as to value relates to a period several years later than the assessment. *Fleming v. Charnock* (W. Va.), 18-711.

Application of rule to small parcels. — Under the statutes of West Virginia relative to taxation, a small lot in an unincorporated village which is crossed by a county or assessment district line may be assessed for taxation in the county or assessment district in which lies the greater part in value of the lot. The statutory provision authorizing such assessment of tracts of land of one thousand acres or less applies to such small parcels as are commonly called lots, as well as to larger parcels. *Fleming v. Charnock* (W. Va.), 18-711.

d. Double taxation.

What is not double taxation. — The levying of a tax by two or more states upon the same property for the same period is not double taxation. This rule applies to the taxation by a state of shares of stock of a foreign corporation owned by a resident thereof, even though such shares are taxed in the state of the corporation's domicile. *Judy v. Beckwith* (Ia.), 15-890.

Shares of stock of a foreign corporation owned by a resident of a state or taxable therein in the absence of a clearly expressed legislative purpose to exempt such stock from taxation. Such shares of stock, even though taxed in the state of the corporation's domicile, are not exempted from taxation in Iowa by a statutory provision that stock "not otherwise assessed" shall be listed for taxation. *Judy v. Beckwith* (Ia.), 15-890.

e. Property belonging to decedent's estate.

Situs of intangible personal property. — After the death of the owner of intangible personal property, its situs for taxation is the residence or domicile of the executor in whom is the legal title, although the actual situs of the property may be elsewhere. *Com. v. Williams* (Va.), 1-434.

The personal representative of an estate is the legal owner for the time being of the personal assets of the decedent, and succeeds to all his rights and responsibilities with reference thereto for purposes of taxation. But the fact that he is such legal owner is only by virtue of his appointment, and the estate does not follow him into every place where he may happen to have a residence. His official domicile is the state of his appointment, and the situs of intangible personal property of the estate is the place where he qualifies. *Com. v. Peebles* (Ky.), 20-724.

Property held in foreign state by resident executor of nonresident decedent. — Where a resident executor of a nonresident decedent qualifies in the sister state in which the decedent died she cannot be required to list for taxation capital stock of a corporation of the sister state legally in his custody as executor, but which he has never physically removed from the sister state or invested in any manner in Kentucky, notwithstanding the Kentucky statute (St. 1909, § 4058), requiring an executor to answer as to whether he has in his possession any property belonging to another, etc., since it applies to an executor who qualifies in Kentucky, or who has within the state property in his custody that he is investing or using in business. *Com. v. Peebles* (Ky.), 20-724.

Interest of decedent in partnership. — For the purpose of taxation, the situs of interest of a deceased partner in a partnership is the place where the business was carried on at the time of his death. *Commissioner of Stamp Duties v. Salting* (Eng.), 9-691.

f. Taxation of vessels.

General rule. — The general rule is that the situs for the taxation of a vessel engaged in coastwise traffic between ports in different states is the domicile of the owner, irrespective of the place of enrolment, except where it has acquired actual situs in a state other than that in which the owner is domiciled. *Ayer, etc., Co. v. Kentucky* (U. S.), 6-205.

A vessel engaged in interstate coastwise traffic and actually employed in traffic between ports in different states, which is owned and operated by a corporation chartered and domiciled in Illinois and upon which taxes have been paid in that state, is not subject to state taxation in Kentucky, though she is enrolled under the federal navigation laws at a Kentucky port and has the name of that port painted on her stern. *Ayer, etc., Co. v. Kentucky* (U. S.), 6-205.

The situs, for the purpose of taxation, of a ship engaged in the coastwise trade is the

domicil of the owner, though the ship in fact has never been there, and under ordinary circumstances cannot go there, and irrespective of the place of enrolment, except that, where a ship has acquired an actual situs in a state other than the domicil of the owner, it may be taxed there because it is within the jurisdiction of the taxing authority. *Com. v. Southern Pac. Co. (Ky.)*, 20-965.

Taxation at home port. — The California statutes regulating the taxation of vessels do not preclude the taxation of a vessel which has as its home port and legal situs for taxation a port within the state, though the vessel has never been registered at the home port and has received temporary registration at a port in another state. *Olson v. San Francisco (Cal.)*, 7-443.

Where a port in California is the home port and the legal situs for taxation of a vessel, the vessel is "property in the state" within the meaning of those words as used in the provision of the state constitution authorizing and requiring the taxation of such property, notwithstanding the vessel has never been in the waters of the state, has never been registered at her home port, and has been engaged in foreign commerce on the high seas under temporary registration received at a port in another state where she was constructed. *Olson v. San Francisco (Cal.)*, 7-443.

Determination of home port. — For the purpose of fixing the legal situs for taxation of a vessel owned by several persons, her home port is that at which the managing owner resides, irrespective of the extent of his interest and of the residence of the other owners. *Olson v. San Francisco (Cal.)*, 7-443.

The legal situs for taxation of a vessel owned by several persons is the port at which the managing owner resides, at which port alone she is entitled to permanent registration, though in the short period which has elapsed since her construction she has been engaged in foreign commerce on the high seas under temporary registration received at a port in another state where she was constructed; though she has never touched at her home port or been registered there; and though some of her owners reside in the state containing the port wherein she has received temporary registration. *Olson v. San Francisco (Cal.)*, 7-443.

Effect of section 4141 United States revised statutes. — The artificial situs of a vessel created by section 4141 of the United States revised statutes only controls the place of taxation in the absence of an actual situs. *Old Dominion Steamship Co. v. Virginia (U. S.)*, 3-1100.

Vessels employed wholly within limits of one state. — Where vessels, though engaged in interstate commerce, are employed in such commerce wholly within the limits of the state, they are subject to taxation in that state, though they may have been registered or enrolled at the port outside its limits. *Old Dominion Steamship Co. v. Virginia (U. S.)*, 3-1100.

4. LEVY OF TAXES.

Assessment by direct act of legislature. — While a valid assessment is indispensable to the levy of a tax, the requirement of uniformity of taxation does not necessitate the making of all assessments through the same officials or by a uniform method of procedure, and it is competent for the state, by direct act of the legislature, to make the assessment of solvent evidences of debt whose face value and actual value are known. *Baltimore v. State (Md.)*, 11-716.

Time of levy. — The Colorado statute (Rev. St. 1908, § 5760) prescribing the time for the levy of "the requisite tax for the year, for school and other county purposes," is limited to the levy of taxes for general county purposes, and does not apply to a levy to pay railroad aid bonds issued by the county. A levy to pay such bonds may be made at any meeting of the board of county commissioners as provided by a statute (Gen. Laws 1877, §§ 103-110) with respect to the levy of taxes for the payment of debts of the county contracted before a certain date, the bonds in question having been issued before such date. *Berkey v. Board of Com'rs (Colo.)*, 20-1109.

Effect of statutory requirement of notice on nature of proceeding. — A tax on land is ordinarily a proceeding *in rem*. Such a tax is certainly a proceeding *in rem* if there is no personal liability super-added, whatever statutory requirements there may be for giving notice by naming parties in interest, and even if naming them is essential to the validity of the tax. *Paddell v. New York (U. S.)*, 15-187.

Effect of death of member of board. — Under the Massachusetts statute which makes it optional with towns to fill or leave unfilled vacancies occurring by the death of town officers, and the further statutory provision that where a joint authority is given to three or more public officers or other persons it may be exercised by a majority of such officers or persons, the death of a duly elected and qualified town assessor, occurring before the assessment proceedings for the year have been commenced, does not deprive the surviving assessors, constituting a majority of the board, of power to assess the taxes for the year, and, consequently, taxes assessed by a board of assessors so constituted are valid. *Cooke v. Scituate (Mass.)*, 16-421.

Liability of assessing officers. — Where the magistrates of a county are by statute *ex-officio* members of a body charged with the duty of levying taxes, the duties performed as such members are *quasi* legislative in character; and for a levy of taxes in excess of the constitutional limit neither they nor the sureties on their bonds are liable in damages. *Com. v. Kenneday (Ky.)*, 4-940.

5. ASSESSMENT AND VALUATION OF PROPERTY.

a. Assessment proceedings.

Assessment of property not a judicial function. — The assessment of prop-

erty for purposes of taxation is not a judicial function, and the Kansas statute providing for an appeal to the district court from the amount of an assessment made by a county board of equalization is unconstitutional and void. *Silven v. Board of County Com'rs* (Kan.), 14-163.

Effect of constitutional provision for election of county assessor and county treasurer. — The effect of the Colorado constitutional provision regarding the election of a county assessor and a county treasurer in each county, and making the treasurer the collector of taxes, is presumably to invest these officials alone with the duties incident to the assessment and collection of taxes. *Chase v. Boulder County* (Colo.), 11-483.

Making of assessment at wrong place. — The Virginia statute providing that any person erroneously assessed with county or city taxes may apply for relief within two years after the assessment does not preclude the committee of a lunatic, when sued for taxes assessed more than two years previously, from setting up the defense that the assessment was made at the wrong place, especially where it does not appear that the committee knew of the assessment until notice of suit was served upon him. *Hurt v. Bristol* (Va.), 7-679.

Name of taxpayer. — Until distributed, personal property is to be assessed for taxation in the name of the executor though it may thereafter become exempt in the hands of the legatee. *Com. v. Williams* (Va.), 1-434.

Effect of return by taxpayer. — Where a taxpayer has furnished an assessor with a statement of his property, and the assessor relying thereon has assessed the property therein described against the person furnishing the list, such person will thereafter be estopped from denying the ownership of the property in an action to enjoin the collection of the taxes. *Inland Lumber, etc., Co. v. Thompson* (Idaho), 7-862.

Failure of taxpayer to make return. — A statutory method of tax assessment under which property withheld from return for taxation, even in good faith on the part of the taxpayer or under an honest belief that the property is not subject to taxation, must be valued in an assessment which is final and conclusive except for fraud by the officer making it, and without notice to the taxpayer or an opportunity for a hearing, and without any opportunity for relief in the state courts in proceedings to collect the taxes or to enjoin their collection, denies that due process of law which is guaranteed by the Fourteenth Amendment of the Federal Constitution and is invalid. *Central of Georgia R. Co. v. Wright* (U. S.), 12-463.

Listing of tracts and town lots in separate tables. — The provision of the West Virginia statute relative to taxation, that tracts of land shall be listed in one table and town lots in another, is directory merely, and a failure of the assessors to comply therewith does not invalidate an assessment. *Fleming v. Charnock* (W. Va.), 18-711.

Assessment after death of owner of property. — The right of the officers who are empowered and charged with the duty to see that omitted property is subjected to taxation is a continuing one against each and every taxpayer, and is not terminated with the death of the latter; but proceedings in discharge of such duty can be maintained against his estate after his death, and the notice required by the law may be served upon his administrator or executor. *Gamble v. Patrick* (Okla.), 18-348.

Power of county auditor to change assessment. — While the auditor of a county has the power to list for taxation property omitted, he is not authorized to change the assessment made by the proper township assessor on property listed after return by a taxpayer. *Parkinson v. Thompson* (Ind.), 3-677.

Liability of assessor for erroneous assessment. — The valuation of property for taxation by a tax assessor partakes of the nature of a judicial act, and the assessor cannot be held liable in damages for an alleged overvaluation and erroneous assessment of the property, where it is not claimed that the assessor acted corruptly or in bad faith. *Daugherty v. Bazell* (Ky.), 13-677.

b. Valuation of property.

Ascertainment of amount on deposit. — In estimating the amount of money on deposit in bank subject to taxation, outstanding checks drawn by the depositor in good faith before the day of the assessment are to be deducted from the balance shown by the books of the bank. *Com. v. Kentucky Distilleries, etc., Co.* (Ky.), 18-1156.

Deduction of indebtedness of taxpayer. — In an assessment of personal property for taxation under the Maine statute, the amount which the person to be taxed owes is to be deducted from the money which he has at interest and the debts due him. *Taylor v. Caribou* (Me.), 10-1080.

The Maine statute providing for the assessment of personal property for taxation makes no distinction between money at interest and debts due the person to be taxed as to his right to have the same reduced in the assessment by the amount of the debts which he is owing. *Taylor v. Caribou* (Me.), 10-1080.

c. Description of property.

Necessity for sufficient description of property. — A sufficient description of the property intended to be assessed and taxed is inherently essential to a valid tax. *State Finance Co. v. Mather* (N. Dak.), 11-1112.

Assessment by lot number in absence of recorded plat. — A valid judgment for taxes cannot be rendered where the property taxed has been assessed as a lot of a certain number in a subdivision of a certain block and there is no recorded plat in the county showing such lot. *Joliet Stove Works v. Kiep* (Ill.), 12-227.

Absence of description of right of way of railroad excepted from assessment. — A description of a parcel of land

assessed for taxation, which excepts, without description, the rights of way of two railroad companies which are within the parcel and are exempt from taxation, is sufficient as it will be presumed that such rights of way are shown by recorded deeds. *Grand Rapids, etc., R. Co. v. Grand Rapids (Mich.)*, 4-1195.

d. Assessment of omitted property.

Power and duties of county assessors. — County assessors have the power and are therefore charged with the duty of searching for omitted property back of the current year and causing it to be taxed. *State v. Goldthait (Ind.)*, 19-737.

Power of county board of equalization. — Under the Wyoming statute the county board of equalization may add omitted taxable property to the roll and assess its value, though the property has not been assessed and the name of the owner does not appear on the roll until entered thereon by the board. *Horton v. Driskell (Wyo.)*, 3-561.

Power of board of review. — Under the Illinois statutes the power to list and assess omitted property for taxation is vested exclusively in the board of review. *Stevens v. Henry County (Ill.)*, 4-136.

Delegation of duty of discovering omitted property to private individual. — The Colorado statute giving to the treasurer and the assessor of a county the power to discover taxable property, and providing means and facilities whereby they shall bring to light omitted assessable property, places upon these officials also the duty of discovering unassessed property, and prevents the delegation of such duty by the county commissioners to a private individual. *Chase v. Boulder County (Colo.)*, 11-483.

Contract with private individual for discovery of omitted property. — The Colorado statute providing that the powers of a county as a body politic shall be exercised by a board of county commissioners, and that the county shall have power "to make all contracts, and do all other acts in relation to the property and concerns necessary to the exercise of its corporate or administrative powers," and vesting in the board of commissioners power "to represent the county, and have the care of the county property and the management of the business and concerns of the county, in all cases where no other provision is made by law," does not give the board of commissioners of a county implied power to enter into a contract with a private individual by which the latter is to discover and report to the county treasurer or assessor property theretofore omitted from taxation in the county, and to receive in consideration for his services a commission of a certain per cent. upon the amount of taxes received by the county as the result of his efforts. *Chase v. Boulder County (Colo.)*, 11-483.

A person who has entered into a contract with county commissioners to discover and report unassessed taxable property, for a percentage of the taxes collected as a result of his efforts, cannot maintain an action for

breach where the property reported has not been assessed nor the tax collected, and the damages arising from the breach are therefore purely speculative and conjectural. *Chase v. Boulder County (Colo.)*, 11-483.

e. Notice and opportunity to be heard.

Statute and published notice as notice to taxpayers. — The Idaho statute prescribing the time for the meetings of the board of equalization, and the notice published by the clerk of the board, constitute notice to taxpayers of the meetings of the board and of their right to appear at such meetings and protest against any assessments or any action by the board in relation to assessments. *Inland Lumber, etc., Co. v. Thompson (Idaho)*, 7-862.

Assessment before final adjournment of board of equalization. — Under the Idaho Revenue Act it is the duty of the board of equalization to order the assessor to assess any property which has escaped assessment, and where such assessment is made before the final adjournment of the session of the board, the taxpayer has his opportunity of being heard and the assessment is not void for want of notice to the taxpayer or of opportunity for him to be heard. *Inland Lumber, etc., Co. v. Thompson (Idaho)*, 7-862.

Personal notice not necessary. — The notice which is essential to the validity of every assessment for taxation, need not be personal, but is sufficient if it is given by a law designating the time and place where the parties may contest the justice of the valuation. Such a notice is furnished by the provisions of law relating to the taxation of the stock of the city of Baltimore, requiring the city register to be furnished with a copy of the lists of holders of loans of the city setting forth the assessed values of the stock mentioned therein, and providing for appeal to the courts for the review of any assessment deemed to be excessive. *Baltimore v. State (Md.)*, 11-716.

f. Appeal and review by boards of equalization.

(1) In general.

Delegation of power to equalize taxes. — The power to equalize taxes is not legislative, but may be delegated by the legislature to a board created for the purpose. *Foster v. Rowe (Wis.)*, 8-595.

Power to equalize taxes quasi-judicial. — The power delegated to a board to equalize taxes is in its nature quasi-judicial and not legislative. *Foster v. Rowe (Wis.)*, 8-595.

Review of action of county boards. — Statutes creating boards to review the equalization of taxes by county boards are not in contravention of the due process of law clause of the Constitution of the United States because no provision is made for giving notice to taxpayers, nor do such statutes deny to the taxpayer the "equal protection of the laws" within the meaning of the Fed-

eral Constitution. *Foster v. Rowe* (Wis.), 8-595.

A statute creating a board to review the equalization of taxes by a county board, and providing for the appointment of the members by the circuit judge, is not unconstitutional because it imposes nonjudicial powers upon the circuit judge. *Foster v. Rowe* (Wis.), 8-595.

Equalization of taxes between municipalities. — It is within the power of the state legislature to provide for the equalization of taxes between municipalities, and for the increase of the amount to be collected in a municipality in which it is found that there has been an undervaluation of property. *Foster v. Rowe* (Wis.), 8-595.

Authority of county treasurer. — The supervisory authority of the county treasurer who, as such, is the supervisor of assessments of the county is wholly confined to the township assessors. Neither he nor his deputy has any supervision over the board of review. *Stevens v. Henry County* (Ill.), 4-136.

Competency of member to contradict his official certificate. — A person who as a member of the Maryland appeal tax court has certified an assessment, is not afterwards competent to contradict his official certificate by testifying to acts which in his judgment rendered the assessment illegal. *Baltimore v. State* (Md.), 11-716.

(2) Proceedings of board.

Presumption of regularity. — The presumption is in favor of the regularity of the proceedings of commissioners to equalize taxes, and whoever attacks them must show affirmatively a want of jurisdiction. *Foster v. Rowe* (Wis.), 8-595.

Discretion as to taking testimony. — By the provisions of the Wisconsin statutes, commissioners to review the equalization of taxes by county boards are vested with a broad discretion respecting the taking of testimony. They are not bound to take all evidence offered, but only the evidence of such taxpayers as in their judgment may tend reasonably to aid them in the performance of their duties. *Foster v. Rowe* (Wis.), 8-595.

Under the Wisconsin statutes, commissioners to review the equalization of taxes by county boards may refuse to hear evidence that property was omitted from the tax roll in a certain city. *Foster v. Rowe* (Wis.), 8-595.

Increase of assessment by board. — Under the Tennessee statutes the board of equalization may either increase or reduce assessments, and an increase is not rendered invalid by the fact that it is made by the board of its own motion, and not in a proceeding had pursuant to an appeal prosecuted by the taxpayer. *State Nat. Bank v. Memphis* (Tenn.), 8-22.

Finality of proceedings. — The proceedings of a board to equalize taxes, if conducted in good faith and within its juris-

diction, are final and conclusive. *Foster v. Rowe* (Wis.), 8-595.

Effect of repeal of statute creating board. — The repeal of a statute creating a board of commissioners to equalize taxes does not extinguish the right to carry into effect the readjustment of taxes which the commissioners have made, where the repealing statute contains a saving clause to the effect that any pending proceedings shall proceed to final determination the same as if the act had not been passed, and where the commissioners have fully performed their duties and made their determination before the repeal. *Foster v. Rowe* (Wis.), 8-595.

6. PAYMENT OF TAXES.

Presumption of payment. — No presumption of payment to the state of taxes on land returned delinquent arises merely from lapse of time. *Mills v. Henry Oil Co.* (W. Va.), 4-427.

Interest on delinquent taxes. — In the absence of statute so providing, delinquent personal property taxes do not bear interest, either from the date of delinquency or from the date of an order for judgment made in proceedings to enforce payment thereof. *State v. New England Furniture, etc., Co.* (Minn.), 16-470.

7. COLLECTION OF TAXES.

Constitutionality of statute providing for proceedings to compel payment. — The North Dakota statute conferring upon county commissioners authority to institute proceedings to enforce the payment of taxes extends in operation to each county in the state and is not unconstitutional as local or special legislation. *Picton v. Cass County* (N. Dak.), 3-345.

The North Dakota statute providing for the enforcement by judicial proceedings of the payment of taxes upon property sold to the state or county, and remaining unredeemed for a certain period, and giving to the boards of county commissioners discretionary authority to institute such proceedings, is not open to the objection that it delegates legislative power to said boards. *Picton v. Cass County* (N. Dak.), 3-345.

Common-law actions. — In the absence of express statutory authorization a municipal corporation cannot maintain a common-law action for the collection of a tax levied by it. *Rochester v. Bloss* (N. Y.), 7-15.

Recovery of penalties in common-law action. — The New York statute authorizing the city of Rochester to maintain common-law actions for the collection of taxes levied by it does not authorize the city to recover in such actions penalties provided by its charter for the nonpayment of taxes, as the statute does not expressly provide for the collection of such penalties. *Rochester v. Bloss* (N. Y.), 7-15.

Effect of charter provision providing complete system. — Where a city's charter contains a complete system for the assessment, levying, and collection of taxes,

the city can pursue no remedy for the collection of taxes other than that prescribed by its charter. *Rochester v. Bloss* (N. Y.), 7-15.

Tax liens. — The Pennsylvania Act of June 4, 1901, repealing the Act of Feb. 3, 1824, but re-enacting in substantially identical terms the provisions of the earlier act as to the priority of payment of liens for taxes, etc., continued *eo instanti* the provisions of the former law so that municipal claims for taxes, water rents, paving, etc., filed as liens of record after the date of the latter act, take priority as against mortgages made prior to that act, where the proceeds of sales under the mortgages are not sufficient to pay both. *Haspel v. O'Brien* (Pa.), 11-470.

Set-off against taxes. — If the owner of property, upon which taxes are due, has against the city a debt equal in amount to the taxes due by the owner to the city, this fact will not prevent the city from collecting such taxes. *Tarver v. Dalton* (Ga.), 20-281.

Taxes as trust funds in hands of collecting officer. — Taxes collected by a deputy sheriff are the property of the state and county, and constitute trust funds in his hands, subject to all the rules of law governing such funds. *Hill v. Fleming* (Ky.), 16-840.

Payment over by tax collector. — A tax collector must pay over to the proper authorities all taxes collected by him, and in no event can he deny the right of the state or county to receive the amount of a tax which has been voluntarily paid by the taxpayer, and which is still in the possession of the collector. *Adams v. Saunders* (Miss.) 11-327.

Parties to mandamus to compel collection of taxes. — A taxpayer applied for mandamus to compel the municipal authorities to collect taxes on property of a private corporation in the city subject to taxation, and the municipal authorities claimed in their answer that the property was not liable for such taxes, by reason of a contract between the city and such private corporation, which had no objection to being made a party defendant to such proceedings. Held, that it was not error, upon motion of the municipal authorities, to make the owner of the property a party to such proceedings. *Tarver v. Dalton* (Ga.), 20-281.

Motion to make mandamus absolute. — A motion by the relator to make the mandamus absolute involves the determination of the question as to whether or not the averments in the answers afford a sufficient reason why the mandamus should not be made absolute. *Tarver v. Dalton* (Ga.), 20-281.

In this case it was error to refuse to make the mandamus absolute, the answers setting up no sufficient reason why this should not be done. *Tarver v. Dalton* (Ga.), 20-281.

Tax on municipal securities. — The obligation imposed upon the city of Baltimore by statute to pay the state tax due from the holders of city loans or stock, and

retain that amount out of the interest due on the stock, is a direct statutory obligation for the breach of which an action at law against the city may be maintained, the contention that the holder of the stock and not the city is directly liable for the payment of the tax not being tenable. The city cannot escape responsibility for the payment of such taxes upon the ground that the owners of the stock taxed are state or national banks or other incorporated institutions doing business in the state and are exempt from taxation under the statute, such corporations not being exempt from taxation, in any true sense, on any city stock of which they may from time to time happen to be holders. *Baltimore v. State* (Md.), 11-716.

The state is entitled to recover interest on an unpaid tax indebtedness of a city from and after the time when, under the statute, the tax was required to be paid. *Baltimore v. State* (Md.), 11-716.

8. REMEDY FOR ERRONEOUS TAXATION OR ASSESSMENT.

Grounds for injunction against collection of tax. — An injunction to prevent the collection of taxes will not be granted because of the failure of the assessor to attach to the assessment roll the oath required by statute. It must appear that the tax itself is inequitable, for the reason that the property is not taxable, or that it is not the property of the complainant, or the like. The fact that the Wyoming statute authorizes an injunction to restrain the illegal levy or collection of taxes does not affect this principle. The effect of such statute merely is that the complainant is not required to show a case of threatened irreparable injury or the absence of an adequate remedy at law. *Horton v. Driskell* (Wyo.), 3-561.

Inadequacy of remedy at law. — The inadequacy of the remedy at law, and the right to an injunction, against the collection of a grossly unfair and discriminating tax, is established where it appears that the tax if paid would pass into the hands of a number of different taxing bodies and could be recovered from them only by a multiplicity of suits, that the proportion going to the state could not be recovered at all, and that the payment of the full amount of the tax would cause the insolvency of the corporation, which is engaged in the operation of a street railway, and would greatly embarrass and injure the public having to use its cars. *Raymond v. Chicago Union Traction Co.* (U. S.), 12-757.

Joinder of parties plaintiff in bill to enjoin collection of taxes. — Persons against whom an unlawful exaction in the form of a tax is sought to be made may unite in an application for an injunction to restrain the collection of the tax, and need not pay the same and bring separate suits against the tax officer for damages. *Hewin v. Atlanta* (Ga.), 2-296.

Allegations of bill to enjoin collection of taxes. — In a suit to enjoin the collection of taxes on the ground that the

plaintiff has no property in the county subject to taxation, he need not allege or prove that he has made application to the board of equalization to correct the assessment. *Horton v. Driskell* (Wyo.), 3-561.

Burden of proof in action to enjoin collection of taxes. — In an action by a taxpayer to enjoin the collection of a tax on the ground that the county auditor exceeded his authority by increasing the assessment, the burden is on the plaintiff to prove that fact; and a judgment in his favor will be reversed on appeal where a finding that he properly listed and returned all his property is not fairly supported by the evidence and there is no substantial conflict in the evidence. *Parkison v. Thompson* (Ind.), 3-677.

Necessity for offer to pay taxes justly assessed. — A landowner who seeks relief in a court of equity against a sale of land for taxes, a portion of which are justly due, must first do equity by paying or offering to pay the taxes justly assessable against him. *Grand Rapids, etc., R. Co. v. Grand Rapids* (Mich.), 4-1195.

What constitutes payment of taxes justly due. — The rule that the amount of a tax fairly and equitably due must be paid before equity will enjoin the collection of an excessive and illegal tax is complied with where a corporation against which a grossly unfair and discriminating assessment has been made by a state board of equalization pays the amount of tax due by it according to the rate applied to other property and other corporations of the same class within the state. *Raymond v. Chicago Union Traction Co.* (U. S.), 12-757.

9. RECOVERY BACK OF TAXES PAID.

As to the right of a corporation paying for its stockholders taxes illegally assessed against its stock to recover the amount so paid, see 11, *infra*.

Facts essential to plaintiff's recovery. — In order to be entitled to maintain an action of assumpsit to recover a license tax, which is claimed to have been wrongfully exacted, the plaintiff must show that the defendant had no authority to impose the tax, that it actually received the money, and that the payment was not voluntarily made. *Phœbus v. Manhattan Social Club* (Va.), 8-667.

Where payment was not made under compulsion. — Taxes paid under protest cannot in the absence of statute be recovered back, where the taxpayer is not sued, or no suit or restraint is threatened or compulsion of any kind is used or threatened to enforce such payment, as a payment under such circumstances is voluntary in the contemplation of the law. *Monaghan v. Lewis* (Del.), 10-1048.

What does not constitute payment under compulsion. — The payment of a license tax to a municipality is not an involuntary payment because made under protest and induced by a threat to begin a criminal prosecution for nonpayment of the tax. *Southern R. Co. v. Mayor, etc.* (Ala.), 3-106.

Merely making a declaration when paying an illegal license fee that the payment is made under protest is not of itself sufficient to make the payment involuntary. *Phœbus v. Manhattan Social Club* (Va.), 8-667.

Effect of voluntary return of property for taxation. — One who voluntarily hands in to an assessor of a certain county a list of property which he represents is liable to assessment in that county, and pays the taxes levied thereon, is thereby estopped from recovering back the taxes so paid on the ground that the property is not properly assessable in that county. Section 1417 of the Iowa Code, which provides for the refunding of taxes found to have been erroneously or illegally exacted or paid, has no application to such a case. *Slimmer v. Chickasaw County* (Ia.), 17-1028.

Effect of agreement with taxpayer. — A city, when it is about to distraint for taxes, may make an agreement with a taxpayer that a payment made by him is made under protest; and such an agreement, when made, should be carried out in any subsequent litigation concerning the payment. *State Nat. Bank v. Memphis* (Tenn.), 8-22.

Attack on action of board of equalization in proceeding to recover back taxes paid. — In an action for the recovery of taxes paid under protest, the plaintiff cannot attack the validity of an action taken by the board of equalization on the ground that one of its members was not a freeholder, as that question cannot be raised in a collateral attack. *State Nat. Bank v. Memphis* (Tenn.), 8-22.

10. TAX SALES.

a. The sale.

Sale to highest bidder after two offers at public sale without sufficient bid. — By virtue of the provision of the Indiana statute of 1895, governing the city of Evansville, that "the laws of the state of Indiana concerning the assessment of property for taxation and the collection of taxes, the sale of property for delinquent taxes, the enforcement of the lien by foreclosure, or other proceedings, so far as the same are not in conflict with this act," shall apply to the city, the statute of 1903 providing that land which has been offered for sale for delinquent taxes for two successive years without receiving the bid required by law can be sold for delinquent taxes to the highest bidder at the regular tax sale of 1904, applies to the city, notwithstanding the existence of the statute of 1901, authorizing the city to foreclose its lien for delinquent taxes against real estate which has been offered for sale three times. *State v. Leich* (Ind.), 9-302.

b. Irregularities as affecting validity of sale.

(1) Fatal irregularities.

Insufficient description. — The term "East middle" of a given town lot, as used in a tax sale certificate, is unintelligible. *State Finance Co. v. Mather* (N. Dak.), 11-1112.

Sale of exempt property. — When the property of a banking association which is exempt from taxation is sold for taxes and is purchased by an individual who takes a certificate in his own name, the tax and the certificate are void, and the rule precluding the recovery back of taxes paid voluntarily is inapplicable, even though the bank is in effect the real purchaser. *First Nat. Bank v. Douglas County (Wis.)*, 4-34.

Sale for taxes which owner has offered to pay. — Where the owner of land applies in good faith to the proper officer for the purpose of paying taxes on the land, but payment is prevented by the erroneous statement of the officer that such taxes have already been paid, or by other mistake or fault on his part, the attempt to pay is deemed the legal equivalent of payment in so far as to discharge the lien and bar a sale for nonpayment. *Gleason v. Owens (Wash.)*, 17-819.

Evidence that sale was erroneously made. — The entry provided for in the Illinois Revenue Act, to be made by the county clerk upon the tax record, that a tax sale has been erroneously made, is not the only evidence of that fact that a court may receive. *Juliet Stove Works v. Kiep (Ill.)*, 12-227.

(2) Immaterial irregularities.

Failure to verify assessment roll. — An objection to a tax sale under the North Dakota tax law of 1897 that the assessment roll was not verified is barred by section 1263 of the Revised Codes of 1899, the verification being merely a legislative requirement that is neither inherently nor constitutionally essential to an assessment. *State Finance Co. v. Mather (N. Dak.)*, 11-1112.

Failure to attach assessor's affidavit to assessment roll. — The failure to attach to the assessment roll the prescribed assessor's affidavit does not invalidate a tax sale of real property made under the North Dakota revenue law of 1897. *State Finance Co. v. Mather (N. Dak.)*, 11-1112.

Mistakes and irregularities in delinquent list, posted notice, and newspaper advertisement. — Under the West Virginia statutes relative to taxation, mistakes or irregularities in the delinquent list, the posted notice of delinquent land sales, and the newspaper advertisement of sale, as regards the description of the property, its location and quantity, and the residence of the owner, are cured by the making of the tax deed. *Fleming v. Charnock (W. Va.)*, 18-711.

Want of valid affidavit to sheriff's return. — Under the West Virginia statutes relative to taxation the want of a valid affidavit to the sheriff's return of sales made for taxes, is cured by the making of the tax deed. *Fleming v. Charnock (W. Va.)*, 18-711.

c. Tax deeds.

Deed not void on its face. — A tax deed is not void upon its face when it gives the name of the grantee, the numbers of the

tax certificates, the dates of the tax sales for unpaid taxes of stated years, the name in which the property was assessed, the amount paid for the certificates, a description of the land, besides the other recitals prescribed by the statute, and the execution is in the prescribed form. *Cowan v. Skinner (Fla.)*, 11-452.

Presumptions to support deed. — Where two tracts of land lying contiguous and under the same ownership are separately taxed in the same amount for a certain year, are sold for the nonpayment of such taxes, and are thereafter deeded to the purchaser in consideration of such taxes and subsequent taxes for the three intervening years, and the deed recites as the consideration therefor, not the separate amount against each tract, but the total amount of taxes, interest, and costs, the deed, in an action commenced more than five years after the recording thereof, will not be held void as not complying with the requirements of section 7677 of the Kansas General Statutes of 1901; and in such a case, to support the deed it will be presumed either that the two tracts continued to be separately taxed in equal amounts, or, subsequent to the sale, were taxed together as one tract; in either of which cases the consideration for the conveyance is one-half the total consideration. *Nagle v. Tieperman (Kan.)*, 10-977.

Recitals. — The statute does not require a tax deed to recite the particular certificate on which the deed was issued when there are several certificates covering the land, nor does it require that the taxes for all the years subsequent to the original sale shall be accounted for in the tax deed. *Cowan v. Skinner (Fla.)*, 11-452.

Tax deed as evidence of regularity of proceedings. — Where a tax deed is executed in compliance with the form and substance of the statute, it is by statute made *prima facie* evidence of the regularity of the proceedings from the valuation of the land to the date of the deed. *Cowan v. Skinner (Fla.)*, 11-452.

Tax deed issued before expiration of period of redemption. — A tax deed issued before the expiration of the period of redemption is void, and is not validated by the subsequent failure of the original owner to redeem, and therefore such deed is not a good defense to an action of ejectment brought by the person who owned the land at the time it was originally sold for taxes, and who holds a later and valid tax deed issued by the state pursuant to a sale for taxes assessed for years other than those covered by the void tax deed, even though the plaintiff has not given the defendant the statutory notice to redeem. *Griffin v. Jackson (Mich.)*, 9-74.

Right to have deed reformed. — The holder of a tax deed has no right to have it corrected or reformed. *Batelle v. Knight (S. D.)*, 20-456.

d. Redemption from tax sales.

Decree under code declaring land redeemed. — A decree under the West Vir-

ginia Code fixing the amount for redemption of forfeited land and declaring the land redeemed and exonerated by payment of such amount is conclusive to release title vested in the state by such forfeiture, though taxes of some years were not included, and it cannot be collaterally attacked for error. *Mills v. Henry Oil Co.* (W. Va.), 4-427.

Materiality of error in notice of expiration of time for redemption. — Whether an error in a notice of the expiration of the period of redemption from a sale for taxes is material depends upon the character of the error and the particular circumstances of the case in which it occurs, viewed in the light of the rule that the statutes must be strictly complied with. *Shine v. Olson* (Minn.), 19-962.

Error in statement of amount due in notice of expiration of time for redemption. — Where a notice of the expiration of the time for redemption from a tax sale gives the amount required to redeem as the amount of principal and interest computed to the date of the notice, and interest on that sum from the date of notice to the day of redemption, the notice is void. *Shine v. Olson* (Minn.), 19-962.

While it is the rule that the law does not regard an error which is a mere trifle, the determination as to what is a trifle must depend upon the facts in each case, and whether an error amounting to a few cents will be disregarded depends to some extent upon the amount of the original tax in connection with which the error occurs. *Shine v. Olson* (Minn.), 19-962.

e. Proceedings in equity to set sale aside.

Complaint failing to show sufficient grounds. — A complaint in equity asking the court to quiet title to land by setting aside the sale of the same for taxes does not show ground for equitable interposition where it fails to allege the illegality of the taxes and where the complainants appear to have been guilty of laches. *Clay v. Bilby* (Ark.), 1-917.

f. Tax titles.

(1) Who may acquire.

Wife of owner of land. — A wife, not being in possession or receiving the rents and not being under any other legal or moral obligation to pay the taxes, may acquire title to land owned by her husband and others by a purchase at a sale for taxes or by purchasing a tax-sale certificate, provided such purchase is made in good faith and with her own money. *Nagle v. Tieperman* (Kan.), 10-977.

Tenant in common. — The rule inhibiting the assertion of an adverse tax title by one tenant in common against his cotenant is based upon a community of interest in a common title between parties having a common possession and a common interest in the safety of the possession of each, whereby such a relation of trust and confidence is created between the parties that it would be inequitable to permit one of them to do any-

thing to the prejudice of the other in reference to tax titles to the property so situated. *Hoyt v. Lightbody* (Minn.), 8-984.

One who, after his purchase of an undivided interest in land, buys tax certificates thereto, based on taxes assessed, in all cases, and sales made, in all cases but one, anterior to the transfer to him of the undivided interest, and who perfects these tax certificates by elimination of the right of redemption, is not permitted in law to assert the resulting tax titles adversely to his cotenant. *Hoyt v. Lightbody* (Minn.), 8-984.

Effect of statute permitting owner of undivided interest to redeem by paying part of taxes. — The Minnesota statute permitting the holder of an undivided interest in land to redeem his estate by paying into the treasury a proportionate part of the amount of taxes required to redeem the whole, does not necessarily or invariably remove the general inhibition against the assertion of an adverse tax title by one cotenant against another. *Hoyt v. Lightbody* (Minn.), 8-984.

Joint tenant. — A tax title acquired by one joint tenant inures to the benefit of all his cotenants. *Morange v. Doe* (Ala.), 5-331.

Mortgagee. — A person holding a mortgage upon property may acquire title to the mortgaged premises by purchase at tax sale and obtaining a tax deed therefor. *Jones v. Black* (Okla.), 11-753.

Holder of adverse title. — As to how the benefit of a title to land forfeited for nonpayment of taxes may be acquired by the holder of an adverse title under the West Virginia constitution, see *Mills v. Henry Oil Co.* (W. Va.), 4-427.

(2) Nature of title acquired.

Where purchaser at sale conveys land to another. — Where the holder of a deed of trust on land, which has been given to secure deferred instalments of purchase money, advertises a sale of the land to pay such instalments, and the sale is enjoined, and during the pendency of the injunction suit the land is regularly returned delinquent for the nonpayment of taxes and is legally sold and conveyed to a person who, after taking the conveyance, sells and conveys the land, the grantee of such purchaser secures a good title to the land. *Wingfield v. Neall* (W. Va.), 9-982.

Evidence insufficient to show that purchaser was trustee for tax debtor.

— Where an individual purchases the property of a bank sold at a tax sale and holds the tax certificate in his own name, evidence that he purchased at the procurement of the bank's attorney, who borrowed from the bank on a note a sum sufficient to buy the tax certificate, is insufficient to show that the bank was in effect the purchaser. *First Nat. Bank v. Douglas County* (Wis.), 4-34.

(3) Rights of purchasers of defective titles.

Application of rule of caveat emptor. — In the absence of express legislation to the contrary, a tax sale is subject to the

rule *caveat emptor*, and in the case of an eviction the purchaser has no recourse against the municipality under the authority of which a sale has been made, either for damages or for reimbursement of the purchase price, his only remedy being such as may be provided by statute or by the constitution of the state. *Lindner v. New Orleans* (La.), 7-919.

Right to recover taxes subsequently paid. — Under the Illinois Revenue Act the purchaser at a tax sale, or any one holding under him, of lands not subject to taxation, or on which the taxes have been paid prior to the sale, or sold under double taxation, or so imperfectly described as to render the sale void, can recover from the owner of the property any taxes subsequently paid thereon, with ten per cent. interest, until barred by the five-year statute of limitations. *Joliet Stove Works v. Kiep* (Ill.), 12-227.

Under such statute the purchaser at an erroneous sale specified by the statute, or one holding under him, is not prevented from recovering the taxes paid, by the doctrine of *caveat emptor* as applied at common law to a tax purchaser to whom a tax deed has issued. *Joliet Stove Works v. Kiep* (Ill.), 12-227.

Right to recover purchase money from county. — On the cancellation of the certificate issued to the purchaser of exempt property sold for taxes illegally assessed by a county, the purchaser is entitled to recover from the county the money paid for the certificate. *First Nat. Bank v. Douglas County* (Wis.), 4-34.

Reimbursement of purchaser by owner of land. — Where a person whose land has been sold for taxes under an invalid tax sale comes into a court of equity and asks for a decree setting aside the sale and quieting his title to the land, and it appears that the property was subject to taxation and that the plaintiff would have been in duty bound to pay the taxes levied thereon had it not been for irregularities in the tax proceedings, he should be required to reimburse the purchaser at the tax sale for taxes paid by the latter, as a condition precedent to relief, on the principle that he who seeks equity must do equity. *Larson v. Peppard* (Mont.), 16-800.

In an action in equity to set aside an invalid tax sale, where the plaintiff establishes the other facts entitling him to relief, the proper practice is for the court to make an order requiring him to pay to the purchaser at the tax sale all taxes paid by the latter upon the property, with interest thereon at the legal rate, within a reasonable time fixed by the order. If such payment is made, then a decree quieting plaintiff's title should be entered, but if it is not made within the time allowed, plaintiff should be denied any relief whatever. *Larson v. Peppard* (Mont.), 16-800.

In such a case, however, the purchaser is not entitled to interest at the rate of two per cent. per month upon the taxes which he has paid, but only to interest at the legal rate. The rule allowing interest at the rate

of two per cent. per month applies only to a proceeding to redeem from a tax sale, and an action to set aside an invalid sale is not such a proceeding. *Larson v. Peppard* (Mont.), 16-800.

Right of purchaser under invalid sale to lien for taxes paid. — A tenant in possession took out a tax deed of the land and conveyed to another, maintaining, however, his proper relation to the landlord owner. In an action of ejectment, to which the landlord was not a party, the tax deed was set aside and the tax-title purchaser was given a lien for taxes, which the claimant was required to satisfy before being let into possession. The claimant paid the amount of the lien, but did not gain possession of the land, and deeded it to another. The tax-title purchaser then procured a conveyance from the owner and brought an action to quiet title against the grantee of the ejectment claimant. Held, that the defendant should be regarded as the equitable assignee of the lien for taxes, and that equitable relief to the plaintiff should be conditioned upon its satisfaction. *Miller v. Dittlinger* (Kan.), 19-261.

Effect of actual possession by purchaser. — Where the defendant in an action of ejectment, or one under whom he claims, goes into actual possession of land purchased at tax sale under a tax deed regular on its face, but based upon a void assessment, such actual possession for the period of four years, prescribed by section 591 of the General Statutes of Florida, prior to the bringing of the action, will bar the suit. *Florida Finance Co. v. Sheffield* (Fla.), 16-1142.

Application statute of limitations where tax deed is void on its face. — A statute providing that an action to avoid a tax deed must be commenced within three years after the recording of such deed does not apply to a deed that is void on its face, and therefore the limitation does not run in favor of such a deed. *Batelle v. Knight* (S. D.), 20-456.

11. TAXATION OF CORPORATIONS.

a. Franchise taxes.

Taxation of federal franchise. — The property of a corporation which is engaged in interstate business under a federal franchise may be taxed by a state upon a valuation fixed with reference to its use and earning power, and the federal franchise may be included as an element in fixing such valuation; but a mere arbitrary tax upon such franchise with no fixed basis for valuation and as a distinct item separate and disassociated from the tangible property or capital stock of the corporation, cannot be sustained. *Western Union Tel. Co. v. Lakin* (Wash.), 17-718.

A city, in the exercise of its police power, may regulate the manner in which a telegraph company operating under a federal franchise shall conduct its business within the city limits, but it has no power to prohibit such corporation from carrying on its business, nor can an ordinance passed by the

city, which purports to grant to such company the right to operate within the city, be construed as granting an independent and original franchise, subject to taxation by the state. *Western Union Tel. Co. v. Lakin* (Wash.), 17-718.

Discrimination in franchise taxes. — Subjecting surface street railroads to franchise taxes while subsurface railroads are exempted does not deny to a surface street railroad company the equal protection of the laws. *People ex rel. Metropolitan St. R. Co. v. State Board of Tax Com'rs* (U. S.), 4-381.

A provision in the statute taxing public franchises as real property for the deduction of annual payments covered by existing contracts from the amount of tax levied, by reason of which deduction corporations which have agreed to pay for their franchises lump sums or annual amounts less than the new tax are discriminated against, does not result in a denial of the equal protection of the laws. *People ex rel. Metropolitan St. R. Co. v. State Board of Tax Com'rs* (U. S.), 4-381.

Taxation of franchise held not to impair obligation of contract. — A statute taxing public franchises as real property held not to impair the obligation of a contract in respect to a franchise granted by a municipal corporation to a street railway in consideration of an annual payment to the municipality. *People ex rel. Metropolitan St. R. Co. v. State Board of Tax Com'rs* (U. S.), 4-381.

Deprivation of property without due process of law. — A statute taxing public franchises as real property held not to deprive a street railway of property without due process of law where the company holds a franchise from the municipality under a contract for annual payments. *People ex rel. Metropolitan St. R. Co. v. State Board of Tax Com'rs* (U. S.), 4-381.

Place of imposition of franchise tax. — Under the California constitution, a corporation's franchise to produce and sell light, heat, and power is taxable in the county where it is exercised, and nowhere else, though the corporation's articles of incorporation declare its principal place of business to be in another county. *Stockton Gas, etc., Co. v. San Joaquin* (Cal.), 7-511.

Listing of property not including franchise. — The listing of property for taxation under the description "capital invested in merchandise and manufacturing" does not include the franchise of a water-works company. *Adams v. Bullock* (Miss.), 19-165.

b. Taxation of capital and shares of stock.

As to the power to tax corporate stock in the hands of an individual, see 2 c, *supra*.

As to the place of taxation of corporate stock, see 3 b, *supra*.

Taxation of stock in other corporation held by bank. — The tax statutes of Maine specifically subject a bank to taxation for its real estate although its shares are also subjected to taxation, but they do not

specifically subject to such taxation shares in other banks owned by it, and hence a bank cannot be held liable to taxation upon such shares. *East Livermore v. Livermore Falls Trust, etc., Co.* (Me.), 13-631.

To tax to the individual shareholders the shares of a bank and at the same time to tax to the bank the shares owned by it in other banks, imposes to that extent an extra burden on the shareholders of the bank so taxed. *East Livermore v. Livermore Falls Trust, etc., Co.* (Me.), 13-631.

Taxation of both capital stock and shares of stock. — As capital stock and shares of stock represent distinct property rights, both may be taxed without violating any established legal principle. *Judy v. Beekwith* (Ia.), 15-890.

Taxation of both shares of stock and property of corporation. — To tax the shares of a corporation to the shareholders, and to tax at the same time the property of the corporation to the corporation itself, imposes in effect, if not in theory, a double tax burden on the shareholders. *East Livermore Falls Trust, etc., Co.* (Me.), 13-631.

c. Taxation of gross receipts.

Application of constitutional requirement of uniformity and equality. — The Tennessee statute entitled "An act to reduce the fire waste in Tennessee by providing for the investigation of fires, and to provide for the expense of such investigations" (Acts of 1907, c. 460, p. 1538) being a police measure, enacted by the general assembly in the exercise of the police power of the state, the provision in section 6 thereof, that a tax of one-fifth of one per centum on the gross premium receipts of the fire insurance companies doing business in the state shall be levied and collected for the purpose of providing a fund for defraying the cost of the enforcement of the act, is not in conflict with section 28, article 2 of the constitution, which requires taxes to be equal and uniform throughout the state, nor is it invalid as vicious class legislation. The constitutional provision as to uniformity and equality of taxation applies only to *ad valorem* taxes, and has no application to police regulations or privilege taxes. *Rhinehart v. State* (Tenn.), 17-254.

The provision of the above statute that if any surplus of the amount collected by the fire insurance commissioner remains after defraying all expenses incurred by him in making investigations as required by the act, it shall be paid into the state treasury, does not make such charge upon the gross premium receipts of fire insurance companies a tax for revenue so as to bring it within the constitutional requirement as to uniformity and equality of taxation. *Rhinehart v. State* (Tenn.), 17-254.

d. Taxation of personality.

Location of principal office as governing situs of personality. — The principal office of a domestic corporation, as governing the situs of its personality for

purposes of taxation, is at the place where the officers of the corporation have their offices and where the business of the corporation is transacted, though meetings of stockholders and directors are held at another place which a by-law declares to be the principal office. A corporation cannot evade taxation in a municipality in which its principal office in fact is located by declaring that its principal office is elsewhere. *Georgia Fire Ins. Co. v. Cedartown (Ga.)*, 19-954.

Place of taxation of tangible personal property. — The Kentucky statute providing for the taxation of personal property of corporations organized under the laws of the state, whether the property be in or out of the state, is unconstitutional in its application to taxation of tangible personal property of domiciliary corporations located and employed in other states. *Union Refrigerator Transit Co. v. Kentucky (U. S.)*, 4-493.

The word "merchandise," as used in the Massachusetts statute providing for the taxation of franchises of domestic corporations, based upon the valuation of their "real estate, machinery, merchandise," etc., includes, so far as chattels are concerned, tangible property that may be the subject of a sale. A steamship is such a chattel and is not exempted from taxation by the fact that its owner uses it in the coastwise transportation of freight and passengers between domestic ports. *New England, etc., Steamship Co. v. Commonwealth (Mass.)*, 11-678.

Rolling stock of electric railway company. — The situs for taxation of the rolling stock of an electric railroad company is the place in which the company's principal office is located. *Board of Supervisors v. Newport News (Va.)*, 10-354.

e. Taxation of transfers of stock.

Transfers of stock of foreign corporation owned by nonresidents. — The New York statute imposing a tax on transfers of stock does not, as applied to shares of a foreign corporation owned by nonresidents, constitute a taking of property without due process of law, as it imposes a tax on the transfers and not on the property transferred. *New York ex rel. Hatch v. Reardon (U. S.)*, 9-736.

The New York statute imposing a tax on transfers of stock is not rendered violative of the commerce clause of the Federal Constitution by the fact that it taxes transfers within the state of certificates of stock issued by foreign corporations and owned by and transferred to nonresidents, as such transfers do not constitute interstate commerce. *New York ex rel. Hatch v. Reardon (U. S.)*, 9-736.

The New York statute imposing a tax on stock transfers does not violate the commerce clause of the Federal Constitution by the fact that it taxes a transfer within the state of certificates of stock issued by foreign corporations and owned and transferred by nonresidents. *People ex rel. Hatch v. Reardon (N. Y.)*, 6-515.

The New York statute imposing a tax on

stock transfers is not open to the objection that, by taxing the transfer within the state of stock certificates issued by foreign corporations and owned by nonresidents, it is virtually a tax on persons or property without the jurisdiction of the state. *People ex rel. Hatch v. Reardon (N. Y.)*, 6-515.

Taxation on basis of face value of stock. — The New York statute imposing a tax on transfers of stock is not rendered unconstitutional by the fact that it imposes a tax on the basis of the face value of the stock without regard to the actual value of the certificates sold or to the sum for which they are sold. *People ex rel. Hatch v. Reardon (N. Y.)*, 6-515.

The New York statute imposing a tax on transfers of stock is not rendered violative of the Fourteenth Amendment to the Federal Constitution by the fact that it imposes a tax on the bases of the face value of the stock without regard to the actual value. *New York ex rel. Hatch v. Reardon (U. S.)*, 9-736.

Taxation of transfers without regard to value. — The New York statute imposing a tax on transfers of stock, inasmuch as it imposes a tax of the same amount on each sale or transfer of a share of stock, irrespective of whether the share has a face value of \$100 or a face value of less than that amount, is unconstitutional in that the classification made by the legislature is purely arbitrary and unreasonable and constitutes an arbitrary discrimination in favor of one member of a class as against other members of the same class. *People ex rel. Farrington v. Mensching (N. Y.)*, 10-101.

Objection that classification is arbitrary, discriminating, and unreasonable. — The New York statute imposing a tax on stock transfers is not open to the objection that the classification made, by selecting one kind of property and taxing a transfer of that only, is so arbitrary, discriminating, and unreasonable as to deprive the persons selling the stock of their property without due process of law and to withhold from them the equal protection of the laws. *People ex rel. Hatch v. Reardon (N. Y.)*, 6-515.

The New York statute imposing a tax "on all sales or agreements to sell or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company, or corporation, made after the first day of June, 1905," of two cents "on each hundred dollars of its face value or fraction thereof," is not repugnant to the Fourteenth Amendment to the Federal Constitution as making an arbitrary discrimination between sales of stock and sales of other kinds of personal property, such as corporate bonds, especially as the statute is intended, not to discourage sales of stock, but merely to collect revenue in a convenient way. *New York ex rel. Hatch v. Reardon (U. S.)*, 9-736.

Taxation of transfers of stock on each share of a certain value "or fraction thereof." — The New York statute imposing a tax "on all sales or agreements to

sell, or memoranda of sales or deliveries, or transfers of shares or certificates of stock in any domestic or foreign association, company, or corporation" of two cents "on each share of one hundred dollars of face value or fraction thereof," must be construed as showing an intention to tax the sale of all shares of the face value of \$100, and also the sale of all shares of the face value of any fraction of \$100, the tax being the same in either case. *People ex rel. Farrington v. Mensching* (N. Y.), 10-101.

f. Taxation of foreign corporations.

Taxation of personal property and shares of stock within state. — Taxation, under the Maryland statutes, of a foreign corporation on its personal property permanently located within the state, after its shares of stock owned by a person residing within the state have been taxed against the owners, is not violative of the Fourteenth Amendment of the Federal Constitution, notwithstanding the fact that the personal property of domestic corporations is not taxed after their capital stock has been taxed. *William Wilkens Co. v. Baltimore* (Md.), 7-1192.

Under the Maryland statutes a foreign corporation may be required to pay state and municipal taxes on its personal property permanently located in a municipality within the state, notwithstanding the fact that the shares of the capital stock of the corporation owned by persons residing within the state have been taxed against the owners. *William Wilkens Co. v. Baltimore* (Md.), 7-1192.

Taxation under the Maryland statutes of a foreign corporation on its personal property permanently located within the state, after its shares of stock owned by persons residing within the state have been taxed against the owners, is not unconstitutional as being double taxation. *William Wilkens Co. v. Baltimore* (Md.), 7-1192.

g. Exemptions.

As to the liability of a corporation exempt from all taxation to assessment for local improvements, see 12 d *infra*.

Statutory exemption of "capital" of bank. — A statute providing that no tax shall be assessed upon the capital of a bank or banking association must be construed as including in the exemption from taxation such of the property of the bank as can be proved clearly to have been acquired with and to constitute part of the capital. *First Nat. Bank v. Douglas County* (Wis.), 4-34.

Where a bank claims its property to be exempt from taxation by a statute exempting capital, it has the burden of proving the exempt character of the property. *First Nat. Bank v. Douglas County* (Wis.), 4-34.

Effect of failure to include exempt property in taxable value of stock. — A bank has the right to insist that its exempt property shall not be taxed, notwithstanding the fact that the tax assessors did not include the value of the property in fix-

ing the taxable value of the shares of the bank's stock assessed against the owners thereof. *First Nat. Bank v. Douglas County* (Wis.), 4-34.

Effect of imposition of business or occupation tax on corporations. — The personality of a domestic corporation is not exempted from *ad valorem* taxes by the Georgia statute (Acts 1907, p. 37) which imposes a business or occupation tax on corporations. *Georgia Fire Ins. Co. v. Cedartown* (Ga.), 19-954.

Repeal of exemption. — An exemption from taxation, granted to a corporation in its charter, may be repealed and such corporation may be subjected to the payment of a recording tax on a mortgage owned by it as provided for by the New York Tax Law, as amended in 1906, where a constitutional provision giving the legislature the right to alter or repeal corporate charters existed at the time of the granting of the charter containing the exemption; and this is true although there was a conveyance of property to such corporation by an individual for charitable purposes, in consideration of the exemption. *People ex rel. Cooper Union v. Gass* (N. Y.), 13-678.

h. Assessment and proceedings thereon.

Time of assessment. — A corporation is estopped to assert that an assessment made against it on a certain date was made too late, where it appears that at the request of the corporation the assessment was on that date made against it in lieu of a prior assessment against the corporation's predecessor in business. *William Wilkens Co. v. Baltimore* (Md.), 7-1192.

Abatement of taxes. — The Maine statute (R. S., c. 9, § 74) barring "resident owners" who do not "make and bring in true and perfect lists of their polls and all their estates and personalty not by law exempt from taxation," from the right to make application to the assessors for an abatement of taxes, applies to "resident owners" only, and does not apply to a corporation which is a resident of another state, and such corporation may maintain an appeal from the refusal of the assessors to abate its taxes because it did not furnish a list of its taxable property. *Squire Co. v. Portland* (Me.), 20-603.

Effect of statute prohibiting appeal. — The Virginia statute prohibiting an appeal from the judgment of a state corporation commission ascertaining the value of the property of a railroad for the purpose of taxation and assessing the taxes thereon, does not preclude the taking of an appeal from the judgment of the commission fixing the situs for taxation of the rolling stock of the railroad company, where the judgment is rendered in a proceeding between the county and city to which the railroad company is not a party, and the sole object of the proceeding is to determine which of the municipalities is entitled to the benefit of the assessment the commission has made. *Board of Supervisors v. Newport News* (Va.), 10-354.

i. Recovery back of taxes paid by corporation.

Taxes on shares of stock. — Under the Tennessee statute providing for the taxation of the shares of stock in banks and certain other corporations, a corporation has a right to pay the taxes on its stock for stockholders; and if it pays under protest taxes illegally assessed, it may sue for and recover them for the benefit of its stockholders. *State Nat. Bank v. Memphis (Tenn.)*, 8-22.

12. EXEMPTIONS.

As to the effect of a constitutional exemption from taxation on the liability to special assessments, see 12 d, *supra*.

a. Power to create exemptions.

Power of legislature. — Where the constitution of a state declares that all property except that falling within certain enumerated classes shall be taxed, the legislature has no power to exempt from taxation any property other than that so enumerated. *Supreme Lodge v. Board of Review (Ill.)*, 7-38.

Construction of constitutional authority to grant exemptions. — The provision of the Tennessee constitution authorizing the legislature to exempt certain kinds of property enumerated must be strictly construed, and cannot be extended by construction to include property, such as state bonds, which is not enumerated. *State Nat. Bank v. Memphis (Tenn.)*, 8-22.

The provision of the Illinois constitution permitting the exemption from taxation of property used exclusively for charitable purposes does not authorize the legislature to exempt money collected and held by fraternal beneficiary societies for the purposes for which they exist. *Supreme Lodge v. Board of Review (Ill.)*, 7-38.

Power of municipality to grant exemption. — A municipality cannot exempt from taxation property which does not belong to any of the classes which the constitution of this state permits to be exempted. *Tarver v. Dalton (Ga.)*, 20-281.

Power of municipality to exempt property by contract. — A contract between the owner of property in a city and the municipal authorities of the latter, wherein it is provided that no taxes on such property above a specified amount (which is less than the amount of taxes due) shall be collected by the city, in consideration of specified privileges and benefits conferred on it by the owner of the property, is unlawful and not enforceable. *Tarver v. Dalton (Ga.)*, 20-281.

Where a taxpayer applies for mandamus to compel the municipal authorities to collect, for the years hereinafter referred to, taxes on property located in the city and subject to taxation for the year in which such application is filed and for seven years prior thereto, and the answers of the authorities aver that by reason of a contract between the owner of the property and the city, the municipal authorities of previous years collected no taxes during such years except

the amount specified in the contract, which was less than the amount of taxes due on such property, and the present municipal authorities, on account of such contract, are willing that no taxes other than those specified should be collected during the present year and that no other taxes should be collected for previous years, no sufficient facts are averred to show any legal settlement of such taxes, or to show any valid reason why they should not be collected for any of such years. *Tarver v. Dalton (Ga.)*, 20-281.

Exemption as part of consideration of contract with city. — A provision in a city's charter authorizing it to contract for water for fire and domestic purposes does not authorize it to exempt the property of the water company from taxation, and an exemption granted by the city cannot be sustained on the ground that it is a part of the consideration entering into the contract for the water supply. *Dayton v. Bellevue Water, etc., Co. (Ky.)*, 7-1012.

Exemption of estates below a certain sum in value. — An act exempting from taxation estates below a certain sum in value is not unconstitutional. *Taylor v. Guilbert (Ohio)*, 1-25.

b. General rules of construction.

Strict construction of exemption. — Exemptions from taxation are strictly construed, and therefore a claim of exemption cannot be allowed if the right thereto is doubtful. *State v. New Orleans R., etc., Co. (La.)*, 7-724.

Effect of sale to exempt corporation after lien has attached. — Land sold after a lien has attached for duly assessed taxes is not released from liability for such taxes by the fact that it is sold to a corporation, the property of which is exempt from taxation. *Philadelphia v. Pennsylvania Institution, etc. (Pa.)*, 6-437.

Extent of exemption from state taxes. — A statute by which a liquor tax is imposed upon social clubs, and which provides that the tax thereby imposed shall be in lieu of all other taxes for privileges granted, relates exclusively to taxes to be paid to the state, and does not exempt social clubs from municipal taxation. *Phæbus v. Manhattan Social Club (Va.)*, 8-667.

c. Particular subjects of exemption.

(1) Educational institutions.

Property leased for school purposes. — The sections of the Missouri constitution and laws providing that lots in cities used exclusively for schools shall be exempt from taxation do not apply to premises used exclusively by a public school but which are leased for such purpose by the owner for a fixed rental. *State ex rel. Hamme v. Macgurn (Mo.)*, 2-808.

Property of educational corporation having capital stock. — Property of a corporation having a capital stock formed for the business of conducting an educational institution which has the absolute ownership of

all realty and personalty employed in the enterprise, and the right to convey at will and to make disposition of the income derived from the fees charged for tuition and board, is not within the exemption from taxation created by the statute in favor of the property of educational institutions not used for purposes of private or corporate profit or income. *Brenau Assoc. v. Harbison* (Ga.), 1-836.

Where nominal charge is made for use of property by students. — Under a municipal ordinance exempting from water taxes and rates the property of any educational institution within the municipality which is used "in the immediate conduct and carrying on" of the educational purposes of such institution and which is not used "for gain or profit, or rented, conducted, maintained, or operated for the purpose of producing revenue for such institutions," the buildings used by a university exclusively as dormitories, dining halls, and as a club house, for its students, constitute property used in the immediate carrying on of the educational purposes of the university and are exempt from water taxes; and the fact that a charge is made for room rent in dormitories, for meals in the dining halls, and for membership in the club does not constitute the buildings devoted to such purposes property used with a view to profit, within the meaning of such ordinance, where the charge in each instance is nominal and not sufficient to pay for the maintenance of the respective buildings. *Chicago v. University of Chicago* (Ill.), 10-669.

(2) Railroads.

What property exempts. — Under the Michigan statute exempting from general taxation the property of railroad companies except such as is not actually occupied in the exercise of franchises, and not necessary or in use in the proper operation of its road, a tract of land of a railroad company occupied partly by the company's side tracks and coal dock, the spaces between the tracks being occasionally and necessarily used by the company for the storage of bulky articles, is exempt. *Grand Rapids, etc., R. Co. v. Grand Rapids* (Mich.), 4-1195.

Property in exclusive possession of private persons. — Under the Michigan statute exempting the property of railroads from taxation, parcels of land belonging to a railroad company but within the exclusive possession of private persons, with the consent of the company, and exclusively used by such persons in their private business for storage purposes, are not exempt from general taxation. *Grand Rapids, etc., R. Co. v. Grand Rapids* (Mich.), 4-1195.

(3) State bonds.

No implied exemption. — There is no implied exemption of state bonds from taxation, as the bonds are not inherently non-taxable. *State Nat. Bank v. Memphis* (Tenn.), 8-22.

Validity of express exemption. — In the Tennessee statute providing for the

taxation of the shares of stock of banks and certain other corporations, the clause attempting to create an express exemption of state bonds is void as violating the constitutional provision that all property shall be taxed, and that taxes shall be uniform. *State Nat. Bank v. Memphis* (Tenn.), 8-22.

(4) Property of religious societies.

Parish houses. — Parish houses, otherwise known as the residence of the priests and bishops of the Roman Catholic church, are not exempt from taxation and legal assessments, either by virtue of the Ohio constitution or by statute, although such places of residence are used by the priests and bishops for the discharge of many duties of a religious and charitable nature, which are imposed by the vows of their ordination and rules of the church. *Watterson v. Halliday* (Ohio), 11-1096.

d. Termination of exemption.

Revocation of exemption by legislature. — The statutory exemption of property from taxation is not a vested right, as it is not founded upon contract, but is a pure gratuity which the legislature may revoke at any time. *Monaghan v. Lewis* (Del.), 10-1048.

Repeal of exemption as impairing obligation of contract. — The repeal by a general tax law of a provision in the charter of an educational institution exempting it from taxation does not impair the obligation of a contract in violation of the Federal Constitution. *Pratt Institute v. New York* (N. Y.), 5-198.

Repeal of charter of educational institution by general statute. — The New York statute providing for the assessment and collection of taxes and exemption of property from taxation throughout the state is a codifying act designed to reduce all statutes relating to taxation into a complete and harmonious system, and such act in exempting so much of the real estate of educational institutions as is used exclusively for corporate purposes, but not exempting real estate held as an investment only, entirely repeals a provision in the charter of an educational institution exempting the property of the institution, the revenues of which are devoted exclusively to the purposes of the institution. *Pratt Institute v. New York* (N. Y.), 5-198.

13. SUCCESSION TAXES.

a. Nature and constitutionality.

Not a tax on property. — Inheritance taxes are taxes upon the right to receive property and are not taxes upon the property itself. *Nunemacher v. State* (Wis.), 9-711.

A succession tax is not a tax upon property, but an excise tax. *State ex rel. Taylor v. Guilbert* (Ohio), 1-25.

The Vermont collateral inheritance tax act imposes a tax on the transmission of property and not on the property itself. *In re Hickok* (Vt.), 6-578.

A succession tax is not a property tax but an excise or franchise tax, and property not taxable as such may constitutionally be considered in fixing the amount of an excise or franchise tax. *Kingsbury v. Chapin* (Mass.), 13-738.

Right to tax not restricted to taxation of property. — The provision of the Wisconsin constitution that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe," does not by implication restrict the right to tax to the taxation of property, and therefore does not prohibit the legislature from taxing inheritances. *Nunne-macher v. State* (Wis.), 9-711.

Justification for tax. — Statutes imposing inheritance taxes may be justified as an exercise of the power of reasonably regulating and taxing transfers of property. *Nunne-macher v. State* (Wis.), 9-711.

Construction of express constitutional authority. — The New Hampshire constitution of 1903, article 6, providing that "public charges of government or of any part thereof may be raised by taxation upon polls, estates, and other classes of property, including franchises, and property when passing by will or inheritance," authorizes, in addition to ordinary taxation upon property as previously understood, the exaction for public purposes of part of the property of the individual upon his death. *Thompson v. Kidder* (N. H.), 12-948.

Exemption of certain beneficiaries. — The New Hampshire statute imposing a tax on inheritances by will or law, and excluding inheritances passing to the father, mother, husband, wife, lineal descendant, and certain other relatives of the decedent, and certain classes of institutions, is not invalid as unequal in its operation or upon any other constitutional ground. *Thompson v. Kidder* (N. H.), 12-948.

Classification as to beneficiaries; exemption of small estates. — In an inheritance tax law, the classification between lineals and collateral relatives and strangers does not violate the rule of uniformity of taxation or the principle of equal protection of the laws; and reasonable exemption of small estates may also be allowed without violating uniformity of taxation. *Nunne-macher v. State* (Wis.), 9-711.

A Vermont collateral inheritance tax act imposes a tax on the transmission of property and not on the property itself, and is not obnoxious to the provision of the state constitution which requires proportional contributions for the support of the government, and which is designed to secure uniformity and equality of taxation; and this is so though the statute exempts from its operation estates of less than a specified value. *In re Hickok* (Vt.), 6-578.

Classification as to amount and application of different rates to various classes. — If the provision of the Wisconsin constitution that "the rule of taxation shall be uniform" is applicable at all to the taxation of inheritances, it means nothing more than is meant by the general equality clause

of the state constitution or by the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution. Under this provision the taxation of inheritances must not be discriminative, and must operate alike on all persons similarly situated, but a proper classification may be made, and a different rate applied to each class. *Nunne-macher v. State* (Wis.), 9-711.

The Minnesota statute imposing a tax upon certain devises, bequests, inheritances, and gifts, is a constitutional and valid legislative enactment. The classified and progressive features of the statute are in accordance with the general principles of the law on the subject of inheritance taxation, and are authorized by the amended constitution of the state. *State ex rel. Foot v. Bazille* (Minn.), 7-1056.

Progressive increase in rate of tax. — The progressive feature of the Wisconsin inheritance tax law, whereby increased rates of taxes are imposed as the amounts of bequests increase, does not violate the general guaranties of equality and of equal protection of the laws contained in the state constitution and in the Fourteenth Amendment to the Federal Constitution. *Nunne-macher v. State* (Wis.), 9-711.

Constitutional amendment permitting progressive taxation. — While the provision of the Minnesota constitution requiring taxes to be as nearly equal as may be applies to inheritance taxes, its application to taxes of that nature is limited by the constitutional amendment expressly permitting inheritance taxes to be graded or progressive. *State ex rel. Foot v. Bazille* (Minn.), 7-1056.

Application of constitutional provision relating to taxation and estimated expenses. — The provision of the Wisconsin constitution that "the legislature shall provide for an annual tax sufficient to defray the expense for each year, and whenever the expenses for any year shall exceed the income the legislature shall provide for levying a tax for the ensuing year sufficient with other sources of income to pay the deficiency as well as the estimated expenses of such ensuing year," has no application to a statute taxing inheritances, but is merely intended as a regulation or provision for the levying of a direct tax upon property whenever such a tax is necessary. *Nunne-macher v. State* (Wis.), 9-711.

Exemption of religious, etc., institutions of state. — The state legislature, in enacting the inheritance tax law, has power to discriminate between classes, and it is a valid exercise of this power to exempt religious, educational, and charitable institutions of the state from the operation of the law without so exempting similar institutions of other states. *Board of Education, etc., v. Illinois* (U. S.), 8-157.

The provision of the Illinois inheritance tax law exempting from its operation property passing to religious, educational, and charitable institutions or corporations, which has been construed by the state court of last resort as not applying to foreign corporations, is not, as so construed, repugnant to the

Fourteenth Amendment of the Federal Constitution, either as abridging the privileges and immunities of such foreign corporations as citizens of the United States or as denying to them the equal protection of the laws. *Board of Education, etc., v. Illinois* (U. S.), 8-157.

Tax on bequests to foreign charitable corporations. — A statute imposing a succession tax upon a bequest to foreign charitable corporations is not unconstitutional. *Humphreys v. State* (Ohio), 1-233.

Taxation of successions not finally closed. — The provision of the Louisiana Succession Tax Act that a tax is "to be collected on all successions not finally closed and administered upon" is not open to the objection that discrimination between successions which have been closed and those which have not been closed denies the equal protection of the laws to the heirs in successions of the latter class. *Cahen v. Brewster* (U. S.), 8-215.

The provision of the Louisiana Succession Tax Act that a tax is "to be collected on all successions not finally closed and administered upon" is not, as to the successions of persons who died prior to the passage of the act, violative of the due process of law clause of the Federal Constitution, notwithstanding the fact that another Louisiana statute provides that a succession is acquired by a legal heir immediately after the death of the person whom he succeeds. *Cahen v. Brewster* (U. S.), 8-215.

Commission of administration of law to county court. — The Wisconsin inheritance tax law is not rendered unconstitutional by the fact that it commits to the county court certain matters concerning the administration of the law, such as the fixing of the value of the property transmitted or bequeathed, and the determination of the amount of the tax to be paid, as the law fixes the rate of the tax, and the power of determining how much the tax fixed by law amounts to in a given case is judicial and not administrative in its character. *Nunne-macher v. State* (Wis.), 9-711.

Louisiana succession tax act. — The Louisiana Succession Tax Act held to be constitutional. *Succession of Levy* (La.), 5-871.

b. Construction and operation of statutes.

(1) In general.

Strict construction against state. — A succession or inheritance tax is a special and not a general tax, and is construed strictly against the government and in favor of the taxpayer. *People v. Koenig* (Colo.), 11-140.

Rule of strict construction inapplicable. — The rule of strict construction, ordinarily applied to the operation and effect of a statute imposing a tax upon the citizen and to proceedings under such a statute, does not apply to the interpretation of the Minnesota statute providing for the imposition of a succession tax. *State ex rel. Foot v. Bazille* (Minn.), 7-1056.

Effect of indefinite and ambiguous provisions. — The Minnesota Inheritance Tax Act, when considered in the light of the general rule that inaccurately drawn statutes will be construed to effectuate the intention of the legislature, is not rendered void by the fact that it contains certain indefinite and ambiguous provisions. *State ex rel. Foot v. Bazille* (Minn.), 7-1056.

Time for determining rights of parties. — With respect to the payment of collateral inheritance taxes the rights and obligations of all parties should be determined as of the time of the death of the decedent. *McCurdy v. McCurdy* (Mass.), 14-859.

Distinction between collateral and lineal descendants. — Whether a distinction in the matter of taxation should be made between collateral and lineal descendants is a matter of legislative discretion and is not a judicial question. *State ex rel. Foot v. Bazille* (Minn.), 7-1056.

(2) Property and legacies and devises taxable.

(a) In general.

United States bonds. — Bonds of the United States are not exempt from a succession tax. *Succession of Levy* (La.), 5-871.

Deduction of debts. — Under the Louisiana Succession Tax Act the amount of debts must be deducted and the balance is subject to taxation, save that expressly exempted. *Succession of Levy* (La.), 5-871.

Deduction of mortgage debt. — For the purpose of determining the amount of the collateral inheritance tax on the real estate of a nonresident, the amount of indebtedness under a mortgage thereon should be deducted from the value of such real estate. *McCurdy v. McCurdy* (Mass.), 14-859.

Deduction of value of estate for years. — In assessing an estate for taxation under the Illinois inheritance tax law, the value of the estate for years should not be deducted and the tax assessed upon the remainder only, unless the remainder goes to collateral heirs, to a stranger to the blood, or to the body politic or corporate. *In re Kingman* (Ill.), 5-234.

Money paid in compromise of will contest. — Money paid in good faith in compromise of a threatened litigation to contest a will is not liable to a collateral inheritance tax, though it is paid to persons claiming under the will, with the result that they agree that the will shall be refused probate. *In re Hawley* (Pa.), 6-572.

Vested remainder. — A vested remainder created by a will is subject to taxation under the Illinois inheritance tax law immediately upon the death of the testator, though the particular estate upon which it depends has not fallen in. *In re Kingman* (Ill.), 5-234.

Property passing by will prior to passage of act. — The Iowa statute providing for the imposition of a collateral inheritance tax is not retroactive in operation, and property which passed by will prior to the act but which is not distributed until after the passage of the act is not subject to the tax. *Gilbertson v. Ballard* (Iowa), 2-607.

(b) Estates of nonresidents.

Liability to inheritance taxes imposed by jurisdiction in which property is located. — Where two brothers residing in England carry on the business of graziers and sheep farmers in partnership by their agent in New South Wales, the interest of one of the partners in the partnership at the time of his death is liable to the duties imposed upon the estates of deceased persons by the New South Wales statute. *Commissioner of Stamp Duties v. Salting* (Eng.), 9-691.

Tax a charge on particular property. — The ground on which the collection of an inheritance tax by the state of the locus of the property, when different from that of the testator's domicile, is sustainable, is the jurisdiction over the property which is given by its situs; and the tax is merely a charge on the particular property, and not on pecuniary legacies given by the will. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Legacy of personal property located in other state. — In the case of a testamentary gift of specific personal property located in another state, the amount demanded by such state as the price of the transfer of the title is naturally a charge against the legacy, because, under the law, the testator cannot transfer by will the entire title. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Pro rata distribution of foreign death duties. — In the absence of a direction, express or implied, in a will, or of a statute on the subject, a *pro rata* distribution among all the pecuniary legacies of sums paid as foreign death duties cannot be made. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Property within jurisdiction at time of death. — Collateral inheritance taxes on the property of a nonresident should be estimated in reference to the property which is within the jurisdiction of the state at the time of the death of such nonresident. *McCurdy v. McCurdy* (Mass.), 14-859.

Payment of debts to exemption of property in other state. — Executors cannot relieve stock held by the deceased in Massachusetts corporations from the collateral inheritance tax imposed by the law of that state, by using such stock for the payment of debts and legacies, to the exemption of property in another state. *Kingsbury v. Chapin* (Mass.), 13-738.

Payment of debts which are liens on property within jurisdiction. — The only ground on which a collateral inheritance tax can be imposed upon the succession to property of a nonresident is that such property is within the jurisdiction of the state, and the ancillary executors or administrators within a state cannot, for the purpose of increasing the amount of such tax on property within the state, be compelled to bring the proceeds of personal estate from the place of domiciliary administration in another state to pay debts of domestic creditors secured by a mortgage or lien upon land in the state of the ancillary administration. *McCurdy v. McCurdy* (Mass.), 14-859.

Stock in railroad company owning and operating railroad within state. — Stock in a railroad company incorporated in the state of Massachusetts and owning and operating a railroad therein which extends into other states in which the railroad is also incorporated and owns franchises and property is "property within the jurisdiction of the commonwealth" of Massachusetts, under the language of the statute of that state authorizing the taxation of collateral inheritances of property within the jurisdiction, and is there taxable as against a nonresident owner. *Kingsbury v. Chapin* (Mass.), 13-738.

Promissory note secured by mortgage of local real estate. — A promissory note secured by a mortgage upon real estate situated in the state of Michigan is subject to the Michigan inheritance tax law, although the owner of the note, who was a resident of another state, had the note and mortgage in his possession in the state of his residence up to the time of his death. *In re Merriam* (Mich.), 11-119.

(c) Exemptions.

No exemption where estate exceeds statutory amount exempt. — Under the Iowa statute relative to collateral inheritance taxes, which provides that all property passing by will to collaterals "shall be subject to a tax of 5 per centum of its value above the sum of \$1,000 after the payment of all debts," if an estate does not contain above \$1,000 after the payment of all debts, then all devises received by collateral persons are subject to the tax, without any exemption whatever. *Morrow v. Durant* (Iowa), 17-850.

Application of exemption to separate legacies or aggregate value of estate. — Under the Colorado statute imposing a succession or inheritance tax on all property which shall pass by will or by the intestate laws of the state to any person or persons, for which tax all heirs, legatees, devisees, administrators, and executors shall be liable, and providing that when property shall pass to a named class of persons the rate of tax shall be a certain amount per \$100 for the property received by each person, and further providing that the sum of \$10,000 of "any such estate" shall not be subject to any duty or taxes, and that only the amount in excess of \$10,000 shall be subject to the tax, the exemption applies to the separate distributive shares and legacies and not to the aggregate value of the property of the decedent, and an individual legacy not exceeding \$10,000 is not subject to the tax. *People v. Koenig* (Colo.), 11-140.

Gifts to foreign charitable or religious corporations. — Bequests to foreign charitable corporations are not exempt from succession taxes. *Humphreys v. State* (Ohio), 1-233.

The provision of the Vermont Inheritance Tax Act exempting from its operation property passing "to or for charitable, educational, or religious societies or institutions, the property of which is exempt by law from

taxation," does not apply to foreign educational or religious corporations, though the laws of the states of their incorporation exempt their property from taxation. *In re Hickok* (Vt.), 6-578.

(d) Transfers of property before death.

Statute taxing transfers in anticipation of death. — Under the Illinois statute imposing a tax upon property which shall pass by will or by the intestate laws of the state, or "which shall be transferred by deed, grant, sale, or gift made in contemplation of the death of grantor or bargainor or intended to take effect in possession of or enjoyment after such death," a gift made while the grantor is looking forward to his death as impending and with a purpose on his part to place that part of his estate in the hands of the person whom he desires to enjoy it after his death, is taxable, and the statutes as applied to that extent to gifts *inter vivos* is not unconstitutional. *Estate of Benton* (Ill.), 14-107.

Where object is not evasion of tax. — Where an old man, suffering with an incurable disease, makes a gift of a large part of his estate a little more than a month before his death, after having a short time before given other considerable portions of his property to his relatives with a declaration of an intention to prevent any part of the property from passing to a stepson through his wife who might obtain one-third of it by renouncing his will, the gift is subject to a succession tax under a statute imposing such tax on gifts made in contemplation of death. *Estate of Benton* (Ill.), 14-107.

(e) Funeral expenses, etc.

In general. — A portion of a decedent's estate which has been set apart by the executor for the erection of a tomb for the testator, in accordance with a provision in the will, is not taxable under the collateral inheritance tax law of Iowa. Such fund does not pass "to any person" within the meaning of section 1647 of the statute, nor is it taxable under section 1647b, which has reference principally to the rights of succession accruing to residents of the state in property situated in other states, but which is brought into the state for distribution, and to the right of succession to property situated without the state which was owned by a decedent domiciled within the state at the time of his death. *Morrow v. Durant* (Iowa), 17-850.

The purpose of that section of the Iowa collateral inheritance tax law which provides that the debts to be deducted in determining the value of an estate shall include a reasonable sum for funeral expenses, is to protect an estate, the value of which is near the dividing line, from being carried into the exempt class by extraordinary charges under the guise of funeral expenses. Where the value of an estate is clearly in excess of \$1,000 after the payment of all debts, including an amount proposed to be expended for a tomb for the deceased, that section becomes unimportant, since the estate is not in the ex-

empt class. In such a case the question is not whether the amount proposed to be expended for a tomb is reasonable, and, therefore, to be classed as a debt, but whether the fund reserved for that purpose is taxable under the general provision of the law. *Morrow v. Durant* (Iowa), 17-850.

Standing of state to object. — In the absence of fraud or collusion, the state has no standing to object to the action of residuary legatees under a will in consenting that a certain portion of the testator's estate shall be set aside for the purpose of erecting a tomb for the testator, even though such portion of the estate is thereby exempted from the tax which would be levied upon it if it passed to the residuary legatees, the latter being collaterals. *Morrow v. Durant* (Iowa), 17-850.

Reasonableness of amount expended. — Whether the amount reserved by an executor for the erection of a tomb for the testator, in accordance with a provision in the latter's will, is reasonable within the meaning of that section of the collateral inheritance tax law which provides that the debts to be deducted in determining whether an estate is exempt shall include a reasonable sum for funeral expenses, is a question of mixed law and fact to be determined in the light of all the circumstances of the case. In the absence, however, of superior rights of creditors or of persons having some legal claim upon the decedent, a provision in the latter's will directing the expenditure of a certain amount for a tomb raises a presumption that the amount directed to be expended is reasonable, so far as the duties of the executor are concerned. *Morrow v. Durant* (Iowa), 17-850.

(3) Effect of particular testamentary provisions.

Purpose to transmit full amount to legatees. — In the case of a gift of a pecuniary legacy of a fixed amount, the apparent intent is to benefit the legatee to such amount; and where the will is administered by the law of a jurisdiction imposing no inheritance tax, the purpose to transmit the full amount to the legatee is clear. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Absence of testamentary provision for payment of tax. — Under the New Hampshire statute (Laws 1905, p. 433, c. 40, § 5) requiring an executor holding property subject to an inheritance tax under the act to deduct the tax therefrom, or to collect it from the legatee, etc., an inheritance tax imposed on property distributed through the courts of New Hampshire is to be deducted from the legacy, and is not a part of the expenses of administration; and a testator, who makes no provision for the payment of such a tax from his estate, intends the benefit to be received by the beneficiary, less the tax. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Effect of direction of payment of inheritance taxes by executor. — A clause in a will, directing an executor to pay inheritance taxes due on any legacy given to an individual, implies a recognition of the pos-

sibility of such taxes, and as to legatees other than individuals a purpose that duties legally chargeable on such legacies shall be borne by them; but as foreign duties are not due on the legacy given by the will, but are a deduction from the property used in carrying out the purpose of the will, the clause is insufficient to require the court to administer the law of other states in which property may have been found and inheritance taxes paid. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Gifts for charitable purposes, though gifts for the benefit of individuals, are not gifts to individuals, within an instruction in a will directing payment of inheritance taxes on legacies to individuals. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Charge on estate or legacy depending on testamentary intent. — Whether inheritance taxes are a charge against the estate, or are to be deducted from the several legacies, depends on the intention of the testator, who may provide by the will how such taxes shall be paid. *Kingsbury v. Bazeley* (N. H.), 20-1355.

(4) Taxation of corporate stock.

Corporation having franchises and property in other states. — Under the Massachusetts succession tax law as applied to the stock of a railroad corporation having franchises and property in other states as well as in the commonwealth of Massachusetts, it is intended that the value of the stock for the purpose of the tax shall be limited to the value of the franchises and property which the stock specially represents within the commonwealth. *Kingsbury v. Chapin* (Mass.), 13-738.

c. Collection of tax.

Payment of attorney's fee. — The Louisiana Succession Tax Act does not provide for the payment of the fee of an attorney to compensate the attorney of a tax collector for his services. *Succession of Levy* (La.), 5-871.

Effect of renouncing of benefit by devisee whose interest is subject to tax. — Where property devised under a will is liable to a collateral inheritance tax, the devisee may renounce all the benefits under the will and enter into an express agreement to allow the property of the estate to be distributed as though no will had been made; and where such devisee is only a beneficiary under the will whose interest is subject to the tax, the administrator of the estate cannot be compelled, in accordance with a collateral inheritance tax law, to file an inventory of the real property of which the deceased died possessed. *Matter of Stone* (Iowa), 10-1033.

d. Appeal.

Undertaking and notice of appeal. — Where a probate court determines the liability of a legacy, etc., to a succession tax, appeal may be taken by either party to the controversy, and in case of appeal by the

state neither an undertaking nor notice of an intention to appeal need be given. *Humphreys v. State* (Ohio), 1-233.

Appeal from order requiring filing of inventory. — Where an application is filed by the state treasurer to require the administrator of an estate to file an inventory of the property of the deceased in accordance with the rules relating to collateral inheritance taxes, and a cross-petition of the administrator resisting the application is stricken from the files and an order made requiring him to file the inventory, the order thus made is appealable, as it affects a substantial right in that its effect is to adjudge finally the obligation of the administrator to file such inventory. *Matter of Stone* (Iowa), 10-1033.

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1. DEFINITIONS.

Telegram. — A telegram is a message transmitted by telegraph. *Western Union Tel. Co. v. Hill* (Ala.), 19-1058.

2. LEGAL STATUS OF TELEGRAPH COMPANIES.

As common carriers. — By statute, telegraph companies in Oklahoma are declared to be common carriers; and, such being their status, they are to be treated in all respects as invested with those privileges and as bound by those obligations and restrictions which are placed around companies of that character. *Blackwell Milling, etc., Co. v. Western Union Tel. Co.* (Okla.), 10-855.

Right to operate telephone system. — A body incorporated only as a telegraph company is not the same as a telephone company and does not have the right to operate a telephone system in the streets of a city under the authority and power given it as a telegraph corporation. *Home Telegraph Co. v. Nashville* (Tenn.), 11-824.

3. RIGHT OF WAY.

Grant by city of right to use public grounds and streets. — Under the code of South Dakota, a city may grant to a telephone company the right to use the public grounds, streets, etc., for the erection and maintenance of a telephone system. *Kirby v. Citizens' Tel. Co.* (S. Dak.), 2-152.

Right of abutting owner to object to license granted by city. — Where a city grants individuals a license to erect telephone lines in a street of the city, and the licensees assign the license to a corporation, and the corporation constructs a telephone system and operates it for some time with the knowledge and consent of the city authorities, an abutting owner will not be heard to contend that the license is invalid. *De Kalb County Tel. Co. v. Dutton* (Ill.), 10-464.

Effect of grant of general power of eminent domain. — The right of a telephone company to construct its lines on the right of way of a railroad company is not to be presumed from a grant of a general power of eminent domain. Such a right exists only when granted expressly or by necessary implication. *Canadian Pac. R. Co. v. Moosehead Tel. Co.* (Me.), 20-721.

Implication of authority to take right of way. — When a telephone company is authorized by statute, as by the Maine statute (Rev. St., c. 55, § 24), to construct and maintain its lines "upon or along a railroad" it is necessarily implied that it may take the right of way so far as is reasonably necessary for that purpose. *Canadian Pac. R. Co. v. Moosehead Tel. Co.* (Me.), 20-721.

Location of telephone line as constituting a taking of property. — The location of a telephone line on a railroad right of way is a taking of it, and imposes a burden on it for which the owner of the fee and the owner of the easement of the right of way are entitled to compensation. And the legislature cannot constitutionally authorize such a location unless it makes provision or that just compensation which the constitution secures when private property is taken for public uses. *Canadian Pac. R. Co. v. Moosehead Tel. Co. (Me.)*, 20-721.

Location of telephone on railroad right of way. — The legislature has the power to authorize a telephone corporation to construct its lines on the right of way of a railroad corporation. *Canadian Pac. R. Co. v. Moosehead Tel. Co. (Me.)*, 20-721.

The Maine statute (Rev. St., c. 55, § 24) provides that a telephone company "may construct a line upon or along any railroad by the written permit of the person or corporation operating such railroad, but in case such company cannot agree with the parties operating such railroad, as to constructing lines along the same, or as to the manner in which lines may be constructed upon, along, or across the same, either party may apply to the railroad commissioners, who, after notice to those interested, shall hear and determine the matter and make their award in relation thereto, which shall be binding upon the parties," but it makes no provision for compensation to the owner of the fee or of the railroad right of way. Acting under this statute, the railroad commissioners, upon the defendant's petition, granted it the right to construct its lines upon the plaintiff's right of way. The defendant's lines were constructed accordingly. The defendant had instituted no condemnation proceedings against the railroad land under section 11 of the same statute, which provides that a telephone company "may purchase, or take and hold as for public purposes, land necessary for the construction and operation of its lines," and that "land may be so taken, and damages therefor may be estimated, secured, and determined, and paid for as in case of railroads." Upon these facts it is held that the defendant is unlawfully maintaining its telephone line upon the plaintiff's right of way, and that the plaintiff is entitled to an injunction. *Canadian Pacific R. Co. v. Moosehead Tel. Co. (Me.)*, 20-721.

4. STATUTORY REGULATION.

Statute imposing penalty as violative of Federal Constitution. — A statute imposing a penalty upon telegraph companies for a failure to transmit messages is not, in its application to messages to be delivered without the state, violative of the commerce clause of the Federal Constitution. *Postal Telegraph-Cable Co. v. Umstadter (Va.)*, 2-511.

Statute imposing terms on foreign companies. — The Arkansas statute imposing terms upon which foreign corporations may do business in the state is not invalid as to a foreign telegraph company on the theory

that another statute of that state requiring such a company doing business in the state to transmit all messages tendered to it, compels such company to do an intrastate as well as an interstate business whether it will or no. The latter statute must be construed to apply only to companies doing an intrastate business, and does not compel a company to transmit intrastate messages even though it may be in the state doing interstate business. *Western Union Tel. Co. v. State (Ark.)*, 12-82.

5. MUNICIPAL REGULATION.

Acceptance of ordinance as constituting contract. — Where a telephone company is authorized by a city ordinance, accepted by the company, to maintain a telephone system, a contractual relation is created and becomes a vested right which cannot be impaired by subsequent action of the city. *Northwestern Tel. Exch. Co. v. Anderson (N. Dak.)*, 1-110.

Ordinance reasonably regulating construction of lines. — It is within the inherent police power of a municipality to adopt an ordinance reasonably regulating the manner, character, or place of construction of telephone and telegraph lines within its limits, and, where such an ordinance has been adopted, a telephone or telegraph company desiring to construct its line must exercise its right of entry into the city, under the general powers conferred by the state, subject to the regulations imposed thereby. *Jonesville v. Southern Michigan Tel. Co. (Mich.)*, 16-439.

Ordinance prohibiting erection of poles, etc., on designated block of certain street. — A municipal ordinance prohibiting the erection of poles and stringing of wires on a designated block of a particular street will not be held invalid for unreasonableness, where there is nothing to show that it prevents telephone or telegraph companies from reaching persons whom they desire to reach and whom, by law, they are obliged to serve. The mere fact that its enforcement will necessitate the adoption of a less convenient route or the expenditure of a larger amount of money by the company, is not sufficient to render it invalid. *Jonesville v. Southern Michigan Tel. Co. (Mich.)*, 16-439.

6. DUTY TO SERVE PUBLIC WITHOUT DISCRIMINATION.

In general. — Telephone companies must, even in the absence of statutory provisions to that effect, serve the public without partiality or discrimination. *Cumberland Tel. etc., Co. v. Kelly (U. S.)*, 15-1210.

Construction of statute prohibiting discrimination. — The Tennessee statute which requires telephone companies to supply all applicants for telephone facilities without discrimination, and imposes upon such companies penalties for the benefit of applicants who are discriminated against, is merely declaratory of the common-law duty of such companies not to discriminate between customers, and enforces that obligation by penal-

ties. Consequently conduct which is not an illegal discrimination by such a company at common law is not an illegal discrimination under such statute. *Cumberland Tel., etc., Co. v. Kelly* (U. S.), 15-1210.

The provision of such statute requiring telephone companies to "supply all applicants" must be construed to mean that applicants shall not be discriminated against, and not that all shall be supplied regardless of location or conditions. Such provision should not be construed as disregarding the usual and approved methods by which the telephone business is conducted, and to compel service under conditions forbidden by general regulations adopted in good faith as conducive to efficiency of service and economy of operation. *Cumberland Tel., etc., Co. v. Kelly* (U. S.), 15-1210.

Division of territory served into districts. — If in accordance with the usual and approved methods of telephone companies, a telephone company divides the territory within which it conducts its business into districts to be served by wires carried in cables to a point within each district convenient for distribution, there is no discrimination at common law or under such statute unless an applicant within a particular district is discriminated against while others within the same general area, in a similar situation and under the same conditions, are served. *Cumberland Tel., etc., Co. v. Kelly* (U. S.), 15-1210.

Delay caused by absence of telephone cable. — Where a cable system is necessary for efficient telephone service, and the delay in supplying service to a particular applicant is due to the fact that the company's cable capacity is full and that the installation of a new cable would take several weeks, and would cost about seven thousand dollars, the court will not hold that in passing such statute the legislature intended to enforce the common-law obligation of a telephone company to furnish reasonably adequate facilities by imposing a penalty of one hundred dollars per day from the time when service might have been furnished to such applicant had the company's cable capacity not been full. *Cumberland Tel., etc., v. Kelly* (U. S.), 15-1210.

The fact that it appears that a telephone company sometimes resorts to the unusual methods of making a connection, known as "backing up" or "jumping wires," or "splitting a pair of wires," for applicants residing within the area served by a cable which has become congested, such methods, which affect injuriously the efficiency of the general service, being resorted to only when serious illness in a family makes a telephone connection an immediate necessity, does not constitute an intentional discrimination, within the prohibition of such statute, against an applicant who is not in the situation under which such practice is resorted to. *Cumberland Tel., etc., Co. v. Kelly* (U. S.), 15-1210.

Service delayed in consequence of business conditions. — Service delayed in consequence of such business conditions is not, where all similarly situated are subject to the

same regulations, a discrimination penalized by the statute. *Cumberland Tel., etc., Co. v. Kelly* (U. S.), 15-1210.

Negligent or accidental failure to supply telephone. — Nor does a mere negligent or accidental failure to supply a telephone involve an intentional discrimination, within the prohibition of such statute, against an applicant in favor of other applicants similarly situated. *Cumberland Tel., etc., Co. v. Kelly* (U. S.), 15-1210.

Distinction between direct and party service. — In an action by an applicant for direct telephone service to recover the penalties imposed by such statute, a charge to the jury under which the determination of the question of discrimination is made to turn upon whether, during the delay in furnishing service to the plaintiff, the telephone company supplied other persons in that locality, is misleading if it draws no distinction between direct and party service, the furnishing of party service to others not being a discrimination against such applicant. *Cumberland Tel., etc., Co. v. Kelly* (U. S.), 15-1210.

Evidence of ill feeling between company and brother of plaintiff. — In such an action the admission of evidence tending to show that there was some ill feeling between the telephone company and a brother of the plaintiff, is erroneous and prejudicial. *Cumberland Tel., etc., Co. v. Kelly* (U. S.), 15-1210.

Right to require payment in advance. — The Arkansas statute providing in substance that every telephone company doing business in the state shall supply all applicants for telephone connection and facilities, without discrimination, and shall not impose any condition or restriction upon any applicant that is not imposed impartially upon all persons in like situations, does not deny the right of telephone companies to require, in their discretion, any individual or individuals to pay cash in advance for telephone service although it is customary to extend the same service to others without payment in advance. *Yancey v. Batesville Tel. Co.* (Ark.), 11-135.

In an action against telephone companies to recover a penalty alleged to have been incurred by reason of discrimination against the plaintiff in the service furnished, a complaint alleging that the defendants refused to connect his telephone with the long-distance lines so that he could talk to persons in other parts of the state, unless the plaintiff "should first come to the central office of said telephone exchange and pay cash in advance for such telephone messages," although other subscribers were not required to do so, is not demurrable for failure to allege an unlawful discrimination, as the payment of the charge was all that could concern the defendants, and the requirement that the plaintiff should first go to the central office and pay it was unreasonable and unnecessary. *Yancey v. Batesville Tel. Co.* (Ark.), 11-135.

Telegraph company furnishing market quotations. — Where, for a number of years, a telegraph company, in the exercise

of its charter rights, has been engaged in buying continuous quotations of the prices of commodities dealt in on a city board of trade, and in supplying the quotations at a fixed price to such persons as desired them, until the quotations have become necessary to the conduct of business in such commodities and until such quotations and the system of gathering and supplying them have become impressed with a public interest, the law will not permit the telegraph company to discriminate between persons in supplying the quotations but will compel it to furnish them to all persons upon the same terms. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co. (Ind.)*, 6-880.

A court should not, under the guise of the performance of a public duty, issue a writ of mandamus to compel a telegraph company to supply market quotations to facilitate the operation of a bucket shop. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co. (Ind.)*, 6-880.

7. TRANSMISSION AND DELIVERY OF MESSAGES.

a. Duties and liabilities of company in general.

Duty to use utmost diligence. — In Oklahoma telegraph companies are bound to exercise the utmost diligence in the transmission and delivery of messages intrusted to them. *Blackwell Milling, etc., Co. v. Western Union Tel. Co. (Okla.)*, 10-855.

Place of performance of contract. — The place of performance of a contract for the transmission and delivery of an interstate telegram is the place of delivery. *Howard v. Western Union Tel. Co. (Ky.)*, 7-1065.

Meaning of message not apparent or made known to company. — Damages are not recoverable of a telegraph company for the failure to transmit a message correctly beyond the price for service, unless the meaning of the message either is apparent or is made known to the company at the time of delivery for transmission. *Williams v. Western Union Tel. Co. (N. Car.)*, 1-369.

Effect of use of code words. — In order to charge a telegraph company with liability for an error in transmitting a message, it is sufficient if the message shows on its face that it relates to a commercial or legal transaction of value; and when such is the case, it is immaterial that the matter of quantity, quality, or value is expressed in code words not understood by the operator. *Bailey v. Western Union Tel. Co. (Pa.)*, 19-895.

Sufficient evidence in action for erroneous transmission of telegram. — Evidence examined and held sufficient to authorize the recovery of damages for the incorrect transmission of a telegram. *Western Union Tel. Co. v. Corso (Ky.)*, 11-1065.

Duty to provide means for delivery. — It is the duty of a telegraph company to provide proper means for the delivery of messages and the transaction of its business, and if it employs an agent jointly with a railroad company, it must abide the conse-

quences of a conflict of duty on the part of the agent. *Kernodle v. Western Union Tel. Co. (N. Car.)*, 8-469.

Delay in delivery not unreasonable as a matter of law. — In an action against a telegraph company to recover damages for its negligent delay in the delivery of a telegram, where it is admitted that there was no delay in the transmission of the message, it cannot be said as a matter of law that twelve minutes' delay in the delivery was unreasonable, and the question should be submitted to the sound discretion of the jury under proper instructions. *Kernodle v. Western Union Tel. Co. (N. Car.)*, 8-469.

Delivery of message announcing sickness. — Though the law gives a telegraph company reasonable time within which to deliver messages, it exacts a greater degree of diligence in the transmission and delivery of a telegram announcing the sickness of a person than it does in the case of an ordinary message, and what would be a reasonable time under some circumstances would not be such under others. *Kernodle v. Western Union Tel. Co. (N. Car.)*, 8-469.

Duty to notify sender of delay. — Where a telegraph company is distinctly informed of the importance of a message filed for transmission and knows that it must be delivered by a certain time the following day to be of any avail to the senders, but upon learning within ten or fifteen minutes after starting the message that the transmission has been interrupted by a break in a line over which the message must go, fails to notify the sender of the message of such interruption so as to give him an opportunity to protect his interests by other means of which the company is also informed, the company is guilty of gross negligence from which it cannot relieve itself by contract. *Postal Tel. Cable Co. v. Nichols (U. S.)*, 14-369.

Delay caused by strike or mob violence. — A telegraph company is not liable in damages, either punitive or actual, for delay in the transmission and delivery of a telegram where the proximate cause of such delay is a strike by its employees, or mob violence, and not any negligence or wilfulness on its part. *Sullivan v. Western Union Tel. Co. (S. Car.)*, 17-238.

Sufficient evidence of negligence in failing to deliver. — Where, in an action against a telegraph company for damages for failure to deliver a telegram, the evidence shows that the addressee of the telegram lived in a house two blocks from the telegraph office, and that the operator told the messenger boy to try to find the addressee there and the boy failed to go to the right house, saying he did not know where to find it, the negligence of the telegraph company is a question of fact for the jury. *Smith v. Western Union Tel. Co. (S. Car.)*, 12-654.

Company held liable for delay. — A telegraph company held liable for delay in delivery a telegram containing a bid for a commodity. *Western Union Tel. Co. v. Love Banks Co. (Ark.)*, 3-712.

Damages for failure to deliver not speculative or remote. — Where contrac-

tors who have submitted a written bid to do certain government work find that they have made a mistake in their bid and file for transmission to the proper government officer a telegram raising the amount of their bid five per cent., which telegram the telegraph company negligently fails to transmit and deliver before the bids are opened, in consequence of which the contractors are compelled to do the work for the original bid, although the government officers having charge of the work testify that the additional five per cent. would have been added if the telegram had been delivered on time, a recovery of damages against the company to the amount of the additional five per cent. is not speculative or remote. *Postal Tel. Cable Co. v. Nichols* (U. S.), 14-369.

In an action against a telegraph company for failure to send a telegram, held that the damages resulting to the plaintiff from the defendant's negligence were within the contemplation of the parties and not too remote to preclude a recovery where the plaintiff communicated his circumstances to the defendant at the time of sending the telegram. *Barnes v. Western Union Tel. Co. (Nev.)*, 1-346.

Failure of telephone company to answer call from burning building. — A telephone company which fails to answer a call from a burning building for a connection with the fire department is not on that account liable for the destruction of the building, unless it can be shown that if the connection had been given the fire department would have responded promptly and would have been able to extinguish the fire; and a petition states no cause of action where it avers no other facts than that the fire, when it was discovered by the plaintiff's watchman, could have been arrested, if the fire company had been promptly summoned; that the watchman tried to call the fire department by telephone, but the operator failed to respond; that about half an hour elapsed before the fire company came; and that in the meantime the fire had gotten beyond control. *Lebanon, etc., Tel. Co. v. Lanham Lumber Co. (Ky.)*, 18-1066.

b. Modification of common law liability by contract.

Limitation of liability for negligence. — A telegraph company cannot stipulate for exemption from liability for its own negligence. *Bailey v. Western Union Tel. Co. (Pa.)*, 19-895.

Liability for full amount of loss notwithstanding stipulations of contract. — Telegraph companies in Oklahoma are liable for the full amount of a loss sustained by reason of their failure properly to deliver messages within a reasonable time, notwithstanding an express stipulation in the contract of carriage that such companies shall not be liable for mistakes or delays in the transmission or delivery, or nondelivery, of any unrepeatable message beyond the amount received for sending the same. *Blackwell*

Milling, etc., Co. v. Western Union Tel. Co. (Okla.), 10-855.

Reasonableness of requirement of repetition of message. — In the absence of any statute governing the subject, stipulations in a contract for sending a telegram providing for the repetition of messages, at an additional charge, and that the liability of the company for mistakes or delays in the transmission of unrepeatable messages shall not exceed fifty times the extra sum received from the sender for repeating the message, are reasonable and binding in the absence of wilful misconduct or gross negligence on the part of the company. *Wheelock v. Postal Tel. Cable Co. (Mass.)*, 14-188.

Construed in the light of the statutes of Oklahoma, a stipulation in a contract of carriage, by which a telegraph company seeks to limit its liability for its negligence, unless the messages intrusted to it are repeated, is unreasonable and contrary to public policy, and therefore void, where the negligence consists in an unreasonable delay in delivery. *Blackwell Milling, etc., Co. v. Western Union Tel. Co. (Okla.)*, 10-855.

Requirement of presentment of claim for damages within certain time. — In an action against a telegraph company to recover damages for the erroneous transmission of a telegram, a nonsuit cannot be granted on the ground that the plaintiff failed to comply with a printed condition exempting the company from liability unless the claim for damages was presented within a certain time after the filing of the message for transmission, as the plaintiff has the right to prove waiver or estoppel as to such condition. *Hays v. Western Union Tel. Co. (S. Car.)*, 3-424.

A stipulation on a blank form furnished by a telegraph company for messages to the effect that a claim for damages must be presented within a certain time held valid, and a nonsuit in an action for damages held properly granted where the plaintiff failed to comply with the stipulation. *Broom v. Western Union Tel. Co. (S. Car.)*, 4-611.

A contract by a telegraph company which relieves the company from liability in regard to the transmission of a message "where the claim is not presented in writing within sixty days after the filing of the message" is a reasonable and valid provision for the protection of the company against stale claims, and for securing an opportunity to investigate claims while the facts are obtainable. *Wheelock v. Postal Tel. Cable Co. (Mass.)*, 14-188.

Purpose of requirement of presentment of claim. — A stipulation printed on a telegraph blank that the company will not hold itself liable "in any case where the claim is not presented in writing within thirty days after the message is filed with the company for transmission" is designed merely to give the company notice of the claim in order that it may be investigated promptly, and does not limit the amount of the liability of the company to a sum which the notice of the claim agrees to accept in consideration

of prompt settlement, especially where such notice states that unless prompt settlement is made the claimant will demand the actual amount of loss sustained. *Western Union Tel. Co. v. Lehman* (Md.), 14-736.

Waiver of requirement of presentment of claim. — Evidence held to show a waiver by a telegraph company of a condition limiting the time to present a claim for damages for the erroneous transmission of a message. *Hays v. Western Union Tel. Co.* (S. Car.), 3-424.

A series of communications by a telegraph company to a claimant for redress for the nondelivery of a telegram, discussing the liability of the company on the merits for its failure to transmit and deliver the telegram, and professing in the beginning to intend to deal with the matter, and finally to have dealt with it, in reference to the general rights created by the sending contract apart from any requirement in the contract as to the formal presentation of a claim in writing, is such conduct as would naturally throw the claimant off his guard as to the requirement of a formal presentation of his claim, and give rise to an inference that the company would consider the claim on its merits without setting up the technical defense founded on the time or manner of presenting the claim, and is evidence from which a jury may find that the company waived its right to rely on this defense. *Wheelock v. Postal Tel. Cable Co.* (Mass.), 14-188.

Commencement of action as presentment of claim. — Under a stipulation in a contract for transmitting a telegram that any claim for damages must be presented to the telegraph company in writing within sixty days after the filing of the message, the commencement of an action for such damages is a presentation of the claim in writing and preserves the liability. *Smith v. Western Union Tel. Co.* (S. Car.), 12-654.

Computation of period for presentment of claim. — A stipulation on a telegraphic blank requiring any claim for damages for the nondelivery of the message to be presented in writing within sixty days after the message is filed for transmission is sufficiently complied with by a presentation of claim within sixty days from the time the sender of the message learns of its nondelivery. *Postal Tel. Cable Co. v. Nichols* (U. S.), 14-369.

Failure of sender of message to read conditions on back of form. — The legal effect of conditions printed upon the back of a telegraphic blank relieving the telegraph company of liability for mistakes and delays in the transmission of any unrepeatable message, and requiring the presentation of any claim for damages or penalties within sixty days after the filing of the message for transmission is not changed by the testimony of the sender of a message that he did not read the matter printed on the blank on which he wrote the message and that his attention was not called to such matter. *Postal Tel. Cable Co. v. Nichols* (U. S.), 14-369.

c. Liability to addressee.

(1) Of telegraph company.

(a) For failure to transmit or deliver message.

In general. — The addressee of a telegram may recover damages from the company for failure to deliver a message when the same was intended for his benefit with knowledge of the company. *Frazier v. Western Union Tel. Co.* (Ore.), 2-396.

The addressee of a telegram may recover damages for the negligent failure of the telegraph company to transmit and deliver the message. *Western Union Tel. Co. v. Woodard* (Ark.), 13-354.

A telegraph company which transmits a message incorrectly is liable to the addressee in tort. *Bailey v. Western Union Tel. Co.* (Pa.), 19-895.

Effect of exemption printed on blank used by sender. — The addressee of a telegram is not affected by the notice of exemption from liability printed on the back of the blank on which the sender writes the message. *Bailey v. Western Union Tel. Co.* (Pa.), 19-895.

Delivery of telegram addressed in "care of" another. — The addressee of a telegram sent to him in "care of" another cannot maintain an action against the telegraph company for its nondelivery if it was delivered to such other person. *Sweet v. Western Union Tel. Co.* (Mich.), 5-730.

Answer to telegram as evidence for company. — Where the addressee of a belated telegram announcing the death and time of burial of his brother, replies, "Message received too late; wife sick; will come to see you as soon as she is better," there is nothing in the reply showing that he could not have attended his brother's funeral had he received the death message in time. *Smith v. Western Union Tel. Co.* (S. Car.), 12-654.

Damages of selling agent as sender of telegram. — A selling agent who, in consequence of an error in the transmission of a telegram, sells goods at less than the price fixed by the principal, for which difference the principal holds him liable, may recover the amount thereof from the telegraph company, though his commissions on the sale exceed such difference. *Bailey v. Western Union Tel. Co.* (Pa.), 19-895.

Damages too remote and uncertain. — Where the nondelivery of a telegram to an attorney deprives him of an opportunity to prosecute a claim for a client upon a contingent fee, the damages sustained thereby are too remote, uncertain, and speculative to be recoverable. *Sweet v. Western Union Tel. Co.* (Mich.), 5-730.

(b) For delivery of forged or fraudulent message.

Company does not warrant genuineness of message. — A telegraph company, in delivering to the addressee what purports to be a message from another person, does

not warrant the genuineness thereof, and in the absence of negligence, is not liable for a loss occasioned to the addressee through his reliance upon the message as genuine. *Western Union Tel. Co. v. Uvalde Nat. Bank (Tex.)*, 1-573.

Prima facie evidence of negligence.

— Negligence on the part of a telegraph company is *prima facie* established by a showing of the delivery of a forged telegram and a loss occasioned to the addressee by reliance thereon as genuine without negligence on the part of the latter. *Western Union Tel. Co. v. Uvalde Nat. Bank (Tex.)*, 1-573.

Company must show exercise of due care. — A telegraph company, in order to escape liability for damages resulting from the delivery of a forged telegram, must show that it has exercised due care in the adoption of measures designed to prevent its being made the instrument of fraudulent deception upon its patrons. *Western Union Tel. Co. v. Uvalde Nat. Bank (Tex.)*, 1-573.

Duty of company to identify sender.

In the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation regarding the authority to send it of the person who presents a message for transmission, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity, or authority to send it, of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone. But when such facts or circumstances come to the notice of the company, or of its acting operator, the exercise of reasonable care to transmit only genuine and authorized messages requires the person who receives the notice either to investigate and ascertain the authority of the sender before transmitting the message, or to communicate the facts and circumstances and the inquiry or suspicion to the addressee at or before its delivery. *Bank of Havelock v. Western Union Tel. Co. (U. S.)*, 5-515.

Telegram not too indefinite; loss natural and probable consequence. —

In an action by the addressees of a telegram against the telegraph company to recover damages for the loss of their mortgage lien on cattle, caused by their receipt and reliance upon a telegram, which falsely purported to be sent by a bank, and which stated that "we will pay Barnes' draft for thirty-five hundred," where it appeared that the telegram was received over the telephone for transmission, from one who was not known to the operator and who had no authority to send it, held that the telegram was not so indefinite that reliance and action might not have been lawfully based upon it: that the loss of the lien on the cattle was not an unnatural or improbable effect of the delivery of the telegram, and the damages resulting from such loss were not too remote to warrant a re-

covery; and that a draft by Barnes was not essential to the maintenance of the action. *Bank of Havelock v. Western Union Tel. Co. (U. S.)*, 5-515.

(2) Of telephone company.

Liability in tort. — A telephone company is liable to the addressee of a message for any negligence on its part in the transmission and delivery thereof, when it has notice, from the message or otherwise, at the time of its transmission, that the addressee has an interest therein. Such liability is not contractual, but in tort, and, therefore, it is not necessary that the addressee shall be the primary beneficiary in the message, so long as he has any interest therein. *McLeod v. Pacific Tel. Co. (Ore.)*, 16-1239.

Negligent connection with wrong telephone. — When the call by a patron of a telephone company is for the office or telephone of a particular person, the company performs its whole duty when it makes the connection with such telephone and it is not responsible for the identity of the person answering, or the message passing between the parties; but if it carelessly connects the patron with the wrong telephone, it may be liable. *McLeod v. Pacific Tel. Co. (Ore.)*, 16-1239.

Contract to produce certain individual to answer call. — Where a telephone company contracts to produce a certain individual at one of its own offices to answer a call, it is bound to exercise reasonable care to produce the proper person, and is liable to such person for negligence in that regard, if it had notice of his interest in the message. *McLeod v. Pacific Tel. Co. (Ore.)*, 16-1239.

In an action against a telephone company to recover damages resulting for the failure of such company to notify the plaintiff that she was wanted at one of its offices to answer a long-distance call, where the evidence shows that the person who put in the call for the plaintiff desired her services as a stenographer to report the trial of a law case, and so informed the operator at the time when the call was put in, and agreed to pay the charges of a messenger to summon the plaintiff from her home to the office of the company, but that the defendant, by mistake, summoned to its office another person of the same surname as the plaintiff, and that, by reason of the mistake, the person who desired the plaintiff's services employed another person, who received a considerable sum for the services performed, a judgment of nonsuit is erroneous. *McLeod v. Pacific Tel. Co. (Ore.)*, 16-1239.

d. Mental anguish.

(1) In general.

Compensatory damages for mental suffering without physical pain. — In an action against a telegraph company for failure to deliver a message where the defendant has been informed of the purpose of

the telegram and the importance of its immediate delivery, the plaintiff may recover compensatory damages for mental suffering, disconnected from any physical pain or attending circumstances of sickness or death. *Green v. Western Union Tel. Co.* (N. Car.), 1-349.

Operation of statute making company liable. — The statute making telegraph companies liable for mental anguish caused by negligence in receiving, sending, or delivering messages is too broad to admit of distinctions between anxiety and other kinds of mental suffering, and between negligence which originates suffering and that which prolongs it. *Willis v. Western Union Tel. Co.* (S. Car.), 2-52.

Presumption of mental anguish. — In an action by a stepmother against a telegraph company to recover damages for negligent delay in the transmission of a telegram notifying her of the death of her stepson and of the hour fixed for his funeral, there is no presumption of mental anguish growing out of the relation of stepmother and stepson, but the question should be submitted to the jury, and if they are satisfied that the plaintiff has really suffered mental anguish, as distinguished from mere disappointment, they may award her such a reasonable sum as will in a measure compensate her for the injury done by the defendant's negligence. *Harrison v. Western Union Tel. Co.* (N. Car.), 10-476.

Failure to deliver message relieving anguish. — Under the Arkansas statute authorizing the recovery of damages for mental anguish caused by negligence in failing to transmit or deliver a telegram, a recovery may be had for the negligent failure to deliver a telegram that would have relieved mental anguish or suffering. *Western Union Tel. Co. v. Hollingsworth* (Ark.), 13-397.

(2) Notice to company of importance of message.

Necessity for notice. — In an action to recover damages from a telegraph company for its negligent delay in the transmission of a telegram, the plaintiff, in order to recover substantial damages, based upon his mental distress and suffering, must show that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty to transmit promptly, or that it had extraneous information which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff. *Harrison v. Western Union Tel. Co.* (N. Car.), 10-476.

Telegram inquiring as to condition of member of family. — A telegram inquiring as to the condition of a member of one's family indicates sickness and anxiety on account thereof, and is a notice to the telegraph company of its importance. *Willis v. Western Union Tel. Co.* (S. Car.), 2-52.

Telegram containing notice of death and of hour fixed for funeral. — A telegram notifying a stepmother of the death

of her stepson and of the hour fixed for his funeral is not open to the construction that its only purpose is to notify the mother of the hour of interment, and that nothing else is reasonably within the contemplation of the parties, as its evident purpose is to notify the mother at once of her son's death, in order that she may come without delay and be with his remains as long as possible before they are buried. *Harrison v. Western Union Tel. Co.* (N. Car.), 10-476.

(3) Negligence of company as cause of injury.

What plaintiff who is neither sender nor sendee must show. — Where the plaintiff, in an action against a telegraph company to recover damages for negligent delay in the delivery of a telegram, is neither the sender nor the sendee of the telegram, the only way in which he can recover is upon the theory that it was sent for his benefit, and he must not only show negligence on the part of the defendant, but must further prove that the negligence caused him injury. Hence, where the plaintiff claims damages for mental anguish caused by his failure to reach the bedside of his sick wife before a certain time, he is not entitled to recover, if, as a matter of fact, he could not have reached his wife's bedside any sooner had there been no delay in the delivery of the message. *Kernodle v. Western Union Tel. Co.* (N. Car.), 8-469.

Where prompt delivery of message would have made no difference. — The addressee of a telegram announcing the serious illness of his son cannot recover for the negligent failure of the telegraph company to deliver the message until after the son's death, if, as a matter of fact he could not have reached his son's bedside before the latter's death had the message been transmitted and delivered within a reasonable time. *Howard v. Western Union Tel. Co.* (Ky.), 7-1065.

Evidence reviewed, in an action by the addressee of a telegram announcing the serious illness of his son to recover damages for the negligent failure of the telegraph company to deliver the message until after the son's death, and held insufficient to show that the addressee could have reached the son's bedside before the latter's death even if the message had been delivered promptly. *Howard v. Western Union Tel. Co.* (Ky.), 7-1065.

Questions for jury. — In an action against a telegraph company to recover damages for mental anguish sustained by a plaintiff by reason of negligent delay in the delivery of a telegram announcing his wife's sickness, it is necessary for the plaintiff to prove both that he could and would have reached his wife's bedside earlier than he did but for the delay in the delivery; and where the question as to what the plaintiff would have done is contested by the defendant, that question, as well as the question as to what he could have done, should be submitted to the jury for determination.

Kernodle v. Western Union Tel. Co. (N. Car.), 8-469.

In an action by the sender of a telegram against a telegraph company for damages for mental anguish suffered through delay in delivering the telegram, it is a question of fact for the jury whether the telegram would have been answered and the mind of the plaintiff relieved, and whether the negligence of the defendant was a proximate cause of the plaintiff's suffering. *Willis v. Western Union Tel. Co. (S. Car.), 2-52.*

(4) To whom company liable.

Right of sender of message to damages. — The sender of a telegram is entitled equally with the addressee to recover damages for mental anguish caused by failure to deliver the message, and it is immaterial that the plaintiff would have suffered no anxiety had the defendant not notified him of the nondelivery of the message. *Green v. Western Union Tel. Co. (N. Car.), 1-358.*

Liability to person not mentioned in message. — Where there is delay in the delivery of a telegram, the telegraph company is not liable for mental anguish suffered by a person who is not mentioned in the message and whose interest therein was not communicated to the company. *Helms v. Western Union Tel. Co. (N. Car.), 10-643.*

Evidence reviewed, in an action against a telegraph company to recover damages for mental anguish sustained by the plaintiff on account of a delay in the delivery of a telegram sent by the plaintiff's son in the son's name, and held insufficient to charge the defendant with knowledge that the plaintiff was the real beneficiary and that the son was acting as his agent in sending the message. *Helms v. Western Union Tel. Co. (N. Car.), 10-643.*

(5) Evidence as to mental suffering.

Testimony of plaintiff. — Evidence by the plaintiff in an action to recover damages for mental anguish caused by delay in delivering a telegram, as to his own mental suffering, is inadmissible, it being for the jury to say what mental anguish, if any, would be likely to result under all the circumstances. *Willis v. Western Union Tel. Co. (S. Car.), 2-52.*

e. Liability for transmission of libelous message.

Right to receive and transmit libels.

— A telegraph company has no right to receive and transmit libelous messages. *Western Union Tel. Co. v. Cashman (U. S.), 9-693.*

Imputation of malice to company. — In an action against a telegraph company for libel and for publishing a libel in violation of a statute, where the evidence shows that the libelous message got into the way of transmission over the defendant's wires without any preliminary reception and authorization by the defendant, or its authorized agent, and that thereafter it was handled as

a matter of routine by the agents, acting in the regular line of their duty and business, who are shown to have been bound to secrecy by the statutes of the state and who are not shown to have had any knowledge of the parties to the message or any particular knowledge of the contents of the message or any interest or improper motive, it seems impossible to impute malice to the defendant. *Western Union Tel. Co. v. Cashman (U. S.), 9-693.*

Effect of statute prohibiting divulging contents of message by company's employees. — In an action against a telegraph company for publishing a libel, where the evidence fails to disclose that the contents of the message complained of were ever disclosed by any employee of the defendant, it is erroneous to refuse the defendant's request for an instruction that the jury, in assessing damages for the plaintiff, should take into consideration the fact that by the statute it is made a misdemeanor, punishable by fine and imprisonment, for an employee of a telegraph company to use, or suffer to be used, or wilfully to divulge to any one but the person for whom it is intended, the contents or nature of a telegraphic message intrusted to him for transmission or delivery, as the presumption is that the law was respected by the defendant's employees. *Western Union Tel. Co. v. Cashman (U. S.), 9-693.*

Publication of message. — Where a libelous telegram is received for transmission in the absence of the agent, by a boy who is not in the employ of the telegraph company, but who merely assists the agent in other lines of business, and the boy transmits the message over the wire to an intermediate point, and at such intermediate point the message is received, written out, and placed in the transmission book, from which it is taken by the agent of the company and forwarded to the company's agent at the addressee's place of residence, and at such place the message is written out by the agent who receives it, and is handed to the messenger boy, who places it in a sealed envelope and delivers it to the addressee after having taken a letter-press copy of it, the only libelous message for which the company is liable, if it is liable at all, is the message copied by the messenger boy and delivered to the addressee, and the only circulation of this message, other than a delivery to the addressee, is such as results from the copying of the message by the messenger boy. *Western Union Tel. Co. v. Cashman (U. S.), 9-693.*

Evidence insufficient to show publication. — In an action against a telegraph company for libel and for publishing a libel in violation of a statute, where the evidence shows that the message was handed to a messenger boy to be copied and delivered, and that the boy made a letter-press copy, but does not show whether the boy could have read or did read the message, the evidence is insufficient to show a publication of the libel. *Western Union Tel. Co. v. Cashman (U. S.), 9-693.*

Direction of verdict for defendant. — In an action against a telegraph company for publishing a libel, where no publication is proved and the evidence disproves the existence of any malice, expressed or implied, in respect to the handling and transmission of the message, the defendant is entitled to have a verdict in its favor directed. *Western Union Tel. Co. v. Cashman* (U. S.), 9-693.

f. Law governing contract.

Law of state in which telegram is sent. — Where a telegram is sent from one state to another, and the contract in the former state, by virtue of the laws thereof, gives the right to recover damages for mental anguish due to a failure to deliver the telegram, the contract inures to the benefit of the addressee, and he may recover in the latter state damages for mental anguish for the nondelivery of the telegram, although no actionable negligence has occurred in the latter state. *Western Union Tel. Co. v. Woodard* (Ark.), 13-354.

g. Measure of damages.

Damages reasonably within contemplation of parties. — The damages recoverable against a telegraph company for failure to deliver a message are only such as are the natural and proximate result of its conduct, and such as reasonably might have been within the contemplation of the parties as a probable result of a breach of it, and where there is nothing in the transaction to have given the company knowledge or information of any particular damage which would be likely to result from a mistake in sending it or a failure to deliver it, only the charges for transmission can be recovered. *Wheelock v. Postal Tel. Cable Co.* (Mass.), 14-188.

Limitation of damages to amount paid for transmission. — The delivery of a cipher message to a telegraph company for transmission, with the statement that it is very important and must be transmitted correctly, does not show the nature or extent of the loss, if any, that will result from the non-delivery of it, or that the probability of special damage to the sender is within the contemplation of the parties so as to render the company liable for damages in excess of the amount paid for transmission. *Wheelock v. Postal Tel. Cable Co.* (Mass.), 14-188.

Speculative damages. — Where a telegraph company has negligently failed to transmit or deliver a message ordering goods, the measure of damages is the difference between the price which would have been paid under the order and the price which the sender was or would be obliged to pay in order, by due diligence, after knowing of the company's remissness, to purchase goods of a like quantity and quality; but damages cannot be recovered for profits which the sender of the message expected or might have realized from a resale not then effected or agreed upon. *Western Union Tel. Co. v. Lehman* (Md.), 14-736.

In an action against a telegraph company for damages for failure to deliver a telegram

sent by dealers in cattle in one city to a buyer in another city directing the buyer to ship to the dealers four to six carloads of cattle for resale, an instruction allowing the jury to find such damages as the evidence shows the plaintiff suffered in loss of profits is erroneous, where it does not appear whether the buyer would have sent four to six carloads, or whether the plaintiffs secured other cattle with which to supply their customers at a profit, or what number of cattle could have been resold, and at what profit, since the profits claimed are too contingent, uncertain, and speculative to permit a recovery. *Western Union Tel. Co. v. Lehman* (Md.), 14-736.

Addressee's right to recover actual damages. — The addressee of a telegram which is incorrectly transmitted is entitled to recover the actual damages sustained by him in consequence of the error. *Bailey v. Western Union Tel. Co.* (Pa.), 19-895.

Actual and punitive damages for mental anguish. — In an action to recover damages for mental anguish caused by a failure to deliver a telegram, the actual damages recoverable are to be restricted wholly to the mental anxiety occasioned the sender of the telegram from the time he should have received an answer thereto until he actually secured the information expected in such answer; but the punitive damages recoverable have reference to the wilful or wanton act of the telegraph company in failing to deliver the message and to the time of the occurrence of such act. *Willis v. Western Union Tel. Co.* (S. Car.), 2-52.

Action for delay in delivering telegram offering bid. — In an action against a telegraph company to recover for delay in delivering a telegram offering a bid for a commodity, the measure of damages is the difference between the price offered in the delayed message and the price which the owner could have obtained for the commodity at the time the message should have been delivered, and not the difference between the price offered and the market value of the commodity at the time the message was actually delivered. *Western Union Tel. Co. v. Love Banks Co.* (Ark.), 3-712.

Action for error in telegram quoting selling price. — Where a telegraph company, in transmitting a telegram quoting the selling price of a commodity offered for sale, makes an error by naming a price lower than that named in the message as delivered to it for transmission, the measure of damages, in an action against the company by the receiver of the telegram who buys in reliance upon the offer contained therein, is the difference between such price and the price which he is compelled to pay. Such measure of damages is proper, though it permits the receiver to recover for loss of profits. *Hays v. Western Union Tel. Co.* (S. Car.), 3-424.

Failure to deliver telegram ordering cattle. — The measure of damages for failure of a telegraph company to deliver a telegram ordering cattle is the difference between the market value of cattle of the kind de-

scribed in the place from which they were ordered at the time the message should have been delivered, and the market price of the same kind of cattle at the time when, with reasonable diligence, they could have been secured, and in the absence of any evidence of such difference, the liability of the company is limited to the amount paid for sending the message. *Western Union Tel. Co. v. Lehman* (Md.), 14-36.

Effect of Massachusetts statute. — The Massachusetts statute providing that a "telegraph company shall be liable for damages to the amount of one hundred dollars actually caused by its negligence . . . in transmitting, receiving, or delivering telegraphic messages, and any limit of such liability by contract or regulation shall apply only to the damages in each case in excess of one hundred dollars," and that "no action therefor shall be maintained unless the claim is presented in writing to such company or its agent within sixty days after such right of action accrues," deprives a telegraph company of any contractual defense to such action as to damages not exceeding one hundred dollars, and leaves the rule for determining the damages within this amount the same as at common law; and the statutory provision requiring the presentation of claims within sixty days may be found to be waived upon evidence that would establish a waiver of a similar provision in a contract. *Wheelock v. Postal Tel. Cable Co.* (Mass.), 14-188.

Verdict held not excessive. — A verdict for \$400 damages for failure to send a telegram held not excessive. *Barnes v. Western Union Tel. Co.* (Nev.), 1-346.

b. Pleading and practice.

(1) Complaint.

Failure to show breach of duty to plaintiff. — The complaint considered, in an action by the addressee of a telegram to recover damages for delay in its transmission, and held insufficient to connect the plaintiff with the sending of the message, or to show any breach of duty to him of which he can complain. *Collins v. Western Union Tel. Co.* (Ala.), 8-268.

(2) Plea.

Necessity for pleading contract. — A telegraph company cannot defeat an action against it for delay in the delivery of a telegram by setting up the terms and conditions on the form used by the sender of the message, unless it interposes a plea for that purpose. *Collins v. Western Union Tel. Co.* (Ala.), 8-268.

(3) Evidence.

Statements of receiving clerk and cashier as hearsay. — The statements of the receiving clerk and the cashier in the main office of a telegraph company respecting matters within the apparent scope of their authority are not hearsay. *Western Union Tel. Co. v. Wells* (Fla.), 7-531.

Proof of allegation of complaint that answer would have been sent. — Where a complaint in an action to recover damages for mental anguish caused by delay in delivering a telegram alleges that an answer would have been sent relieving the mind of the plaintiff if the telegram had been promptly delivered, the plaintiff may prove such fact by the person from whom the answer was expected. *Willis v. Western Union Tel. Co.* (S. Car.), 2-52.

(4) Charge of court.

As to reasonableness of company's regulation. — The trial court should not submit to the jury the question of the reasonableness of a regulation of a telegraph company, but should instruct the jury on such question as a matter of law. *Western Union Tel. Co. v. Love Banks Co.* (Ark.), 3-712.

Instruction not erroneous as varying from pleadings. — In an action for damages caused by an error in the transmission of a telegram whereby the consignee of a carload of perishable freight was induced to refuse to receive such freight, an instruction submitting to the jury the question whether the error in the telegram had induced the consignee to leave the freight "in the care of the railroad company" is not erroneous as varying from the pleadings. *Western Union Tel. Co. v. Corso* (Ky.), 11-1065.

Failure to charge on question of mitigation of damages. — In an action to recover damages for mental anguish caused by failure to deliver a telegram, a general charge that the jury should take into consideration all the facts and circumstances in estimating the damages, does not cover a specific request to charge that the jury might consider in mitigation of damages the plaintiff's failure to use other means within his reach to secure the information sought by him. *Willis v. Western Union Tel. Co.* (S. Car.), 2-52.

Failure to charge that evidence properly received but afterward rendered immaterial cannot be considered. — Where, in an action against a telegraph company for damages for failure to deliver a telegram, evidence is received as to the wealth of the defendant, which is competent before the questions of wilfulness and wantonness are disposed of by nonsuit, the failure of the court afterwards to instruct that such evidence cannot be considered under the cause of action for negligence is not reversible error in the absence of a request. *Smith v. Western Union Tel. Co.* (S. Car.), 12-654.

Instruction as to right of company to fix office hours. — In an action against a telegraph company for negligent delay in delivering a message, instructions as to the right of the defendant to establish opening and closing hours for its offices and what would amount to a waiver thereof, given instead of an instruction on the subject requested by the defendant, held a correct and sufficient statement of the law. *Smith v. Western Union Tel. Co.* (S. Car.), 12-654.

8. TRANSMITTING MONEY BY TELEGRAPH.

Right to recover damages for wilful refusal to pay over money. — When the known probable result of a wilful refusal, without adequate excuse, of a telegraph company to pay over money to one entitled thereto, causes such person to travel for more than twenty-four hours without food or funds, he may recover damages for bodily pain and suffering and for mental anguish attendant thereon. *Western Union Tel. Co. v. Wells (Fla.)*, 7-531.

Action of sendee on refusal of company to pay over money. — When the refusal of a telegraph company to pay over money causes one without funds to act quickly, and, instead of seeking to recover from a sleeping-car company the money theretofore paid for a section and awaiting the possibility of getting the money the next day, he decides to travel homeward, a finding of the jury that the injury was not self-imposed will not be disturbed. *Western Union Tel. Co. v. Wells (Fla.)*, 7-531.

Declaration stating bona fide claim for refusal to pay over money. — A declaration alleging the wilful refusal of a telegraph company to pay the money in its hands, to which the plaintiff was entitled, with full knowledge that the plaintiff would thereby be compelled to travel without food for more than twenty-four hours, states a *bona fide* claim within the jurisdiction of the Florida circuit court, even though the money withheld is below the jurisdictional amount of that court. *Western Union Tel. Co. v. Wells (Fla.)*, 7-531.

Evidence as to suffering of plaintiff's wife and children. — As against a general objection, evidence as to the suffering for food of a wife and children may be admitted for the purpose of explaining why one spent a small sum of money on them rather than to relieve his own wants, where the jury are charged that they must not allow any damages for the suffering of the wife or children. *Western Union Tel. Co. v. Wells (Fla.)*, 7-531.

Company not relieved from liability by paying over money to sender. — After an action brought against a telegraph company for refusal to pay over to the payee of the telegraph order the money therein named, the company is not relieved from liability by paying over that sum to the transmitting bank. *Western Union Tel. Co. v. Wells (Fla.)*, 7-531.

9. TELEGRAMS AS EVIDENCE.

Telegram delivered to company as original. — If one initiates correspondence by telegraph he selects the telegraph company as his agent, which agency continues throughout the correspondence, and a telegram delivered for transmission in reply to one first sent is the original for the purpose of evidence. *Bond v. Hurd (Mont.)*, 3-566.

Necessity for proof of identity of sender. — A telegram received in due course, and which purports to be in reply to another telegram shown to have been previously sent

by the receiver, is admissible in evidence without further proof as to the identity of the sender. *Edwards v. Erwin (N. Car.)*, 16-393.

10. POLES AND WIRES.

Duty to exercise high degree of care. — It is the duty of a telephone company to exercise a high degree of care to select sound poles, to place them securely in the earth to prevent them from falling, and to exercise similar care in their maintenance and inspection, having due regard to the character of the soil, the condition of the weather and winds, the season of the year, and such other conditions as may affect the security of the poles and the safety of the traveling public. *Harton v. Forest City Tel. Co. (N. Car.)*, 14-390.

Use of city streets. — While a telephone company may use the streets of a city for constructing and maintaining its system, it must exercise the right so as not to cause unnecessary injury or inconvenience to the property owners. *Kirby v. Citizens' Tel. Co. (S. Dak.)*, 2-152.

Failure to inspect for eight or ten days after construction of line. — A telephone company, having discharged its duty as to the secure construction of its line, cannot be said to be guilty of negligence in failing to inspect the line for eight or ten days thereafter, in the absence of any notice of trouble, or other evidence of negligence; and no evidence of negligence is furnished by the fact that a heavy rain occurred on the night preceding the falling of a pole on the following day. *Harton v. Forest City Tel. Co. (N. Car.)*, 14-390.

Declaration in action for injuries caused by live wire. — A declaration in an action against a telephone company to recover damages for an injury to a pedestrian caused by a live telephone wire, held to state a case of negligence on the part of the defendant sufficient to withstand a demurrer. *Southern Bell Tel., etc., Co. v. Howell (Ga.)*, 4-707.

A declaration in an action by a pedestrian to recover damages against a telephone company for coming in contact with a live telephone wire held good against a demurrer on the ground of the plaintiff's contributory negligence. *Southern Bell Tel., etc., Co. v. Howell (Ga.)*, 4-707.

Liability for injury to shade trees. — Where an abutting owner has planted trees in the streets adjacent to his property in accordance with a city ordinance, a telephone company is liable for an injury to such trees in erecting poles and wires under a franchise, though no unnecessary injury is inflicted. *Bronson v. Albion Tel. Co. (Neb.)*, 2-639.

A telephone company operating lines in the streets of a city and sued by an abutting owner for the mutilation of shade trees in front of the plaintiff's premises, is not in a position to contend that it was only using the streets in a manner consistent with the purposes for which they were acquired and that the damage complained of was a result of

such use, in the absence of any showing that it was ever granted a franchise or license to conduct a telephone business in the city or authorized to occupy the streets with its poles, wires, and cables. *Cartwright v. Liberty Tel. Co.* (Mo.), 12-249.

Removal by individual of pole on private property. — A lessee whose title extends to the centre of a private alley in the rear of his premises, whereon a telephone company has erected, without authority, a pole which tends to interfere with the proper use of the alley by him, is not liable for cutting down such pole after having given reasonable notice to the company to remove it. *Maryland Tel., etc., Co. v. Ruth* (Md.), 14-576.

In an action by a telephone company against a person who cut down a telephone pole which interfered with his use of an alley abutting on his premises, a ruling by the court, sitting as a jury, that if it finds from the evidence that the defendant acted in a wanton and reckless manner in removing the pole and its appliances he is liable not only for actual but for exemplary damages, is as favorable a ruling as the plaintiff is entitled to have. *Maryland Tel., etc., Co. v. Ruth* (Md.), 14-576.

11. TAXATION.

When taxation of poles not unreasonable. — The rental of three dollars per pole per annum, imposed by the city of Memphis upon telegraph and telephone companies for the use of its streets, is not so unreasonable and excessive in amount as to invalidate the ordinance imposing the same. *Memphis v. Postal Tel. Cable Co.* (U. S.), 16-342.

Poles, wires, etc., personalty. — For purposes of taxation, the poles, wires, and other appliances constituting a telegraph line are personalty and not realty. *Western Union Tel. Co. v. Modesto Irrigation Co.* (Cal.), 9-1190.

Under the California statute providing that the term "improvements" shall include "all buildings, structures, fixtures, fences, and improvements erected upon or affixed to land, except telephone and telegraph lines," and the statute providing that telegraph and telephone lines shall be "assessed as personal property by the assessor of the county," an irrigation district which is empowered to tax realty only cannot impose a tax on the poles, wires, and other appliances constituting a telegraph line. *Western Union Tel. Co. v. Modesto Irrigation Co.* (Cal.), 9-1190.

TEMPORARY INJUNCTION.

See INJUNCTIONS, 4.

Restraining nuisances, see NUISANCES, 6 b (4).

TENANCY.

See JOINT TENANTS AND TENANTS IN COMMON; LANDLORD AND TENANT.

TENANTS IN COMMON.

See JOINT TENANTS AND TENANTS IN COMMON.

TENDER.

Defense to action for conversion, see TROVER AND CONVERSION, 5 c.

Effect of tender on lien of mortgage, see MORTGAGES AND DEEDS OF TRUST, 10 b.

Liability of clerk for interest on funds paid into court as tender, see CLERKS OF COURTS.

Necessity of tender of amount due by pledgor to maintain trover against pledgee, see TROVER AND CONVERSION, 5 a.

Prerequisite to specific performance, see SPECIFIC PERFORMANCE, 3 f (6).

Ratification of tender made by stranger. — A tender of a simple debt by a mere stranger for the purpose of avoiding a forfeiture under a statutory proceeding instituted by one cotenant against another, and not involving the acquisition of any right or privilege by the person making the tender, or the surrender of any right or property by the person to whom it is made, is rendered valid by subsequent timely ratification by the person in whose interest the tender is made. *Forderer v. Schmidt* (U. S.), 12-80.

Title to money tendered by payment into court. — Where a defendant, pursuant to an order of the court, pays into the court as an unconditional tender a sum of money which he claims is the amount due by him to the plaintiff, the title to the money so paid passes irrevocably to the plaintiff, though he does not accept the tender, and the court, upon subsequently granting the defendant permission to amend his answer and change the issue, has no power to permit him to withdraw the money. *Mann v. Sprout* (N. Y.), 7-95.

Right to object to failure to keep tender good. — Where it appears that the amount deposited in court by the plaintiff in an action of replevin for the purpose of discharging the defendant's lien on the chattel in controversy remained therein until the final judgment, wherein the defendant's rights were fully protected, the defendant cannot complain of the plaintiff's failure to keep good the tender of such amount made before the commencement of the action on the ground that the plaintiff did not deposit the same until several months after filing the complaint. *Andrews v. Hoeslich* (Wash.), 14-1118.

TENEMENT HOUSES.

Regulating manufacture of clothing in tenement houses, see HEALTH, 2 b.

Validity of statute requiring water closets in tenement houses, see HEALTH, 2 b.

TENEMENTS.

Tenement as leasehold, see **LANDLORD AND TENANT**, 3 a.

TERM.

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Duration of lease, see **LANDLORD AND TENANT**, 3 b.
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Imposition of terms on dismissal of appeal, see **APPEAL AND ERROR**, 10 a.
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TERMS AND SESSIONS OF COURTS.

See **COURTS**, 5.
Entry of judgment at term subsequent to trial, see **JUDGMENTS**, 4.
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Territorial operation of injunction, see **TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION**, 3 c (4).
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Territorial operation of street railway franchises, see **STREET RAILWAYS**, 4.
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See **WILLS**.

TESTAMENTARY CAPACITY.

See **WILLS**, 4.

TESTIMONY.

See **DEPOSITIONS**; **EVIDENCE**.

THEATRES AND PUBLIC RESORTS.

1. **STATUTORY REGULATIONS**, 1532.
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 - a. Nature of rights of ticket holder, 1533.
 - b. Conditions in ticket, 1533.
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 - a. Right to exclude persons from theatre, 1533.
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 - d. Liability for loss of property, 1534.
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Regulating sale of admission tickets, see **CONSTITUTIONAL LAW**, 5 c.

Superintendence of theatre as labor, see **SUNDAYS AND HOLIDAYS**, 1 b.

1. **STATUTORY REGULATIONS**,

Validity of ordinance requiring fireman to be kept on duty in theatre at expense of owner. — A city has no power to require every person conducting a theatre to employ and have in attendance at the theatre during performances a fireman detailed from the city fire department, and to pay the city for the services of such fireman. *City of Chicago v. Weber* (Ill.), 20-359.

Validity of ordinance regulating hours for operation of skating rinks. — An ordinance forbidding the operation of skating rinks between the hours of six o'clock P. M., and six o'clock A. M., is unreasonable, because a place of amusement of that char-

acter so restricted as to hours would be practically suppressed. *Johnson v. Philadelphia* (Miss.), 19-103.

2. TICKETS AND ADMISSION.

a. Nature of rights of ticket holder.

In general. — Under the California statute, a ticket of admission to a public place of amusement is, when sold, an irrevocable license to the purchaser of the ticket to occupy a place in the place of amusement during the performance; and this right is a right of property, and the ticket which represents the right is also a species of property. *Ex p. Quarg* (Cal.), 9-747.

Theatre ticket as license. — A theatre ticket is a license issued by the proprietor of the theatre pursuant to a contract as evidence of the right of the holder to admission at the date named and with the privileges specified, subject to the observance of any reasonable condition appearing on the face of the ticket, and this license is revocable for a violation of such condition by the holder. *Collister v. Hayman* (N. Y.), 5-344.

Effect of license to ticket speculators. — The license of a ticket speculator granted under the New York city charter authorizes him to conduct his business on the sidewalk within the limits prescribed. This license does not add to, or take from, the rights of the parties to the contract made when the proprietor of the theatre sells a ticket, but the rights of the purchaser and the duties of the proprietor are measured by the terms of the contract as in fact made. *Collister v. Hayman* (N. Y.), 5-344.

b. Conditions in ticket.

Validity of condition that admission will be refused if sold on sidewalk. —

A condition on the face of a theatre ticket that if sold on the sidewalk it will be refused at the door is a reasonable condition and within the power of the proprietor to make. Such a condition is not a violation of the New York statute providing for the equal accommodation of all persons in places of public accommodation and amusement. *Collister v. Hayman* (N. Y.), 5-344.

A condition on the face of a theatre ticket that it will be refused if sold on the sidewalk is valid and may be enforced against the original purchaser and all subsequent purchasers. *Collister v. Hayman* (N. Y.), 5-344.

c. Actions for refusal of admission.

Right to maintain action of trespass. — Where the managers of a theatre fail to supply to the holder of a ticket for a reserved seat the seat for which his ticket calls, and the holder refuses to take another seat offered him, whereupon he leaves the theatre, no rudeness or violence being offered him, he cannot maintain an action of trespass for the price of the ticket and for inconvenience, annoyance, mortification, and humiliation suffered by him. *Horne v. Noxon* (Pa.), 5-349.

Right to maintain action in tort or for breach of contract. — A ticket to a theatre or other place of amusement is a mere license, revocable at the pleasure of the proprietor of the amusement resort, and therefore the holder cannot maintain an action of tort against the proprietor for refusing to permit him to occupy the seat purchased, or for humiliation or inconvenience attending such refusal; but as the ticket constitutes a contract between the proprietor and the holder, the latter may maintain an action for a breach of the contract. *Taylor v. Cohn* (Ore.), 8-527.

A theatre ticket is to be regarded as a mere license, for the revocation of which before the holder has actually been given his seat and has taken it, his only remedy is in assumpsit for the breach of the contract. *Horney v. Nixon* (Pa.), 5-349.

Measure of damages for refusal of admission. — The holder of a ticket entitling him to a seat at a given time in a place of amusement, who is refused admission, is entitled to recover the amount paid for the ticket and such necessary expenses as were incurred in order to attend the performance. *People ex rel. Burnham v. Flynn* (N. Y.), 12-420.

Sufficiency of complaint. — A complaint contains a sufficient statement of a cause of action for breach of a contract between the proprietor of a theatre and the purchaser of a ticket, where it states that the defendant is the proprietor of a theatre; that on or about a certain date the plaintiff purchased of the defendant a ticket for seats at a certain performance in the theatre; that such tickets were presented at the proper time and place, but that the defendant refused to permit the plaintiff to enter the theatre or occupy the seats; and that by reason thereof the plaintiff has been damaged in a certain sum. *Taylor v. Cohn* (Ore.), 8-527.

3. RIGHTS, DUTIES, AND LIABILITY OF PROPRIETOR.

a. Right to exclude persons from theatre.

In absence of statute. — The proprietor of a theatre has the right to decide who shall be admitted to witness the plays he produces, in the absence of any express statute controlling his action. *People ex rel. Burnham v. Flynn* (N. Y.), 12-420.

b. Duty to keep theatre open.

Grant of license as imposing duty. — A grant of a license to a theatre is not a franchise and does not impose upon the proprietors the duty to keep the theatre open. *Collister v. Hayman* (N. Y.), 5-344.

c. Duty to protect patrons from injury.

In general. — The proprietor of a place of amusement is bound to exercise only reasonable care to protect his patrons from injury. *Williams v. Mineral City Park Assoc.* (Ia.), 5-924.

University athletic association. — A university athletic association, which erects a stand or bleacher to be used at an intercollegiate football game by spectators who are required to pay an admission fee for the profit of the association, stands in the position of the proprietor of a public resort, and is bound to exercise a high degree of care to prevent disaster, such association impliedly contracting that, but for latent defects not discoverable by the use of reasonable means, the stand is safe. *Scott v. University of Michigan Athletic Assoc. (Mich.)*, 15-515.

Proprietor of bathing resort. — The proprietor of a public bathing resort which is operated for hire is not only required to exercise ordinary care and prudence to keep the premises in a reasonably safe condition, but where the character and condition of the resort are such that because of deep water, or the arising of a sudden storm, or other causes, the bathers may get into danger, the law imposes upon him the additional duty of having in attendance some suitable person with the necessary appliances to effect rescues; and it is the duty of the proprietor to act with promptness, and to exert every reasonable effort to search for and recover bathers who are known to be missing. *Larkin v. Saltair Beach Co. (Utah)*, 8-977.

d. Liability for loss of property.

Proprietor of bath house. — The proprietor of a bath house, who for a consideration furnishes bath rooms, bathing suits, and other accessories of a bath to those who desire to bathe in the sea, and also receives their money, jewelry, or other valuables for safekeeping, is a depository for hire in relation thereto, and is liable for any loss occurring from the want of ordinary care on his part. *Walpert v. Bohan (Ga.)*, 8-89.

e. Actions.

Sufficiency of declaration for loss of property. — Allegations of declaration considered, in an action against the proprietor of a bath house to recover for the loss of valuables deposited by the plaintiff with the defendant's agent preparatory to bathing, and held sufficient to withstand a general demurrer. *Walpert v. Bohan (Ga.)*, 8-89.

Sufficiency of evidence. — In an action against a university athletic association for damages for personal injuries sustained by the collapse of a stand erected by the defendant on the athletic field of the university with the permission of the authorities thereof, evidence examined and held to show that in erecting such stand the defendant was not the agent of the regents of the university. *Scott v. University of Michigan Athletic Assoc. (Mich.)*, 15-515.

Where in an action against a university athletic association to recover damages for personal injuries sustained by the collapse of a stand erected by the defendant for the use of spectators at an intercollegiate football game, the jury might have found from the evidence that the stand, designed to sup-

port five thousand persons, collapsed from inherent and discoverable weakness while occupied by less than three thousand persons, the court cannot, notwithstanding the testimony introduced on behalf of the defendant that the stand was constructed of good materials by a competent and experienced builder and was inspected and pronounced safe by engineers and other admittedly competent persons, say as a matter of law that a latent and not a patent defect existed. *Scott v. University of Michigan Athletic Assoc. (Mich.)*, 15-515.

Evidence reviewed, in an action against the proprietor of a bathing resort to recover damages for his negligence resulting in the drowning of the plaintiff's intestate, and held sufficient to justify the jury in finding that the defendant was negligent and that the plaintiff's intestate was free from contributory negligence. *Larkin v. Saltair Beach Co. (Utah)*, 8-977.

Negligence as question for jury. — In an action to recover damages for personal injuries, where it appears that the plaintiff, while sitting on the grand stand of an amusement field, was struck by a bottle dropped from the band platform overhead, and it also appears that the defendant permitted dealers to carry bottled liquors to persons on the band platform, it is for the jury to determine whether the defendant was negligent in not keeping the floor of the platform clear of bottles. *Williams v. Mineral City Park Assoc. (Ia.)*, 5-924.

In an action to recover damages for personal injuries, where it appears that the plaintiff, while sitting on the grand stand of an amusement field, was struck by a bottle dropped from the band platform overhead, it is for the jury to determine whether it was negligence for the defendant to fail to provide such an inclosure around the platform as would have prevented the accident from happening. *Williams v. Mineral City Park Assoc. (Ia.)*, 5-924.

Instructions as to liability of proprietor for act of servant. — In an action to recover damages for personal injuries where it appears that the plaintiff, while sitting on the grand stand of an amusement field, was struck by a bottle dropped from a band platform overhead, it is proper to instruct the jury that the defendant is not liable for the bottle so carelessly dropped by his servant, a member of the band, who was drinking beer on the platform, as the negligent act of the servant was not within the scope of his employment. *Williams v. Mineral City Park Assoc. (Ia.)*, 5-924.

THEFT.

See LARCENY.

THEORY OF CASE.

Conclusiveness of judgment as to theory of law advanced by counsel, see JUDGMENTS, 6 b (1).

Departure from theory in instructions, see FRAUD AND DECEIT, 6.
 Determination by appellate court, see APPEAL AND ERROR, 12 a.
 Request for instructions not applicable to theory of case, see CRIMINAL LAW, 6 q (1).

THREATS.

Avoidance of deed of married woman procured by threats against husband, see HUSBAND AND WIFE, 2 d.
 Coercion of employers, see LABOR COMBINATIONS, 6.
 Evidence of threats in arson case, see ARSON, 4.
 Evidence of threats in homicide cases, see HOMICIDE, 6 a (5).
 Participation in homicide under threats, see HOMICIDE, 2.
 Preventing witness from testifying, see EMBRACERY.
 Threat to eject passenger as actionable wrong, see CARRIERS, 6 g (4).
 Relevancy of threats to procure attendance of witness, see EVIDENCE, 2.

What constitutes a threat. — A threat is a menace of such a nature as to unsettle the mind of a person on whom it is intended to operate, and to take away from his acts that free, voluntary action which alone constitutes consent. *State v. Louanis* (Vt.), 9-194.

Nature of offense of threat to accuse of crime with intent to extort money. — The Vermont statute making it an offense to threaten to accuse another person of crime, with an intent to extort money, is aimed at blackmailing, and a threat of any public accusation is as much within the reason of the statute as a threat of a formal complaint by course of law. *State v. Louanis* (Vt.), 9-194.

Admissibility of evidence of other threats by defendant. — In a prosecution for threatening to accuse another person of crime, with an intent to extort money, evidence that the defendant made similar threats to other persons is admissible to show that the threats charged were made with the intent alleged. *State v. Louanis* (Vt.), 9-194.

Necessity of instruction as to meaning of term "extort." — In a prosecution under the Vermont statute for threatening to accuse another person of crime, with an intent to extort money, it is not necessary for the court to define the word "extort" in instructing the jury, as the word is a common one, and is used in the statute in its ordinary sense. *State v. Louanis* (Vt.), 9-194.

Sufficiency of instructions. — In a prosecution under the Vermont statute for threatening to accuse another person of crime, with intent to extort money, it is not erroneous to refuse to instruct the jury that the threat must be such as to overcome the will of an ordinarily prudent man, where the court leaves it to the jury to say whether

"the threat was calculated to disturb and unsettle a man's mind and give anxiety; whether it was calculated to disturb a man and unsettle him—overcome his mind." *State v. Louanis* (Vt.), 9-194.

THRESHERS.

Right to laborers' liens, see LIENS.

TICKET BROKERAGE.

See CARRIERS, 6 c (2); THEATRES AND PUBLIC RESORTS, 2 a.
 Prohibition of ticket brokerage as impairing obligation of contract, see CONSTITUTIONAL LAW, 15 a.
 Reasonableness of ordinance for licensing ticket brokers, see MUNICIPAL CORPORATIONS, 5 f (2).
 Statutory prohibition of ticket brokerage, see CONSTITUTIONAL LAW, 5 c; 9 b.

TICKETS AND FARES.

See CARRIERS, 6 c.
 Failure to purchase ticket or pay fare as ground for ejecting passenger, see CARRIERS, 6 g.
 Expression in title of subject of statute to prevent fraudulent sale of railway tickets, see STATUTES, 3 b.
 Lottery tickets, see LOTTERIES.
 Power of municipality to prohibit sale or giving away of street car transfers, see MUNICIPAL CORPORATIONS, 5 f. (2).
 Railroad ticket as subject of larceny, see LARCENY, 2 c.
 Right of holder of ticket to place of public amusement, see THEATRES AND PUBLIC RESORTS, 2 a.

TIDE LANDS.

Ownership of, see STATES, 1.
 Rights of lessee on tide lands, see FISH AND FISHERIES.

TIE VOTE.

See ELECTIONS, 7 e (3).

TIMBER.

See LOGS AND LUMBER; WOODS AND FORESTS.
 Reservation of timber in conveyance of land, see DEEDS, 3 e.

TIME.

Acceptance of goods sold under verbal contract, see FRAUDS, STATUTE OF, 9 b (1).
 Allowance of time to prepare for trial, see CRIMINAL LAW, 6 c (3).

Application for inquisition of insanity, see **INSANITY**, 2.
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 Commencement of actions generally, see **LIMITATION OF ACTIONS**.
 Commencement of actions on insurance policies, see **INSURANCE**, 3 c (1); 5 m (2).
 Commencement of actions on judgments, see **JUDGMENTS**, 12.
 Computation of time as affecting rate of interest, see **USURY**, 1 g.
 Determination of capacity of attesting witness to will, see **WILLS**, 3 e (2).
 Disaffirmance of contract by infant, see **INFANTS**, 2 b (3).
 Duration of contract of employment, see **MASTER AND SERVANT**, 1 b.
 Duration of contract of insurance, see **INSURANCE**, 5 f (3).
 Duration of contract of suretyship, see **SURETYSHIP**, 3 c.
 Duration of judgment lien, see **JUDGMENTS**, 5 b.
 Duration of partnership, see **PARTNERSHIP**, 1 d.
 Duration of tenancy, see **LANDLORD AND TENANT**, 3 g.
 Duration of term of office of judges, see **JUDGES**, 1.
 Duration of trusts, see **TRUSTS AND TRUSTEES**, 1 a (3).
 Extending time of payment of debt as discharge of mortgage, see **MORTGAGES AND DEEDS OF TRUST**, 8 a.
 Extension of time for filing report of referee, see **REFERENCES**.
 Filing bills of exceptions, see **APPEAL AND ERROR**, 9 b.
 Filing claim for mechanics' liens, see **MECHANICS' LIENS**, 6 b.
 Filing of pleas in abatement, see **PLEADING**, 6.
 Filing transcript on appeal, see **APPEAL AND ERROR**, 8 b.
 Injuries to servant in consequence of exhaustion from excessive hours of labor, see **MASTER AND SERVANT**, 3 a.
 Laying time in indictments, see **INDICTMENTS AND INFORMATIONS**, 4.
 Limitation as to time for use of railroad tickets generally, see **CARRIERS**, 6 c (4).
 Limitation as to time of using tickets over connecting railroads, see **CARRIERS**, 6 c (5).
 Limitation of time for argument to jury, see **CRIMINAL LAW**, 6 i.
 Limitation of time for presentment of claim for loss of goods, see **CARRIERS**, 4 f (2).
 Limiting argument of counsel, see **TRIAL**, 4 a.
 Loss of time as element of damage for injuries to property, see **DAMAGES**, 9 d.
 Materiality of exact date of commission of crime, see **CRIMINAL LAW**, 6 q (1).

Meeting of jury commissioners, see **JURY**, 4 a.
 Motions for new trials, see **NEW TRIAL**, 3 a.
 Omission of dates in indictment, see **INDICTMENTS AND INFORMATIONS**, 8.
 Part payment of price of goods purchased, see **FRAUDS, STATUTE OF**, 9 b (4).
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 Questioning constitutionality of criminal statute, see **CRIMINAL LAW**, 2 a.
 Reasonable time for removal of goods, see **CARRIERS**, 4 e.
 Regulation of hours for operation of skating rinks, see **THEATRES AND PUBLIC RESORTS**, 1.
 Removal of fixtures, see **FIXTURES**, 6 c.
 Return of indictment, see **INDICTMENTS AND INFORMATIONS**, 2.
 Sentencing persons convicted of crime, see **CRIMINAL LAW**, 7 b (2).
 Service of bill of particulars, see **PLEADING**, 7.
 Stipulations as to performance of contract of sale, see **VENDOR AND PURCHASER**, 1 d.
 Submission of interrogatories, see **TRIAL**, 8 a.
 Summoning jurors, see **JURY**, 4 b.
 Taking appeals, see **APPEAL AND ERROR**, 7.
 Taking effect of deed, see **DEEDS**, 3 g.
 Taking effect of statutes, see **STATUTES**, 4 a; 4 m.

Determination of system to control in fixing hour certain. — Where a contract provides that it shall begin or end at an hour certain, without naming the standard for the reckoning of the hour, a court in construing the contract will hold that the parties intended the system in most common use, or if more than one system was in use at the place where the contract was to be performed, the court, for the purpose of determining which system was probably intended by the parties, will receive evidence to prove the prevailing custom at the place of performance in the business to which the contract relates. *Rochester German Ins. Co. v. Peaslee-Gaubert Co. (Ky.)*, 9-324.

In an action on a fire insurance policy expiring at "noon" on a specified day, it is proper for the court to submit to the jury the question whether the word "noon" as used in the policy was intended by the parties to mean twelve-o'clock solar time or twelve o'clock standard time, and to instruct the jury that if they believe from the evidence that at the time the policy was issued there existed in the place of performance "a custom or usage with reference to the meaning of the word 'noon,' so well settled, uniformly acted upon, and of such continuance as to raise a presumption that plaintiffs and defendant knew of it, and entered into the contract of insurance sued on herein with reference to it, such usage will govern the jury in arriving at their conclusion." *Rochester German Ins. Co. v. Peaslee-Gaubert Co. (Ky.)*, 9-324.

Time for performance of act not stated in agreement. — Where the time within which an agreement is to be performed is not stated the law implies a rea-

sonable time. *Patrick v. Kirkland* (Fla.), 12-540.

Exclusion of first day and inclusion of last day in computation of time. — When time is to be computed from a particular day, or when an act is to be performed within a specified period from or after the day named, the rule is to exclude the first day designated and to include the last day of the specified period. *Simmons v. Hanne* (Fla.), 7-322.

Exclusion of Sunday in computation of time. — Section 895 of the Nebraska code applies to the computation of time, whether the time to be taken into account is days, months, or years; and where an act is to be done, or is permitted to be done, within a specified time, and the last day is Sunday, it shall be excluded, and the act may be done on the following day. *Johnston v. New Omaha, etc., Elec. L. Co.* (Neb.), 20-1314.

In computing time within which an act required by statute must be done, if the last day falls on Sunday it cannot be excluded, unless the intention of the legislature to exclude is manifest. *Simmons v. Hanne* (Fla.), 7-322.

Where an act is required to be done in a certain number of days exceeding a week, Sunday is not excluded from the computation; but if the number of days is less than seven, Sunday is not counted. *Craig v. U. S. Health, etc., Ins. Co.* (S. Car.), 15-216.

Exclusion of half holiday in computation of time exclusive of Sundays and holidays. — The statute of the District of Columbia making Saturday afternoons half holidays expressly abrogates the rule that the law takes no note of the fractions of a day, and in computing the time within which, exclusive of Sundays and holidays, an act is required by law to be performed, Saturday half holidays are to be deducted, each being counted as one-half day. *Ocupaugh v. Norton* (D. C.), 2-133.

Meaning of word "to" as used with reference to time. — The word "to" as used in an order extending the time for making and serving a case "to" a certain day is a term of exclusion, and the time granted expires at midnight of the day preceding the day named. *Maynes v. Gray* (Kan.), 2-518.

Meaning of word "month" as used with reference to time. — The term "months," when used in a statute, means the calendar months, not the lunar months, unless there is something in the statute which indicates that the contrary meaning is intended. *Simmons v. Hanne* (Fla.), 7-322.

Judicial notice of meaning of word "noon." — For a great many years the word "noon" had a fixed, certain, and universally understood meaning, and had reference alone to the physical fact of the coincidence of the centre of the sun's circle with a given meridian of the earth; but courts will take judicial notice of the fact that in recent years the custom has grown to be almost general throughout the country to give the word "noon" a slightly different meaning, owing to the adoption of what is commonly

called "standard time." *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.* (Ky.), 9-324.

TIME OF PASSAGE.

Construction of phrase "at the time of the passage of this act," see **STATUTES**, 4 d.

TIPS.

Tips as earnings within Workmen's Compensation Act, see **MASTER AND SERVANT**, 3 m (3).

TITLE.

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Conformity of title with subject of statute, see **STATUTES**, 3.

Defective title as affecting liability of purchaser at sheriff's sale, see **EXECUTIONS**, 8.

Estoppel of tenant to deny landlord's title, see **LANDLORD AND TENANT**, 8.

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Personal representatives' title to decedents' estates, see **EXECUTORS AND ADMINISTRATORS**, 5.

Recourse to title in construction of statutes, see **STATUTES**, 4 f.

Recovery for conversion as transfer of title, see **TROVER AND CONVERSION**, 5 f.

Subject of ordinance expressed in title, see **MUNICIPAL CORPORATIONS**, 5 f. (1).

Sufficiency of title to support replevin, see **REPLEVIN**, 2.

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Tobacco factory as nuisance, see **NUISANCES**, 1 b.

TOLL BRIDGES.

See **BRIDGES**.

TOLL ROADS.

See **TURNPIKES AND TOLL ROADS**.

TOMBSTONES.

Bequest for erection of tombstones, see **WILLS**, 9 h.

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TORRENS ACTS.

See **RECORDS**.

TORTS.

- See **FALSE IMPRISONMENT**; **LIBEL AND SLANDER**; **MALICIOUS PROSECUTION**; **NEGLIGENCE**.
- Action sounding in tort or contract, see **ACTIONS**.
- Arrest on judgment in tort action, see **IMPRISONMENT FOR DEBT AND IN CIVIL CASES**.
- Arrest, see **FALSE IMPRISONMENT**.
- Bankruptcy as affecting liability for tort, see **BANKRUPTCY**, 9.
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- Deprivation of right to vote, see **ELECTIONS**, 10.
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- Inducing breach of contract, see **INTERFERENCE WITH CONTRACT RELATIONS**, 1.
- Injuries by animals, see **ANIMALS**, 2.
- Injuries by parent to child, see **PARENT AND CHILD**, 2 a.
- Injuries caused by defective condition of demised premises, see **LANDLORD AND TENANT**, 5 h.
- Injuries caused by explosions, see **EXPLOSIONS AND EXPLOSIVES**.
- Injuries caused by fire, see **FIRES**.
- Injuries to pauper by officer of almshouse, see **POOR AND POOR LAWS**.
- Injuries to property by railroads, see **RAILROADS**, 7.
- Injury to business of others by combinations and strikes, see **LABOR COMBINATIONS**.
- Interest on amount recovered, see **DAMAGES**.
- Joinder of tort and contract, see **ACTIONS**.
- Joint tortfeasors, see **ANIMALS**, 2 h; **CONTRIBUTION**; **DAMAGES**, 14 b; **FALSE IMPRISONMENT**, 2; **JUDGMENTS**, 4; **RELEASE**, 4; **TRIAL**, 8 g.
- Judgment against one of several joint tortfeasors, see **JUDGMENTS**, 4.
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- Law governing as to unlawful character of act, see **CONFLICT OF LAWS**, 6.
- Liability of carrier for acts of insane agent, see **CARRIERS**, 4 d (1).
- Liability of corporation for torts of officers, see **CORPORATIONS**, 5 b.
- Liability of drainage district, see **DRAINS**.
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- Liability of husband for torts of wife, see **HUSBAND AND WIFE**.
- Liability of innkeeper for acts of guest, see **INNS, BOARDING HOUSES, AND APARTMENTS**, 8.
- Liability of innkeeper for personal injuries to guest, see **INNS, BOARDING HOUSES, AND APARTMENTS**, 6.
- Liability of principal for torts of agent, see **AGENCY**, 3 c.
- Liability of seller to third persons for defects in article sold, see **SALES**, 7.
- Liability under civil damage acts, see **INTOXICATING LIQUORS**, 8.
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- Limitation of actions for torts, see **LIMITATION OF ACTIONS**, 4 a (2) (a).
- Malicious prosecution, see **MALICIOUS PROSECUTION**.
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- Liability of firm for negligence of partner, see **PARTNERSHIP**, 5 a.
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- Liability of parent for torts of child, see **PARENT AND CHILD**, 3 b.
- Liability of states for torts, see **STATES**, 10.
- Liability of ward for guardian's acts, see **GUARDIAN AND WARD**, 4.
- Municipal liability for injuries in collection and removal of garbage, see **HEALTH**, 2 a (3).
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- Officer and instigator of arrest as joint tortfeasors, see **FALSE IMPRISONMENT**, 2.
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- Personal injuries by school officers to pupils, see **SCHOOLS**, 2.
- Personal injuries caused by cutting holes in ice, see **ICE**.
- Personal injuries to persons on or near railroad tracks, see **RAILROADS**, 8.
- Personal injuries to servants, see **MASTER AND SERVANT**, 3.
- Personal injury in initiating member of society, see **SOCIETIES AND UNINCORPORATED ASSOCIATIONS**, 1.
- Proceeds of claim for tort as asset in bankruptcy, see **BANKRUPTCY**, 4.
- Refusal to admit ticket holder to place of public amusement, see **THEATRES AND PUBLIC RESORTS**, 2 c.
- Release by infant from liability for tort, see **INFANTS**, 2 b (1).
- Release of one joint tortfeasor as release of all, see **RELEASE**, 4.
- Revival of cause of action, see **ABATEMENT AND REVIVAL**.
- Right of action for tort as asset in bankruptcy, see **BANKRUPTCY**, 11.
- Right of action for tort as contract right within protection of constitution, see **CONSTITUTIONAL LAW**, 15 a.
- Setting aside verdict as to one of two joint tortfeasors, see **TRIAL**, 8 g.
- Set-off of claim of damages for tort, see **SET-OFF AND COUNTERCLAIM**, 1 a.
- Slander, see **LIBEL AND SLANDER**.
- Verdict against joint tortfeasors, see **DAMAGES**, 14 b.
- Waiver of tort, see **SET-OFF AND COUNTERCLAIM**, 1 a.
- Wrongful expulsion of member of society, see **SOCIETIES AND UNINCORPORATED ASSOCIATIONS**, 2.

Wrongful levy of execution, see **EXECUTIONS**, 10.

Wrongful sale under attachment, see **SHERIFFS AND CONSTABLES**, 2.

Lawful act performed with bad motive as tort. — A complaint which states, in substance, that the defendant, a banker and man of wealth and influence in the community, maliciously established a barber shop, employed a barber to carry on the business, and used his personal influence to attract customers from the plaintiff's barber shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring the plaintiff, whereby the plaintiff's business was ruined, states a cause of action. *Tuttle v. Buck* (Minn.), 16-807.

An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable in a civil action. *J. F. Parkinson Co. v. Building Trades Council* (Cal.), 16-1165.

Persuading a sovereign power to seize property or to do any other act cannot be a tort, for the fundamental reason that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. The very meaning of sovereignty is that the decree of the sovereign makes law. *American Banana Co. v. United Fruit Co.* (U. S.), 16-1047.

Intent as controlling factor. — In civil actions for wrongs, the intent of the party charged with the wrong is frequently of controlling effect on the conclusion to be reached in the action. *Adams v. Gillig* (N. Y.), 20-910.

Soliciting sexual intercourse as tort. — No cause of action lies in favor of a woman against a man who solicits her to have sexual intercourse when such solicitation is unaccompanied by assault or trespass on her person. *Reed v. Maley* (Ky.), 2-453.

Extent of liability of wrongdoer. — A tortfeasor is liable for the natural consequences that will probably result from his wrongful act. *Brame v. Light, etc., Co.* (Miss.), 20-1293.

A tortfeasor is answerable for all the consequences that in the natural course of events flow from his unlawful acts, though those results are brought about by the intervening agency of others, provided that the intervening agents are set in motion by the primary wrongdoer, or that their acts are the natural consequences of his original act. *Hilligas v. Kuns* (Neb.), 20-1124.

Necessity of allegation of place of injury in complaint. — In an action to recover damages for a tort, the complaint should allege the place where the injury occurred, in order to give the defendant an opportunity to set up all defenses which might arise by reason of the law of the place where the injury occurs. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

Joinder of defendant unconnected with tort as defeating recovery. — In an action for tort against more than one defendant joint liability need not be proved, and the joinder with a defendant who is liable for other defendants who are unconnected with the commission of the tort will not defeat a recovery against the one who is liable. *Lovelace v. Miller* (Ala.), 14-1139.

Determination of question of malice. — The question whether injuries for which an action of tort is brought are wilful and malicious is not to be determined solely from an inspection of the pleadings, but from the record as a whole and the findings of the court in granting a close jail certificate determining that the acts complained of are of a malicious and wilful character. *Flanders v. Mullin* (Vt.), 12-1010.

Dismissal of action where justification shown by plaintiff. — Although the burden of providing a defense of justification rests upon the defendant in an action of tort, still, where the facts making out the justification appear from the plaintiff's evidence, a verdict in favor of the defendant should be directed as a matter of law. *Connors v. Cunard Steamship Co.* (Mass.), 17-1051.

TOTAL DISABILITY.

See **INSURANCE**, 8 a (3).

TOTAL LOSS.

In marine insurance, see **INSURANCE**, 6.

TOWAGE.

Duty of vessel in tow to anticipate negligence of tug. — A barge in tow has the right to expect that the tug will be reasonably well navigated, and to act on that belief; and therefore it is not chargeable with any part of the blame of coming into collision with a vessel at anchor, where the collision is caused by the faulty navigation of the tug and could be avoided by the barge only by anticipating the fault of the tug. *Lightship Comet v. W. H. No. 1* (Eng.), 19-299.

TOWNS.

See **MUNICIPAL CORPORATIONS**.

Liability of township for defective roads, see **STREETS AND HIGHWAYS**, 7.

Power of town court to punish for contempt, see **CONTEMPT**, 2.

TRACKS.

Opinion evidence as to similarity of tracks, see **CRIMINAL LAW**, 6 n (7).

Using shoes of accused to identify tracks as compelling the giving of testimony against himself, see **CRIMINAL LAW**, 6 n (1).

TRADE.

Interference with trade or calling, see CONSPIRACY, 1 a.
 Restraint of trade, see MONOPOLIES AND CORPORATE TRUSTS.
 Right to organize in pursuit of trade or calling, see LABOR COMBINATIONS, 4.
 Words affecting person in his trade, see LIBEL AND SLANDER, 2 i.

TRADE CUSTOM.

See USAGES AND CUSTOMS.

TRADE FIXTURES.

See FIXTURES, 6 b.

TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION.

1. SUBJECTS OF TRADEMARK OR TRADE NAME, 1540.
2. ASSIGNABILITY OF TRADEMARK, 1540.
3. INFRINGEMENT AND UNFAIR COMPETITION, 1540.
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Prohibition of use of arms or seal of state as trademark, see CONSTITUTIONAL LAW, 9 b.

Taxation of trademarks, see TAXATION, 2 c.

1. SUBJECTS OF TRADEMARK OR TRADE NAME.

Descriptive words as subject of trademark. — As applied to eyeglass frames, the hyphenated coined words "shur-on" and "sta-zon" are not purely inventive words, but are merely corruptions of words descriptive of some special merit possessed by the articles to which they are applied, and therefore neither word can properly be the subject of exclusive use as a trademark. *Kirstein v. Cohen* (Can.), 9-762.

Color as subject of trademark. — A trademark cannot be acquired in the use of a color not connected with some symbol or design. *In re L. E. Waterman Co.* (D. C.), 18-1033.

Symbol of keystone as subject of trademark. — The symbol of the keystone of an arch is susceptible of exclusive appropriation as a trademark, and its use by another upon similar products after such adoption and registration by the owner is an infringement of his monopoly and remediable in equity. *Buzby v. Davis* (U. S.), 10-68.

Title of comic section of newspaper as subject of trademark. — Under the

Canada statute defining what may be registered as trademarks, as "all marks, names, labels, brands, packages, or other business devices which are adopted for use by any person . . . for the purpose of distinguishing any manufacture, product, or article of any description manufactured, produced, compounded, packed, or offered for sale" the term "Buster Brown" or "Buster Brown and Tige" used as the title to a comic section of a newspaper cannot be registered as a trademark. *New York Herald Co. v. Ottawa Citizen Co.* (Can.), 144-270.

Acquisition of trade name by benevolent association. — Where an association known as the Knights of Pythias, with a supreme lodge incorporated in the District of Columbia, and a grand lodge unincorporated in this state, the main objects of which were fraternal and benevolent, but which received and owned large amounts of property and had an insurance feature, acquired a proprietary right in the name by which it was known and under which it operated, no other association of persons organized for similar purposes had the right to fraudulently copy or infringe upon that name. *Creswill v. Grand Lodge* (Ga.), 18-453.

2. ASSIGNABILITY OF TRADEMARK.

In general. — A trademark is not assignable. *Falk v. American West Indies Trading Co.* (N. Y.), 2-216.

Trademark used to distinguish one article from another. — A trademark used merely to distinguish one cigar from another is not an exception to the general rule as to the assignability of trademarks. *Falk v. American West Indies Trading Co.* (N. Y.), 2-216.

3. INFRINGEMENT AND UNFAIR COMPETITION.**a. In general.**

Right to pass off goods as those of rival trader. — One has no right to pass off his goods as the goods of a rival trader. *International Silver Co. v. Wm. H. Rogers Corp.* (N. J.), 2-407.

b. What constitutes infringement and unfair competition.

In general. — Seeking to induce the public to believe that one's product is that of another is unfair competition, but mere duplication as to the details of a device is not, regardless of any confusion as to the source of manufacture caused thereby. *Westcott Chuck Co. v. Oneida Nat. Chuck Co.* (N. Y.), 20-858.

Where a bill in equity contains averments that the complainant has made and sold oils and lubricants for nineteen years under the name "Keystone Lubricating Company" until his products have become known throughout the markets of the world as the Keystone oils and lubricants, and that after his trade had been established seventeen years and his trade name and his products had

become known as the Keystone Lubricating Company and the Keystone oils and lubricants, respectively, the defendants, for the purpose of deceiving the purchasers and selling their goods as those of the complainant, commenced and continued to make and sell inferior and less costly oils and lubricants under the name Keystone Oil Company, and have succeeded and are succeeding in this way in palming off their products as those of the complainant, the bill makes out a case showing that the use of the word "Keystone" by the defendant constitutes unfair competition and entitles the complainant to a relief in equity. *Buzby v. Davis* (U. S.), 10-68.

Use of personal or corporate name. — A corporation, the name of which has been selected with intent to profit by the trade reputation of another by means of the similarity of names, is not entitled to use its corporate name in a business in which the use thereof is likely to lead purchasers to buy its goods for the goods of those by whose reputation it seeks to profit. *International Silver Co. v. William H. Rogers Corp.* (N. J.), 3-804.

Where it appears that a person or corporation is using a particular name to designate his goods in such a manner as to pass off the same as the goods of his rival, the latter is entitled to restrain such use. *International Silver Co. v. Wm. H. Rogers Corp.* (N. J.), 2-407.

A corporation may be enjoined from using a name or conducting its business under a name so similar to the name of a previously established corporation, association, partnership, or individual engaged in the same line of business, that confusion or injury results therefrom. *Martel v. St. Francis Hotel Co.* (Wash.), 16-593.

Under the facts of this case, the rulings made by some courts that generally a foreign corporation has no right to enjoin a domestic corporation, which has been chartered under a similar name, from continuing to do business thereunder, especially in the absence of fraud, are not applicable. *Creswill v. Grand Lodge* (Ga.), 18-453.

A corporation may be enjoined from using a trade name lawfully adopted prior thereto by a copartnership engaged in a like business at the same place, and the good faith of the corporation in using the name is not material. *Nesne v. Sundet* (Minn.), 3-30.

Addition of words to name as affecting infringement. — The mere addition to the distinctive name of the defendants' association of the words, "of North America, South America, Europe, Asia, Africa, and Australia, jurisdiction of Georgia," cannot be declared as matter of law to constitute such a difference as to make the name so altered free from the complaint of being an infringement contrary to law. *Creswill v. Grand Lodge* (Ga.), 18-453.

Use of geographical or descriptive terms to deceive. — The use of geographical or descriptive terms to palm off the goods of one manufacturer or vendor as those of another may constitute unfair competition

and may be lawfully enjoined by a court of equity to the same extent as the use of any other terms or symbols. *Buzby v. Davis* (U. S.), 10-68.

Conceding, but not deciding, that the word "Keystone" is a geographical term and not susceptible of monopolization as a trademark, yet its use by one manufacturer in his trade name or on his products to palm them off as those of another may constitute unfair competition and entitle the latter to an injunction and damages. *Buzby v. Davis* (U. S.), 10-68.

Use of word "sta-zon" to denote eyeglasses as infringement on "shur-on."

— A trader in eyeglass frames who uses the word "sta-zon" to designate his goods is not guilty of fraudulently counterfeiting similar goods advertised by another trader under the name "shur-on," as the words are neither visually nor phonetically alike, and therefore the use of the former word is not calculated to mislead the purchasing public into the belief that they are buying goods described by the latter word. *Kirstein v. Cohen* (Can.), 9-762.

Sale of patented article after expiration of patent. — Though the patentee of a device loses the exclusive right to manufacture on the expiration of the patent, he is entitled to protection against unfair competition. *Westcott Chuck Co. v. Oneida Nat. Chuck Co.* (N. Y.), 20-858.

The making and sale of unmarked repair parts for a well-known machine on which all patents have expired, by others than the makers of the machine, is not an act of unfair competition unless such parts are put out as the goods of the original patentee. *Bender v. Enterprise Mfg. Co.* (U. S.), 13-649.

c. Actions.

(1) In general.

Treatment of wrongdoer as trustee of injured competition as to profits. — Equity will treat one who has been guilty of unfair competition as a trustee for the injured competitor so far as the former has derived profits from his acts. *Westcott Chuck Co. v. Oneida Nat. Chuck Co.* (N. Y.), 20-858.

Exclusive right to use name as condition precedent to relief. — Where a trade name is unlawfully used for the purpose of profiting by the trade reputation of another, the injured party is entitled to relief, though he may not have an exclusive right to the use of the name. *International Silver Co. v. William H. Rogers Corp.* (N. J.), 3-804.

Jurisdiction of state court over suit for infringement of trademark. — A state court has jurisdiction over a suit for the infringement of a trademark notwithstanding the fact that the plaintiff's or the defendant's trademark has been registered under the provisions of the federal statutes. *Traiser v. J. W. Doty Cigar Co.* (Mass.), 15-219.

Neither the Act of Congress of March 3,

1881, authorizing the registration of trademarks on goods which are the subject of commerce with foreign nations and with the Indian tribes, nor the Act of Congress of Feb. 20, 1905, authorizing the registration of trademarks on goods employed in interstate commerce, impairs the jurisdiction which the state courts have always had over suits for the infringement of trademarks. *Traiser v. J. W. Doty Cigar Co. (Mass.)*, 15-219.

(2) Defenses.

False representations as to article. —

The proprietors of a brand of bottled whiskey bearing upon the bottles labels and marks falsely stating that the whiskey is very old stock, fine old whiskey, and rye whiskey, are not entitled to relief in equity against unfair competition by the simulation of their trademark and symbols. *Epperson v. Bluthenthal (Ala.)*, 13-832.

One who has adopted a trademark to identify his production, and by his labor and skill has created a valuable market therefor, and has induced public confidence in the superiority of his goods, is entitled, so long as he deals honestly with the public, to equitable protection against those who, without right, attempt to appropriate his symbol and apply it to other goods of the same class, but any material misrepresentation by the owner of the trademark as to the quality of the article or goods bearing the trademark or symbol deprives the owner of the right to relief in equity, although the conduct of the one appropriating the symbol is without justification. *Epperson v. Bluthenthal (Ala.)*, 13-832.

A complainant who seeks to protect a trade name from unfair competition will not be refused relief merely because for several years he has circulated catalogues and price lists containing false statements as to his exclusive right to the name, where it is not proved that the trade name owes its value in a material degree to the false representations, and where the publication has ceased prior to the filing of the bill. *Johnson & Johnson v. Seabury & Johnson (N. J.)*, 14-840.

Good will of wrongdoer in trade name. — The fact that a person has acquired skill and experience in a business which he has conducted for the purpose and with the intent of profiting unlawfully by the trade reputation of another, does not as against the injured party entitle the corporation in which he is interested to use such name in the same business, though it may be accompanied with additions sufficient to prevent the purchaser from mistaking the goods of one for the goods of the other. *International Silver Co. v. William H. Rogers Corp. (N. J.)*, 3-804.

(3) Evidence.

Necessity of proof of fraudulent intent. — Proof of fraudulent intent in using the trade name of a rival is not essential in a suit to enjoin the person wrongfully using such trade name from the continuance of

such use. *International Silver Co. v. Wm. H. Rogers Corp. (N. J.)*, 2-407.

Sufficiency of evidence. — In an action by the proprietor of a hotel operated under a certain name, to enjoin the defendant from operating another hotel under a similar name, where the evidence shows, and the court finds, that after the establishment of the defendant's hotel the plaintiff daily received many telephone calls intended for the defendant's hotel; that groceries for one hotel were delivered to the other; that trunks and baggage intended for the guests of one were sent to the other; and that upon one occasion a call for a doctor at the plaintiff's hotel became confused, and the doctor was delayed thereby, the plaintiff is entitled to an injunction on the ground of confusion and injury resulting from the defendant's acts, and a dismissal of the action constitutes error. *Martel v. St. Francis Hotel Co. (Wash.)*, 16-593.

In such a case the plaintiff is not deprived of his right to an injunction by the fact that there is a difference in the character of the two hotels, in that one is larger than the other, and is run on a more expensive plan, and charges higher rates, and caters to transient trade, which the other does not, or by the fact that there was no actual fraud or deception practiced by the defendant because at the time the name of its hotel was chosen it did not know of the plaintiff's hotel or its name. Nor is it any defense that the plaintiff, who has been substituted as such pending the action, purchased his hotel after the action had been commenced and with full knowledge of the pending of the litigation. *Martel v. St. Francis Hotel Co. (Wash.)*, 16-593.

(4) Relief.

Decree for account of profits. — On a bill to enjoin unfair competition a court of equity, upon granting an injunction, may also decree an account of the profits made by the defendant by means of the unfair competition. *L. Martin Co. v. L. Martin, etc., Co. (N. J.)*, 20-57.

Allowance of damages in addition to profits. — On a bill to enjoin unfair competition it is not permissible for a court of equity, upon granting an injunction, to decree that the defendant shall account for damages suffered by the complainant in addition to accounting for the profits made by the defendant. *L. Martin Co. v. L. Martin, etc., Co. (N. J.)*, 20-57.

Stipulations as to damages. — A stipulation in a suit for unfair competition "for the purpose of the trial only" that the defendant sold articles which would have netted the plaintiff \$4,300, on the making of which stipulation evidence on the issue of profits is stricken out, concludes the amount of recovery, though the stipulation provides that, if the court finds that illegal competition caused the plaintiff to sell at a discount, it can recover \$1,800, there being no finding justifying the latter award. *Westcott Chuck Co. v. Oneida Chuck Co. (N. Y.)*, 20-858.

Territorial extent of injunction. —

Where the manufacturer of cigars has an acquired right to use a geographical name in its secondary sense as a trade name for cigars, but the evidence only establishes that the name has acquired such secondary meaning in the New England states, a decree in a suit to enjoin unfair use by another manufacturer should be limited in its operation to those states. *Cohen v. Nagle* (Mass.), 5-553.

The manufacturer of cigars who has no trademark in their name, but who by long-continued use and expenditure of money has acquired the right to use such a word for a trade name, and has made his cigars well known under that name in the New England states, is entitled to an injunction restraining another manufacturer from using the word, in selling cigars, so as to mislead the public and deprive the plaintiff of trade; and this is so though the word was used in other parts of the United States as a trade name for cigars before the plaintiff began to use it. *Cohen v. Nagle* (Mass.), 5-553.

TRADE NAMES.

See TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION.

TRADE SECRETS.

Restraining disclosure by employee, see MASTER AND SERVANT, 1 e.

TRADE UNIONS.

See LABOR COMBINATIONS.

TRADING STAMPS.

Validity of statutes and ordinances prohibiting distribution of trading stamps. — A municipal ordinance prohibiting the giving, presenting, or distributing of any trading stamp which entitles the purchaser of goods to demand and receive from any person or corporation other than the vender any article, goods, or money is unconstitutional, as not with the legitimate scope of the police power. *Denver v. Frueauff* (Colo.), 12-521.

Such an ordinance is not authorized by a constitutional prohibition of lotteries or gift enterprises for any purpose" or by a statute making it unlawful for any person or corporation "to engage in or otherwise promote any lottery or gift enterprise of any nature for any purpose whatsoever," as the provisions of the constitution and statute are necessarily directed against enterprises containing the element of chance which is absent from the trading stamp enterprise. *Denver v. Frueauff* (Colo.), 12-521.

The California statute prohibiting the use

of trading stamps is an unconstitutional infringement of the right of freedom of contract. *Ex p. Drexel* (Cal.), 3-878.

An act prohibiting the use of trading stamps is unconstitutional as violating the Fourteenth Amendment to the Constitution of the United States. *State v. Dodge* (Vt.), 1-47.

The New Hampshire statute making it illegal for merchants to give trading stamps to their customers is not a valid exercise of the police power, but is unconstitutional as interfering with the right of acquiring and possessing property. *State v. Ramseyer* (N. H.), 6-445.

Power to tax business of distributing trading stamps. — The right to conduct the business of selling, giving, or delivering trading stamps in connection with a sale of articles, is not a "commodity" within the meaning of a provision of the Massachusetts constitution conferring the power to tax commodities. *O'Keefe v. Somerville* (Mass.), 5-684.

Validity of statute taxing business of distributing trading stamps. — The Massachusetts statute imposing an excise tax on the business of selling, giving, or delivering trading stamps in connection with a sale of articles is violative of the Massachusetts constitution and cannot be upheld as a valid exercise of the state's police power. *O'Keefe v. Somerville* (Mass.), 5-684.

Giving away of stamps by merchant as separate business subject to taxation. — An agreement between a number of merchants and a corporation provided that the former should print the names of the latter in its subscribers' directory and circulate a number of copies of the book in a named city, and that the merchants should purchase of the corporation a number of so-called trading stamps, to be delivered to customers with their purchases (and not to be otherwise disposed of), and by them preserved and pasted in the books furnished by the corporation until a certain number had been secured, when they should be presented to the corporation in exchange for the customer's choice of certain articles kept in stock by the corporation. Held: (1) That the furnishing of the trading stamps by a merchant to his customers did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute of itself a business in either a commercial or a legal sense. (2) That authority in a municipal charter "to make a just and proper classification of business for taxation," and "to classify business and arrange the various business, trades, and professions carried on in said city into such classes of subjects for taxation as may be just and proper," did not authorize the passage of an ordinance separating from the business of selling merchandise the incident of furnishing trading stamps for the purpose of increasing the sale of merchandise and classifying the furnishing

of such stamps as a separate business subject to taxation. (3) That, whether the furnishing of the trading stamps be treated as a gift or as a part of the contract of sale of the merchandise which is delivered at the time the stamps are furnished, the furnishing of the stamps does not constitute a business subject to be taxed under charter authority to classify and tax business. (4) That the word "business" in a commercial or legal sense means something done or carried on for a livelihood, profit, or the like. (5) That even if the general assembly is authorized to impose a tax upon one who gives away his property, the giving away of property is not a business within the meaning of a charter provision authorizing the taxation of business. *Hewin v. Atlanta (Ga.)*, 2-296.

Proper parties to application for injunction to restrain collection of tax.—An application for an injunction filed jointly by a trading-stamp company and one or more merchants who are its customers, seeking to enjoin the collection of a tax imposed upon the business of furnishing trading stamps, is not bad for a misjoinder of the parties. *Hewin v. Atlanta (Ga.)*, 2-296.

TRAINS.

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TRANSACTIONS WITH DECEASED PERSONS.

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TRANSITORY ACTIONS.

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TRAP.

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TRAVELING SALESMEN.

Judicial notice of customs of, see EVIDENCE, 1 e.
Lien of innkeeper on samples of traveling salesmen, see INNS, BOARDING HOUSES, AND APARTMENTS, 7.
Sale by traveling salesman as doing business by foreign corporation, see CORPORATIONS, 13 c (5).

TREASON.

Giving aid to enemy by alien resident as high treason.—An alien resident within British territory owes allegiance to the crown, and it is high treason for him to render aid or assistance to an invading army during a time when the state forces are temporarily absent for strategical or other reasons. *De Jager v. Attorney-General (Eng.)*, 8-76.

TREASURER.

State treasurer, see STATES, 5.

TREASURE TROVE.

What constitutes treasure trove.—Treasure trove is a name given by the early common law to any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. *Weeks v. Hackett (Me.)*, 15-1156.
Coin, gold and silver plate, and similar articles hidden for safe keeping and forgotten, or remaining undiscovered by reason of

the death of the person who hid them, are technically known as treasure trove. *Kuykendall v. Fisher* (W. Va.), 11-700.

Title of owner of soil to treasure trove. — The owner of the soil in which treasure trove is found acquires no title thereto by virtue of his ownership of the land. *Weeks v. Hackett* (Me.), 15-1156.

Title of finder to treasure trove. — In the absence of legislation upon the subject, the title to treasure trove belongs to the finder as against all the world except the true owner. Ordinarily the place where it is found is immaterial. *Weeks v. Hackett* (Me.), 15-1156.

Rights of several finders of treasure trove. — Where several persons are joint finders of treasure trove consisting of coin, each of such finders is entitled to the possession of an equal share thereof, is charged with the duty of holding it for the true owner, if he can be ascertained, and is under obligation to exercise reasonable care to keep safely his share of it and to be prepared to restore it to the true owner whenever he may appear. Each of such finders is therefore authorized to maintain such action as may be necessary to retain or recover possession of such share, and the refusal of one joint finder who has possession of all the coin, to surrender to the other joint finders their respective shares thereof, is a conversion of their shares as tenants in common, which authorizes each of such other joint finders to maintain an action of trover for his share against the cotenant who, having possession of all the coin, refuses to surrender such share. *Weeks v. Hackett* (Me.), 15-1156.

Effect of Maine statutes on law of treasure trove. — The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the statutes of many states. But the provisions of the Maine Revised Statutes have no reference to the law of treasure trove. *Weeks v. Hackett* (Me.), 15-1156.

Sufficiency of evidence in action by joint finder for share in treasure trove. — In two actions of trover for the alleged conversion of the plaintiffs' respective shares of silver coins contained in three metallic cans found buried in the ground, evidence examined and held that the jury were warranted in finding that the discovery of the three cans was one transaction, and that the participation of the plaintiffs in the discovery of the cans was sufficient to constitute them joint finders with the defendant. *Weeks v. Hackett* (Me.), 15-1156.

TREATIES.

Extradition treaties, see EXTRADITION, 2.

TREES AND TIMBER.

See LOGS AND LUMBER; WOODS AND FORESTS. Contract to sell standing timber, see FRAUDS, STATUTE OF, 4 b (2).

Expression in title of subject of statute relating to branding of trees, see STATUTES, 3 b.

Injuries to fruit trees as element of damage to land, see DAMAGES, 9 b.

Liability of municipality for injuries caused by trees on sidewalk, see STREETS AND HIGHWAYS, 7 c (6).

Obstruction of view of railroad track by trees on right of way, see RAILROADS, 8 b (6).

Restraining cutting of trees, see INJUNCTIONS, 1 c, 2 a.

Right of abutting owner to compensation for destruction of shade trees in streets, see STREETS AND HIGHWAYS, 3 d.

Right to plant and grow shade trees in streets, see STREETS AND HIGHWAYS, 5 c.

Standing timber as property in fire insurance policy, see INSURANCE, 5 f (5).

TRESPASS.

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Liability of railroad for injuries to trespassers, see RAILROADS, 8 b.

Restraining trespass on land, see INJUNCTIONS, 2 a.

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Right of trespasser to kill in self-defense, see HOMICIDE, 5 b.

Trespass as element of larceny, see LARCENY.

Venue of action to enjoin trespass on land, see VENUE, 1.

Wrongful levy of execution, see EXECUTIONS, 10.

1. WHAT CONSTITUTES TRESPASS.

In general. — While "trespass" generally involves the idea of force, yet it comprehends any misfeasance, transgression, or offense which damages another's person, health, reputation, or property. *Cox v. Strickland* (Ga.), 1-870.

Nonprejudicial overhead encroachment. — An encroachment by one person into

the domain of another, that other not being prejudiced in the occupancy of his land up to the boundary line, as for example by such person projecting the eaves of his building over the boundary line, is remediable at the suit of such other to enjoin as a continuous trespass. *Huber v. Stark* (Wis.), 4-340.

Shooting across lands. — It is trespass to shoot guns across the land of another, though the damage from falling shot or birds is insignificant. *Whittaker v. Stangvick* (Minn.), 10-528.

Refusal to remove poles and wires wrongfully placed on land. — The action of trespass *quare clausum fregit* lies for any direct and wrongful invasion of the owner's possession, and may be maintained for the failure of another to remove, upon request, a pole and wires wrongfully placed on the land during a prior ownership of the land. *Benjamin v. American Tel., etc., Co.* (Mass.), 13-306.

2. ACTIONS.

a. Who may maintain action.

Persons in possession of realty. — The grantee of one holding a tax deed to land has at least color of title, and if in actual possession may maintain an action against a materialman with whom he has contracted for the purchase of lumber, for entering upon the premises and removing therefrom a house in the building of which the lumber has been used. In such a case, actual possession of the building being in the plaintiff at the time of the seizure, an action for trespass and conversion will lie against the materialman when he neither shows nor claims a right to its possession. *Kunkel v. Utah Lumber Co.* (Utah), 4-187.

The complaint in a suit to enjoin a trespass on land is not subject to the objection that it states a defective title in the plaintiff where it alleges that one S., being the owner and in possession of land over which a private passway had been laid out, conveyed to various persons all the land on both sides of the passway, but not the passway itself, and that at a later date S. conveyed all her title to and interest in the passway to the plaintiff. *Seery v. Waterbury* (Conn.), 18-73.

An action by an owner of land against an adjoining owner who has removed a fence erected by the former upon what he claims to be the boundary line, at a distance of eight feet from the defendant's side of an old boundary fence, is not maintainable where it appears that at no time prior to the erection of the new fence was the plaintiff in lawful possession of the eight-foot strip, and it does not appear that by building the fence and the lapse of time the plaintiff acquired a lawful possession or divested that of the defendant. *Hooper v. Herald* (Mich.), 16-149.

Right of wife of person in possession to recover for personal injuries caused by trespass. — A wife who sustains personal injuries by a trespasser entering the dwelling occupied by her and her husband is the

proper party to sue for such injuries regardless of whether the ownership of the premises is in her or her husband. *Engle v. Simmons* (Ala.), 12-740.

b. Parties defendant.

Necessity of making state defendant in action by assignor of lessee of state.

— In an action to enjoin strangers from repeatedly trespassing upon land in the plaintiff's possession under a lease from the state to the plaintiff's assignor the state is not a necessary party defendant. *Sequim Bay Canning Co. v. Bugge* (Wash.), 16-196.

c. Defenses.

Necessity as justification. — Necessity may justify an entry upon another's land which would otherwise be a trespass. This rule applies with special force where the entry is for the preservation of human life. *Ploof v. Putnam* (Vt.), 15-1151.

What constitutes necessity as justification. — A declaration alleging that while the plaintiff was sailing upon a lake in a loaded sloop on which were his wife and two minor children, the sloop and the persons and property therein were placed in great danger of destruction by a sudden and violent tempest, and that to prevent such destruction or injury the plaintiff was compelled to and moored the sloop to a dock attached to an island owned by the defendant, discloses a necessity for so mooring the sloop. *Ploof v. Putnam* (Vt.), 15-1151.

Such declaration is sufficient although it does not negative the existence of other natural objects to which the plaintiff could have moored with equal safety. The details regarding the necessity are matters of proof, and need not be alleged. *Ploof v. Putnam* (Vt.), 15-1151.

Benefit to plaintiff by wrongful act.

— A trespasser on real estate may not, when compensation is demanded for his trespass, urge in defense or in mitigation that he has benefited the plaintiff by his wrongful acts. *Pinney v. Winsted* (Conn.), 20-923.

Right to offset debts due from plaintiff to defendant. — In an action of trespass brought against a materialman for entering upon premises in possession of the plaintiff and removing a dwelling house, the defendant cannot defend the wrongful act by balancing the damage done with the debts due him from the plaintiff. *Kunkel v. Utah Lumber Co.* (Utah), 4-187.

d. Evidence.

Admissibility of evidence of malice.

In an action by a landowner to enjoin other persons from shooting across his land, the plaintiff may introduce evidence to show that the defendants were actuated by "unmixed malice," as he is entitled to invoke the principle that "intentionally to do that which is calculated, in the ordinary course of events, to damage, and which does in fact damage, another, in that other person's property or trade, is actionable, if done without

just cause or excuse." *Whittaker v. Stangvick* (Minn.), 10-528.

e. Damages.

Presumption of damage from trespass.—An unauthorized entry upon another's land is an actionable wrong from which the law infers some damage. *Brame v. Clark* (N. Car.), 16-73.

Amount of damage for trespass on realty.—A purchaser of standing timber from a widow to whom the land has been assigned as dower, who knows of the rights of the heirs of the deceased husband and of the want of authority of the widow to sell the timber, is a wilful trespasser in cutting and removing the timber, and is replevin by the heirs for the timber he is liable for the timber cut and removed, without any deduction for the money or labor expended in increasing its value. *Nashville Lumber Co. v. Barefield* (Ark.), 20-968.

Right to recover exemplary damages.—In an action of trespass to recover damages for a wrongful entry upon the plaintiff's land, the plaintiff may recover exemplary damages, if it appears that the defendant entered for the purpose of and actually insulted the plaintiff's wife and attempted to "seduce and carnally know" her. *Brame v. Clark* (N. Car.), 16-73.

Mitigation of damages.—It is no ground for mitigation of damages caused to the property of one person by trespass thereon that if such property had been in a good state of repair the wrongful invasion would not have damaged it. *Huber v. Stark* (Wis.), 4-340.

f. Relief by injunction.

Power of legislature to create new right to injunction.—It is competent for the legislature to give a new right to an injunction to restrain trespasses to preserve property, but the legislature cannot add to such new right to injunction the further right to an accounting and an award of damages in equity, thereby depriving the defendant of the right to a jury trial unless the trespasses are of such a nature that equity could have enjoined them independent of the statute, for the reason that the right to a jury trial is secured in all cases where the right existed at the adoption of the state constitutions. *Cowan v. Skinner* (Fla.), 11-452.

Necessity that plaintiff's title be established at law.—As the defendant in an action to restrain a trespass, by demurring to the bill, admits the complainant's title, the court will not, as a condition to granting an injunction, require the complainant to resort to an action at law to establish his rights. *Cragg v. Levinson* (Ill.), 15-1229.

Right to injunction where complainant's title admitted or has been established at law.—Where the complainant's title is admitted or has been established in an action at law, a court of equity may pre-

vent by injunction the repetition of trespasses, even though committed or threatened by the same person, and even though the threatened injury may not be irreparable. *Cragg v. Levinson* (Ill.), 15-1229.

But the mere fact that the complainant's rights have been established at law is not always sufficient to justify the granting of an injunction to restrain repeated trespasses by the same person. The circumstances and the character of the threatened injury must be considered. *Cragg v. Levinson* (Ill.), 15-1229.

Right to injunction where damages inadequate.—Where it appears from the bill of complaint in an action to restrain repeated trespasses by the same person that though the injuries resulting from such trespasses are such as may be compensated in damages, they are of such a character that, while exceedingly annoying and vexatious, the actual damages recoverable would be so small as to be disproportionate to the expense and vexation attending the litigation, a demurrer to the bill should be overruled. *Cragg v. Levinson* (Ill.), 15-1229.

Necessity of clear showing of inadequacy of remedy at law.—Independent of statutes, an injunction to restrain trespasses on real estate can be obtained only upon a clear showing of the inadequacy of the remedy afforded by an action at law for damages. *Cowan v. Skinner* (Fla.), 11-452.

Shooting gun across lands as enjoined trespass.—Shooting guns across another's land, so as to cause considerable damage, is an enjoined wrong. *Whittaker v. Stangvick* (Minn.), 10-528.

TRESPASSERS.

Injuries to trespassers, see NEGLIGENCE, 3.
Right to kill to prevent trespass to property, see HOMICIDE, 5 b.

TRESPASS ON THE CASE.

Right of remainderman or reversioner to maintain action.—Where a trespass has been committed on real property, causing permanent damage which impairs the value of the inheritance, the owner of the remainder or reversion in fee may maintain an action of trespass on the case for the wrong done to his estate and interest, though he cannot maintain an action of trespass. *Cherry v. Lake Drummond Canal, etc., Co.* (N. Car.), 6-143.

Waiver of nonjoinder of parties plaintiff by entering general denial.—In an action on a case brought by one of two reversioners to recover for a trespass causing permanent damage to and impairing the value of the inheritance, the defendant waives nonjoinder of the other reversioner by entering a general denial, and the plaintiff may recover for the injury of his interest in the property. *Cherry v. Lake Drummond Canal, etc., Co.* (N. Car.), 6-143.

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1. PROCEEDINGS PRELIMINARY TO TRIAL.

Transfer of cause on docket. — A defendant, by failing to move to transfer a cause to equity, waives his right to have the cause heard in a court of equity. *Wilson v. White* (Ark.), 12-378.

Compelling plaintiff to elect between actions. — Without deciding whether a trial court may properly compel a plaintiff who has brought two actions based on the same transaction, one in tort and the other in contract, to elect between the two in a case where either action is maintainable, it must be held that a ruling which compels the plaintiff to make such election, and to submit to the direction of a verdict for the defendant in the action of contract, is erroneous in a case where his remedy, if he has any, is in contract and not in tort. *Connors v. Cunard Steamship Co. (Mass.)*, 17-1051.

Motion to strike out defense not demurred to. — A motion may be entertained at the trial of a cause to strike out as insufficient in law a defense which has not been demurred to. *Amperсанд Hotel Co. v. Home Ins. Co. (N. Y.)*, 19-839.

2. RECEPTION OF EVIDENCE.

a. Order of proof.

Discretion of trial court. — The trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will not be interfered with on appeal except where clearly abused. *Richbourg v. Rose (Fla.)*, 12-274.

Receiving evidence inadmissible when offered upon promise to connect later in trial. — The order of proof on a trial rests in the discretion of the court, and the trial judge is justified in receiving evidence which seems to be inadmissible when offered, upon the promise of counsel to connect it later on. If such promise is not kept, and the evidence is not properly connected, the adverse party should move to strike it out, and where he fails to make such motion he cannot complain if the evidence is permitted to remain in the record. *Dorn v. Cooper (Ia.)*, 16-744.

Evidence in rebuttal. — The plaintiff in an action is entitled to introduce his rebuttal evidence after the defendant has rested his case, and there is no rule requiring the plaintiff, before he has rested his case, to put in evidence to rebut the evidence given by his own witnesses on cross-examination. *Allen v. Phenix Assur. Co. (Idaho)*, 10-328.

Where a witness on cross-examination gives testimony against the party calling him, and apparently to the party's surprise, it is not error to permit the party and his witnesses to testify in rebuttal. *Southern Ry. v. Goddard (Ky.)*, 12-116.

b. Offers of proof.

Offer of proof partly competent and partly incompetent. — When an offer of proof is made, some of which is good and some bad, the court is not required to separate the offer and admit the competent evidence, but may reject the entire offer. *R. M. Davis Photo Stock Co. v. Photo Jewelry Mfg. Co. (Mass.)*, 19-540.

Exclusion when offered at improper time. — It is not error to exclude evidence offered at an improper time, even though such evidence would be admissible when offered at another stage of the case. *Yazoo, etc., R. Co. v. Grant (Miss.)*, 4-556.

Failure to renew offer as waiver of error in exclusion. — A judgment will not be reversed because of the exclusion of evidence, where the court notified counsel that the evidence might be offered later in the trial, and counsel did not again make the offer. *H. P. Moore Lumber Corp. v. Walker (Va.)*, 19-314.

Sufficiency of offer. — An offer of proof as to the violation of a statute prohibiting the use of the arms of the state for advertising purposes held properly excluded on the ground of insufficiency. *Commonwealth v. R. I. Sherman Mfg. Co. (Mass.)*, 4-268.

c. Limiting purpose of evidence.

Duty of court to limit purpose. — Where evidence admissible for a special purpose only is received for that purpose on the trial, its effect should be limited, by proper instructions, to the purpose for which it is admitted, and a failure so to limit it constitutes reversible error. *Saldiver v. State (Tex.)*, 16-669.

d. Objections and exceptions.

Necessity that objections be specific. — The rule that objections to evidence must be specific does not apply, where the evidence is clearly inadmissible for any purpose, in which case a general objection is sufficient. *Oregon R., etc., Co. v. Eastlack (Ore.)*, 20-692.

An objection to the admission of evidence which specifies no ground of objection nor in any manner suggests to the court any reasons why the testimony is inadmissible may be disregarded. *Moynahan v. Perkins (Colo.)*, 10-1061.

Sufficiency of objection. — In condemnation proceedings, an objection to evidence of what the plaintiff paid for other property for use in the same enterprise, on the ground that the evidence is not the measure of value, is sufficient to raise the question of the admissibility of such evidence, offered as substantive evidence, or on cross-examination as a test of an expert's knowledge of value. *Oregon R., etc., Co. v. Eastlack (Ore.)*, 20-692.

General objection to question proper in part. — Where a question propounded to a witness is legal in part and illegal in part and the objection is made to the whole question and not confined to the part which is illegal, the objection will be overruled. *Woodstock Iron Works v. Stockdale (Ala.)*, 5-578.

Time for taking exceptions. — A party cannot, after a verdict has been rendered against him, ask the trial court for the first time to grant the exceptions. *H. S. Kerbaugh v. Caldwell (U. S.)*, 10-453.

Grounds not urged when objection was interposed. — The rule of court re-

quires that all objections to evidence be urged and insisted upon at once, and after a decision upon one or more grounds, no others afterwards urged shall be heard by the court. Where objections are made to evidence when offered and overruled, it is in the discretion of the court to refuse to exclude the evidence on a ground not urged to its admission; and this is especially true where the motion to rule out is made pending the argument and is predicated upon a failure to lay the proper foundation for the evidence sought to be excluded. *Patton v. Bank of La Fayette (Ga.)*, 4-639.

e. Limiting number of witnesses.

Discretion of court. — While the number of expert witnesses in a case may be limited in the sound discretion of the court, as may also the number of witnesses to prove a given fact which is uncontradicted or merely collateral to the main issue, such discretion must be exercised in a reasonable and not in an arbitrary manner, judged by the special facts of the case. If there is any attempt to limit witnesses, not experts, on any particular relevant point, it must be when such point has already been satisfactorily established, and the court must so exercise its discretion as to deprive none of the parties to the litigation of any material rights. *West Skokie Drainage Dist. v. Dawson (Ill.)*, 17-776.

Abuse of discretion. — While trial courts should be allowed reasonable discretion in regard to the number of witnesses that may be introduced, it is reversible error for a court in an eminent domain proceeding to make an arbitrary rule limiting the number of witnesses on the question of damages to four on each side, especially where the rule is made and applied after three witnesses have been placed on the stand by the plaintiff. *St. Louis, etc., R. Co. v. Aubuchon (Mo.)*, 8-822.

Permitting additional witness to testify in violation of rule as error. — A judgment will not be reversed on the ground that the trial court, after limiting the number of witnesses that each party might introduce on a particular issue, permitted the successful party to introduce an additional number, in the absence of a showing that the court abused its discretion. *Brady v. Shirley (S. Dak.)*, 5-972.

Application of rule to witnesses in rebuttal. — On the trial of a condemnation proceeding, where the petitioner has proved that certain property in the immediate vicinity of the property sought to be acquired has been sold for a certain price, the defendant is entitled to introduce evidence in rebuttal, showing that the sale in question was a sale under foreclosure, and the exclusion of such evidence by the court, in pursuance of a rule announced by the judge at the beginning of the trial limiting the number of witnesses, constitutes reversible error. The rule that the court may in certain cases limit the number of witnesses, has no application to a witness called to rebut new or additional

facts brought out by the opposing party on direct or cross-examination. *West Skokie Drainage Dist. v. Dawson (Ill.)*, 17-776.

f. Putting witnesses under rule.

Application of rule to parties. — The rule in reference to the sequestration of witnesses does not apply to a witness who is a party to the case, even though there may be several parties on the same side who are all to be examined as witnesses. *Georgia R., etc., Co. v. Tice (Ga.)*, 4-200.

3. INSTRUCTIONS.

a. In general.

See DAMAGES, 12; DEATH BY WRONGFUL ACT, 10; EMINENT DOMAIN, 7 c (1), 9 k; FALSE IMPRISONMENT, 5; FORCIBLE ENTRY AND DETAINER, 3; LIBEL AND SLANDER, 4 g; MALICIOUS PROSECUTION, 2 f; NEGLIGENCE, 13; REPLEVIN, 7.

Action against carriers of passengers, see CARRIERS, 6 g (5) (c).

Actions against railroads for injuries to persons, see RAILROADS, 8 b (9) (b).

Actions for fraud, see FRAUD AND DECEIT, 6.

Actions for injuries caused by explosions, see EXPLOSIONS AND EXPLOSIVES, 6 c.

Actions for injuries to servants, see MASTER AND SERVANT, 3 n (4).

Actions for medical services, see PHYSICIANS AND SURGEONS, 4 b.

Actions on contracts, see CONTRACTS, 7 g.

Actions on fire insurance policies, see INSURANCE, 5 m (9).

Actions on injunction bonds, see INJUNCTIONS, 5 c (6).

Actions relating to water rights, see WATERS AND WATERCOURSES, 3 b (7) (f).

Credibility of witnesses, see WITNESSES, 5 a (3).

Explaining relative value of testimony of witnesses, see EVIDENCE, 20 c.

Instructions in criminal cases, see CRIMINAL LAW, 6 q.

Presumptions as to propriety of instructions, see APPEAL AND ERROR, 14 g.

Probate proceedings, see WILLS, 7 i.

Review of instructions in criminal cases, see CRIMINAL LAW, 9 b (4).

Construction of instructions. — In construing instructions upon any given proposition, all instructions bearing upon the same should be construed together as a whole. *Morris v. Miller (Neb.)*, 17-1047.

Correctness of instructions. — Instructions examined and held correct and applicable to the case. *Pearce v. Quincy Mining Co. (Mich.)*, 12-304.

Refusal of instruction approved on former appeal. — On the second trial of a case after reversal on appeal, it is error for the court to refuse to give instructions given on the first trial and approved by the appellate court, where the facts on the second trial are the same as on the first. *Louisville, etc., R. Co. v. Payne (Ky.)*, 19-204.

Right of court to give instructions not requested. — The court may exercise a

wide discretion in the matter of charging the jury and may, upon the request of the jury for further instructions, proceed to give instructions not requested by them. *Charlton v. Kelly* (U. S.), 13-518.

Right to disregard evidence contrary to view by jury. — The jury, in an action for damages for injuries caused by an explosion, by consent, having inspected the defendant's plant, the ground, the manner and place of storing the explosives, the location of the plaintiff's injured property, and the character of the damages, it is proper to instruct that they are not bound to accept any testimony as true, if, after a personal inspection of the matter testified about, they believe the testimony to be untrue, or to return a verdict according to testimony if it is in conflict with what their personal inspection has disclosed. *Whaley v. Sloss-Sheffield Steel, etc., Co.* (Ala.), 20-822.

Right to recover on proof of case as alleged in declaration. — An instruction that the plaintiff is entitled to recover if the case is proved as alleged in the declaration is not reversible error where every count in the declaration contains the allegations necessary for recovery. *Belskis v. Dering Coal Co.* (Ill.), 20-388.

Statement to jury of amount of damages claimed in complaint. — In an action for personal injuries it is reversible error for the trial judge to state to the jury the amount of damages claimed by the plaintiff in his complaint. Such a statement is a suggestion to the jury which is liable to take the place of evidence in their minds, and it cannot be justified on the ground that they might otherwise bring in a verdict in excess of the amount claimed. *Hollinger v. York R. Co.* (Pa. St.), 17-571.

Explanation of ambiguous instruction by additional instructions. — An ambiguous or general term in one instruction may be explained by another, and an instruction presenting only a partial view of the case may be supplemented by another, provided the whole is consistent and harmonious. *Gibler v. Terminal R. Assoc.* (Mo.), 11-1194.

Though two instructions which deal with a particular phase of the case are, when considered separately, technically inaccurate, yet if the jury could not be misled by them when taken together, they are sufficient. *Kirkham v. Wheeler-Osgood Co.* (Wash.), 4-532.

An incomplete instruction, correct as far as it deals with its subject-matter, is perfected by the giving of another for either party, supplying the omitted matter. *Connolly v. Bollinger* (W. Va.), 20-1350.

b. Formal requisites.

Written or oral. — The office of a charge is to state clearly and concisely to the jury the issues of fact and the principles of law which are necessary to enable them rightly to solve those issues, and in a case involving serious questions of law this can only be done by a carefully written charge. *Eichman v. Buchheit* (Wis.), 8-435.

Necessity of numbering written instructions. — Where instructions are reduced to writing, and clearly and concisely state the law, the mere failure to number them does not constitute reversible error. *Atchison, etc., R. Co. v. Calhoun* (Okla.), 11-681.

Necessity of writing "given" on an instruction read to jury. — An omission to write the word "given" on an instruction signed by the judge, read by him to the jury, and delivered with other instructions for consideration in the jury box, does not constitute reversible error. *Clasen v. Pruhs* (Neb.), 5-112.

Necessity of delivering instructions in open court. — Further instructions on the law of the case, requested by the jury after they have retired, must be delivered in open court, and if, in answer to such request, further instructions are sent to the jury room by the bailiff in charge, the record should show the consent of the parties to that procedure. *Martin v. Martin* (Neb.), 14-511.

Necessity that instruction follow language of request. — It is reversible error in South Dakota for the trial judge to read to the jury an instruction as requested by a party, in language substantially different from that requested, though the instruction as read may state the law correctly. *Rood v. Dutcher* (S. D.), 20-480.

Where a trial judge instructs a jury correctly, and in substance covers the relevant rules of law proposed to him by counsel, it is not erroneous for him to refuse to adopt the exact words of the request. *Cunningham v. Springer* (U. S.), 9-897.

c. Instructions regarding burden of proof.

In general. — A charge to the jury explaining the burden of proof is not erroneous because the judge tells the jury that they cannot find in accordance with a particular contention unless it has been "proved that it was so," where he adds: "By proved that it was so I mean a balance of proof in favor of that theory. . . . The plaintiff must make his side heavier, stronger, in favor of the proposition, to your minds, than that of the defendant, because if your minds remain balanced, you will give a verdict for the defendant." Nor is the use of the word "probable" in different parts of instructions on the burden of proof necessarily reversible error. *Sobel v. Boston Elevated R. Co.* (Mass.), 14-421.

Statement that burden of proof and preponderance of evidence are identical. — An instruction is erroneous which tells the jury in effect that preponderance of evidence and burden of proof are the same thing, and which further tells them that if they are inclined to the opinion that the plaintiff is entitled to recover, then the plaintiff has not only produced the preponderance of evidence but has also discharged his duty as to the burden of proof. *Eichman v. Buchheit* (Wis.), 8-435.

Waiver of error in instruction. — An instruction which requires the plaintiff in an action to establish a fact by a "clear" preponderance of the evidence is erroneous as imposing a greater burden than the law requires, but the error is without prejudice where the plaintiff offers no evidence at all of the fact in question and does not rely on that fact as a ground of recovery. *Fleming v. Lockwood* (Mont.), 13-263.

d. Misleading instructions.

Refusal of misleading instruction. — An instruction calculated to mislead the jury is properly refused. *Jacksonville Electric Co. v. Adams* (Fla.), 7-241.

Making case depend wholly on one of several grounds of liability. — A requested charge is properly refused as calculated to mislead the jury where it does not submit to the consideration of the jury all the grounds on which the defendant might be held liable. *Schow et al. v. McCloskey*, (Tex.), 20-1.

Mingling issues of negligence and contributory negligence. — Since, in a negligence action, the defense of contributory negligence has to be specially pleaded and the burden of proof as to that issue is upon the defendant, instructions should be directed to the issues of negligence and contributory negligence separately, as the mingling of the two issues in one instruction is confusing. *Overcash v. Charlotte Electric R., etc., Co.* (N. Car.), 12-1040.

Right of plaintiff to costs on recovery of less than offer of judgment. — In an action where the defendant has offered to confess judgment for a certain amount and such offer has been declined by the plaintiff, an instruction from which the jury may infer that a verdict for a smaller amount in plaintiff's favor will carry costs is misleading, and therefore erroneous. *Dorn v. Cooper* (Ia.), 16-744.

e. Argumentative instructions.

Giving or refusing to give as error. — It is not error to give or refuse an argumentative instruction. *Whaley v. Sloss-Sheffield Steel, etc., Co.* (Ala.), 20-822.

It is proper to refuse an argumentative instruction. *Pullman Car Co. v. Krauss* (Ala.), 8-218.

It is not reversible error to give, at the request of a party, an argumentative and abstract instruction which asserts a correct proposition of law. *Birmingham R., etc., Co. v. Mason* (Ala.), 6-929.

Requested instructions which are argumentative, or which invade the province of the jury, are properly refused. *Morris v. McClellan* (Ala.), 16-305.

f. Instructions not based on evidence.

Giving instruction not based on evidence as error. — It is error to submit a proposition of law, though correct as an abstract proposition, in the absence of any

facts to which it can be applied. *Colorado, etc., R. Co. v. Thomas* (Conn.), 3-700.

Although the instructions of a court to the jury may state the law correctly in the abstract, if they are not authorized by the evidence in the case they are erroneous; and a new trial will be granted for the giving of such instructions, unless it is apparent that the jury could not have been misled by them. *Culberson v. Alabama Construction Co.* (Ga.), 9-507.

The giving of instructions, having no basis or foundation in the evidence in the case in which they are given, is prejudicial and constitutes reversible error. *Kuykendall v. Fisher* (W. Va.), 11-700.

Notwithstanding the fact that it appears that there are no conflicts in the evidence, an instruction that the jury should attempt to reconcile any conflicts which there might be in the evidence is nonprejudicial, even if erroneous. *Aetna Ins. Co. v. Lipsitz* (Ga.), 14-1070.

Refusal of instruction not based on evidence as error. — It is not erroneous for a trial court to refuse an instruction based on a state of facts which none of the evidence tends to establish. *Oldenburg v. Dorsey* (Md.), 5-841.

It is proper to refuse a party's request for instructions embodying his "theory of the case" where the evidence does not in vital respects tend to substantiate the theory, and where the instructions are elaborately drawn, and are in their nature a special argument addressed to the jury under the guise of instructions of law. *Estate of Dolbeer* (Cal.), 9-795.

An instruction is rightly refused where there is no evidence on which to base it. *State v. Whitman* (Minn.), 14-309.

In a contest between the finder of money and an alleged owner thereof, proof by the latter of circumstances strongly tending to establish title in him, unopposed by any evidence tending in an appreciable degree to prove the contrary, precludes the giving of instructions, predicated on the assumption of conflict in the evidence, requiring a verdict for the party in whose favor it preponderates. *Kuykendall v. Fisher* (W. Va.), 11-700.

Determination of question whether evidence exists as basis for instruction. — It is for the court to determine whether there is evidence to render an instruction relevant. An instruction cannot be given and its consideration by the jury made to depend upon whether the jury finds that there is or is not such evidence. *Rowan v. Hull* (W. Va.), 2-884.

g. Instructions misstating evidence.

Misstatement of testimony of witness as error. — Where the trial court, in its instructions to the jury, attempts to state what the testimony of a witness upon a certain point is, such statement should be based upon the whole testimony of the witness upon that point, and not upon isolated passages

disconnected from their context. An instruction which misstates the testimony of a witness constitutes reversible error. *Glaser v. Rothschild* (Mo.), 17-576.

h. Instructions singling out evidence.

Refusal to give instruction based on portion of evidence as error. — An exception to the rejection of an instruction which segregates the plaintiff's evidence on a certain point and directs the jury that if they believe such evidence they should find for the plaintiff, but omits the defendant's evidence on the same point which would justify a contrary conclusion, should be overruled, especially where the rejected instruction is incorporated in an instruction given by the trial judge on his own motion. *B. F. Sturtevant Co. v. Dugan* (Md.), 14-675.

In an action for damages for injuries caused by an explosion, the plaintiff's requested instruction for a verdict if the defendant kept large quantities of dynamite and dynamite caps in a wooden magazine in a thickly settled portion of the town, in proximity to many buildings and persons, and the dynamite and caps were liable to explode and do serious injury to such persons or property, and said explosives did explode with such violence as to damage the plaintiff's property, is bad in ignoring proof of one of the particular explosives alleged to be stored, to wit, powder, and in premitting proof of the negligence alleged, as, these being material averments, each requires proof before the plaintiff can recover. *Whaley v. Sloss-Sheffield Steel, etc., Co.* (Ala.), 20-822.

i. Instructions assuming fact in issue.

Refusal of instruction as error. — It is proper to refuse an instruction which assumes a fact that under the evidence is in issue and is for the jury to decide. *Lyon v. United Moderns* (Cal.), 7-672.

In an action against a railroad company for killing a dog on the track, where it is controverted whether the dog had run on the track in front of the engine for a half mile or had run along the side of the track until shortly before he was struck, when he went on the track, a charge that when the engineer saw the dog running along beside the track, he could presume that the dog would leave the track before being struck, and was warranted in acting on that belief, is properly refused as assuming the fact in controversy. *St. Louis, etc., R. Co. v. Rhoden* (Ark.), 20-915.

Giving instruction erroneously stating that defendant admits certain contentions as error. — A new trial is demanded where it appears that the trial court, in charging the jury as to the respective contentions of the parties, not only failed to present correctly those of the losing party, but practically instructed the jury that such party admitted the contentions of the opposite party concerning one of the vital issues of the case. *Hightower v. Ansley* (Ga.), 7-927.

j. Instructions unauthorized by pleadings.

Refusal as error. — The failure of the trial court to give an instruction unauthorized by the pleadings is not error. *Hewitt v. Lamb* (Ga.), 14-800.

k. Instructions singling out issues.

Refusal as error. — Where there are several important issues, it is proper to refuse an instruction which singles out one of them in such a way as is calculated to mislead the jury into believing that it is the controlling issue. *Jacksonville Electric Co. v. Adams* (Fla.), 7-241.

In an action for damages for injuries caused by an explosion, an instruction requested by the plaintiff for a verdict if the defendant negligently kept large quantities of explosives in a wooden magazine within the town, where they were liable to explode, and from their being so negligently kept they did explode with such violence as to damage the plaintiff's storehouse and residence, is bad for ignoring the material averment of the complaint that the explosives were stored in a thickly settled portion of the town. *Whaley v. Sloss-Sheffield Steel, etc., Co.* (Ala.), 20-822.

l. Inconsistent and contradictory instructions.

Giving inconsistent and contradictory instructions as error. — It is a ground of reversal for the court to give inconsistent and contradictory instructions on a material question in the case, though one of the instructions correctly states the law as applied to the facts. *Gardner v. Metropolitan St. R. Co.* (Mo.), 18-1166.

Refusal as error. — An instruction which is inconsistent with an instruction previously granted at the request of the same party is properly rejected. *B. F. Sturtevant Co. v. Dugan* (Md.), 14-675.

m. Instructions invading province of jury.

In general. — An instruction based on undisputed facts in evidence is not erroneous merely because it fails to submit those facts with the qualification "if the jury believe from the evidence." *Carpenter v. Hyman* (W. Va.), 20-1310.

Directing jury as to inference of fact in issue from proven facts. — In an action for damages caused by an explosion of gas, it is proper for the court to refuse to charge that if the "defendant's pipes, meters, and their connections were free from any leak a week or any less time before the explosion, then the presumption is that they were in such condition at the time of such accident; and unless this presumption is removed by evidence sufficient to convince you to the contrary, you must find that the presumption is true." Such an instruction would invade the province of the jury by directing them as to the inference of fact which they should draw from other proven

facts. *Linforth v. San Francisco Gas, etc., Co. (Cal.)*, 19-1230.

Requiring jury to accept evidence of one party as true. — In an action to recover damages for personal injuries received by falling into an elevator pit in the basement of a building, where there is evidence tending to show that the basement was poorly lighted and very dark, and that, on account of the darkness, the plaintiff was unable to see the pit into which he fell, an instruction that there is no evidence in the case to sustain the charge in the plaintiff's petition that the defendant left the said basement without light or illumination of any kind, is erroneous, as invading the province of the jury. *Glaser v. Rothschild (Mo.)*, 17-576.

Requiring jury to accept as true inconsistent testimony of party given before trial. — In an action for damages for injuries received by a person while riding in an elevator, a requested instruction for the defendant that if the plaintiff at the time of the accident was riding up and down in the elevator, as he himself testified in his deposition taken nearly a year before the trial, then he was not a passenger, is properly refused as invading the province of the jury by requiring the jury to accept as true testimony given by the plaintiff nearly a year before the trial, and inconsistent with his testimony on the trial. *Ferguson v. Truax (Wis.)*, 13-1092.

Reference to undisputed evidence as violation of constitutional provision. — The constitutional provision that a judge shall not state the facts in charging the jury does not prohibit such reference to the undisputed evidence as is necessary to enable the jury to apprehend the law applicable to the issues. *State v. Driggers (S. C.)*, 19-1166.

n. Repetition of instructions.

Refusal of request for charge already given as error. — A request to charge is properly refused where the substance of it is fully covered by an instruction already given. *Schow et al. v. McCloskey (Tex.)*, 20-1.

A party cannot complain of the refusal of the court to give a requested charge, where the substance of it has already been given. *Johnson v. Caughren (Wash.)*, 19-1148.

It is not error to refuse a request covered by instructions given. *St. Louis, etc., R. Co. v. Rhoden (Ark.)*, 20-915.

It is not reversible error for the trial court to refuse an instruction, the matters treated wherein have been amply and fairly presented to the jury in other instructions. *District of Columbia v. Duryee (D. C.)*, 10-675.

An appellant cannot predicate error of a refusal of an instruction, where the record shows that the trial court gave another instruction which stated the same proposition in as favorable a manner as the appellant could ask. *Godfrey v. Rowland (Hawaii)*, 7-993.

It is not reversible error for the trial court to refuse to give an instruction which, though proper, is substantially similar to an in-

struction already given. *Sweet v. Western Union Tel. Co. (Mich.)*, 5-730.

It is not erroneous to refuse instructions as to matters which have been fully covered by instructions already given. *Lyon v. United Moderns (Cal.)*, 7-672.

It is not error for the court to refuse to give instruction asked for, however pertinent, if the same in substance and effect have already been given by him to the jury. *Florida East Coast R. Co. v. Welch (Fla.)*, 12-210.

The failure of the court to give a requested instruction is not error where the substance of the request is given in other instructions. *Kiley v. Rutland R. Co. (Vt.)*, 13-269.

Although a request to charge is correct in form and substance, the court may properly refuse the same, where it has been substantially covered by instructions already given. *Morris v. McClellan (Ala.)*, 16-305.

o. Requests to charge.

Written or oral. — A rule of the court that a request to charge must be in writing is intended for the benefit of the trial judge, and he may in his discretion receive and rule upon verbal requests. *Willis v. Western Union Tel. Co. (S. Car.)*, 2-52.

Necessity of requesting more definite instructions than given. — If a party to a civil action desires more definite instructions than those given by the court, he must make a special request for them. *Ives v. Atlantic, etc., R. Co. (N. Car.)*, 9-188.

Necessity of special request when instruction given is misleading. — Though in an action for damages for injuries caused by an explosion, various causes for which are alleged in the various counts, the cause may be immaterial if the jury find that the storing or keeping of the explosives was a nuisance *per se*, and so an instruction to render a verdict for the defendant if from all the evidence the jury find that the cause of the explosion lies wholly in the realm of conjecture and doubt may be open to the criticism of being misleading in this respect, it is not ground for reversal, as it might be cured by an explanatory charge, which the plaintiff should request. *Whaley v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 20-822.

An instruction that the burden of proof is not on the defendant to acquit itself of negligence being at most misleading, the plaintiff is bound to ask for explanatory charges. *Whaley v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 20-822.

In an action based on the frightening of a horse on the highway by an automobile, in the absence of a request for more definite instructions a charge to the jury that a recovery could be had if the injury was caused by the negligence of the defendant, without contributory negligence on the part of the plaintiff, is not rendered materially erroneous by the omission to state that the negligence complained of must have been the proximate cause and that the injury must have been one reasonably to have been anticipated as a

result thereof. *Martin v. Garlock* (Kan.), 20-81.

p. Objections and exceptions.

Error in detached portion of charge correct in entirety. — Error cannot be predicated on objections to a part of a charge segregated from the balance, where the whole charge, when read in its entirety, is correct. *Grimes v. Greenblatt* (Colo.), 19-608.

Where an exception to a charge to the jury consists of an extract, detached from its context, the whole charge must be examined in order to determine if the exceptions are well taken. *Nielson v. International Text-book Co.* (Me.), 20-591.

Where a paragraph of a set of instructions, when taken as a whole, sufficiently states the law on the point to which it relates, the fact that a disconnected portion of the paragraph, when taken alone, is open to the objection that it is too general, does not render the instruction erroneous. *Kirkham v. Wheeler-Osgood Co.* (Wash.), 4-532.

Instructions based on evidence not objected to but not within issues. — Error cannot be predicated on instructions as not within the issues made by the pleadings, where they are based on evidence admitted without objection. *Johnson v. Caughren* (Wash.), 19-1148.

Waiver of objection by failure to except. — A party cannot complain of the incompleteness of an instruction that is abstractly correct, where he neither took exceptions to the charge on the trial nor asked for more specific instructions. *Coe v. Northern Pacific R. Co.* (Minn.), 11-429.

Statement, on making request, that most of matters have been already covered, as waiver of right. — Where the defendant's attorney, in an action tried before a jury, after handing to the trial judge certain written requests to charge, states that the rulings of the court on the different grounds have covered most of the points embraced in such requests, he thereby waives his right to insist upon the requests. *McCrary v. Southern Ry.* (S. Car.), 18-840.

4. CONDUCT AND ARGUMENT OF COUNSEL.

a. In general.

See **BREACH OF PROMISE OF MARRIAGE**, 2 c.

Misconduct of counsel in criminal cases, see **CRIMINAL LAW**, 9.

Probate proceedings, see **WILLS**, 7 g.

Review of rulings of trial court, see **APPEAL AND ERROR**, 12 a; 13.

Right to open and close. — The Kentucky statute providing that "the burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side" means that the burden is on the party against whom a judgment carrying costs would be rendered, and when the defendant is in this situation, it is erroneous to deny him the right to make the closing argument. *Mattingly v. Shortell* (Ky.), 8-1134.

In an action for services rendered, where the claim is made up of several items and the defendant denies liability for all of the items but one, as to which he pleads payment and counterclaim, the defendant is entitled to the closing argument, as the burden of proof in the whole action lies on him, inasmuch as judgment would go against him for part of the amount claimed if the case were submitted without any evidence. *Mattingly v. Shortell* (Ky.), 8-1134.

Limiting argument to forty-five minutes for each side. — Where the issues raised on the trial of an action are not complicated, and the testimony is neither voluminous nor conflicting except upon one or two points, it is not an abuse of discretion for a trial court to limit the time allowed for oral argument before the jury to forty-five minutes for each side. *Christiansen v. William Graver Tank Works* (Ill.), 7-69.

Restricting argument to vital issues. — A judge presiding at a jury trial must exercise sound discretion in confining counsel in their arguments to a discussion of the vital issues, and his discretion in that respect will not be revised by a reviewing court in the absence of a showing of abuse. *Wrynn v. Downey* (R. I.), 8-912.

Questioning juror with reference to employers' liability insurance as error.

— In an action for personal injuries by an employee against his employer, the alleged misconduct of the plaintiff's attorney in asking a juror whether he had ever obtained an insurance policy from a certain employers' liability insurance company, the attorney stating to the trial court that, as it appeared or was understood that the defendant had taken out insurance in that company, his purpose in asking the question was to determine whether to exercise the peremptory challenge, but subsequently withdrawing the question, does not require the reversal of a judgment in favor of the plaintiff. *O'Neill v. Thomas Day Co.* (Cal.), 14-970.

Persisting in improper examination of witness as error. — It is misconduct for which a judgment will be reversed for counsel to persist in asking a witness questions which the court has held to be wrong and which any one reasonably acquainted with the rules of evidence must know to be improper. *Louisville, etc., R. Co. v. Payne* (Ky.), 19-294.

Improper offer of proof as error. — In an action to recover damages for personal injuries, it is reversible error to permit counsel for the plaintiff to offer, in the presence of the jury, to make proof of prior contradictory statements made by the only witness for the plaintiff who has given medical testimony, where the court has repeatedly and properly held the evidence offered to be incompetent. *Chicago City R. Co. v. Gregory* (Ill.), 6-220.

b. Scope of argument.

(1) In general.

Delay in amending answer. — Counsel for the plaintiff in a negligence action held

to be entitled to a comment upon the delay of the defendant in amending an answer setting up a new defense. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

Sufficiency of damages claimed. — In an action to recover damages for personal injuries there is no valid objection to a statement by the plaintiff's counsel in his argument to the jury that under the evidence he considers the amount claimed in the declaration full compensation for the plaintiff's injuries. *Graham v. Mattoon City R. Co.* (Ill.), 14-853.

Statement as to recovery on former trial. — A statement by counsel for the plaintiff in the course of his closing argument to the jury to the effect that the plaintiff had recovered a fixed amount below, held to be improper, but under the circumstances of the case not sufficient to warrant a reversal of the case. *Culbertson v. Alexander* (Okla.), 10-916.

Comment on custom of employers to carry liability insurance as error. — In an action by a servant against his master for negligence, it is improper for the plaintiff's counsel in the closing argument to the jury to comment on the custom of the employers in the vicinity of carrying an insurance against liability for accidents to the employees, in the absence of evidence of any such custom; and a judgment for the plaintiff will, on account of such remarks, be set aside notwithstanding an instruction by the court that the remarks should not be considered for any purpose. *Coe v. Van Why* (Colo.), 3-552.

Reading and commenting on interrogatories. — Counsel for one of the parties to a cause may read and comment upon to the jury interrogatories which the opposing party has requested and which the trial judge has indicated his intention of submitting to the jury. *McIntyre v. Orner* (Ind.), 8-1087.

(2) Comment on matters not in evidence.

Permitting argument as error. — It is reversible error to permit counsel, against objection, to base his argument to the jury on material facts which are not in evidence. *Boone v. Holder* (Ark.), 15-735.

It is highly improper for counsel to attempt in the course of argument to place before the jury indirectly that which could not be produced directly in proof. *Little Rock R., etc., Co. v. Goerner* (Ark.), 10-273.

In an action to recover damages for personal injuries, where the court has properly refused to permit the plaintiff to introduce in evidence prior contradictory statements made by the only medical witness called by him, it is improper to permit counsel for the plaintiff, in his closing argument, to comment upon those statements in such a manner as to cast discredit upon the testimony given by the witness. *Chicago City R. Co. v. Gregory* (Ill.), 6-220.

(3) Comment on failure to produce evidence.

Failure to call witness. — In an action for personal injuries where the defendant calls as witnesses three out of four of his employees who saw the accident, but fails to call the fourth, though the latter is in the city where the trial takes place, it is proper for the plaintiff's counsel to argue that if the witness had been called his testimony would have been unfavorable to the defendant, and it is not prejudicial error for him to state that the witness is well instead of arguing that there is no evidence that he is sick. *Lambert v. Hamlin* (N. H.), 6-713.

Claim of privilege interposed by defendant. — When the defendant in a civil action has refused to answer interrogatories filed by the plaintiff, on the ground that he could not be required to give evidence which might subject him to criminal punishment, plaintiff's counsel may properly read such interrogatories to the jury, together with defendant's reason for refusing to answer the same, and comment thereon in his argument. *Morris v. McClellan* (Ala.), 16-305.

(4) Attack on witnesses.

Calling witnesses liars and scoundrels. — It is improper and prejudicial for counsel to say concerning opposing witnesses, in the course of his argument before the jury, that "I have known . . . [the witnesses] for years, and two bigger liars and scoundrels never walked the face of the earth." *Herman Kahn Co. v. Bowden* (Ark.), 10-132.

Comment on interest of witness. — In arguing a case to the jury an attorney has the right, within reasonable limits, to comment upon the interest of an opposing witness in the result of the trial, and even where the right is abused, a judgment will not be reversed upon that ground alone, if it appears that the trial judge sustained an objection to the comments complained of, in the presence and hearing of the jury, thus dissipating any prejudice therefrom. *St. Louis, etc., R. Co. v. Raines* (Ark.), 17-1.

(5) Appeal to sympathy and prejudice.

Defendant and witnesses engaged in same business. — In an action against a commission merchant to recover the price of hay sold, a remark by plaintiff's counsel, in an argument before the jury, to the effect that the defendant and his witnesses are "a crowd of commission merchants" and that the plaintiff and the jury should "stick together" is improper as being in the nature of an appeal to class prejudice, and an objection thereto if properly made should be sustained. *Whaley v. Vannatta* (Ark.), 7-228.

Defendant not fit to live. — In an action for libel and slander brought by a woman, a remark by plaintiff's counsel, in the course of argument to the jury, that if the defendant "is guilty he is not fit to live in this country," affords no ground for reversal. *Miller v. Nuckolls* (Ark.), 7-110.

c. Preserving question for review.

Objection essential. — An appellate court will not consider an assignment of error based on the language used by counsel in addressing the jury, where no objection was made at the time the language was used. *Iola v. Birnbaum* (Kan.), 6-267.

Where on a trial counsel for the plaintiff, in argument to the jury, uses improper language, and the defendant's counsel are present, and at the time make no objection thereto, such silence operates as a waiver of the objection. *Cleveland, etc., R. Co. v. Hadley* (Ind.), 16-1.

Time for objection. — Failure to object to improper remarks of counsel at the time they are made is a waiver of the objection. *People v. Giddings* (Mich.), 18-844.

Ruling by trial court essential. — In order to make an objection to improper remarks by counsel in argument available in an appellate court, there must first be a ruling or a refusal to rule by the trial court, except possibly where the remarks are so obviously prejudicial that no reprimand or action on the part of the court can cure the error. *Whaley v. Vannatta* (Ark.), 7-228.

A statement in a bill of exceptions that the appellant objected to the remarks made by opposing counsel in argument "and asked that his exceptions be noted of record" shows neither a ruling nor a refusal to rule by the trial judge, and therefore presents no question for review on appeal. *Whaley v. Vannatta* (Ark.), 7-228.

A mere exception to a statement made by opposing counsel in his argument to the jury is insufficient to preserve the question for review on appeal, where the trial court is not requested to act in the matter. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Error cured by instruction to disregard. — A judgment will not be reversed for the misconduct of counsel, in argument to the jury, in making a statement of fact not justified by the evidence, where it appears that the trial court of its own motion instructed the jury to disregard the statements of counsel which were not borne out by the testimony. *Taylor v. Modern Woodmen* (Wash.), 7-607.

Where after an objectionable statement by counsel in the closing argument, the court without delay admonishes the jury not to consider the statement, the opposing party is not entitled to have the cause withdrawn and the jury discharged on account of such statement. *Malott v. Central Trust Co.* (Ind.), 11-879.

Where in an action for personal injuries received by the plaintiff while riding in an elevator, the plaintiff's counsel remarks to the jury that the question whether the plaintiff was a passenger in the elevator is the turning point in the case, and the court first overrules an objection to such remark but afterwards changes its ruling, and states that in a special verdict, such as the jury was required to render, there is no turning point, no reversible error is committed. *Ferguson v. Truax* (Wis.), 13-1092.

Error cured by caution to counsel by court. — A judgment will not be reversed for improper remarks made by counsel in course of argument to the jury, where the record shows that the trial court cautioned the counsel not to make such remarks; and this is so though the court administered the caution "mildly" and "quietly," if the opposing party failed to ask that the jury should be instructed to disregard the remarks. *Miller v. Nuckolls* (Ark.), 7-110.

Remarks not affecting verdict. — Remarks by counsel in an argument to the jury, though improper, do not call for a reversal of the judgment where in the opinion of the appellate court they were not so improper as to have affected the verdict and objections to most of them were sustained by the trial judge who afterwards approved the verdict. *Baltimore, etc., R. Co. v. Mullen* (Ill.), 3-1015.

5. CONDUCT AND COMMENTS OF TRIAL JUDGE.

Communications between court and jury, see JURY, 7 b.

Examination of witnesses by judge, see WITNESSES, 4 b.

Remarks of judge in criminal cases, see CRIMINAL LAW, 6 o.

Commitment of witness for contempt while on stand as error. — A trial judge may properly commit a witness for contempt of court while on the witness stand. *State v. Swink* (N. Car.), 19-422.

Comments in general. — The remarks of the court in regard to an argument of counsel held not to be prejudicial, and not having been objected to, not to be considered on appeal. *State v. Tully*, 3 Mont., 3-824.

Comment on materiality of evidence admitted as error. — A judgment rendered in an action tried before a jury will not be reversed on the ground that the trial judge stated that there was nothing material in a deposition received in evidence, though some parts of the deposition were in fact material, where it does not appear that the judge's remarks were understood by the jury or were prejudicial to the appellant. *Coulter v. Goulding* (Minn.), 8-778.

In an action by a woman for the alienation of her husband's affections, a statement by the court in overruling the defendant's objection to evidence of advances made by the husband to the defendant, that "my experience has been, my observation has been, that a woman is not liable to be seduced without she contributes a little in some way to the general purposes of the case," is a violation of the statutory rule that the court shall not present the facts of the case, and unless expressly withdrawn from the jury is ground for reversal. *Keen v. Keen* (Ore.), 14-42.

Expression of opinion as to what facts proven as error. — It is error for the court, during the trial of a case and in the hearing of the jury, to express or intimate an opinion as to what has or has not been

proved. *Atlantic Coast Line R. Co. v. Powell* (Ga.), 9-553.

6. DIRECTION OF VERDICT.

a. Nature of request for direction.

Distinguished from motion for nonsuit. — A request by the defendant to the trial court to instruct the jury that if they find the entire evidence to be true, the plaintiff is not entitled to recover, assumes the truth of the plaintiff's evidence and that, taking the defendant's evidence to be true, it entitles the defendant to a verdict, in which respect the request differs from a motion for judgment of nonsuit. *Harton v. Forest City Tel. Co.* (N. Car.), 14-390.

Nature of question presented by request. — The question presented to a trial court on a motion to direct a verdict or which presents itself in the consideration of such action on its own motion is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict should the jury find in accordance therewith. Where the evidence is conflicting and the court is asked or on its motion considers the direction of a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such action is leveled. *Cooper v. Flesner* (Okla.), 20-29.

Effect of sustaining demurrer to evidence. — When a court has sustained a demurrer to evidence, the direction, reception, and recording of a verdict are mere ceremonial acts. The verdict in such a case has no legal significance; it does not furnish the basis of the judgment nor serve any other useful purpose. *Bee Building Co. v. Dalton* (Neb.), 4-508.

b. Direction upon request of one party.

When verdict should be directed in general. — The affirmative charge may not be given where there is a conflict in the evidence, or different inferences can properly be drawn therefrom, as to some of the material averments in each count. *Whaley v. Sloss Sheffield Steel, etc., Co.* (Ala.), 20-822.

In the trial of a cause, the trial court has no right to discharge the jury and render judgment for the defendant unless it appears that there is not sufficient legal testimony offered by the plaintiff to sustain the judgment. *Morris v. Warwick* (Wash.), 7-687.

When the evidence adduced by one of the parties to a civil action at law is sufficient to warrant a finding in his favor, and no evidence appreciably tending to overthrow the case so made has been adduced by the opposite party, it is the duty of the court to direct a verdict in favor of the former, if

requested so do to. *Kuykendall v. Fisher* (W. Va.), 11-700.

The direction of a verdict must be held to have been erroneous if it appears from the record that upon the evidence before the jury they might properly have found facts which would have sustained a verdict for the other party. *Pigeon v. Lane* (Conn.), 11-371.

Direction of verdict for defendant upon evidence. — A court belonging to the federal judiciary system is never justified in directing a verdict for the defendant except where, conceding the credibility of the plaintiff's witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the plaintiff has not made out a case sufficient in law to entitle him to a verdict and judgment. *Dodge v. Rush* (D. C.), 8-671.

If there is any substantial evidence supporting the claim of the plaintiff to an action, the court will not direct a verdict for the defendant, but will submit the question to the jury. *Schofield v. Metropolitan Life Ins. Co.* (Vt.), 8-1152.

Where the sufficiency of a plea to the merits is not questioned and issue is joined thereon, if such plea is proven without contradiction it is not error for the court to direct a verdict thereon for the defendant. The proper judgment to be entered upon the verdict is for the determination of the court. *American Process Co. v. Florida White Pressed Brick Co.* (Fla.), 16-1054.

In an action against two defendants upon their alleged agreement to purchase certain property at a foreclosure sale and pay the indebtedness secured by the instrument foreclosed, it is error to refuse to instruct that in no aspect of the evidence can a recovery be had against the defendant who bid off the property, where there is no evidence that he was a party to the agreement to pay the secured debts and take the property. *Satterfield v. Kindley* (N. Car.), 12-1098.

Where the evidence as to the existence of a cause of action is conflicting, it is not error to deny the defendant's motion for a directed verdict or for a judgment notwithstanding the verdict. *Higgs v. Minneapolis, etc., R. Co.* (N. Dak.), 15-97.

A verdict cannot be directed for the defendant upon an issue as to which he has the burden of proving the affirmative, where the evidence is sufficient to support a different conclusion by fair-minded men. *Taylor v. Security Life, etc., Co.* (N. Car.), 13-248.

Where the evidence given at the trial of a cause, with all the inferences which the jury can justifiably draw from it, is not sufficient to support a verdict for the plaintiff, so that such verdict if returned must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Ford v. Ford* (D. C.), 7-245.

Where the evidence in an action is of such a character as to make it clear to the trial court that a verdict for the plaintiff could not stand, it is the duty of the court to

direct a verdict for the defendant. *Westfall v. Wait* (Ind.), 6-788.

Direction of verdict for defendant upon opening statement of plaintiff's counsel. — Where it clearly appears from the opening statement to the jury made by the plaintiff's counsel that the plaintiff is not entitled to recover, it is within the power of the trial court, after giving the plaintiff's counsel an opportunity to explain or qualify his statement, to render judgment upon such statement for the defendant. *Hornblower v. George Washington University* (D. C.), 14-696.

Direction of verdict for defendant as harmless error. — Although a ruling by the trial court that the plaintiff can in no event recover, is erroneous, the error is harmless where the plaintiff fails to introduce the evidence without which a recovery would not be authorized. *Brick v. Atlantic Coast Line R. R.* (N. Car.), 13-328.

Where a verdict has been directed on specific, but untenable, grounds, it may not be affirmed on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time of the rendition of the verdict. But where the defeated party has introduced at the trial all the legal evidence he has offered and has rested his case, he has thereby estopped himself from denying that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor; and if the bill of exceptions contains all the evidence, and it is clear beyond doubt that it would not sustain a verdict in his favor, an instruction by the court to return a verdict against him upon some other, but untenable, ground will be held error without prejudice, and no ground for reversal. *Bank of Havelock v. Western Union Tel. Co.* (U. S.), 5-515.

Direction of verdict upon evidence where former judgment reversed for insufficiency of evidence. — Where a judgment in favor of the plaintiff has been reversed on the ground that the evidence was insufficient to establish actionable negligence on the part of the defendant, and on a second trial no new or additional evidence on that branch of the case is offered by the plaintiff, it is proper for the trial court to direct a verdict for the defendant. *Johnston v. New Omaha, etc., Elec. L. Co.* (Neb.), 20-1314.

Refusal of nonsuit where defect in evidence supplied by defendant. — A nonsuit on the ground of contributory negligence is properly denied where the defect in the plaintiff's proofs is cured by evidence introduced by the defendant. *Yergy v. Helena Light, etc., Co.* (Mont.), 18-1201.

Direction of verdict for plaintiff upon disputed evidence. — In an action against a corporation for the amount of a check and interest, where the plaintiff's evidence is that the check was given as a loan to the corporation, and the defendant's evidence is that it was given to pay for stock

in the corporation, the court is not authorized to decide the disputed question of fact and direct a verdict for the plaintiff including interest from the date of the check. *Wolf v. Chicago Sign Printing Co.* (Ill.), 13-369.

c. Request by both parties for direction.

Request for direction as request for court to find facts. — Where on the close of the evidence in a jury trial both parties request the court to direct a verdict, they thereby affirm that there is no disputed question of fact involved, and necessarily request the court to find the facts; and the trial court's findings of facts will be affirmed by the appellate court if there is any evidence to support them. *McCormick v. National City Bank* (U. S.), 6-544.

Where each of the parties to an action moves for the direction of a verdict in his favor, and no request is made by either party for submission of the case to the jury, the facts must be regarded as undisputed, and the trial court is authorized to draw all inferences therefrom that the jury might have drawn had the case been submitted to the jury in the ordinary manner. *Sundling v. Willey* (S. Dak.), 9-644.

Request by both parties as waiver of right to have jury pass on case. — The fact that both parties ask the court to direct a verdict does not amount to a submission of controverted questions of fact to the court or operate as a waiver by the party against whom the court directs a verdict of the right to have the jury pass upon the case. *Wolf v. Chicago Sign Printing Co.* (Ill.), 13-369.

Where each party on the trial of an action asks for the direction of a verdict in his favor, and counsel for the defendant expressly concurs with the opinion expressed by the judge that there is no question for the jury, and a verdict is directed for the plaintiff, it is not open to the defendant, on a writ of error, to contend that there was a question which should have been submitted to the jury. *Philadelphia Brewing Co. v. McOwen* (N. J.), 16-648.

Determination of correctness of direction. — Where in addition to requests for peremptory instructions by both parties the plaintiff requests special instructions requiring the submission of the case to the jury, the validity of a peremptory instruction for the defendant depends upon whether the evidence is so undisputed or of so conclusive a character that it would be the duty of the court to set aside a verdict for the plaintiff. *Empire State Cattle Co. v. Atchison, etc., R. Co.* (U. S.), 15-70.

d. Preserving question for review.

Waiving objection by failing to insist upon ruling or to reserve exception. — A motion for a directed verdict at the conclusion of all the evidence is waived where a direct ruling thereon is not insisted upon and no exception is reserved in that

connection. *Fidelity, etc., Co. v. Thompson* (U. S.), 12-181.

Introduction of evidence by defendant after refusal to direct verdict as waiver. — Where on the trial of a civil action the defendant, at the close of the plaintiff's evidence, moves for a verdict thereon in his favor, and on excepting to the decision of the court overruling such motion, introduces evidence to support his grounds of defense, and rests without renewing the motion at the close of all the evidence, the exception is deemed to be waived, and it is no longer a predicate for error in a reviewing court. *Cincinnati Traction Co. v. Durack* (Ohio), 14-218.

An exception by the defendant to the denial of its motion for a directed verdict at the close of the plaintiff's case in chief is waived by introducing evidence in its own behalf. *Fidelity, etc., Co. v. Thompson* (U. S.), 12-181.

7. CONTROL AND DELIBERATIONS OF JURY.

Discretion of court to permit view of premises. — Under the statutes of South Carolina it is discretionary with the trial court whether it will allow the jury to view the premises in dispute, or other subject-matter of the action, and, in the absence of abuse, its exercise of such discretion will not be disturbed on appeal. *Rodgers v. Hodge* (S. Car.), 18-729.

Refusal to permit view as error. — In an action to restrain the cutting of timber on plaintiff's land and for damages circumstances considered and held to justify the trial court in refusing to permit a view of the premises by the jury. *Rodgers v. Hodge* (S. Car.), 18-729.

Making of experiments by jury during view. — A jury may be allowed, in the discretion of the court, to inspect the scene of a transaction under investigation, but it is improper for the jurors, during such inspection to take evidence by making experiments. *State v. Ballew* (S. Car.), 18-569.

An objection that the jurors, while viewing the scene of the transaction under investigation, were guilty of misconduct in taking evidence by making experiments comes too late after verdict. *State v. Ballew* (S. Car.), 18-569.

Submitting statement admitted on motion for continuance to jury. — Where a motion for continuance is based on the absence of the witness and the opposite party admits that the witness, if present, would testify as stated, and the statement is not offered in evidence, it is not erroneous for the trial court to fail to submit the statement to the jury. *Michel v. Boxholm Co-operative Creamery* (Ia.), 5-918.

Submitting paragraphs of petition stricken out of jury. — Paragraphs of a petition which have been stricken out on motion should not under any circumstances be submitted to the inspection of the jury. *Trumbull v. Trumbull* (Neb.), 8-812.

8. VERDICT.

a. Submitting interrogatories to jury.

Power to direct finding of special verdict. — In the absence in Florida of a statute on the subject of special verdicts, our trial courts are not justified in directing the jury to find a special verdict, though they may, in their discretion, in a proper case recommend one; but the jury has the right to decline finding any other than a general verdict. The appellate court will not review or reverse such trial courts for their refusal to exercise their discretion in such cases. *Florida East Coast R. Co. v. Lassiter* (Fla.), 19-192.

Even in the absence of any mandatory statute, a trial court has power to submit to the jury pertinent written interrogatories to be answered upon returning a general verdict, and the exercise of this power does not depend upon the consent of the parties. *Freedman v. New York, etc., R. Co.* (Conn.), 15-464.

Discretion of court in submission. — In the absence of any statute or rule upon the subject, it is within the reasonable discretion of the trial court to determine when and to what extent interrogatories should be submitted, and when and how counsel may make a request for the submission thereof. *Freedman v. New York, etc., R. Co.* (Conn.), 15-464.

Refusal of request for special finding. — Requested interrogatories to the jury which call for a special finding on the one material question in the case are properly refused. *Haase v. Morton* (Ia.), 16-350.

Time for presentation of interrogatories. — The Iowa statute providing that special interrogatories propounded by the defendant for submission to the jury shall be presented to counsel for the plaintiff before such counsel's opening argument to the jury is substantially complied with where the interrogatories are presented after the plaintiff's counsel has risen to his feet and by formal phrase addressed the court and jury, but before he has actually commenced his argument, if, on the presentation of the interrogatories, the argument is postponed to enable the plaintiff's counsel to make such objections as he may deem proper. *Wilson v. Wapello County* (Ia.), 6-958.

Submission of two sets of questions. — It is not a proper method of submitting a special verdict under the Wisconsin statute for the trial court to submit several even-numbered questions together, and then to submit together an equal number of odd-numbered questions, each of which is dependent upon the answer to one of the even-numbered questions. *J. H. Clark Co. v. Rice* (Wis.), 7-505.

Construction of apparently conflicting answers to interrogatories. — Where the answers to special interrogatories appear to conflict, the court should construe all the interrogatories and answers as one document, and though it should avoid straining the lan-

guage for the purpose of avoiding the apparent conflict, it should give to the questions and answers as a whole a reasonable construction so as to give effect to the intention of the jury. *New York, etc., R. Co. v. Hamlin (Ind.)*, 15-988.

Duplicity of answer. — In an action brought by the president of a bank to recover compensation for services rendered as president, the question submitted to the jury whereby they are to find in a special verdict whether there was a contract "express or implied" for compensation, to which question they answer "yes," is faulty for duplicity and fatally defective for uncertainty as to the determination of the issue. *Lowe v. Ring (Wis.)*, 3-731.

Effect of contradictory findings. — In an action tried before a jury it is the province of the jury to find the facts and return a verdict accordingly, and where a return made by the jury in the nature of a special verdict contains contradictory findings it is not for the court to say that one part of the return is correct and another part not correct. If a verdict is contrary to the evidence the court may set it aside as a whole and enter judgment *non obstante*, but it cannot split up a verdict and give effect to one portion thereof only. *Donaldson Iron Co. v. Howley Constr. Co. (Pa.)*, 18-778.

An answer of a jury to a question submitted to them may be rejected as insensible or at unreasonable variance with the other answers. *Nettleton v. Prescott (Ont.)*, 12-790.

b. General verdicts.

Sufficiency of general verdict. — In an action for death by wrongful act, brought against several defendants jointly, where the complaint, although in fact stating but one cause of action, is drawn in four separate counts, a verdict finding the issues in favor of the plaintiff and against the defendants "on each and all of the four causes of action set forth in the complaint," and fixing the plaintiff's damages at a certain sum, is sufficient as a general verdict, although not strictly correct in form. *Mize v. Rocky Mountain Bell Tel. Co. (Mont.)*, 16-1189.

There is no objection to a verdict which is based generally on counts, two of which name an individual and two of which employ words which might be used to describe a corporation or partnership, as the latter two counts are bad. *Bates v. State (Wis.)*, 4-365.

Effect of omission of word "dollars" in verdict. — The omission of the word dollars in a verdict for a money recovery does not affect the validity of the judgment when it is manifest that dollars were meant, and, consequently, a judgment entered on such a verdict will not be reversed on appeal, because of such omission, in a case where the whole controversy before the jury on the issue of damages, as presented by the pleadings, the evidence, and the charge of the court, was expressed in terms of "dollars" and where the omission in the verdict was

not called to the attention of the court by any timely exception. It would be more regular, however, to amend such a verdict before judgment. *Cox v. High Point, etc., R. Co. (N. Car.)*, 16-474.

Power of court to add interest to verdict. — The judgment of the court must follow the verdict, and where the verdict is general and for a sum in gross and the question of interest was not reserved by the court, and there is nothing to indicate that the jury omitted interest, it will be presumed that it is embraced in the amount of their finding, and the court cannot add interest to the verdict. *Blackwell, etc., R. Co. v. Bebout (Okla.)*, 14-1145.

Where the person in whose favor a verdict is rendered is entitled to interest, and there is nothing in the record from which it can be determined whether the jury took into consideration the matter of interest in fixing the amount of their award, it will be presumed that they included interest. *Blackwell, etc., R. Co. v. Bebout (Okla.)*, 14-1145.

In a case tried by a jury, where it is clearly apparent that the prevailing party is entitled to interest upon the amount found in the verdict, and it is unquestionably clear that the jury allowed no interest, or where the court reserved the question of the allowance of interest until after the verdict, and the dates from which and to which the interest should be allowed are clearly ascertainable from the verdict or the uncontroverted facts, and the rate is fixed, the court may make a computation, and add the interest so found to the sum found in the verdict and render a judgment for the aggregate amount. *St. Louis, etc., R. Co. v. Oliver (Okla.)*, 10-748.

Effect of erroneous apportionment of damages against defendants. — Where the jury find the amount of damages to which the plaintiff is entitled and erroneously apportion the damages against the several defendants, the plaintiff may select which one of the defendants he will take judgment against, and may enter a *nolle prosequi* as to the others, and have his judgment against this one in the amount the jury awarded against him, and the irregularity in the verdict awarding several damages is thereby cured. *Nashville R., etc., Co. v. Trawick (Tenn.)*, 12-532.

Where two or more joint tortfeasors are sued jointly and all are found guilty, the damages should be assessed jointly against all, although all may not be equally culpable, and a verdict assessing several damages is irregular and erroneous. *Nashville R., etc., Co. v. Trawick (Tenn.)*, 12-532.

Verdict not responsive to issues. — A verdict for damages which rests solely upon an issue not raised by the pleadings cannot be supported. *Holmes v. Pennsylvania R. Co. (N. J.)*, 12-1031.

Power of court to strike out special finding that claim not due. — In an action on contract to recover a liquidated sum, where the jury find generally for the plaintiff for the amount claimed, but add to their

verdict a special finding to the effect that such amount is not yet due, it is reversible error for the trial court to strike out such special finding as surplusage and render judgment for the plaintiff. *Donaldson Iron Co. v. Howley Constr. Co. (Pa.)*, 18-778.

Waiver of objections to verdict. — When two causes of action against a defendant in favor of different plaintiffs are tried at one time, the defendant failing to raise an objection to the misjoinder at a proper time, and a verdict for one sum in favor of both plaintiffs is rendered, and no objection is raised when the verdict is received, the irregularity in the form of the verdict is not ground for a new trial. The payment of the verdict as rendered to the parties jointly, or to their attorney, will discharge the defendant from liability to both of them on account of all matters alleged in the petition. *Georgia, R., etc., Co. v. Tice (Ga.)*, 4-200.

c. Excessive verdicts.

Review of order setting aside verdict as excessive, see *APPEAL AND ERROR*, 13.

Duty of court to set aside or reduce. — While the trial court should not interfere with the functions of the jury and undertake to determine facts which are exclusively within the province of the jury, yet when it is apparent that the jury have returned a verdict excessive in amount and clearly beyond what the evidence warrants, the court should set it aside or reduce the amount. This is a duty as imperative as any other which rests upon the trial court, and there should be no hesitancy in performing it. *Hollinger v. York R. Co. (Pa. St.)*, 17-571.

Eliminating items of damages not supported by evidence. — Where a verdict has been rendered for the plaintiff in an action for damages, the trial judge cannot cure an error in the admission of incompetent evidence by so reducing the verdict as to eliminate the items of damage with regard to which there was admittedly no sufficient evidence, but the proper course is for him to grant a new trial. *Jayne v. Loder (U. S.)*, 9-294.

d. Amendment of verdict.

In form. — It is within the power of a trial court to amend a verdict in form so that it will express what the jury really intended to find. *Murtland v. English (Pa.)*, 6-339.

e. Impeachment of verdict.

By affidavits of jurors. — The affidavits of jurors cannot be received by the court to impeach their verdict. *State v. Kiefer (S. Dak.)*, 1-268.

The general rule that the statements of jurors will not be received to establish their own misconduct or to impeach their verdict does not prevent the reception of their evidence as to what really was the verdict agreed upon, in order to prove that by mistake or otherwise it has not been correctly expressed. *Wolfgram v. Schoepke (Wis.)*, 3-398.

f. Coercing verdict.

See *JURY*, 7 a.

Propriety of directions by court to consider case further. — Where a jury, after having been out for a number of hours, report that they are unable to agree upon a verdict, it is improper for the trial court to instruct them that it is the duty of each juror to lay aside all pride of judgment and carefully to review the ground of his opinion and endeavor to reach an agreement, and to call their attention to the fact that a new trial will entail a large expense upon the parties, and to direct them to return to their room and examine their difference in a spirit of fairness and candor and to endeavor, if possible, to agree upon a verdict; and where such a course has been pursued, and the jury, after a further deliberation of several hours, bring in a verdict for the plaintiff, a new trial will not be granted on affidavits of certain of the jurors to the effect that the verdict was brought about by such additional instructions. *Burton v. Neill (Ia.)*, 17-532.

Necessity of presence of parties in urging agreement by jury. — Where a jury after having been out for a number of hours, report that they are unable to agree on a verdict, general directions by the court to the jury as to their duty to agree on a verdict, such as informing them that it is the duty of each juror to lay aside all pride of judgment and carefully to review the ground of his opinion and endeavor to reach an agreement, and to call their attention to the fact that a new trial will entail a large expense on the parties, and directing them to return to their room and examine their difference in a spirit of fairness and candor and to endeavor, if possible, to agree on a verdict, are not within the meaning of the Iowa statute which requires additional instructions "as to any point of law arising in the case," when given after the jury have retired for deliberation, to be given in the presence of or after notice to the parties or their counsel, and, consequently, the giving of such directions in the absence of the defendant and his counsel, and without any effort by the court to advise them that the jury are to be further instructed, does not constitute reversible error. *Burton v. Neill (Ia.)*, 17-532.

g. Setting aside verdict.

As to one of two joint tortfeasors. — A verdict against two joint tortfeasors may be set aside as to one of them and allowed to stand as to the other. *Sparrow v. Bromage (Conn.)*, 19-796.

9. TRIAL BY COURT.

View of premises by judge. — It is erroneous for the judge, in a trial without a jury, to view premises with the knowledge or consent of either party, and to use the result of his inspection in weighing the testimony of the witnesses. *Denver Omnibus*,

etc., Co. v. J. R. Ward Auction Co. (Colo.), 19-577.

Necessity of finding of facts where facts not controverted. — Where the facts are not controverted, the evidence amounts to an agreed statement of facts, and findings of fact are not required. *State v. Edwards* (Mont.), 20-239.

Agreed state of facts, adopted as basis of findings, as special verdict. — Where an agreed state of facts, adopted by the trial court as a basis of its findings and spread upon the record, includes all the facts essential to the determination of the controversy, it will be treated as a special verdict upon which a court of review will render the same judgment that the trial court ought to have rendered. *National Bank of New Jersey v. Berrall* (N. J.), 1-630.

Requisites and validity of findings. — The findings of fact in an action tried by the court should severally cover all of the material issues raised by the pleadings, carefully excluding all other matters, and the paper should be draughted from a strictly judicial viewpoint. *Brenger v. Brenger* (Wis.), 19-1136.

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TROVER AND CONVERSION.

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1. WHAT CONSTITUTES CONVERSION.

In general. — Any act of dominion wrongfully exercised over another's property, in denial of his rights or inconsistent with them, may be treated as a conversion; and this is true of shares of stock as of any other property. *Herrick v. Humphrey Hardware Co.* (Neb.), 11-201.

Wrongful refusal to transfer stock. — Where under the by-laws of a corporation, or by statute, it is necessary that the transfer of the stock be made on its books, and the corporation wrongfully refuses to make the transfer, such refusal is a conversion of the stock. *Herrick v. Humphrey Hardware Co.* (Neb.), 11-201.

Appropriation of money by agent. — From its nature the title to money passes by delivery, and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe-keeping and transmission, and an agent unless restricted by his contract would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover, although it might be the ground for an action of assumpsit. *Hazelton v. Locke* (Me.), 15-1009.

Where the relation of a plaintiff and a defendant is that of principal and agent, it is necessary, in determining whether trover or assumpsit is the proper remedy for money collected by the agent but not turned over, to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the agent in receiving and retaining the money collected by him. *Hazelton v. Locke* (Me.), 15-1009.

In an action for the conversion of a sum of money placed by the plaintiffs with the defendant under an agreement that the latter should purchase therewith a certain amount of stock, no liability on the part of the defendant is shown where it appears, that he, relying on the agreement and before any effort was made to rescind it, became personally responsible for payment for the stock. *Wiger v. Carr* (Wis.), 11-298.

Liability of third person receiving converted property. — Where a debtor wrongfully converts the money of a third person and uses it to pay his own debt, the law implies a promise on the part of the creditor to pay the money to the rightful owner, though the money is paid in the first instance to a bank which the creditor has employed as his collecting agent and is received by the creditor without knowledge of the conversion, and though the identical money paid to the bank is not turned over to the creditor. *Porter v. Roseman* (Ind.), 6-718.

2. SUBJECTS OF CONVERSION.

Shares of stock. — Trover will lie for the wrongful conversion of shares of stock in

a corporation. *Herrick v. Humphrey Hardware Co.* (Neb.), 11-201.

Paid promissory note. — Trover may be maintained by the maker of a negotiable promissory note against the payee, after the same is fully paid, if the payee, having the note in his possession, refuses to deliver it to the maker upon demand, or if, after payment, the payee disposes of the note. *Long v. McIntosh* (Ga.), 12-263.

Where a suit has been brought by the makers of a promissory note against the payee and his agent, to recover possession of it, on the ground that it has been fully paid and its possession has been refused on demand, it furnishes no ground for an equitable proceeding on behalf of the payee that he denies the full payment of the note, and that he cannot obtain judgment on it in the trover suit, or that the City Court in which that suit has been brought has no equitable jurisdiction. *Long v. McIntosh* (Ga.), 12-263.

Money. — Legal currency may be the subject of an action of trover. There is nothing in the nature of money making it an improper subject of this form of action so long as it is capable of being identified, as delivered at one time, by one act and in one mass, or when the deposit is special and the identical money is to be kept for the party making the deposit, or when wrongful possession of such property is obtained. *Hazelton v. Locke* (Me.), 15-1009.

3. WHO MAY SUE.

Person having special ownership in property. — The absolute and unqualified ownership of a chattel is not essential to enable one to maintain trover for its conversion. Either a general or a special property in a plaintiff at the time of the conversion is sufficient. *Weeks v. Hackett* (Me.), 15-1156.

Agent of owner. — An agent intrusted by his principal with the possession of goods for the purpose of sale has such a special interest in the goods as will support an action against a stranger for their conversion. *Gunzburger v. Rosenthal* (Pa.), 18-572.

Tenant in common. — With respect to things so far indivisible in their nature that the share of one cannot be distinguished from that of the other, it is a well-established rule that one tenant in common cannot maintain trover against his cotenant for the reason that the two are equally entitled to possession. But this rule does not apply to commodities, such as grain or money, which are readily divisible by count or measure into portions absolutely alike in quality. *Weeks v. Hackett* (Me.), 15-1156.

4. WAIVER OF TORT.

Property used or consumed by wrongdoer. — Where a person who has wrongfully converted the property of another uses or consumes the property, the only remedy of the owner is by an action *ex delicto*. It is only where the property converted has been

turned into money, or its equivalent, that an action of assumpsit will lie against the wrongdoer. *Woodruff v. Zaban* (Ga.), 17-974.

A petition alleging that the defendants wrongfully and tortiously took possession of the plaintiff's personal property, and carried said personal property away, thereby converting the same to their own use, with the intent to deprive the plaintiff thereof, and which further alleges that the plaintiff waives the tort and sues for the value of the property, is demurrable. Under the circumstances alleged, the only remedy of the plaintiff is by an action *ex delicto*, and in view of the express allegation that the plaintiff waives the tort and sues for the value of the property, the action brought cannot be treated as such an action. *Woodruff v. Zaban* (Ga.), 17-974.

5. ACTIONS.

a. Conditions precedent.

Tender of amount of debt by pledgor. — Where a pledgee, in violation of his trust, sells or disposes of the pledge, thereby putting it out of his power to return the property, a tender of the amount of the loan is not a condition precedent to the right of the pledgor to maintain an action for the conversion of the property, and in such an action it is not necessary to allege or prove the tender. *Austin v. Vanderbilt* (Ore.), 10-1123.

b. Pleading.

Trover or money received. — Plaintiff's petition construed and held to state sufficiently a cause of action for the recovery of an indebtedness arising from money placed in the hands of the defendant as agent, and not to state a cause of action for conversion. *Ackerman v. Green* (Mo.), 6-834.

Complaint for conversion of collateral security. — In an action to recover damages for the conversion of personal property which had been delivered by the plaintiff to the defendant as security for a loan, the complaint is sufficient where it alleges the ownership of the property by the plaintiff, the delivery of the property to the defendant, and the fact of conversion, without alleging the substance of the contract respecting the delivery of the property and the particulars in which the defendant has violated it. *Austin v. Vanderbilt* (Ore.), 10-1123.

Description of money. — In a declaration in an action of trover for the alleged conversion of money, only the same certainty is required as in indictments. It is not necessary to set out the money verbatim, the description in a general manner being sufficient. *Hazelton v. Locke* (Me.), 15-1009.

c. Defenses.

Tender by defendant. — After a tortious conversion of property has become complete, the wrongdoer cannot escape liability or lessen the actual damage recoverable, by

a tender back of the property, and, therefore, in an action for conversion, an instruction that such an offer made before suit brought, and refused by the plaintiff, would defeat plaintiff's action and necessitate a verdict for the defendant, is erroneous. *Munier v. Zachery* (Ia.), 16-526.

In an action for the conversion of stock, the tender by the defendant on the trial of the certificates theretofore demanded and refused is no defense. *Dooley v. Gladiator Consol. Gold Mines, etc., Co.* (Ia.), 13-297.

Insolvency of maker of note. — In an action against a maker of notes for their conversion, he cannot set up his own insolvency in mitigation of damages. *Ackerman v. Green* (Mo.), 6-834.

d. Evidence.

Refusal to return on demand. — In an action for the conversion of household goods, the plaintiff may establish a conversion by proof of either an unlawful sale or a refusal to return upon demand, though the complaint alleges merely a conversion by an unlawful sale. *Barker v. Lewis Storage, etc., Co.* (Conn.), 3-889.

Value of property covenanted. — In an action for conversion, the value of the property at the time of the conversion is generally the measure of damages, but to ascertain that value evidence of its worth a reasonable time prior and subsequent to the conversion is admissible. *Austin v. Vanderbilt* (Ore.), 10-1123.

Sufficiency to raise question for jury. — In an action of trover, a prayer by the defendant that the case be taken from the jury on the ground that there is no legally sufficient evidence to entitle the plaintiff to recover raises no question as to the form of the action or the pleadings, but simply as to the sufficiency of the evidence, and is properly refused where there is evidence which would warrant the jury in finding that the plaintiff was entitled to immediate possession of the property at the time when it was converted, and that his demand for such possession was refused by the defendant. *Swartz v. Gottlieb-Bauern-Schmidt-Straus Brewing Co.* (Md.), 16-1156.

e. Measure of damages.

Household property. — In an action for the conversion of household goods, an instruction as to measure of damages held erroneous as improperly restricting the jury to the consideration of only a part of the many factors that might enter into the question of fair compensation. *Barker v. Lewis Storage, etc., Co.* (Conn.), 3-889.

In an action for the conversion of household goods, the measure of damages is not the price which could be realized by a sale of the goods in the market, but the actual money loss resulting to the plaintiff from the depreciation of his goods, taking all the circumstances and conditions into consideration, but not including any sentimental or fanciful value placed on the goods by the

plaintiff. *Barker v. Lewis Storage, etc., Co.* (Conn.), 3-889.

Shares of stock. — The damages for the sale and conversion by the defendant of 20,000 shares of the capital stock of a mining company, unlisted and having no market value to which the plaintiff was entitled under a contract with the defendant, were assessed by a referee upon a reference at forty cents a share, which was the highest price at which shares of the company had been sold. It appeared that the circumstances in regard to that sale were exceptional. Under the defendant's appeal to a judge, the damages were reduced to twenty-six cents a share, the price obtained by the defendant. Upon the plaintiff's appeal to a division court, the damages as reduced by the judge were increased by the sum of \$1,500; the court holding that it should act as a jury, and assess the damages at a fair sum, taking into consideration the fact of a sale at a higher price than that obtained by the defendant. *Per Clute, J.*: The plaintiff never recognized the sale by the defendant, and only consented to take damages in lieu of the shares because, the shares being sold, he had no other remedy. The shares on the day the action was brought had no market value; and a jury would have to say what was a reasonable compensation for the loss of the shares. *Per Middleton, J.*: The defendant cannot escape liability beyond the amount received by him in a case of this kind, merely because he acted in good faith so far as the sale was concerned. Nor should he be held to account for the full price realized by another in exceptional circumstances. The value of the shares was left in doubt; and the court should, as a jury, make a fair assessment. *Goodall v. Clarke* (Can.), 18-605.

The market value of stock, recoverable in a suit for the conversion of the stock, is what the stock was selling for in the market when the conversion occurred. *Dooley v. Gladiator Consol. Gold Mines, etc., Co.* (Ia.), 13-297.

f. Effect of recovery as transfer of title.

Time when title passes. — As a general rule the title acquired by a tortfeasor who satisfies a judgment obtained against him for the wrongful conversion of chattels takes effect from the date of the conversion. *Third Nat. Bank v. Rice* (U. S.), 15-450.

Waiver of title by tortfeasor. — But although the tortfeasor may, after the satisfaction of the judgment, maintain an action against a third person who tortiously deprives him of possession between the date of the conversion and the satisfaction of the judgment, yet where such tortfeasor, expressly disclaiming any interest in the chattels, voluntarily turns them over not in trust, but absolutely to one who claims them under a mortgage, there is no implied promise by such mortgagee to answer to the tortfeasor for the chattels, and the latter cannot subsequently, upon satisfying a judgment obtained against him by the owner of the chattels, recover from the mortgagee. *Third Nat. Bank v. Rice* (U. S.), 15-450.

g. New trial.

Grounds for new trial. — There is no abuse of discretion by the trial court in denying a new trial after a judgment for the plaintiff in an action for the conversion of corporate stock where the petition for new trial is based only on the alleged grounds that the plaintiff after obtaining his judgment participated in a stockholders' meeting and voted the stock, and that he gave false testimony on the trial regarding the value of the stock. *Dooley v. Gladiator Consol. Gold Mines, etc., Co. (La.)*, 13-297.

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TRUSTS AND TRUSTEES.

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1. CREATION AND DURATION OF TRUST.

a. Express trust.

(1) In general.

Sufficiency of instrument creating trust. — A trust and not an agency is created by the words in a letter, "until I give further instructions, hold the sum of \$1,000 and what of the first fund is left, for the support of the child in case of my death, for such a time as it may hold out." *Witherington v. Herring (N. Car.)*, 6-188.

Where a testator makes an absolute gift of all his property, real and personal, to his wife, and then in a separate clause of the will states it to be his wish and desire that his wife shall pay a certain sum annually to a named person, such latter clause is to be construed as a mere expression of the wish of the testator to be complied with or not in the discretion of the wife and not as creating a trust or charge upon the estate in favor of the person named. *Post v. Moore (N. Y.)*, 2-591.

Knowledge of cestui que trust of creation as essential to validity. — It is not essential to the creation of a valid trust that the *cestui que trust* should know of the trust at the time of the transfer of the property in trust. *Clark v. Callahan (Md.)*, 12-162.

(2) Creation by parol.

Trust in personal property. — A trust in personal property may be created orally and may be established by parol evidence. *Coyne v. Supreme Conclave, etc. (Md.)*, 14-870.

An oral agreement between the insured in a death benefit certificate and the beneficiary therein that the latter will pay the proceeds of such certificate to a third person for the support of the three minor children of the insured is enforceable as a trust in favor of such children. *Coyne v. Supreme Conclave, etc.* (Md.), 14-870.

Trust in real property. — A valid express trust in real property, enforceable in equity, may be created by a parol agreement. *Insurance Co. v. Waller* (Tenn.), 7-1078.

Creation at time of absolute conveyance of realty, intended for use of third person. — A contemporaneous parol agreement, made at the time of the execution and delivery of a conveyance of real estate which is absolute upon its face, that the grantee will hold the property conveyed in trust for a certain person, is not within the statute of frauds, and, aside from the rights of creditors of the original grantor and of the rights of innocent purchasers from the original grantee, vests in the beneficiary of the trust a valid equitable title to the property conveyed, which equitable title a court of equity will enforce. *Insurance Co. v. Waller* (Tenn.), 7-1078.

(3) Duration.

Effect of death of donor. — A valid trust is not affected by the death of the donor testate, where he dies without having exercised his power of revocation. *Witherington v. Herring* (N. Car.), 6-188.

Revocation by donor. — A voluntary settlement in trust fully executed without the reservation of any power of revocation cannot be revoked by the settlor without proof of mental unsoundness, mistake, fraud, or undue influence. But a court of equity may decree a termination of a trust where its purposes have been accomplished, and the interests under it have all vested and all parties beneficially interested desire that it shall be ended. *Sands v. Old Colony Trust Co.* (Mass.), 12-837.

Where the settlor of a trust in securities gives the trustee full power of control with authority to sell any or all of the securities in such manner and for such price as the trustee may deem expedient, and to make new investments at the discretion of the trustee, and, without reserving to himself any power of revocation, expressly gives the trustee power to pay to the settlor or his order such portion of the principal as the trustee may see fit, the settlor has no right to revoke the trust and resume control of the property at his pleasure. *Sands v. Old Colony Trust Co.* (Mass.), 12-837.

Termination by discharge of executor who is trustee, and payment to person not entitled thereto. — Where an executor agrees to hold money bequeathed by the will and to pay it to the legatee in installments, the express trust relation thereby created is not changed by the final settlement and discharge of the executor in the probate court or by the payment by mistake

of part of the legacy remaining in his hands to a residuary legatee. *Glennon v. Harris* (Ala.), 13-1163.

(4) Actions to establish trust.

Sufficiency of evidence of trust. — In an action seeking to have a trust declared in favor of the plaintiff in the proceeds of certain insurance certificates given by the insured to the defendant, evidence examined and held to show that the insured declared the trust claimed and that the donee of the certificates knew thereof. *Clark v. Callahan* (Md.), 12-162.

Liability for costs. — Where the holder of insurance certificates, having separated from his wife, substitutes his daughter as beneficiary and imposes on her a trust in one-half of such certificates for the benefit of another person, the *cestui que trust* is equally interested with the daughter in defeating a proceeding by the wife to set aside the substitution of the daughter as beneficiary and is chargeable with one-half the costs incurred in resisting said proceeding, but the *cestui que trust* is not chargeable with any part of the costs of a pending divorce suit by the wife, or of actions of replevin and for slander brought by the wife against the daughter, in which the *cestui que trust* has no interest. *Clark v. Callahan* (Md.), 12-162.

b. Implied trusts.

(1) In general.

Reposing confidence in another as making him trustee. — Merely reposing confidence in another does not of itself create a trust, or make a trustee of the one in whom confidence has been reposed. To create a fiduciary relation by contract it is necessary that the consent of the trustee to assume that relation should be expressed in the contract, or be derived therefrom by necessary implication. *State v. State Journal Co.* (Neb.), 13-254.

Request that beneficiary of insurance policy shall share proceeds with another, to which beneficiary assents. — Where a father has his daughter made the beneficiary of certain insurance certificates, without surrendering control or possession of the same, and declares his intention, either at the same time or afterwards, that she shall share the proceeds of such certificates with another named person, and the daughter assents to such declaration, a trust is declared in favor of such other persons which a court of equity will enforce. *Clark v. Callahan* (Md.), 12-162.

Absolute conveyance, without consideration, on parol agreement to divide property. — Where a mother conveys to her son absolutely and without consideration real property which he agrees orally to hold for the benefit of himself and the other children of the grantor and to divide the same after the grantor's death, equity will raise a constructive trust in the property in favor of the brothers and sisters of the grantee and

will require him and his grantee with notice to execute the same. *Stahl v. Stahl* (Ill.), 2-774.

The failure to perform an oral promise made by the sole heir at law of one desiring to will her estate to third persons, that he will dispose of the estate as she desires, cannot make the heir at law, in case of intestacy, a trustee *ex maleficio* as to the property inherited by him in the absence of fraud. *Casels v. Finn* (Ga.), 2-554.

Obtaining renewal of lease by person in fiduciary relation to tenant. — Though a tenant may not have any absolute right to a renewal against the will of the lessor, courts of equity recognize his reasonable expectancy of renewal as a property or asset, and if one standing in a fiduciary or quasi-fiduciary relation to a lessee secured a renewal of the lease to himself, a court of equity will treat him as holding the lease in trust for his original lessee. *McCourt v. Singers-Bigger* (U. S.), 7-287.

Creation in favor of one paying purchase price for conveyance to another. — In order to create a trust in favor of one who pays purchase money for land conveyed to another, the payment must be made at the time of the purchase, so as to make it part of the same transaction, and the mere payment of money subsequently for the purpose of making improvements on the land creates no lien in favor of the person making the payment, but merely constitutes a loan. *Butterfield v. Butterfield* (Ark.), 9-248.

Trust in favor of annuitants as against devisee in fee. — Where a testator devises the use, income, and occupancy of real property to his children, "to them and their heirs forever, by their keeping the buildings insured and in good repair, paying all taxes and claims against said property, including any deficiency arising in the settlement of" the estate, making such improvements from time to time as may be required, and paying certain specified annuities, the devisees, though they take the fee in the property, are charged by implication with a trust, in favor of the annuitants, which a court of equity will enforce by compelling performance of the duties imposed by the will. *Merrill v. American Baptist, etc., Union* (N. H.), 6-646.

Sufficiency of evidence of implied trust. — Evidence reviewed in an action to charge a person as trustee of the legal title to land, and held insufficient to justify the trial court's conclusion of law that the trust exists. *Dougan v. Bemis* (Minn.), 5-253.

(2) Agent taking title in own name.

Creation of trust in favor of principal. — Where one employed to act as the agent for another in the purchase of real estate becomes the purchaser himself, with his own money, he will be considered in equity as holding the property in trust for his principal, subject to reimbursement for his proper expenditures. *Johnson v. Hayward* (Neb.), 12-800.

Where a daughter pays a sum of money to her father upon the latter's oral promise to buy a house which shall go to her upon his death and that of her mother, and subsequently the father purchases the house for an amount considerably larger than such sum, and without the daughter's knowledge takes the title thereto in his own name, no trust results in favor of the daughter, and the agreement of the father is not enforceable as a contract because indefinite and because void under the state of frauds; but the daughter has an equitable lien upon the property for the amount advanced, with the interest from the time of the payment. *Leary v. Corvin* (N. Y.), 2-664.

If an agent to purchase land for another with money furnished by the latter takes the title thereto in his own name, without the assent of his principal, he will hold the legal title as trustee for his principal. If, however, the agent buys with his own money, and the principal advances no part of the purchase price, and the right of the principal rests upon a verbal agreement, which is denied, no resulting trust can arise, and the case falls within the statute of frauds. *Dougan v. Bemis* (Minn.), 5-253.

Person representing himself as agent of person in possession in purchasing land as trustee for intended grantee. — A person who obtains a conveyance of real estate to himself by falsely representing to the grantors that he is the agent of another party in possession of and claiming the ownership of the land, and by leading the grantors to believe that the conveyance is to cure defects in their former conveyances, will be declared a trustee for the benefit of the one for whose benefit the grantors intend to make the conveyance. *Virginia Pocahontas Coal Co. v. Lambert* (Va.), 13-277.

Sufficiency of evidence of relation and trust. — In an action by the principal to have a trust in his favor declared in lands of which his agent has become the purchaser in violation of his contract of agency, evidence examined and held sufficient to support a finding that a contract of agency existed, and to entitle the plaintiff to the relief asked. *Johnson v. Hayward* (Neb.), 12-800.

(3) Agreement to bid in land at public sale.

Purchase at execution sale pursuant to agreement as creating trust. — Where the lessees for turpentine purposes of land upon which an execution has been levied, upon being applied to for a loan to prevent a sale of the land orally agree with some of the heirs of the execution debtor that the lessees will bid in the land at the execution sale, and upon payment by the heirs of the amount with interest will reconvey the land to the heirs, and pay them the usual rent for turpentine purposes while the lands are held under the sheriff's deed, and that \$50 due as rent shall be credited on the purchase price, and the land alleged to be worth \$3,000 is bought in for \$250, and thereafter profitably used by the purchasers, a trust in favor of the heirs is thereby created which a court of

equity will enforce. *Patrick v. Kirkland* (Fla.), 12-540.

A mere parol agreement without consideration to buy in land at an execution sale and to reconvey it to the judgment debtor upon payment of the purchase price and interest, may not create a trust in favor of the judgment debtor. But where there is in the transaction an element of equity arising from fraud, confidential relation, refraining from bidding at the sale, or from further protection of the property from sale, gross inadequacy of the purchase price, the supplying by the debtor of a part of the purchase money, or otherwise, such circumstances may be shown by parol and establish a trust. *Patrick v. Kirkland* (Fla.), 12-540.

A mere verbal agreement by which one of the parties thereto is to buy in lands of the other at a sheriff's sale and to hold the same for him until they can be sold, at which time he is to pay to himself whatever moneys he has advanced for the purpose aforesaid, and to pay the balance to the other, is within the statute of frauds and unenforceable, and the law will not, in the absence of fraud, raise a resulting trust. *Bryan v. Douds* (Pa.), 5-171.

(4) Enforcement of intended gift as trust.

Gift void for want of delivery. — An intended gift which is incomplete for want of delivery to the donee cannot be enforced as a declaration of trust. A court of equity will not impute a trust where a trust was not in contemplation. *Trubey v. Pease* (Ill.), 16-370.

Agreement to devise lands. — In the case of an agreement to devise land equity will impress a trust upon the property which will follow it into the hands of personal representatives or devisees of the promisor. *Best v. Gralapp* (Neb.), 5-491.

2. RIGHTS AND LIABILITIES OF CESTUI QUE TRUST.

Right to recover on contract concerning trust property after acquisition of legal title. — After the beneficiary in a parol trust in real property has acquired the legal title, he may recover on a contract concerning the property, notwithstanding the trust was tainted with fraud in its creation. *Insurance Co. v. Waller* (Tenn.), 7-1078.

Right to rescind agreement extending time for payment in consideration of void note. — A beneficiary under a testamentary trust, suing to rescind an arrangement whereby he released his right to immediate payment in full, on receipt of a void note, believed by the parties to be valid, is not bound to return money received under such arrangement, such payments being credits on his original demand. *Reggio v. Warren* (Mass.), 20-1244.

The right of a beneficiary under a testamentary trust to rescind an arrangement whereby he releases his right to immediate payment in full, on receipt of a void note, believed by the parties to be valid, covering

a large part of the sum due, is not affected because the remaining part is paid in cash at the time of such release. *Reggio v. Warren* (Mass.), 20-1244.

Right of life tenant to mortgage trust property under power of sale. —

Where a husband conveys property to a third person in trust for the benefit of his wife during her life or widowhood, and in trust for the benefit of their children after the death or marriage of the wife, and the conveyance gives the life tenant the power, with the consent and approbation of the trustee, to sell the property absolutely and reinvest the proceeds for the purposes of a trust, and the life tenant and the trustee execute a valid mortgage to the husband to secure the balance of the purchase money, a second mortgage executed by the life tenant and the trustee to a person other than the husband is binding only as to the interest of the life tenant, and does not affect the interests of the remaindermen. *Stump v. Warfield* (Md.), 10-249.

Where a husband conveys property to a third person in trust for the benefit of his wife during her life or widowhood, and in trust for the benefit of their children after the death or marriage of the wife, and the conveyance gives the life tenant and the trustee power to sell the property and reinvest the proceeds for the purposes of the trust, a mortgage to the husband executed by the life tenant and the trustee for the purpose of securing the balance of the purchase money is valid, unless there is something in the instrument creating the trust prohibiting it. *Stump v. Warfield* (Md.), 10-249.

Following trust funds. — As between the *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for a valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continue to be subject to or affected by the trust. *Hill v. Fleming* (Ky.), 16-840.

Liability of beneficiary to suffer for errors of judgment of himself and co-trustees. — One cannot be made to suffer as a beneficiary under a testamentary trust for errors of judgment in which he has shared as a trustee but for which neither he nor his cotrustees are liable as trustees. *Reggio v. Warren* (Mass.), 20-1244.

3. APPOINTMENT, POWERS, AND LIABILITIES OF TRUSTEES.

a. Appointment.

Power of court to appoint. — The Kentucky statute (St., § 318), providing that no trust shall be defeated for want of a trustee, but that equity may uphold the same by appointing trustees, etc., is but declaratory of the rule of equity on the subject, and, where a trust is once properly created, the incompetency, disability, or nonappointment of a trustee will not defeat it, but equity will

administer and enforce the trust, and, if necessary, appoint trustees. *Green v. Fidelity Trust Co. (Ky.)*, 20-861.

In the event of a failure of the creator of a testamentary trust to designate the manner of appointing successors to the trustees named therein, a chancery court has, upon the death, resignation, failure to qualify, or other disqualification of such trustees, the power to appoint trustees as their successors; but such power should, except upon the disclaimer of the trustees named, be exercised only upon proof that a vacancy exists, and upon notice to all the parties in interest, including the trustees named, if living. *Mason v. Bloomington Library Assoc. (Ill.)*, 15-603.

Power of court to increase or reduce number of trustees. — A court of equity has the power to increase or reduce the number of trustees designated by the creator of a trust, where a change in the number is essential to the proper execution of the trust. *Barker v. Barker (N. H.)*, 6-596.

Power of appointing new trustees under English Trustee Act. — Under the statutory power of appointing new trustees conferred by the English Trustee Act, a legal personal representative of the last survivor of two trustees cannot validly appoint himself and another to be new trustees of the original testator's will, there being no express power to do so contained in the will itself. *In re Sampson (Eng.)*, 4-404.

Right of married woman to accept and execute trust. — A married woman may accept, hold, and execute a trust in real property, and may, in executing the trust, convey the property without the concurrence of her husband or his joinder in the conveyance; and this rule extends to a trust in which the husband of the trustee is the beneficiary, and to a conveyance made directly to him in execution of such trust. *Insurance Co. v. Waller (Tenn.)*, 7-1078.

Right of corporation to accept and execute trust. — A corporation may act as a trustee and execute a charitable trust which is not expressly forbidden by its charter, if the purposes of the trust are germane to the objects stated in the corporation's charter. *Stearns v. Newport Hospital (R. I.)*, 8-1176.

b. Powers of trustees.

(1) Sale of trust property.

In general. — The trustee under the residuary clause in a will held to have power by implication to sell the real estate for the purpose of converting it into an income-producing property. *Fail v. Newsome (N. Car.)*, 3-417.

The provision of a will by which the testator gives to his executor and trustee and his successors in the trust, whenever in his or their judgment the interests of the estate shall demand, power to sell at private sale or otherwise all or any part of the testator's personal estate in such manner and upon such terms as may be deemed best, to deliver

for any or all real estate sold deeds acknowledged by him or them, to reinvest the proceeds arising from any such sales in such manner as he or they may think best, to dispose of any property real or personal so acquired, and to reinvest the proceeds in the same manner, serves to extend the scope of the Ohio statute governing investments by trustees, and relieves the trustee from the requirements of such statute. *Willis v. Braucher (Ohio)*, 16-66.

Power to convert corporate stock received as cash dividend into money. —

Where a testator bequeaths stock in a corporation in trust for the benefit of several life tenants, and after the death of the testator the corporation makes a distribution of stock which amounts to a cash and not to a stock dividend, the trustee may convert into cash the stock received by him by virtue of the distribution, if such conversion is necessary to enable him to make a just division of the dividend among the various life tenants. *Green v. Bissell (Conn.)*, 9-287.

Validity of deed executed without actual receipt of purchase money. — A deed of land by a trustee, executed under a power of sale for reinvestment, but without the actual receipt of purchase money by the trustees, is voidable merely and not void. *Scottish-American Mortg. Co. v. Clowney (S. Car.)*, 3-437.

Sale to trustee's wife as breach of trust. — A sale of trust property by a trustee to his wife under a power of sale is a breach of trust and will be set aside on the application of a *cestui que trust*. *Scottish-American Mortg. Co. v. Clowney (S. Car.)*, 3-437.

(2) Leasing trust property.

Term of lease as limited by duration of trust. — Under a general power to lease trust property, the duration of the trust ordinarily limits the term for which such property may be leased by the trustees. *In re Hubbell Trust (Ia.)*, 14-640.

Power to execute lease for ninety-nine years. — Where trustees are directed by will to care for, rent, and manage the real property belonging to the estate, they have power, under the directions of a court of chancery, if not without its aid, to make a ninety-nine year lease of a portion of the realty, where such a disposition of the property is manifestly for the benefit of all parties interested and those of the latter who are capable of consenting give their consent. *Denegre v. Walker (Ill.)*, 2-787.

A provision in a trust deed prohibiting the trustees from selling or disposing of the trust property is not violated by a lease for ninety-nine years made by the trustees. *In re Hubbell Trust (Ia.)*, 14-640.

Determination of rental. — In determining the adequacy of the rental at which trust property is to be let, the location and condition of the property, the purpose for which it is to be used, and its relation to other property belonging to the estate, should

be taken into consideration. *In re Hubbell Trust* (Ia.), 14-640.

(3) Mortgaging trust property.

Power to mortgage as included in power to sell. — In determining whether a trustee who is invested with the power to sell has an implied power to mortgage, the court will look into the instrument creating the trust, and will give effect to the manifest intention of the donor as shown by the light of the surrounding circumstances; and the instrument will be construed as giving the power to mortgage the trust estate, if this construction is not violative of the donor's intention, and the purpose of the trust can be answered and best accomplished by the execution of a mortgage. *Lueft v. Lueft* (Wis.), 9-639.

The power to grant and convey trust property absolutely does not authorize the execution of a mortgage on the property. *Stump v. Warfield* (Md.), 10-249.

Where a testator makes a devise in trust for the benefit of his son, with directions to the trustees to use the net income for the son's support, and the trustees, in the valid exercise of the power implied from the power to sell, mortgage the trust estate, and on the death of the *cestui que trust* the trustees, acting pursuant to the directions of the will, convey the property to a third person for life, with remainder over to his children, a court, for the purpose of protecting the interests of the infant remaindermen and of preventing a sale under the mortgage, may authorize the execution of another mortgage, notwithstanding the fact that the trustees may have exceeded their powers by applying more than the net income to the support of their *cestui que trust*. *Lueft v. Lueft* (Wis.), 9-639.

Power to mortgage under powers to continue and manage business. — Where a testator has provided in a will for the continuance of his business by a trustee, and has conferred upon the latter the broadest powers as to the management of the business, the trustee may execute a mortgage upon the trust property to secure a debt contracted by him in carrying on the business. *Roberts v. Hale* (Ia.), 1-940.

Implied power to mortgage to make improvements. — A bequest in trust for the benefit of the testator's son construed, and held to give the trustees an implied power to mortgage the trust estate for the purpose of making improvements, where the mortgage is necessary to enable them to carry out the purposes of the trust, as where the net income is insufficient but can be increased by making the improvements for which the mortgage is executed. *Lueft v. Lueft* (Wis.), 9-639.

(4) Selection of beneficiaries.

Power of trustee to select where beneficiaries uncertain. — Where a will appoints trustees "for the purpose of carrying out the full terms" of the will, and makes a bequest to the trustees for the es-

tablishment and support of a school for the free education of boys who reside within the state of the testator's domicile "and who are unable to educate themselves," but does not specify who shall select the beneficiaries of the trust, the will should be construed as giving the power of selection to the trustees named in the will, but if necessary a trustee may be appointed by a court of competent jurisdiction to select the beneficiaries. *Tincher v. Arnold* (U. S.), 8-917.

(5) Application to court to construe trust.

Power to apply in general. — Where the trustee of an express trust is in doubt, he may, for his protection, apply to a court of equity for a construction of the instrument creating the trusts, and for execution under the court's direction. *Diggs v. Fidelity, etc., Co.* (Md.), 20-1274.

(6) Joint trustees.

In general. — One of several trustees under a will is not entitled to pass, with the other trustees, upon questions in which he is directly interested as a beneficiary and which involve an exercise of discretion, unless the will gives him that right. *Barker v. Barker* (N. H.), 6-596.

Power of one trustee to sell property without consent of co-trustees. — One of several trustees held to have no power to sell land vested in the trustees without the consent of the co-trustees. *Gibb v. McMahon* (Ont.), 4-952.

c. Liability for acts of trustee.

Misconduct with relation to sale of property. — It is a misappropriation of trust funds for a trustee who has sold certain land belonging to the estate, receiving as part of the purchase price five notes for \$5,000 each, payable on or before ten years, bearing five per cent. interest, to sell four of the notes at par and to pledge the fifth note to secure his agreement that the notes sold shall yield six per cent. interest, payable semiannually, by which transaction the trust estate loses \$1,900. *U. S. Fidelity, etc., Co. v. Douglas* (Ky.), 20-993.

Liability for loss through unfortunate investment. — Where, upon a sale of trust property, the funds of the estate required to be invested in order to produce income are invested by the trustee in the stock of a state bank at current market rates, and the trustee, in making such investment, uses discretion and care in ascertaining the value of the stock, and with the honest belief, exercised in the utmost good faith, that the bank is sound and the stock a good investment, acting on the advice of business men of sound judgment having means of knowing the market value of the stock, including the judge of the probate court, and upon the advice of a reputable attorney that the terms of the will are broad enough to authorize the trustee to make such investment, the trustee cannot be held personally liable for a loss

which occurs by reason of the failure of the bank. *Willis v. Braucher* (Ohio), 16-66.

Personal liability on decree for payment of money. — A decree entered by the Superior Court in an equity suit against trustees, which requires the defendants to pay to the complainants a certain sum, which sum is specially declared by the decree to be dividends and income from a trust estate theretofore received by the defendants as trustees and to which the complainant is entitled, cannot be construed as limiting the payment directed to a payment out of trust funds in the hands of the defendants. Under such a decree, the duty of the defendants to make the payment is absolute, and if they have devoted the complainant's property, received by them, to other purposes, they must reimburse him from their individual estates, and cannot be heard to claim that they have none of the trust income available for the payment. *Jastram v. McAuslan* (R. I.), 17-320.

Liability for conversion of funds by co-trustee. — The joint receipt of trust funds by co-trustees imposes the duty upon each of them to exercise good faith and reasonable diligence to protect such funds against his co-trustee as well as against others, and if by the negligence of one of the trustees the other is enabled to dissipate the funds or to convert them to his own use, the former is responsible for the loss. *Adams's Estate* (Pa.), 15-518.

The conduct of a trustee is gauged by that of a reasonably prudent man in the management of his own property. Consequently the mere fact that one trustee, because of his confidence in his brother and co-trustee, bestows no higher degree of care upon his own interest in such trust estate and upon his private securities than upon the interest of the other *cestui que trustent* does not excuse his dereliction of duty. *Adams's Estate* (Pa.), 15-518.

Where H. and R., two brothers, receive jointly, as trustees of their father's estate, securities which are negotiable by either of them, and place such securities in a safe-deposit box to which each of them has access, and thereafter H. discovers that R. has removed the securities, and demands their immediate return, which demand is complied with on the following day, no explanation for the removal being asked or given, and although H. knows that R. is in bad financial condition he merely arranges with R. that both of them shall be present thereafter at the opening of the box, but because R. is "prominent in society and politics" H. takes no steps to prevent the misapplication of the securities by arranging with the proprietor of the safe-deposit box that it shall be opened only in the presence of both trustees, H. is liable for the abstraction and conversion of the securities by R. ten years afterwards. *Adams's Estate* (Pa.), 15-518.

The fact that H. communicates such conduct of his co-trustee to the *cestui que trustent* does not relieve him from performing his legal duty as trustee in exercising good

faith and diligence in protecting the trust estate. The *cestui que trustent* have the right to rely upon the performance of his duty, especially if he assures them that he has "arranged at the bank that both executors must be present when the box was opened." *Adams's Estate* (Pa.), 15-518.

The fact that for two years before such defalcation by R., H. has been a helpless invalid does not relieve him from liability for not taking steps to prevent a misapplication of the securities when he discovers their removal, his breach of duty being a continuing one. *Adams's Estate* (Pa.), 15-518.

Liability of trust property for torts of trustee. — The property of a railroad company in the hands of a trustee, who operates the road with the sanction and for the benefit of the *cestuis que trust*, is liable for the negligence of the trustee or his employees in operating the road. The doctrine that trust property cannot be subjected to liability by reason of the torts of the trustee or his employees is limited to passive trusts and to those active trusts in which the powers and duties of the trustee are defined and limited, either by law or by the trust instrument, so that the doctrine of imputed responsibility cannot apply. *Wright v. Caney River R. Co.* (N. Car.), 19-384.

Liability of surety on trustee's bond for expenses of examining account. — A claim for expenses incurred in making an examination of the affairs of a trustee after it is discovered that he has defaulted is not a charge for which the trustee's surety can be made to answer. *U. S. Fidelity, etc., Co. v. Douglas* (Ky.), 20-993.

4. REMOVAL OF TRUSTEE.

In general. — A court of equity has the power to remove trustees who become unsuitable for the execution of their trust. *Barker v. Barker* (N. H.), 6-596.

Trustee removing from jurisdiction. — The court which appoints a trustee has power to remove her and appoint another in her stead when she goes out of the jurisdiction of such court. A proceeding to remove a trustee is one *in rem*, and notice of such proceeding by a constructive process is sufficient. *Letcher v. German Nat. Bank* (Ky.), 20-815.

5. SUBSTITUTED TRUSTEES.

Execution of powers conferred on original trustee. — Where a will vests the trustee named therein with purely discretionary powers as to certain matters connected with the execution of a trust thereby created, and it is apparent that the powers in question are given to the trustee because of a personal confidence reposed in him by the testator, such powers cannot be exercised by a substituted trustee. *Whitaker v. McDowell* (Conn.), 16-324.

The words, "it is my will that said trustee have an absolute discretion in the manner of the disposition of said trust fund, both principal and income, during the lifetime of my said sister, and his decision in

said matter is to be final and conclusive," as used in a will creating a trust, shows that the testator intended to leave it to the judgment and discretion of the original trustee as to whether any part of the principal of the trust fund should be paid to the life beneficiary; and such discretionary power, being a matter of personal confidence reposed in the original trustee, cannot be exercised by a substituted trustee, appointed by the court upon the death of the trustee named in the will. *Whitaker v. McDowell* (Conn.), 16-324.

Effect of Connecticut statute on execution of powers by substituted trustee. — The Connecticut statute which empowers courts of probate upon the death of a testamentary trustee, and upon other named contingencies, to appoint a suitable person to execute such trust, does not authorize such appointees to exercise special discretionary powers conferred by the testator upon the original trustee and founded upon personal confidence. *Whitaker v. McDowell* (Conn.), 16-324.

TRUTH.

Character of accused for truth and veracity, see *HOMICIDE*, 6 a (2) (b).

Defense to action for libel, see *LIBEL AND SLANDER*, 4 d.

Justification in contempt proceeding, see *CONTEMPT*, 1 a.

TUGS.

See *TOWAGE*.

TUITION.

See *SCHOOLS*.

TURNPIKES AND TOLL ROADS.

Title to turnpike after expiration of charter. — A turnpike corporation created for the public purpose of constructing a macadamized road with the privilege of enforcing the payment of tolls by all persons traveling thereon, but with the right of exercising this privilege expressly limited to fifty years, acquires only an easement in the road during its charter life and has, after the expiration of its franchise, no right, title, or interest in the said highway which it can hold or convey, other than its toll gates, houses, and personal property, and the road becomes, as before, a public highway wholly free from the burden of tolls. *State ex rel. Hines v. Scott County Macadamized Road Co.* (Mo.), 13-656.

Sufficiency of petition to enjoin collection of tolls. — A petition to enjoin a turnpike company whose charter has expired from obstructing the road by the collection of tolls, sufficiently alleges that the road belongs to the public, by defining the road as

a public highway, and alleging that it is a public highway, and that the defendant without right maintains toll gates on and across said highway and prevents the public from making free and proper use of said highway. *State ex rel. Hines v. Scott County Macadamized Road Co.* (Mo.), 13-656.

The petition in such an action need not allege that the stockholders of the turnpike corporation have been reimbursed or have been offered reimbursement of the money invested in the road, as no such obligation is imposed on the public. *State ex rel. Hines v. Scott County Macadamized Road Co.* (Mo.), 13-656.

TURNTABLES.

Doctrine of turntable cases extended, see *NEG-LIGENCE*, 3.

Liability of railroad for injuries to children, see *RAILROADS*, 8.

TURPENTINE.

Crude turpentine in tree boxes as personalty, see *PROPERTY*.

TYPEWRITERS.

Use of typewriter as forgery, see *FORGERY*, 1 a.

ULTRA VIRES.

See *CORPORATIONS*.

Contract abdicating police power, see *MUNICIPAL CORPORATIONS*, 7 b.

Liability of municipality for *ultra vires* act, see *MUNICIPAL CORPORATIONS*, 9 d.

UMPIRE.

See *ARBITRATION AND AWARD*.

UNBORN CHILDREN.

See *DAMAGES*, 1.

UNCERTAIN DAMAGES.

See *DAMAGES*, 3.

UNCERTAINTY.

Description of property in deed, see *DEEDS*, 1 a.

UNCHASTITY.

Imputing unchastity to female as libelous, see *LIBEL AND SLANDER*, 1 f.

UNCONSCIONABLE CONDUCT.

Ground of equitable relief, see **EQUITY**, 2 a.

UNDERGROUND RAILWAYS.

See **STREET RAILWAYS**.

UNDERGROUND WATERS.

Diversion of underground waters, see **WATERS AND WATERCOURSES**, 3 b (3).

Pollution of underground waters, see **WATERS AND WATERCOURSES**, 1.

UNDERLETTING.

See **LANDLORD AND TENANT**, 3.

UNDERSTANDING.

Understanding of parties as affecting construction of contract, see **CONTRACTS**, 3 a.

UNDERTAKERS.

Licensing undertakers, see **LICENSES**, 5.

UNDERTAKINGS.

See **APPEAL AND ERROR**, 18; **BONDS**.

Bail bonds, see **BAIL**, 6.

Liability of sureties, see **SURETYSHIP**, 2.

UNDISCLOSED AGENCY.

See **AGENCY**, 3 g (1).

UNDUE INFLUENCE.

See **WILLS**, 5.

Ground for revoking decree of adoption, see **ADOPTION OF CHILDREN**.

Presumption of undue influence, see **GIFTS**, 4.

Relation of physician and patient, see **PHYSICIANS AND SURGEONS**, 5.

Transactions between parent and child, see **PARENT AND CHILD**, 5.

Validity of gift by principal to agent, see **GIFTS**, 1 a.

UNFAIR COMPETITION.

See **TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION**.

UNFAIR LIST.

Notice that contractor is on unfair list, see **LIBEL AND SLANDER**, 2 i.

UNFORESEEN ACCIDENTS.

Duty of master to provide against unforeseen accidents, see **MASTER AND SERVANT**, 3 b.

UNHEALTHY OCCUPATIONS.

Restricting hours of labor, see **LABOR LAWS**, 1 a.

UNIFORMITY.

License laws as conforming with rule requiring all taxation to be uniform, see **HAWKERS AND PEDDLERS**, 3.

Measure of damages, see **DAMAGES**, 9 a.

Operation of general laws, see **CONSTITUTIONAL LAW**, 18.

Operation of ordinances, see **MUNICIPAL CORPORATIONS**, 5 f (1).

Operation of usury laws, see **INTEREST**, 2.

Requirement of uniformity in bankrupt law, see **BANKRUPTCY**, 1.

Taxes required to be uniform, see **TAXATION**, 1 b.

UNINCORPORATED ASSOCIATIONS.

See **SOCIETIES AND UNINCORPORATED ASSOCIATIONS**.

Compelling action by mandamus, see **MANDAMUS**, 3 c.

UNIONS.

See **LABOR COMBINATIONS**.

UNION DEPOTS.

Power to grant exclusive privileges on depot grounds, see **RAILROADS**, 5 d.

Relation to railroads using premises, see **MASTER AND SERVANT**, 3 f (1) (b).

UNITED STATES.

Competency of employee of government as juror in criminal prosecution, see **JURY**, 5 e.

Conspiracy to defraud government, see **CONSPIRACY**, 1 b.

Constitutional provisions applicable to federal government only, see **CONSTITUTIONAL LAW**.

Deeds and official maps to show title of United States to land, see **CRIMINAL LAW**, 6 n (1).

Federal control of aliens, see **ALIENS**.

Internal revenue, see **REVENUE LAWS**.

Judicial power, see **CONSTITUTIONAL LAW**, 6.

Jurisdiction of crimes committed in federal territory, see **CRIMINAL LAW**, 6 a.

Jurisdiction of homicide committed on government reservation, see **HOMICIDE**, 6 b.

Jurisdiction of navigable waters, see **WATERS AND WATERCOURSES**.
 Liability of government for infringement of patent, see **PATENTS**, 4.
 Liability of United States bonds to succession taxes, see **TAXATION**, 13 b (2) (a).
 Nomination of senators, see **ELECTIONS**, 1 c.
 Place of trial of offenses against United States, see **CRIMINAL LAW**, 6 b.
 Power of congress over state courts, see **STATES**, 4.
 Power of Congress to prescribe rules of evidence for state courts, see **EVIDENCE**, 22.
 Power of Congress to regulate interstate commerce, see **INTERSTATE COMMERCE**, 2 a.
 Power of states to tax United States bonds, see **TAXATION**, 2 a.
 Power of taxation, see **TAXATION**, 1 b.
 Right of government to appeal, see **APPEAL AND ERROR**, 2 b; **CRIMINAL LAW**, 5 a.
 Right to destroy oyster beds in improving navigation, see **WATERS AND WATERCOURSES**, 3 b (2).
 State law suspended by enactment of federal statute, see **STATUTES**, 8.

Nature of office of United States senator.—United States senators are chosen by the state legislatures and cannot properly be said to hold their offices "under the government of the United States." *Burton v. United States* (U. S.), 6-362.

Election of United States senators.—The provision of the federal Constitution (art. 1, § 3), that Senators shall be chosen by the state legislatures, requires the legislatures to meet, consult, and exercise their conscientious judgments in making a choice, having in mind the fact that they are the representatives of the people, and that the wishes of the people are entitled to grave consideration. *State v. Frear* (Wis.), 20-633.

The laws of Congress embodied in sections 14-19 of the Revised Statutes of the United States (2 Fed. St. Ann. 210-211), prescribing the time, place, and manner of holding elections for United States Senators, supersede any state legislation on the subject. *State v. Frear* (Wis.), 20-633.

Validity of assignment of claim against United States as against trustee in bankruptcy of assignor.—The assignment of an unallowed claim against the United States as collateral security for a loan being in direct opposition to the federal statute (Rev. St., § 3477, 2 Fed. St. Ann. 7) making absolutely null and void voluntary transfers of claims against the United States before their allowance, can confer no interest in the assignee, as against the trustee in bankruptcy of the assignor. *Nat. Bank of Commerce v. Downie* (U. S.), 20-1116.

Validity of federal statute imposing criminal liability for acts of United States senators.—There can be no doubt as to the constitutionality of the federal statute making it an offense against the

United States for a United States Senator, after his election and during his continuance in office, to receive or agree to receive compensation for services rendered or to be rendered to any person, before a department of the government, in relation to a proceeding, matter, or thing in which the United States is a party or is interested. *Burton v. United States* (U. S.), 6-362.

Proceeding before post-office department as matter in which United States is party.—A proceeding before the post-office department involving the issuance of a fraud order depriving a corporation of the right to use the mails is a matter in which the United States is a party and is interested, within the meaning of the federal statute making it an offense for a United States senator to agree to receive compensation for his services in a proceeding of that nature. *Burton v. United States* (U. S.), 6-362.

Indictments for violation of federal statute.—Under the federal statute prohibiting United States senators from receiving compensation for services in a proceeding before a government department in which the United States is interested, a United States senator may be indicted for two separate offenses, namely, receiving the compensation prohibited by the statute and agreeing to receive such compensation. *Burton v. United States* (U. S.), 6-362.

Validity of criminal judgment against senator.—A judgment convicting a United States senator of having violated the federal statutes forbidding him to receive compensation for services rendered before a department of government in relation to a matter in which the United States is interested is not vitiated by the fact that it recites, in the words of the statute, that the accused by his conviction "is rendered forever incapable of holding any office of honor, trust, or profit under the government of the United States," as the judgment neither operates *ipso facto* to vacate the seat of the contested senator, nor by its own force compels the senate to expel him or to regard him as expelled. *Burton v. United States* (U. S.), 6-362.

Sufficiency of evidence of guilt of senator in receiving prohibited compensation.—Evidence considered in a prosecution against a United States senator for having agreed to receive and having received compensation for his services in a proceeding before the post-office department in which the United States was interested and held sufficient to support a verdict of guilty. *Burton v. United States* (U. S.), 6-362.

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UNLAWFUL ASSEMBLY.

Unlawful assembly as criminal offense. — Although the Oregon code defines "unlawful assembly," it does not declare participation in such an assembly, when not accompanied by violence, to be a misdemeanor or crime, and affixes no penalty therefor, and, consequently, it must be held that an assemblage of persons, unaccompanied by any acts such as would bring it within the charge of riot as defined in the code, is not a crime. *State v. Stephanus* (Ore.), 17-1146.

Inasmuch as the statutes of Oregon do not make unlawful assembly a criminal offense, a verdict, on a prosecution for riot, finding the defendants guilty of an unlawful assembly, not only amounts to an acquittal of the crime of riot but is a nullity so far as convicting the defendants of any crime whatever is concerned. *State v. Stephanus* (Ore.), 17-1146.

Conviction of unlawful assembly under indictment for riot. — Assuming that at common law a person indicted for riot could be convicted, under such indictment, of the lesser offense of unlawful assembly, such rule does not prevail in Oregon, since the statutes of that state do not make unlawful assembly a criminal offense. *State v. Stephanus* (Ore.), 17-1146.

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Necessity that nonresident have knowledge of local custom to be bound thereby. — In order to make a local usage binding on a nonresident, it must be known to him at the time he enters into the contract. There is no presumption that a stranger in a community is cognizant of a usage prevailing in a particular trade in that locality. *Miller v. Wiggins* (Pa.), 19-942.

Competency of witness to testify as to business or trade custom. — There is no error in excluding the testimony of a witness as to a business or trade custom where the witness is not shown to be familiar with the custom of the particular business, or of the locality. *Schultz v. Ford* (Iowa), 12-428.

Exclusion of evidence denying custom as error. — The rejection of evidence offered by one party tending to show that there was no such business custom as the opposing party claimed to exist is prejudicial error. *Schultz v. Ford* (Iowa), 12-428.

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1. **WHAT CONSTITUTES USURY.**

a. In general.

Necessity of contract for forbearance of existing indebtedness. — In order that a transaction shall fall within the prohibition of the statute against usury, it is essential that there should be a contract for the forbearance of an existing indebtedness or a loan of money. *Smithwick v. Whitley* (N. C.), 20-1348.

Effect of subsequent usurious agreement for forbearance. — A contract free from usury is not rendered usurious by a subsequent agreement to pay illegal interest

in consideration of forbearance. *Nance v. Gray* (Ala.), 5-55.

Contract by mortgagor to pay tax on mortgage and on additional mortgage.

— A contract by which a mortgagor agrees to pay seven per cent. on the indebtedness, which is the highest legal rate of interest, and in addition agrees to pay any and all taxes levied on account of the mortgage or the indebtedness created thereby, and all taxes already assessed or levied upon another mortgage made to the same mortgagees on the same land, and which also reserved seven per cent. interest, is usurious and unlawful. *Stack v. Detour Lumber, etc., Co.* (Mich.), 14-112.

Deduction of commissions of borrower's agent from amount of loan. —

A note providing for the payment of the amount loaned at the highest legal rate of interest is not rendered usurious by the fact that the person negotiating the loan, who is shown by the preponderance of the evidence to be the agent of the borrower, takes out the amount of his commission before delivering the loan to the borrower. *Graham v. Fitts* (Fla.), 13-149.

b. What law governs.

In general. — The New York statute against usury does not affect the validity of a transaction or agreement valid between the parties in the foreign jurisdiction where made, as the statute contemplates and intends that the law of the place of the making of the agreement shall govern in that respect. *Manhattan Life Ins. Co. v. Johnson* (N. Y.), 11-223.

Note executed in one state secured by mortgage on realty in another state.

— The fact that promissory notes executed in another state by parties residing there are secured by mortgage on real estate in New York does not make the transaction subject to the usury law of New York. *Manhattan Life Ins. Co. v. Johnson* (N. Y.), 11-223.

c. Sale of property at excessive price.

Making credit price higher than cash price. —

Usury can attach only to a loan of money, or to the forbearance of a debt. On a contract to secure the price or value of work and labor done or to be done, or of property sold, the contracting parties may agree on one price if cash is paid, and on as large an addition to the cash price as may suit themselves if credit is given, and the difference between the cash price and the credit price on a sale of property may be put into the form of interest on a note given for the purchase price without violating the usury law although the per cent. agreed is greater than the lawful rate of interest. *Davidson v. Davis* (Fla.), 20-1130.

Sale of property to borrower at excessive price to enable him to raise money. — Where a person to whom an application for a loan of money is made, instead of furnishing money, sells the borrower an article of personal property at a price largely in excess of its real value, and the

borrower purchases, not because he desires the property for his own use, but to enable him to raise money by selling the property, the transaction is usurious if it is intended as a scheme or cover for usury and as an evasion of the usury statute, but is not usurious if it is entered into in good faith with no intention to evade the laws against usury; and the question of the good faith, purpose, and intention of the parties to such a transaction is one of fact. *Barry v. Paranto* (Minn.), 7-984.

d. Charging more than legal rate by mistake.

In general. — There is no usury where, through an inadvertence or mistake of fact, more than the legal rate of interest is taken or reserved, as where an excessive interest taken or reserved is by a mistake in computation, or where a clerical mistake is made in drawing the obligation evidencing the loan. *Goodale v. Wallace* (S. Dak.), 9-545.

The statute providing for a forfeiture of the interest taken or reserved in a usurious transaction does not apply where an excessive interest is reserved or taken under an honest mistake, with no intention on the part of the parties to violate the statute. *Goodale v. Wallace* (S. Dak.), 9-545.

Question of mistake for jury. — The question whether a sum in excess of the legal interest has been taken through an honest mistake, or through a corrupt agreement, is a question of fact to be determined by the jury, or, in a trial without jury, by the trial judge, and a finding of fact on this question will not be disturbed on appeal, unless it is contrary to the preponderance of evidence. *Goodale v. Wallace* (S. Dak.), 9-545.

e. Monthly payments of interest.

On notes given to pay principal of mortgage debt. — Where a series of notes are given to cover both the principal and interest of a mortgage debt, the debt is not rendered usurious by the fact that the transaction provides for the payment of the interest monthly as it becomes due. *Goodale v. Wallace* (S. Dak.), 9-545.

f. Compound interest.

Stipulation in note that upon failure to pay interest it shall bear interest at certain rate. — A promissory note providing for the payment of interest annually, and stipulating that each annual instalment of interest not paid when due shall bear interest at a specified rate from the time it falls due until it is paid, is valid. *Goodale v. Wallace* (S. Dak.), 9-545.

A promissory note bearing interest at a rate permitted by law is not rendered usurious by a provision that if it is not paid at maturity the interest earned and unpaid shall be added to and become a part of the principal, and the whole sum of principal and interest shall bear interest thereafter at the highest legal rate, unless it appears upon the face of the transaction that there is some

trick or device to compel the borrower to pay more than the legal interest. *Blake v. Yount* (Wash.), 7-487.

Interest notes providing for interest thereon after maturity. — Where a series of notes given to evidence a mortgage debt cover both the principal and interest at the highest legal rate, the notes are not rendered invalid by the fact that they provide that they shall draw interest after maturity at a specified rate. *Goodale v. Wallace* (S. Dak.), 9-545.

The payment of interest on overdue instalments of interest, evidenced by separate coupon notes, given at the time of the accrual of the debt, for interest on the principal, does not constitute usury, and such interest is recoverable upon the coupon notes after their maturity. *Graham v. Fitts* (Fla.), 13-149.

Banking transaction requiring monthly computation of interest and charging in account. — A provision for computing interest monthly on average daily debit balances and charging it in the account does not render usurious a contract between a bank and a customer under which are to be had transactions calling for monthly debits and credits in large sums. *First National Bank v. Waddell* (Ark.), 4-818.

g. Computation of time.

Including days of grace in computation of interest. — Prior to the Georgia Act of 1903 abolishing grace, in taking interest in advance on discounting a negotiable note payable at a charter bank, it was lawful to include the three days of grace in the computation. *Patton v. Bank of La Fayette* (Ga.), 4-639.

Computing interest on basis of 360 days in year. — Computing interest on the basis of 360 days in the year is not usurious providing the method is resorted to in good faith. *Patton v. Bank of La Fayette* (Ga.), 4-639.

h. Accelerating maturity of debt.

Stipulation that entire amount shall become due on failure to pay instalment. — Notes given to evidence a debt secured by a mortgage are not rendered usurious by the fact that the mortgage contains a stipulation that if the mortgagor fails to pay any instalment of the principal or interest promptly at maturity the whole sum, both principal and interest, shall at once become due and collectible. *Goodale v. Wallace* (S. Dak.), 9-545.

A principal note providing that if default be made in the payment of any interest note, all the principal and interest shall become due and payable at the option of the payee, only authorizes the collection of interest accrued at the time the option is exercised, and is therefore not usurious. *Graham v. Fitts* (Fla.), 13-149.

Exacting interest to maturity in consideration of permitting discharge before maturity. — Where a purchaser gives

purchase-money notes maturing annually and secures them by a mortgage, it is not exacting usury for the vendor, when the purchaser seeks to pay up the debt at once, to compel him to pay interest for the full time on the unmaturing notes, but it is merely the price of releasing a good investment. *Smithwick v. Whitley* (N. C.), 20-1348.

2. CIVIL REMEDIES FOR TAKING USURY.

a. Availability as defense.

Personal to debtor. — The defense of usury is personal to the debtor, and while he lives no other person can interpose except with his consent and concurrence. *Harper v. Middle States Loan, etc., Co.* (W. Va.), 2-42.

The purchaser of real estate charged with a usurious debt cannot defend against the usury unless the debtor unites with him in defense or acquiesces therein or consents thereto. *Harper v. Middle States Loan, etc., Co.* (W. Va.), 2-42.

Right of corporation to plead usury. — The provision of the Illinois statute that "no corporation shall hereafter interpose the defense of usury in any action" is designed for the enforcement of a local policy only and was not intended to operate outside the state. *Stack v. Detour Lumber, etc., Co.* (Mich.), 14-112.

The statute of the state of Illinois providing among other things that corporations "may borrow at legal rates of interest," and that "no corporation shall hereafter interpose the defense of usury in any action," does not by the last provision legitimize a contract by a corporation to pay interest in excess of the legal rate. *Stack v. Detour Lumber, etc., Co.* (Mich.), 14-112.

An Illinois corporation admitted to do business in the state of Michigan is not deprived of the right to plead usury on the foreclosure of a mortgage executed and payable in the latter state where the mortgaged lands are situated, by reason of a provision of the interest statute of the former state that "no corporation shall hereafter interpose the defense of usury in any action." *Stack v. Detour Lumber, etc., Co.* (Mich.), 14-112.

Sufficiency of pleading. — A debtor who seeks to purge a note of usury must plead the terms and nature of the usurious agreement and the amount of the usury, and must make proof with the same definiteness. *Nance v. Gray* (Ala.), 5-55.

Admissibility of evidence. — In an issue of usury, where some money apparently in excess of the legal rate of interest was retained by the lender, it is competent for a witness to testify that part of the same was received in payment of an independent claim, and not reserved as interest upon the loan. *Patton v. Bank of La Fayette* (Ga.), 4-639.

b. Recovery of payments.

Right to recover payments made on usurious interest. — There is nothing in the statutes of West Virginia forbidding an action by the debtor after having paid his

usurious debt to recover back the unlawful interest so paid, and the common-law right of action still exists. *Harper v. Middle States Loan, etc., Co.* (W. Va.), 2-42.

Right as restricted to excess of legal interest. — Interest paid in excess of the legal rate is recoverable, but sums paid on the lawful interest and principal are not recoverable although the contract is usurious. *Murphy v. Citizens' Bank* (Ark.), 12-535.

Recovery of voluntary payments on usurious debt. — Payments made voluntarily on an alleged usurious debt cannot be recovered back, but amounts collected by a creditor on collateral after the appointment of a receiver for the debtor and a demand by him for the surrender of the collateral are not voluntary payments by the debtor, and if the debt secured by the collateral is void on account of usury the receiver is entitled to recover the amount so collected by the creditor. *Murphy v. Citizens' Bank* (Ark.), 12-535.

Right to recover double amount of payments under North Dakota statute. — Under the North Dakota statute prescribing the amount recoverable when usurious payments have been made, the plaintiff may recover double the amount of all interest payments made and not merely the excess over the lawful rate. *Waldner v. Bowden State Bank* (N. Dak.), 3-847.

Sufficiency of complaint in action to recover. — A complaint held to state a cause of action for the recovery of money paid as usury pursuant to a contract, in an action under the North Dakota statute, though not alleging that such payments were knowingly made and received. *Waldner v. Bowden State Bank* (N. Dak.), 3-847.

c. Equitable relief.

Injunction against sale under usurious trust deed pending suit to purge. — The grantor in a deed of trust, conveying real estate to secure the payment of an usurious debt, may, in a suit in equity instituted by him to purge the debt of its usury, after having conveyed the land to a third party by deed with a covenant of general warranty, enjoin the sale of the property under the deed of trust pending the suit. *Rorer v. Holston Nat. Bldg., etc., Assoc.* (W. Va.), 2-910.

In such case, the jurisdiction to enjoin rests upon the inherent power of the court to maintain its jurisdiction to give full and complete relief between the parties to the main cause of action by preventing either of them from interfering with or obstructing it by proceedings *in pais* or in the forum other than the one having jurisdiction, and also upon the lack of any other remedy by which the plaintiff can prevent the defendant from fixing upon him inevitable liability to an innocent third party for a demand which, as between the original parties, may be resisted and defeated on the ground of utter invalidity. *Rorer v. Holston Nat. Bldg., etc., Assoc.* (W. Va.), 2-910.

In such case, it is error to dissolve the injunction in advance of the hearing, unless it appears that the allegations of the bill cannot be, or probably will not be, sustained, or that the plaintiff is not prosecuting his suit with due diligence. *Rorer v. Holston Nat. Bldg., etc., Assoc. (W. Va.)*, 2-910.

3. CRIMINAL RESPONSIBILITY FOR TAKING USURY.

Validity of statutes creating offense.

—A state legislature may make usury a crime and punish it as such; and a statute making it a misdemeanor for any person to take interest at a greater rate than two per cent. per month is constitutional, though there is another statute providing that the taking of interest at a greater rate than eight per cent. per annum is usury. *Ex p. Berger (Mo.)*, 5-383.

The Missouri statute making it a crime to take interest at a rate greater than two per cent. per month held not to be invalid as class legislation. *Ex p. Berger (Mo.)*, 5-383.

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VENDOR AND PURCHASER.

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1. REQUISITES AND VALIDITY OF CONTRACT.

a. In general.

Contract to convey by one having interest and right to require conveyance.

— One having an interest in land, and such control of title that he may require a conveyance of it, may make a contract in his own name to convey it by warranty deed without disclosing the actual state of the title to the purchaser. *Provident Loan Trust Co. v. McIntosh* (Kan.), 1-906.

Naming purchaser. — Where a contract to sell land describes the land specifically, recites a receipt from a named person of a sum of money "to apply as part payment on the following described land," and provides that the balance consisting of a specified sum shall be "paid on delivery of good and sufficient warranty deed," and is signed by the vendor, it is not open to the objection that it fails to show by whom or to whom the deed is to be made. *Moore v. Gariglietti* (Ill.), 10-560.

b. Offer and acceptance.

What acts show refusal to accept offer to sell.

— Where a corporation has adopted a resolution offering to form a contract to sell lands, the mere fact that the other party asks the adoption of another resolution looking to the completion of the transfer of the title to the property does not show any refusal to accept the offer. *Western Timber Co. v. Kalama River Lumber Co.* (Wash.), 7-667.

Sufficiency of evidence of acceptance.

— Evidence reviewed, in an action by a purchaser to enforce the specific performance of a contract to sell land, and held to show that the purchaser accepted the offer before the withdrawal thereof and that he had at all times been ready, willing, and able completely to perform the contract. *Western Timber Co. v. Kalama River Lumber Co.* (Wash.), 7-667.

c. Description of lands.

Effect of uncertainty in description of lands excepted.

— Uncertainty in the description of land excepted from a contract to convey a certain tract does not render the contract void, but merely avoids the exception. *Lange v. Waters* (Cal.), 19-1207.

d. Time for performance.

Validity of contract containing no stipulation as to time for performance.

— A contract for the sale of lands is not incomplete because no time is specified for its completion, where time is not made the essence of the contract, as the law will imply that it is to be performed within a reasonable time after it is made. *Ullsperger v. Meyer* (Ill.), 3-1032.

e. Validity of options.

In general. — Options for the purchase of land, where based on a valid consideration, are valid contracts and may be specifically enforced. *Mier v. Hadden* (Mich.), 12-88.

Necessity of witnesses. — Under the Michigan statutes an option contract for the purchase of land is not void for want of witnesses. *Mier v. Hadden* (Mich.), 12-88.

Adequacy of consideration. — An option contract given in consideration of one dollar, for the purchase of land at the price of \$8,300, running for a period of about four months, and giving the holder of the option the right to sue for damages or specific performance as he may elect, in the event of the failure of the vendor to perform the contract, is not unconscionable. *Mier v. Hadden* (Mich.), 12-88.

Time for payment of consideration. — The consideration for an option for the sale of land need not be paid at the time of the making thereof. *Cummins v. Beavers* (Va.), 1-986.

Taking option for speculation as fraud. — The mere fact that the purpose of taking an option on real property is speculation does not constitute fraud or unfair dealing. *Cummins v. Beavers* (Va.), 1-986.

Enforcement of option not ratified by all owners. — An option given without authority, while not binding on the landowners who did not authorize or ratify it, is binding and enforceable against the optioner whose land is included therein. *Tibbs v. Zirkle* (W. Va.), 2-421.

f. Who may question validity.

Person having received benefit from contract. — Under a statute providing that any person having knowingly received and accepted benefits from a contract relating to real estate shall be estopped to deny the validity of such contract, or the power to make the same, except on the ground of fraud, the vendor in a parol contract to sell land is not estopped to deny its validity by the fact that part of the purchase money has been paid to his agent who had no authority to convey or to receive the purchase money. *Halsell v. Renfrow* (U. S.), 6-189.

2. CONSTRUCTION OF CONTRACT.

Lands and interest conveyed. — A contract of sale construed, and held to call for a conveyance of the title to the land including the timber. *Arentsen v. Moreland* (Wis., 2-628.

Provision for forfeiture. — A contract for the sale of land, providing for monthly payments and that in case the purchaser makes default in his payments, then all payments made by him are "to be forfeited as liquidated damages by reason of his failure to make such further payment" necessarily implies a forfeiture of all of the purchaser's interest in the premises upon default in the payments. *Cutright v. Union Savings, etc., Co.* (Utah), 14-725.

Condition that contract shall be "null and void" if purchaser defaults.

— A provision in a contract for the sale of land, that a cash payment made by the purchaser shall be forfeited and that the contract shall be "null and void of no effect in law" if the purchaser does not pay a certain further sum on a day named, does not give the purchaser the privilege of avoiding the contract by failing to pay such further sum; but it is a condition enforceable at the election of the vendor, where other parts of the contract clearly import mutual promises, such as recitals that the cash payment is part of the "purchase price" of the land, which is "sold at the rate of \$40 per acre," and that the vendor "sells and agrees to convey" the land on certain payments being made by the purchaser, and a promise by the purchaser to pay \$40 if a burial lot of one acre reserved by the vendor shall be abandoned by him. *Stewart v. Griffith* (U. S.), 19-639.

The word "void" means "voidable" in a condition for the benefit of the vendor in a contract for the sale of land, that the contract shall be "null and void and of no effect in law;" and therefore the condition may be enforced or waived at the election of the vendor. *Stewart v. Griffith* (U. S.), 19-639.

Intention that holder of option should sign same. — A contract giving, for a valuable consideration, to the plaintiff as "agent," an option to purchase the defendant's land, which does not purport to obligate the plaintiff to purchase the land or to do any other thing, does not, notwithstanding the fact that the plaintiff is also referred to therein as "party of the second part," indicate that the parties intended that the plaintiff should sign the contract before it should become binding on the defendant. *Aiple-Hemmelmann Real Estate Co. v. Spelbrink* (Mo.), 14-652.

Signing additional contract. — Where, after the execution of a contract for the sale of land, the purchaser is induced to execute another contract providing that upon failure to pay the full amount of the purchase price he shall forfeit his contract and all rights thereunder, the latter instrument, if valid, is merely a form of additional security. *Harris v. Greenleaf* (Ky.), 4-849.

3. MUTUAL RIGHTS AND LIABILITIES OF PARTIES.

a. Right to possession.

Right of purchaser. — Under a contract for the sale of land which provides that the purchaser shall pay all taxes from the date

of the contract, shall keep up improvements, and whenever default in payment shall occur shall hold the premises from that date as tenant at sufferance, the purchaser has the right of possession. *Krakow v. Wille* (Wis.), 4-1016.

b. Right to interest on purchase price.

Right of vendor delivering possession. — A vendor selling land by an executory contract stipulating that he must make a deed and that the first payment of purchase money shall be made when he shall make a deed, who delivers to the purchaser possession at the date of the contract, is entitled to interest on the whole purchase money, though he is in default in making the deed, unless the purchaser sets apart the purchase money for the vendor, notifies the vendor of his readiness to pay, and does not himself use the money. *Hoard v. Huntington, etc.*, R. Co. (W. Va.), 8-929.

c. Who bears losses.

Loss of buildings by fire after execution of contract. — Where an executory contract to sell land contemplates that a conveyance is to be made of the whole estate, including both the land and the buildings thereon, for the entire price, and the value of the buildings constitutes a large part of the total value of the estate, and the terms of the agreement show that the buildings constitute an important part of the subject-matter of the contract, the contract must be construed as being subject to an implied condition that it shall no longer be binding if before the time for the making of the conveyance the buildings are destroyed by fire without the fault of either party. A loss by fire falls upon the vendor, and if he is not protected by insurance he can have no reimbursement for this loss. If the purchaser has advanced any part of the purchase price, he may recover it back. *Hawkes v. Kehoe* (Mass.), 9-1053.

The general rule is that where a house situated on land under contract of sale is destroyed by fire pending the contract, without the fault of the vendor, the loss falls on the vendee; and this rule applies in a case where the house is destroyed, without the fault of either party, after the vendee has accepted the title and taken possession of the property, even though the deed has not been delivered or recorded. *Sewell v. Underhill* (N. Y.), 18-795.

The provision in an executory contract to sell land "and the buildings thereon," that the premises at the time of delivering the deed are to be "in the same condition in which they now are, reasonable use and wear of the buildings thereon alone excepted," does not make the vendor answerable for the continued existence of the buildings, but merely assumes that the buildings will continue in existence until the arrival of the time for the making of the conveyance, and provides against any change in the condition of the buildings while they are so existing being

made or allowed by the vendor to the possible detriment of the purchaser; and therefore where the buildings constitute a large part of the value of the estate and constitute an important part of the subject-matter of the contract, their destruction by fire without the fault of either party before the arrival of the time for the making of the conveyance renders the contract no longer binding. *Hawkes v. Kehoe* (Mass.), 9-1053.

d. Duty to furnish abstract of title.

Duty of vendor in absence of stipulation in contract. — Unless a contract for the sale of land so provides, the vendor is under no obligation to furnish an abstract of title. *Thompson v. Robinson* (W. Va.), 17-1109.

e. Payment of taxes.

Duty of purchaser to pay taxes assessed after execution of contract. — A purchaser in possession of land under a contract of purchase is, as between himself and the vendor, chargeable with the taxes assessed after his purchase, where the contract of sale is silent on the subject. *Angel v. Bashaw* (Vt.), 18-449.

f. Assignment of contract.

Ratification of assignment of contract. — The vendor of property, the sale of which is rescinded by the refusal of the purchaser to make further payments and the surrender of the possession of the premises, does not ratify an assignment of the purchaser's interest in the contract, made after the rescission of the contract, by accepting from the assignee a payment on the purchase price, where such payment is accepted by the vendor's clerk in ignorance of the facts and the vendor's manager upon becoming aware of the true situation consults attorneys who on the same day notify the assignee that the assignment will not be recognized. Nor is the fact that the payment is not promptly returned a ratification of the assignment, the failure to make the return being due to an oversight on the part of the vendor's manager. *Cutright v. Union Savings, etc., Co.* (Utah), 14-725.

g. Vendor's lien.

(1) Right to lien.

In general. — In Arizona, the grantor of real estate by absolute conveyance has no implied equitable lien thereon for the unpaid purchase money. *Baker v. Fleming* (Ariz.), 2-370.

Right to lien where consideration is agreement to support grantor. — A grantor has no vendor's lien where the consideration of a conveyance, though recited to be a certain sum of money, is the grantee's agreement to care for and support the grantor for life. It is essential to the creation of such a lien that there should be a promise to pay a certain definite amount, or that the parties should agree on a fixed, def-

nite monetary substitute, to be effective in case the grantee fails to perform his covenant. *Burroughs v. Burroughs* (Ala.), 20-926.

(2) Waiver of lien.

By bringing suit for purchase price and recovering judgment. — The bringing of a suit at law for the purchase price of realty and obtaining judgment thereon do not waive the vendor's lien. *Zeigler v. Valley Coal Co.* (Mich.), 13-90.

By taking additional security. — The lien of a vendor upon property sold conditionally is not affected by taking additional security for the payment of the indebtedness from a purchaser of the vendee. *Kimball v. Costa* (Vt.), 1-610.

By taking note with personal surety. — A recital in a note stating it to have been given in payment for certain described land, indicates an intention not to abandon or waive the vendor's lien, and rebuts the presumption of an intention to waive arising from the fact that the note has upon it a personal surety. *Spears v. Taylor* (Ala.), 13-867.

By conditional assignment of purchase money note. — Where a vendor of real property takes an unsecured promissory note from the purchaser for the purchase price, a subsequent conditional assignment of such note for collection or other like purpose, not amounting to an absolute transfer, does not destroy the vendor's lien in the event that he is afterwards compelled to resume full ownership of the note. *Nolan v. Nolan* (Cal.), 17-1056.

(3) Enforcement of lien.

Nature of action to enforce. — In a suit to enforce a vendor's lien, the gravamen is that the land has been sold and part only of the purchase money paid, and the suit may be maintained whether or not the purchaser has given any note for the unpaid purchase money. *Nance v. Gray* (Ala.), 5-55.

Necessity that waiver of lien be pleaded. — In an action to enforce a vendor's lien the defendant cannot insist upon a waiver of the lien where it has not set up that defense in its answer. *Zeigler v. Valley Coal Co.* (Mich.), 13-90.

Burden of proof of waiver of lien. — Clear and convincing proof is required to show a waiver of a vendor's lien, and the burden of proof is on the purchasers. *Zeigler v. Valley Coal Co.* (Mich.), 13-90.

Admissibility of evidence of conditional assignment of note to rebut evidence of waiver. — Upon an issue as to whether an assignment of an unsecured promissory note given for the purchase price of land was conditional merely, or constituted an absolute transfer destroying the vendor's lien, it is proper to permit the vendor who made the assignment to testify in his own behalf that when he indorsed the note he did not intend to part with the ownership thereof to the indorsee. Such testi-

mony does not vary the terms of the written indorsement, since those terms do not express an absolute transfer. *Nolan v. Nolan* (Cal.), 17-1056.

Sufficiency of evidence of waiver. — In an action involving the assignment of an unsecured promissory note taken by the vendor of land from the purchaser for the purchase price, evidence examined and held to show a conditional assignment merely, and not an absolute transfer sufficient to destroy the vendor's lien. *Nolan v. Nolan* (Cal.), 17-1056.

Variance between pleading and proof. — In a suit to enforce a vendor's lien, the fact that the copy of the purchase-money note set out in the bill describes the land as the "south" quarter of the specified section, while the original note introduced in the evidence describes the land as the "southwest" quarter, is an immaterial variance. *Nance v. Gray* (Ala.), 5-55.

Redemption of premises. — Where A conveys to B, taking notes for the conveyance, and B reconveys an undivided half interest to A for a nominal consideration and the latter thereupon transfers the same half interest to C, taking in payment C's notes, no presumption of a waiver of A's vendor's lien for the amount of B's notes arises from the acceptance by A of the notes of C, and C can redeem his half from the purchaser at the sale decreed to satisfy A's vendor's lien on payment of the notes given by him to A. A second mortgagee of B of the second half of the property can redeem his half on payment of the debt secured by the first mortgage on the same half. *Dickinson v. Duckworth* (Ark.), 4-846.

Validity of deficiency judgment in action to enforce lien. — A deficiency decree may be entered only in suits for the foreclosure of mortgages, and if rendered in an action to enforce a vendor's lien, is not simply irregular or voidable, but absolutely void and subject to collateral attack. *Johnson v. McKinnon* (Fla.), 14-180.

h. Purchaser's lien.

Right to lien for purchase money paid. — A vendee, even if he is not in possession and has no special equity, has a lien for the amount paid on a contract for the purchase of land which can be foreclosed upon the default of the vendor. *Elterman v. Hyman* (N. Y.), 15-819.

Where the vendor in a contract for the sale of land fails to complete the contract, the purchaser has a lien on the land for the purchase money paid by him, and for the interest thereon, and this is so though the money was paid to a stakeholder instead of to the vendor. *Everett v. Mansfield* (U. S.), 8-956.

Right of purchaser to reject title.

Nature of right conferred by contract. — Where a contract for the sale of land provides that the purchaser shall not be bound thereby "unless the title to the

property is satisfactory to him" or unless he is "satisfied with the title," the purchaser is the sole judge of whether he is satisfied; and he is not bound by the contract if he is honestly dissatisfied with the title, notwithstanding the fact that his dissatisfaction is unreasonable. *Lieberman v. Beckwith* (Conn.), 8-271.

Presumption of good faith.—The right conferred upon the purchaser by an agreement for the sale of lands to pass upon the title thereto is not an arbitrary right to reject the title unreasonably and in bad faith, and it will be presumed in the absence of a showing to the contrary that the purchaser who has exercised this right has done so in good faith and because the title was defective. *Simmons v. Zimmerman* (Cal.), 1-850.

j. Rescission of contract.

What constitutes release of purchaser from contract.—A purchaser is not released from his contract by a letter sent him by the vendor's executor stating that he thinks the purchaser is entitled to the land and he will wait until a certain day, but that the purchaser must "consider the matter ended," unless he complies with the contract before the day named. The import of such a letter is to urge completion of the contract. *Stewart v. Griffith* (U. S.), 19-639.

Rescission of contract by execution of new contract.—A contract to convey the fee in land will be considered as having been rescinded by a subsequent contract to convey only a remainder dependent on a life estate in the same land and in other land, where it appears that the grantee took a deed in execution of the second contract, entered into possession of the land and conveyed a part of it, as the two transactions are wholly irreconcilable. *Redding v. Vogt* (N. Car.), 6-312.

Revocation of option by vendor.—An option given for a valuable consideration cannot be revoked until the time limited therein has expired; but if without consideration it may be revoked at any time before acceptance. *Tibbs v. Zirkle* (W. Va.), 2-421.

Repudiation of option by vendee after acceptance.—An option to purchase is a continuing offer by the vendor to sell. Its acceptance by the vendee completes the contract, exhausts the option, and estops the vendee from subsequently repudiating it, or choosing the other alternative. *Castle Creek Water Co. v. Aspen* (U. S.), 8-660.

k. Reformation of contract.

Oral agreement omitted by mistake.—Where, by mistake or otherwise, an oral agreement forming a part of the transaction involving the sale and purchase of land is omitted from the writing, it can be made effective and enforceable only by a reformation of the writing so that the same shall include the entire agreement of the parties. *Adams v. Gillig* (N. Y.), 26-910.

l. Actions.

(1) Right of action.

Liability of vendor having no title to purchaser with knowledge thereof.

—A vendor who agrees to convey what he at the time knows he has no right to convey because the title is in another assumes the risk of acquiring the title and making the conveyance or responding in damages for the vendee's loss of the bargain; and this is true though the vendee has knowledge of the vendor's lack of title when the bargain is made. *Arentsen v. Moreland* (Wis.), 2-628.

Right of action for defeat of vendee's title by vendor.—A purchaser under an unrecorded deed may recover damages from his vendor for defeating his title by making a subsequent conveyance of the land to another person. *Hilligas v. Kuns* (Neb.), 20-1124.

Right of vendor to recover for excess of land over estimated acreage.

—As to the vendor, every sale of land in gross is a contract of hazard as to the quantity of the tract or tracts sold, and he cannot recover on the contract, either at law or in equity, compensation for an excess therein above the quantity which the tract or tracts were, at the time of the sale, supposed to contain. Nor can he have rescission of the contract, on the ground of mutual and innocent mistake as to the quantity, resulting in a considerable excess, when both parties have been ignorant of the area of the land and free from fraud in the execution of the contract. *Newman v. Kay* (W. Va.), 4-39.

Action for contract price on breach by vendee.—Upon breach by the purchaser of an executory contract for the sale of land, the remedy of the vendor is in equity for specific performance, or at law for damages, and an ordinary action for the recovery of the contract price will not lie. *Prichard v. Mulhall* (Ia.), 4-789.

If a vendor of land, under a contract of sale calling for the conveyance of a fee simple title free from incumbrance and an abstract of title, put the vendee in possession, and upon default in the payment of the purchase price tender to the vendee deeds in due form and documents purporting to be abstracts of title and no objection be made to the deeds or abstracts or to the title offered, and no offer be made to rescind or restore possession, the vendor may maintain an action to recover the purchase price without further performance or offer to perform on his part. *Dunn v. Mills* (Kan.), 3-363.

Recovery of purchase money paid vendor.—Where, after the formation of a contract for the sale of land making time of its essence and contemplating the examination of the title according to an abstract to be furnished by the vendor, notice of *lis pendens* is filed, whereupon the vendor undertakes, by giving the statutory notice of foreclosure, to enforce the contract, the purchaser is entitled to rescind the contract and recover the part of the purchase price paid before the filing of the notice, in case the ven-

dor is unable to deliver a marketable title. *Moulton v. Kolodzik* (Minn.), 7-1090.

A court of equity will, at the instance of the purchaser, rescind an executed contract for the sale of land, annul the deed, and order a return of the purchase money, where it is shown that the land covered by the deed was at the time of the sale part of a public street, and therefore incapable of being sold by the vendor, and that the parties were mutually mistaken in the transaction, the purchaser believing that he was buying the lot described in the deed, and the vendor believing that he was selling another lot than the one so described. *Lee v. Laprade* (Va.), 10-303.

Where the vendor under a parol contract for the sale of land upon which a part of the purchase price has been paid refuses to convey the land to the trustee in bankruptcy of the vendee upon the trustee's demand, such refusal is a breach of the contract by the vendor and renders unnecessary a tender of the full amount of the purchase money by the trustee before rescinding the contract and suing to recover the purchase money paid. *Durham v. Wick* (Pa.), 2-929.

The purchaser in an executory contract for the sale of land which the vendor is unable or refuses to perform has the election of two remedies; he may rescind the contract and recover the purchase money paid, or maintain an action for damages for the breach. *Vallentyne v. Immigration Land Co.* (Minn.), 5-212.

Recovery of earnest money paid broker having no authority to sell. — Where a contract to sell land is unenforceable against a vendor because made by his broker without authority, the purchaser is entitled to recover from the vendor earnest money paid as part of the purchase price; and this is so though the vendor has returned the money to his agent, especially if it appears that the vendor knew the name of the person with whom the agent was dealing. *Larson v. O'Hara* (Minn.), 8-849.

Ejectment against vendee not in default. — A vendor cannot maintain ejectment against a vendee in possession under an executory contract of purchase and not in default. *Talley v. Kingfisher Imp. Co.* (Okla.), 20-352.

Cancellation of contract of vendee to purchase his own land. — A person who enters into a contract to purchase land belonging to himself is entitled to cancellation of the contract where he acted under the mistaken belief that the other party was the owner of the land. *Houston v. Northern Pac. R. Co.* (Minn.), 18-325.

Right of intermediate vendor, whose vendee has been ejected under paramount title, to reimbursement. — An intermediate vendor of land who has been forced to discharge his liability to his purchaser, who has been evicted by paramount title, may maintain an action against his vendor for reimbursement; and in such an action an allegation in the bill of complaint that in a litigation between the intermediate

vendor and his purchaser the latter recovered the price which he had agreed to pay for the property sufficiently alleges that the intermediate vendor has discharged his liability to his purchaser. *Morrow v. Baird* (Tenn.), 4-974.

(2) Defenses.

In general. — A purchaser under an unrecorded deed, whose title has been destroyed by a subsequent conveyance made by the vendor to a third person, does not lose his right of action against the vendor by receiving a certain sum of money from the second grantee for a deed of the premises, but that fact may be shown in mitigation of damages. *Hilligas v. Kuns*, (Neb.), 20-1124.

Defense of want of title in vendor by vendee in possession. — In the absence of fraud, insolvency of the vendor, or other special circumstances, a vendee of land in possession under a contract of sale calling for a title in fee simple free from incumbrance, and whose possession has not been disturbed, cannot resist payment of the purchase price when due on the ground of a lack of title in the vendor unless he rescind the contract and restore possession to the vendor. *Dunn v. Mills* (Kan.), 3-363.

Want of tender of performance as defense to action by vendee. — In an action by the purchaser in an executory contract for the sale of land to rescind the contract and recover payments made on the purchase price, the vendor cannot contend that the offer of a cashier's check by the purchaser was not a good tender of the balance of the purchase price, where it appears that no point was made at the time as to the purchaser's failure to produce the proper medium for tender, and that the matter of disagreement between the parties related solely to the marketability of the title. *Moulton v. Kolodzik* (Minn.), 7-1090.

(3) Measure of damages.

Action against vendor for breach of contract. — In an action by a purchaser for the breach of a contract for the sale of land, where it appears that the vendor has a title and refuses to convey, the measure of damages is the market value of the land at the time of the breach of the contract, less the amount, if any, of the purchase price remaining unpaid. *Neppach v. Oregon, etc., R. Co.* (Oregon), 7-1035.

The measure of damages for the breach of an executory contract for the sale of land, where the breach results from either the inability or the refusal of the vendor to perform, is the loss suffered by the purchaser — in this case the difference between the value of the land as contracted to be sold, and its value after the removal of certain timber standing thereon when the contract was made, and which was removed by a third party under a prior grant, less the unpaid purchase price. *Vallentyne v. Immigration Land Co.* (Minn.), 5-212.

Action against vendee for breach of contract. — Upon breach by a vendee of an

executory contract for the sale of land the vendor's measure of damages, where he is possessed of the title and the property, is the difference between the contract price of the land and its market value at the time of the breach, less the portion of the purchase price already paid. *Prichard v. Mulhall* (Iowa), 4-789.

Destruction of purchaser's title by vendor. — A purchaser under an unrecorded deed, whose title has been defeated by a subsequent conveyance of the land by the grantor to a third person for value and without notice of the unrecorded deed, may recover from the vendor the value of his (the purchaser's) interest in the land at the time his title was destroyed by the second conveyance. *Hilligas v. Kuns* (Neb.), 20-1124.

An action by a purchaser of land against the grantor of her immediate grantor, for damages caused by his subsequent conveyance of the same land to another, sounds in tort, and the measure of plaintiff's damages is the value of the land when she lost title thereto, less the taxes thereon and whatever she received from the subsequent grantee of the original vendor. *Hilligas v. Kuns* (Neb.), 20-1124.

(4) Pleading.

Sufficiency of complaint for breach. — Complaint construed, and held to state a cause of action for the breach of an executory contract for the sale of land. *Vallentyne v. Immigration Land Co.* (Minn.), 5-212.

(5) Evidence.

Burden of proof of default of vendee in action of ejectment. — In ejectment by a vendor against a vendee in possession under an executory contract of purchase for an alleged default in said contract, the burden of proof is on the vendor to prove such default. *Talley v. Kingfisher Imp. Co.*, 352.

Burden of proof of defense of lesion beyond moiety. — The burden is on the vendor to prove lesion beyond moiety by evidence peculiarly strong and convincing, of such a nature as to exclude speculation and conjecture. The highest estimates under this rule cannot be adopted as the measure of value. *Succession of Witting* (La.), 15-379.

Sufficiency of evidence of mistake warranting rescission. — Evidence considered and held to entitle the grantor in a deed to rescission on account of a mistake of both the grantor and grantee as to different facts. *Wirsching v. Grand Lodge of F. & A. M.* (N. J.), 3-442.

Evidence reviewed, in an action by the purchaser in an executed contract for the sale of land to rescind the contract and cancel the deed, on the ground of mutual mistake as to the premises sold, and held sufficient to show that the purchaser is entitled to the relief sought. *Lee v. Laprade* (Va.), 10-303.

Sufficiency of evidence of unmarketable title of vendor. — In an action for rescission brought by the purchaser in an executory contract for the sale of land, a

prima facie case of unmarketable title is made out by showing that a notice of *lis pendens* concerning the land in question has been led, that the action described in the notice was commenced and was pending before the time for the completion of the contract, and that the complaint in that action attacked the validity of the foundation of the vendor's title. *Moulton v. Kolodzik* (Minn.), 7-1090.

Sufficiency of evidence of eviction by paramount title. — In an action by a purchaser of land against his vendor for breach of the latter's covenant of warranty, the requirement that the purchaser must show an eviction by paramount title is satisfied by showing that he purchased a superior title exhibited by a third person in an action brought by the latter to recover the land, though there is no showing that a judgment of eviction was rendered in such action. *Morrow v. Baird* (Tenn.), 4-974.

Sufficiency of evidence of waiver of time for performance. — Evidence reviewed, in an action by a purchaser for the breach of a contract for the sale of land, and held sufficient to justify the jury in finding that the defendant extended or waived the time stipulated in the contract for the performance by the plaintiff. *Neppach v. Oregon, etc., R. Co.* (Oregon), 7-1035.

4. RIGHTS OF PARTIES AS AGAINST THIRD PERSONS.

a. Who are *bona fide* purchasers.

Purchaser with knowledge of facts sufficient to put prudent man upon inquiry. — One who purchases land with knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely to his vendor, is guilty of bad faith if he neglects to make such inquiry, and is chargeable with the "actual notice" he would have received. *Cooper v. Flesner* (Okla.), 20-29.

Person taking option without payment of purchase money in full. — One who has taken an option on land but has not paid the purchase money in full is not a purchaser for value without notice. *Tibbs v. Zirkle* (W. Va.), 2-421.

Purchaser for value, without notice, from grantor having notice. — A purchaser for value, and without notice of a prior unrecorded deed, acquires an indefeasible title though his grantor purchased the land with notice of such unrecorded deed. *Hilligas v. Kuns* (Neb.), 20-1124.

Corporation, where agent and trustees of incorporators had notice. — A corporation against which a vendor's lien is asserted is not a *bona fide* purchaser of the property where the agent and trustee for the incorporators had notice of the claim of the lien. *Zeigler v. Valley Coal Co.* (Mich.), 13-90.

Creditor relinquishing rights in declaration of trust and accepting deed. — Where a debtor executes a declaration of

trust in certain land to his creditor to secure the payment of the debt, and the creditor subsequently relinquishes his right under the trust and accepts a deed to other land in payment of his claim, the creditor is a *bona fide* purchaser as to the land deeded to him. *Grand Rapids Nat. Bank v. Ford* (Mich.), 8-102.

Purchaser under lien of title containing no covenants of warranty. — Under a conveyance by deed of "all the fire clay and shale" on described lands, with the right to remove the same, and successive conveyances of such interest by deeds none of which contain any covenant of warranty, the ultimate grantee takes only such an interest as his grantor had and is not a *bona fide* purchaser, so as to be protected against the vendor's lien of the original grantor. *Zeigler v. Valley Coal Co.* (Mich.), 13-90.

Purchaser with knowledge of agreement of grantor to convey to another. — One who takes conveyance of the legal title to land, with knowledge of the agreement by the grantor to sell to another person, takes it subject to the equitable estate vested in the latter. *Cummins v. Beavers* (Va.), 1-986.

b. Rights of creditors of vendor.

Creditor holding assignment of contract of sale as security. — The assignment by the vendor of an executory contract for the sale of real property, as security for an indebtedness due the assignee, vests in the assignee a lien upon the vendor's interest in the property to the extent of the debt secured, not exceeding the purchase money unpaid on the contract, and this lien may be enforced as against the vendor's trustees in bankruptcy where the question of unlawful preference is not properly raised. *Lamm v. Armstrong* (Minn.), 5-418.

Creditors of grantor of deed in escrow. — A sale of real property and the delivery of the deed in escrow pending the payment of the purchase price, creates an equitable interest in the vendee such that, upon full payment of the purchase price according to the escrow agreement, the title vests at once in him; but pending the completion of the purchase by full payment of the price, the legal title remains in the vendor, and is subject to attachment or the lien of a judgment against the vendor to the extent of his interest therein. Such lien, however, if obtained with notice of the escrow agreement, is subject to the equity of the vendee. *May v. Emerson* (Ore.), 16-1129.

Where land is sold and the deed deposited in escrow pending payment of the purchase price, a creditor of the vendor who desires to enforce his claim against the latter's right and title in the property must acquire such right and title by judgment and execution sale, and until he does so he is in no position to demand payment of the unpaid balance of the purchase price from the vendee. *May v. Emerson* (Ore.), 16-1129.

In such a case, the act of the vendee in paying instalments of the purchase price to

the depository after the vendor's interest has been sold on execution and purchased by a judgment creditor, does not constitute a forfeiture of his right of possession under the contract of sale, so as to enable the creditor to oust him by an action of ejectment; nor can the creditor maintain such an action, in any case, until he has placed the vendee in default by tendering him a deed and demanding payment of the purchase price. *May v. Emerson* (Ore.), 16-1129.

c. Rights of creditors of vendee.

Enforcement of vendor's lien against creditors of vendee holding warranty deed. — A vendor who gives a warranty deed to a purchaser and allows the purchaser to obtain credit on the faith of the ownership of the property, will not be allowed to claim a vendor's lien as against such creditors. The right to a vendor's lien is neither a legal lien nor an interest in the land, but merely a right recognized by courts of chancery to protect the general equity that the purchaser shall not enjoy the property with immunity from his agreement to pay therefor. *Larschied v. Kittell* (Wis.), 20-576.

VENDOR'S LIEN.

See VENDOR AND PURCHASER, 3 g.

Existence of vendor's lien as breach of representation of sole and unconditional ownership of property, see INSURANCE, 5 b (2) (b).

VENIRE.

See JURY.

VENUE.

1. IN CIVIL PROCEEDINGS, 1588.
2. IN CRIMINAL PROCEEDINGS, 1589.
 - a. Validity of statutes, 1589.
 - b. Proper place for trial, 1589.
 - c. Allegation of venue in indictment, 1590.
 - d. Evidence of venue, 1590.

See CHANGE OF VENUE.

Certificate of acknowledgment, see ACKNOWLEDGMENTS.

Omission of venue from affidavit, see AFFIDAVITS.

Particular actions and proceedings, see BASTARDY; BURGLARY, 3; EMBEZZLEMENT, 3; EMINENT DOMAIN, 9 c; LIBEL AND SLANDER, 5.

1. IN CIVIL PROCEEDINGS,

Action to enjoin threatened trespass on land as local action. — An action to enjoin a threatened trespass upon land is a local action and must be brought in the state or county where such land is situated. *Ophir Silver Min. Co. v. Superior Court* (Cal.), 3-340.

Where in an action to enjoin a threatened trespass upon lands brought in the state other than that in which the lands are situated, the complaint also seeks to recover the value of minerals theretofore removed from the lands, but a reasonable construction of the latter allegations presents a case involving the determination of the title to the realty, the action should be dismissed as without the jurisdiction of the court. *Ophir Silver Min. Co. v. Superior Court (Cal.)*, 3-340.

Action against municipal corporation as local action. — An action against a municipal corporation, on account of the natural characteristics of a corporation, is inherently a local action, and must be brought in the county in which such corporation is situated. *Nashville v. Webb (Tenn.)*, 4-1169.

A municipal corporation may be sued in a court other than its own; and where an action is for a trespass to real property, it must be brought in the county or place where the cause of action has arisen. *Baltimore v. Meredith's Ford, etc., Turnpike Co. (Md.)*, 10-35.

Action to cancel contract for sale of land and recover price paid as transitory action. — An action to cancel a contract for the sale of land on the ground of fraud, and for the recovery of the purchase price paid by the vendee before the discovery of fraud, in which it does not appear that the vendors had title to the land, and in which no relief as to real estate record is involved, is a transitory, not a local, action. *State v. District Court (Minn.)*, 3-725.

Venue of action on open account for services rendered. — The provision of the Montana Code to the effect that actions upon contracts may be tried in the county in which the contract was to have been performed contemplates express contracts, and an action to recover upon an open account for medical services is triable, not in the county where the services were performed, but in the county where the defendant resides, under other provisions of the code. *Bond v. Hurd (Mont.)*, 3-566.

In an action to recover upon an open account for medical services, the plaintiff cannot abridge the right of the defendant to have the action tried in the county of his residence by joining in the same complaint another cause of action which might be construed as triable in the county of the plaintiff's residence. *Bond v. Hurd (Mont.)*, 3-566.

Effect of constitutional provision fixing venue for suits against joint defendants. — The constitution in fixing the venue in suits against joint defendants was intended to be exhaustive and not to leave a hiatus in which the right to bring a single suit against joint defendants might be lost because of the want of jurisdiction to apply the remedy. *Cox v. Strickland (Ga.)*, 1-870.

Validity of judgment rendered in county where venue improperly laid. — When an action is prosecuted to judgment

against a municipal corporation in the courts of a county other than the one wherein such defendant corporation is situated, such a judgment is wholly void and its enforcement will be restrained by injunction. *Nashville v. Webb (Tenn.)*, 4-1169.

The Tennessee statute providing that an action when brought in the wrong county may be prosecuted to a termination, unless abated by plea of the defendant, does not apply to a local action when brought in the wrong county, since consent itself cannot give jurisdiction. *Nashville v. Webb (Tenn.)*, 4-1169.

Reversal of judgment for want of proof of venue as laid. — When a declaration shows the jurisdiction of the court and no plea in abatement has been filed, the judgment will not be reversed for want of proof of the venue as laid. *Snyder v. Philadelphia (W. Va.)*, 1-225.

2. IN CRIMINAL PROCEEDINGS.

a. Validity of statutes.

Validity of statute providing for trial in county adjoining county where crime committed. — It is within the power and discretion of the legislature of a state to provide that a person charged with crime may be indicted and tried in any county which adjoins the county in which the crime is alleged to have been committed. *State v. Lewis (N. Car.)*, 9-604.

The North Carolina statute making lynching an offense and providing that the offender may be indicted and tried in any county which adjoins the county in which the crime has been committed is a valid and constitutional enactment. *State v. Lewis (N. Car.)*, 9-604.

Validity of statute fixing venue of crime committed in two counties. — Statutes fixing the venue of the prosecution for an offense committed in two counties held not to violate a constitutional guaranty that every person accused of crime shall have a speedy trial by the jury of the vicinage. *Commonwealth v. Jones (Ky.)*, 4-1192.

b. Proper place for trial.

Division of county after commission of crime. — If a county is divided, and a portion of its territory enters into the formation of new territory, a criminal case pending in a court of the original county, which involves an offense committed before the division in the territory embraced within the limits of the new county, cannot properly be tried in the court of the original county, over a timely objection made by the accused raising the question of jurisdiction. *Pope v. State (Ga.)*, 4-551.

Under the Georgia constitution, one accused of crime cannot be deprived of the right to be tried in the county where the offense was committed by the creation of a new county while the case is pending against him. Such a person has a right to demand a trial in the county which embraces the

territory where the offense was committed, and though the act creating the county and the general law of the state may be silent upon the transfer of criminal cases, under such circumstances the court in which the case is pending has the inherent power to order a transfer of the case to a proper court in the new county, and that court has like power to take jurisdiction of the case and carry the same to judgment. *Pope v. State* (Ga.), 4-551.

Crime committed in two counties. — Under the Kentucky statutes courts of both counties have concurrent jurisdiction of an offense committed partly in one county and partly in another, but the assumption of jurisdiction by the courts of one county deprives the courts of the other county of jurisdiction to try the offender. *Commonwealth v. Jones* (Ky.), 4-1192.

County where crime committed. — An allegation in an indictment that the offense was committed in a certain county confers jurisdiction to try the cause upon a court of criminal jurisdiction of that county. *Welty v. Ward* (Ind.), 3-556.

c. Allegation of venue in indictment.

Necessity of direct allegation. — An indictment is not defective for failure to contain an express allegation as to the venue, where from the statement of facts constituting the crime the venue is clearly shown. *Manning v. State* (Tex.), 3-867.

Necessity of alleging that crime was not committed on federal property within jurisdiction. — In a criminal prosecution in a state court, an information which charges that a crime was committed in a certain county within the general jurisdiction of the court sufficiently alleges the venue, although a national military reservation of which the federal courts have jurisdiction is situated within the county and the information contains no averment that the crime was not committed on the reservation. *State v. Tully* (Mont.), 3-824.

d. Evidence of venue.

Judicial notice of townships in county. — The venue of a crime is sufficiently proven by the testimony of a witness that his residence, at which the crime was committed, is at a named town, and that he is a resident of a named township, as judicial notice will be taken that a certain town is in the county in which the cause is pending, and the inference will be drawn that a named township is the one of that name in such county. *State v. Meyer* (Ia.), 14-1.

Necessity of direct evidence where all facts and circumstances show venue. — In the prosecution of a criminal case, it is not essential that the venue of the crime should be proven in express terms, provided it is established by all the facts and circumstances in the case, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the indictment. *State v. Dickerson* (Ohio), 11-1181.

Rights of defendant where evidence shows prosecution in wrong county — In a criminal prosecution, if the evidence shows that the offense was committed in another county than that laid in the indictment and in which the trial is being held, the defendant is entitled to a verdict of not guilty in the absence of a statute providing otherwise. *Welty v. Ward* (Ind.), 3-556.

In a criminal prosecution, if the evidence shows that the offense was committed in another county than that laid in the indictment, and in which the trial is being held, the defendant is entitled to a verdict of not guilty, and such verdict is a bar to a second prosecution in the same county for the same offense, but will not prevent indictment, prosecution, and conviction in the county where the offense was actually committed. *Welty v. Ward* (Ind.), 3-556.

VERACITY.

Character of accused for truth and veracity, see *HOMICIDE*, 6 a (2) (b).
Words affecting veracity as libelous, see *LIBEL AND SLANDER*, 2 c.

VERBAL AGREEMENTS.

See *FRAUDS*, *STATUTE OF*.

VERDICT.

See *CRIMINAL LAW*, 6; *TRIAL*, 8.
Appeal from order denying motion to correct verdict, see *APPEAL AND ERROR*, 4 a.
Directing verdict, see *CRIMINAL LAW*, 6 r (1); *TRIAL*, 6.
Impeachment of verdict by affidavit of juror, see *CRIMINAL LAW*, 7; *JURY*, 7 d (2).
Sufficiency of evidence to support review on appeal, see *APPEAL AND EVIDENCE*, 12 h (3).

VERIFICATION.

See *ADMIRALTY*; *INDICTMENTS AND INFORMATION*, 3; *PLEADING*, 1.
Amendment of unverified plea, see *PLEADING*, 9 e (1).
Sufficiency of verification of bill by affidavit of solicitor, see *INJUNCTIONS*, 3 c (2).
Verification of pleading by corporation, see *PLEADING*, 1.

VESSELS.

See *SHIPS AND SHIPPING*.

VESTED REMAINDERS.

See *REMAINDERS*.

VESTED RIGHTS.

Exemption from jury service, see **JURY**, 3.
Interference with vested rights, see **CONSTITUTIONAL LAW**, 14.

VETERANS.

Exemption from occupation taxes, see **LICENSES**, 3.
Preference of veterans in appointment of public officers or employees, see **MUNICIPAL CORPORATIONS**, 14; **PUBLIC OFFICERS**, 3 a (3).

VETO.

Power of mayor, see **MUNICIPAL CORPORATIONS**, 5 b.
Veto of bills of executive, see **STATUTES**, 1 e.

VIBRATION.

Liability for vibration caused by blasting, see **EXPLOSIONS AND EXPLOSIVES**, 4.
Liability of railroads for vibration in operation of road, see **RAILROADS**, 7 b.

VICE-PRINCIPAL.

See **MASTER AND SERVANT**, 3 f (1).

VICINAGE.

Jury of the vicinage, see **JURY**, 1 a.
Right to trial by jury of vicinage, see **CRIMINAL LAW**, 6 b; **VENUE**, 2.

VI ET ARMIS.

See **TRESPASS**.

VIEW.

Right of accused to be present at view by jury, see **CRIMINAL LAW**, 6 c (4).
View of premises by judge, see **TRIAL**, 9.
View of premises by jury, see **TRIAL**, 7.

VILLAGES.

See **MUNICIPAL CORPORATIONS**.
Powers and duties of village as to streets, see **STREETS AND HIGHWAYS**, 3.

VIOLENCE.

Actual violence as element of forcible entry, see **FORCIBLE ENTRY AND DETAINER**.
Necessity of personal violence to constitute cruel and inhuman treatment, see **DISVOICE**, 2 b.

VISITORS.

Control of corporations, see **CORPORATIONS**, 3.

VOICE.

Identification by voice, see **CRIMINAL LAW**, 6 n (2).

VOIDABLE CONTRACTS.

Disaffirmance by infants, see **INFANTS**, 2 b.

VOIDABLE TRANSFERS.

By bankrupt, see **BANKRUPTCY**, 10.

VOID JUDGMENTS.

Collateral attack, see **JUDGMENTS**, 10.
Ground for habeas corpus, see **HABEAS CORPUS**, 2.
Right to appeal from, see **APPEAL AND ERROR**, 4 a.

VOLUNTARY.

Necessity that confession should be voluntary, see **CRIMINAL LAW**, 6 n (11) (b).

VOLUNTARY AGREEMENT TO FIGHT.

See **ASSAULT AND BATTERY**, 2 b.

VOLUNTARY ASSOCIATIONS.

See **SOCIETIES AND UNINCORPORATED ASSOCIATIONS**.

VOLUNTARY EXPOSURE.

Attempting to save life or property, see **NEGLIGENCE**, 7 d.
Risks excepted in accident insurance, see **INSURANCE**, 8 b (1).

VOLUNTARY MANSLAUGHTER.

See **HOMICIDE**, 4 a.

VOLUNTARY PAYMENTS.

See **PAYMENT**, 4.

VOTERS.

See **ELECTIONS**.
Right to vote in corporate elections, see **CORPORATIONS**, 8 e (2).

VOTING MACHINES.

See **ELECTIONS**, 1 d (2).

VOYAGE.

Termination of voyage, see **SEAMEN**, 2.

WAGER.

See **GAMING AND GAMING HOUSES**.

WAGES.

Assignment of unearned wages, see **ASSIGNMENTS**, 1 b; **BANKRUPTCY**, 9.

Exemption of wages from execution, see **EXECUTIONS**, 5.

Laborers' liens for wages, see **LIENS**.

Receipt of wages by discharged seaman as release of claim for wrongful discharge, see **SEAMEN**, 3 b.

Regulation of payment of wages, see **CONSTITUTIONAL LAW**, 5 c 9; 15 a; **MASTER AND SERVANT**, 1 d; 2 a.

Right of child to recover wages, see **PARENT AND CHILD**, 6.

Who are wage earners within bankruptcy law, see **BANKRUPTCY**, 2.

WAIVER.

Acceptance of rent as waiver of forfeiture of lease, see **LANDLORD AND TENANT**, 3 g.

Acquiescence in violation of building restrictions, see **DEEDS**, 3 c.

Antenuptial agreement waiving dower, see **HUSBAND AND WIFE**, 2 a (3).

Attachment as waiver of lien of chattel mortgage, see **CHATTEL MORTGAGES**, 7.

Attachment lien, see **ATTACHMENT**, 5.

Breach of contract of employment, see **MASTER AND SERVANT**, 1 c.

Breach of contract, see **CONTRACTS**, 5 b (3).

By-laws regarding payment of dues, see **BUILDING AND LOAN ASSOCIATIONS**, 1.

Capacity of plaintiff to sue, see **PLEADING**, 11 b.

Compensation in condemnation proceedings, see **EMINENT DOMAIN**, 7 f.

Conditions in insurance policy, see **INSURANCE**, 3 c (4).

Conditions waived by rejection of goods by purchaser, see **SALES**, 6 b.

Constitutional immunity from self-crimination, see **WITNESSES**, 4 g (7).

Damages for delay in furnishing transportation facilities, see **CARRIERS**, 4 f (2).

Defect in indictment waived by joinder in issue, see **INDICTMENTS AND INFORMATION**, 4.

Defects in complaint waived by answer, see **DEATH BY WRONGFUL ACT**, 4.

Defects in pleading, see **PLEADING**, 11.

Defense of statute of frauds, see **FRAUDS, STATUTE OF**, 12 c.

Disqualification of judge, see **JUDGES**, 4 b (4).

Errors waived in appellate court, see **APPEAL AND ERROR**, 12 i.

Factor's lien, see **FACTORS**, 5.

Failure to make demand before suing in replevin, see **REPLEVIN**, 3.

Failure to make timely objection to evidence, see **CRIMINAL LAW**, 6 m (9).

Forfeiture of membership in benevolent association, see **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, 6 b.

Illegal arrest, see **ARREST**, 4.

Immunity from second jeopardy, see **CRIMINAL LAW**, 5 c.

Irregularity in arrest, see **FALSE IMPRISONMENT**, 1.

Liens, see **ATTACHMENT**, 5; **CHATTEL MORTGAGES**, 7; **MECHANICS' LIENS**, 2 g; **VENDOR AND PURCHASER**, 3 g (2).

Mechanic's lien, see **MECHANICS' LIENS**, 9.

Misjoinder of causes of action, see **PLEADING**, 11 b.

Oath of witness, see **WITNESSES**, 2.

Objections to change of judge in criminal case, see **JUDGES**, 5.

Objections to competency of witnesses, see **WITNESSES**, 3 b (10).

Objections to irregularity of grand jury, see **GRAND JURY**, 4.

Objections to juror waived by failure to examine, see **JURY**, 6 d.

Performance of contract, see **CONTRACTS**, 5.

Parol waiver of covenant against subletting, see **LANDLORD AND TENANT**, 3 c (1).

Pleading to merits as waiver of defects in process, see **SUMMONS AND PROCESS**, 1.

Privilege of witness, see **GRAND JURY**, 5 c.

Privilege, see **WITNESSES**, 3 d (7).

Requirement of notice of claim against city for damages, see **MUNICIPAL CORPORATIONS**, 9 f.

Right of accused to be confronted by witnesses, see **CRIMINAL LAW**, 6 c (6).

Right of administration, see **EXECUTORS AND ADMINISTRATORS**, 2 b.

Right of privacy, see **PRIVACY, RIGHT OF**.

Right of purchaser to inspect goods, see **SALES**, 6 a.

Right to be present at rendition of verdict, see **CRIMINAL LAW**, 6 r (5).

Right to discharge servant, see **MASTER AND SERVANT**, 1 c (3).

Right to dower, see **DOWER**, 2 c.

Right to jury trial, see **JURY**, 1 e.

Right to question validity of gift to charity, see **CHARITIES**, 4.

Right to speedy trial waived by consent to continuance, see **CRIMINAL LAW**, 6 c (1).

Right to suppress deposition, see **DEPOSITIONS**, 7.

Right to time to prepare for trial, see **CRIMINAL LAW**, 6 c (3).

Right to mechanic's lien, see **MECHANICS' LIENS**, 2.

Right to remove cause to federal court, see **REMOVAL OF CAUSES**, 4.

Right to waive tort, see **SET-OFF AND COUNTERCLAIM**, 1 a.

Right to waive tort, see **TROVER AND CONVERSION**, 4.

Statute of limitations, see **LIMITATION OF ACTIONS**, 8.

Statutory mode of selecting jurors, see **JURY**, 4 b.

Validity and effect of waiver of protest, see **BILLS AND NOTES**, 9 b.

Vendor's lien, see **VENDOR AND PURCHASER**, 3 g (2).

Verification of information, see **INDICTMENTS AND INFORMATIONS**, 3.

Voluntary appearance as waiver of process, see **SUMMONS AND PROCESS**, 1.

WALKING DELEGATE.

See **LABOR COMBINATIONS**.

WANTONNESS.

See **NEGLIGENCE**.

WAR.

Contraband of war, see **INTERNATIONAL LAW**.

WARD.

See **GUARDIAN AND WARD**.

WARDEN.

Power of warden to inflict corporal punishment upon prisoner, see **PRISONS**.

WAR DEPARTMENT.

Jurisdiction over navigable waters, see **WATERS AND WATERCOURSES**.

WAREHOUSES.

1. **RIGHTS, DUTIES, AND LIABILITIES OF WAREHOUSEMAN**, 1593.

2. **WAREHOUSE RECEIPTS**, 1594.

Delivery of key as delivery of goods in warehouse, see **SALES**, 3.

Liability of carrier as warehouseman, see **CARRIERS**, 4 e.

Parol evidence to explain receipt, see **BAILMENT**, 2.

Taxation of property held by warehousemen, see **TAXATION**, 3 b.

1. **RIGHTS, DUTIES, AND LIABILITIES OF WAREHOUSEMAN**.

Definition of warehouseman. — A warehouseman may be defined as one who receives and stores goods as a business for a compensation or profit. There is nothing in the Pennsylvania statute making warehouse

receipts negotiable which requires a warehouseman to hold himself out to the general public as such. *National Union Bank v. Shearer (Pa.)*, 17-664.

What are warehouses of class "A" under Illinois statute. — Under the Illinois statute, public warehouses of the class designated as "A" are elevators or storehouses where grain or other property is stored for a compensation, and which are bound to serve the public by accepting and storing grain or property tendered for storage by any and all persons indiscriminately. *People ex rel. Healy v. Illinois Cent. R. Co. (Ill.)*, 13-235.

Nature of contract where depositor has option to demand goods or market price. — Where grain is deposited in a warehouse under an agreement that in the usual course of business the grain may be mixed and commingled with other grain of the same kind, and that the depositor may demand a return of an equal quantity of the grain of a like kind as that delivered, or the market price of the grain at the time the demand is made, such a transaction constitutes a sale, and not a bailment, as the title to the grain passes to the warehouseman at the time of the delivery, and the fact that the warehouseman has an option to pay for the grain in kind or in money does not change the local effect of the transaction. *Savage v. Salem Mills Co. (Ore.)*, 10-1065.

Duty of warehouseman with relation to goods stored. — A warehouseman is not an insurer of goods received for storage, nor is he required to provide a building which is secure from danger from within or without that could not be foreseen or provided against. He is required not only to place such goods in a building reasonably adequate and safe against danger from within, but should exercise due care to store them in a place where they will not be exposed to unusual hazards from without. *Wiley v. Locke (Kan.)*, 19-241.

In the absence of an express agreement the law implies that a warehouseman for compensation will exercise reasonable care to protect and preserve property intrusted to him for safekeeping, and imposes a liability for a loss resulting from his failure in that respect. *Wiley v. Locke (Kan.)*, 19-241.

Liability of warehouseman for goods stored in violation of contract. — A warehouseman who contracts to store the goods of another in a brick building, but in violation of his agreement stores them in an adjoining wooden building, sheeted with iron, which is less secure, and the goods are burned in a fire which did not destroy the brick building or its contents, is liable for the loss of the goods. *Wiley v. Locke (Kan.)*, 19-241.

Extent of liability of warehouseman to customer having right to demand goods or price. — Where grain is delivered to a milling company maintaining a depository for grain for which a receipt is issued to the owner, who according to the usage and custom of the business can either demand a

return of the grain in kind or payment therefor at the market price at the time of the demand, and such demand is made, the value of the grain becomes due and payable at the time of the demand, and should bear interest from that time. *Savage v. Salem Mills Co. (Ore.)*, 10-1065.

Pleading in action for loss of goods.

— In an action to recover for the loss of goods intrusted to a warehouseman it is competent for the owner to set up his cause of action in two counts: one upon an express agreement as to the character of the building in which the goods are to be stored and the care to be exercised, and another based on the implied undertaking of the warehouseman to exercise reasonable care in providing an adequate and safe place for the goods delivered to him for safekeeping. *Wiley v. Locke (Kan.)*, 19-241.

Sufficiency of evidence of relation. —

In an action of replevin to recover goods on storage in a building belonging to the defendant, evidence examined and held sufficient to warrant a finding that the defendant was a warehouseman. *National Union Bank v. Shearer (Pa.)*, 17-664.

2. WAREHOUSE RECEIPTS.

Requisites of warehouse receipt. —

The law does not require warehouse receipts to be in any particular form. Any instrument which, by express language or fair implication, involves an acknowledgment by the signer of his possession of designated goods of another on storage, and an obligation to deliver them to a specified person, or to his order, or to bearer, on return of the instrument, constitutes such a receipt. *National Union Bank v. Shearer (Pa.)*, 17-664.

Necessity of indorsement of receipt on negotiation thereof. — For all purposes the transfer of goods in storage in a warehouse is complete upon delivery of the warehouse receipt, with intent to transfer title to the goods represented thereby, and an indorsement of the receipt adds nothing to the effectiveness of such delivery. The Pennsylvania statute, while permitting, does not require transfer of warehouse receipts by indorsement. *National Union Bank v. Shearer (Pa.)*, 17-664.

Effect of secret agreement between warehouseman and owner on bona fide holder of receipt. — In view of the Pennsylvania statute which makes warehouse receipts negotiable, it must be held that the rights of the holder of such a receipt cannot be defeated or affected by any secret arrangement between the warehouseman and the owner of the goods. *National Union Bank v. Shearer (Pa.)*, 17-664.

Admissibility of parol evidence to vary receipt. — Where a receipt is issued by a warehouseman and accepted by the owner of the goods stored as containing the terms and conditions upon which the commodity is delivered and received, it becomes a contract between the parties, and cannot be contradicted or varied by parol; but if

the receipt is silent as to the terms of the contract, parol evidence is admissible to show the terms thereof, or, if the language of the receipt is ambiguous or uncertain, the contract may be interpreted in the light of the surrounding circumstances. *Savage v. Salem Mills Co. (Ore.)*, 10-1065.

WARNINGS.

Approaching railroad trains, see **RAILROADS**, 8 b (3).

Approaching street cars, see **STREET RAILWAYS**, 8 a (5).

Duty of master to warn servants of danger, see **MASTER AND SERVANT**, 3 d.

WARRANTS.

Arrest on void warrant, see **FALSE IMPRISONMENT**, 2.

Arrest without warrant, waiver of objection, see **FALSE IMPRISONMENT**, 1.

Consolidation of warrants for violating Sunday laws, see **SUNDAYS AND HOLIDAYS**, 1 c.

Defect in warrant as ground for habeas corpus, see **HABEAS CORPUS**, 2.

Discretion of magistrate as to issuance of warrant, see **CRIMINAL LAW**, 3.

Enforcement of void municipal bonds as warrants, see **MUNICIPAL CORPORATIONS**, 8 e (1).

Interest on county warrants, see **COUNTIES**, 3.

Issue of warrant without jurisdiction, see **FALSE IMPRISONMENT**, 2.

Limitation of actions on municipal warrants, see **LIMITATION OF ACTIONS**, 4 a (2) (a).

Married woman's warrant of attorney to confess judgment, see **HUSBAND AND WIFE**, 1 b.

Necessity in making arrest, see **ARREST**, 2.

Procuring issuance of search warrant as malicious prosecution, see **MALICIOUS PROSECUTION**, 1 a.

Search warrants, see **SEARCHES AND SEIZURES**.
Validity of warrant of arrest reciting offense under void amendatory statute, see **CRIMINAL LAW**, 3.

Warrant of attorney to confess judgment, see **JUDGMENTS**, 15.

WARRANTY.

See **SALES**, 4.

Agent's liability for warranty of goods sold, see **AGENCY**, 3 c.

Answers in applications for insurance, see **INSURANCE**, 3 c (3); 5 f (6).

Answers in applications for membership in beneficial association, see **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, 4.

Estoppel of grantor to plead statute of limitations in action for breach of warranty, see **LIMITATION OF ACTIONS**, 8.

Evidence of warranty, see **DEEDS**, 4.

Implied warranty in sale of stock, see **CORPORATIONS**, 8 b (2).

Liability of decedent's estate for breach of warranty, see **EXECUTORS AND ADMINISTRATORS**, 9.

WASTE.

Action by tenant in common against cotenant for waste, see **JOINT TENANTS AND TENANTS IN COMMON**, 2.

Conservation of natural resources, see **MINES AND MINERALS**, 9.

Liability of life tenant for waste, see **LIFE ESTATES**, 2 b.

Right of policyholders to equitable relief for waste by officers, see **INSURANCE**, 1 a.

Statutory regulations to prevent waste of gas, see **GAS AND GAS COMPANIES**, 6.

Injunction to restrain waste. — In Georgia, when the power of a court of equity is invoked to prevent threatened injuries to realty, the old common-law distinction between waste and trespass still exists, and an injunction may issue to prevent the commission of waste, although, if committed, it may not be irreparable in damages and the party threatening to commit it may be solvent; but the rule is otherwise as to mere trespass. *Brigham v. Overstreet* (Ga.), 11-75.

Right of county holding claim for taxes to maintain suit to restrain waste. — Where taxes against real estate are past due and unpaid, the county by which the taxes have been levied may maintain a suit to restrain waste by acts that will reduce the value of the property to an amount insufficient to pay the taxes. *Lancaster County v. Fitzgerald* (Neb.), 13-88.

In order to maintain such suit it is not necessary that the county shall first become a purchaser of the property at tax sale. *Lancaster County v. Fitzgerald* (Neb.), 13-88.

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WATERS AND WATERCOURSES.

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1. UNDERGROUND WATERS.

Right to use of subterranean waters.

—The law of correlative rights applies to the use by adjoining landowners of the waters drawn from an artesian basin. Such proprietors must so use their wells as not unreasonably to injure their neighbors. *Erickson v. Crookston Waterworks, etc., Co.* (Minn.), 10-843.

Nature of right to use. — The fundamental principles of right and justice upon which the common law is founded, and which its administration is intended to promote, lead to the adaptation of its rules concerning the use of subterranean waters to the nature and necessities of the environment. *Erickson v. Crookston Waterworks, etc., Co.* (Minn.), 10-843.

Extent of use. — A landowner has the absolute right to dig a well beneath the surface of his land, and if, in the exercise of such right, he dries up his neighbor's well by diverting the percolating waters underground which supply it, the inconvenience which such neighbor suffers therefrom is *damnum absque injuria*. *Houston, etc., R. Co. v. East* (Tex.), 4-827.

The circumstances of a particular case may render it illegal for a landowner to make merchandise of waters drawn from an artesian basin. *Erickson v. Crookston Waterworks, etc., Co.* (Minn.), 10-843.

Where a water company acquires a title to land on which are wells flowing from an underground basin, the source of supply of a hundred or more similar wells on the lands of adjoining owners in the natural use of the soil, the company has no right to deprive such landowners, or any of them, of the water, by use of artificial force in pumping the water in the artesian basin to a low level in order that it may supply a neighboring community with water as merchandise. *Erickson v. Crookston Waterworks, etc., Co.* (Minn.), 10-843.

Measure of damages for destruction of right to underground water. — In

measuring damages caused real property by the destruction of several springs of water, resulting from removal of the subjacent support, where it is shown that the loss of one spring has been supplied by piping water from another, the damage in so far as that one is concerned is the cost of the piping. *Rabe v. Shoenberger Coal Co.* (Pa.), 5-216.

Duty to prevent artificial percolation. — The owner of a mill race is bound to use a degree of care "proportionate to the danger of injury" to prevent the water from escaping on to adjoining land by means of percolation or seeping. *Scott v. Longwell* (Mich.), 5-679.

One who creates an artificial reservoir by means of a dam in a stream in which he owns the flowage rights, is not liable for damages done an adjacent owner by the percolation of the water from the reservoir unless it is found as a fact, under all the attendant circumstances, that the maintenance of the reservoir is an unreasonable use of the owner's rights in the stream and in his property. *Moore v. Berlin Mills Co.* (N. H.), 13-217.

Liability for pollution of underground waters. — A person who buries a dead animal on his own land is not an insurer, and is not liable if his neighbor's spring is thereby polluted, unless the circumstances are such as to show that a person of ordinary prudence should have anticipated the result which would probably follow. *Long v. Louisville, etc., R. Co.* (Ky.), 16-673.

In an action to recover damages for the pollution of a spring, alleged to have been caused by the negligence of the defendant in burying a dead animal on his own land in too close proximity thereto, where the evidence shows that the grave was only seventy feet in a straight line from the spring, and that the slope of the land was downward from the place of burial to the spring, and where there is also evidence tending to negative any theory of pollution from surface drainage, the question of negligence is for the jury, and it is error for the court to direct a verdict in defendant's favor. *Long v. Louisville, etc., R. Co.* (Ky.), 16-673.

In such an action, the measure of damages is the diminution in value of the use of the property during the time the water is polluted. *Long v. Louisville, etc., R. Co.* (Ky.), 16-673.

In such an action, the plaintiff may recover without proof of title to the land on which the spring is located, where the evidence shows that he is in possession and where the defendant sets up no claim to the spring. *Long v. Louisville, etc., R. Co.* (Ky.), 16-673.

2. SURFACE WATERS.

a. What constitute surface waters.

Overflow from natural stream. — Overflow waters of a natural stream in times of ordinary flood, flowing over or standing upon the adjacent lowlands, do not cease to be part of the stream unless and until separated therefrom so as to prevent their return

to its channel. *Uhl v. Ohio River R. Co.* (W. Va.), 3-201.

Surface waters collecting in natural basin. — When surface waters by natural drainage collect in a natural basin or depression upon the premises of a dominant tenement, and escape therefrom only by percolation or evaporation, forming thereby a lake or pond, permanent in its character, the waters so collected and coming to rest lose the character of surface water, and may not by artificial means, other than that incident to the cultivation of the soil, be drained to the damage of a servient tenement, without liability in damages for such act. *Davis v. Fry* (Okla.), 2-193.

b. Rights and liabilities of owners.

With relation to discharge on lands of adjacent owner. — The common-law rule that surface water is a common enemy which the owner of lands may convey therefrom by ditches or drainage, subject to the modification that in so doing he may not cause unnecessary or unreasonable damage, is adhered to and followed as the law of Minnesota. *Werner v. Popp* (Minn.), 3-845.

No one has a right, by an artificial structure on his own land, to cause the water which falls and accumulates thereon in rain and snow to be discharged on the land of an adjacent proprietor, and such erection, no matter how the water may flow, works a violation of the adjoining proprietor's right of property, and cannot be justified unless the right is shown by express grant or prescription. *Huber v. Stark* (Wis.), 4-340.

A landowner has the right to protect his premises from surface waters by causing the same to flow by the natural and necessary course to adjoining lands, subject to the limitation that he cannot rightfully collect surface waters on his premises in a reservoir and then discharge the same on to the land of another to his injury. *Shaw v. Ward* (Wis.), 11-1139.

A person on whose land surface water coming from his own and other lands collects in a natural basin or depression and there remains except in seasons of drought, has the legal right to rid his land of the water by causing the same, by such means as may be reasonably necessary, to flow in the natural course of drainage on to adjoining lands, though the water may from thence, by natural or artificial means for which he is not responsible, reach and spread out over the lands of others. In such a case the landowner effecting the drainage of his land by means of a ditch is only in the exercise of the right of every person to defend his premises against surface water, and for consequential damages to other landowners the latter have no remedy against the former. *Shaw v. Ward* (Wis.), 11-1139.

Right of municipality to discharge waters from street on lands of abutting owner. — A municipal corporation has no right to collect the surface water on a street into an artificial channel and cast it

upon abutting property without providing an adequate outlet for it; but this rule does not require a municipality to guard against the consequences of a cloudburst or an unprecedented rainfall. *Valparaiso v. Spaeth* (Ind.), 8-1021.

The dedication and acceptance of a road as a highway gives a municipal corporation no right, as against the dedicator's successor in title, to dispose of the surface water in any manner other than that required in properly maintaining and repairing a highway, irrespective of the manner in which the dedicator disposed of the water before dedication. *Rudnyai v. Harwinton* (Conn.), 6-988.

A city is not liable to a property owner for the increased flow of the surface water over or on his property arising merely from the changes in the character of the surface produced by the opening of streets, building of houses, etc., in the ordinary and regular course of the expansion of the city. *Strauss v. Allentown* (Pa.), 7-686.

A municipal corporation is liable in damages and to an injunction if, for the purpose of protecting its highways from surface waters, it accumulates such waters and discharges them by means of sluices or drains upon the property of an adjoining owner. *Rudnyai v. Harwinton* (Conn.), 6-988.

Defense to action for discharge of waters of abutting owner. — In an action against a city to recover damages for injury resulting from its action in casting the surface water from the street on the plaintiff's land, it is reversible error to exclude evidence offered by the defendant to prove that the damages sued for were caused by water from an unprecedented rain. *Valparaiso v. Spaeth* (Ind.), 8-1021.

In an action against a city to recover damages for injury resulting from its action in casting the surface water from the street on the plaintiff's land, it is harmless error to sustain a demurrer to a paragraph of the answer setting up the defense that the damages were caused by an unprecedented and extraordinary rain storm or freshet, as that fact can be proved under the city's answer of general denial. *Valparaiso v. Spaeth* (Ind.), 8-1021.

3. WATERCOURSES.

a. Definitions.

What is natural watercourse. — A stream may be a natural watercourse although its outlet is over an unchanneled surface of lowland, and not into another watercourse. *Rait v. Furrow* (Kan.), 10-1044.

The source of supply of a watercourse may be springs, surface water, or a pond formed by the surface water; but, whatever the source, if it has an element of permanence it becomes a natural watercourse where the water comes to, or collects on, the surface and flows in a well-defined channel and bed, with such banks as will ordinarily confine the water and cause it to run in a definite direction. *Rait v. Furrow* (Kan.), 10-1044.

While the element of permanence is necessary, great age is not an essential attribute

of a watercourse. *Rait v. Furrow* (Kan.), 10-1044.

Where water runs in a well-defined channel, with the bed and banks made by the force of the water, and has a permanent source of supply, it is to be regarded as a natural watercourse, although the stream may be small, its course short, and it may have existed for only a short time. *Rait v. Furrow* (Kan.), 10-1044.

Artificial watercourses may have been created under such conditions that so far as the rules of law and the rights of the public and of individuals are concerned they are to be treated as if they were of natural origin. *Stimson v. Brookline* (Mass.), 14-907.

Where the public authorities, pursuant to a formal legislative act, take part of the water of a river and conduct it three-quarters of a mile through a new channel or ditch, thereby making a watercourse which continues for more than twenty years without change, with the acquiescence of the public authorities and of everybody interested, the same rules of law are applicable to such ditch as to a natural watercourse. *Stimson v. Brookline* (Mass.), 14-907.

If in such a case there is also evidence tending to show that an important reason for the digging of the ditch was the drainage of adjacent meadows, it is a question for the jury whether the ditch was ever in any proper sense a watercourse or merely a ditch for carrying off surface water and draining the land through which it passed. *Stimson v. Brookline* (Mass.), 14-907.

The term watercourse includes an artificial ditch created for the purpose of determining the flow of water from a river, but not for the purpose of carrying off surface water or water percolating through the ground. *Stimson v. Brookline* (Mass.), 14-907.

What is navigable stream. — A stream may be navigable for the purpose of floating logs and timber to market, even though not navigable for boats at ordinary stages. *Ireland v. Bowman* (Ky.), 17-786.

What is shore of sea. — The shore of the sea and its arms is that space of land which is alternately covered and left dry by the rising and falling of the tide; in other words, that space of land which is between high and low water marks. *Mobile Dry Docks Co. v. Mobile* (Ala.), 9-1229.

* b. Rights of riparian owners.

(1) In general.

Origin of riparian rights. — The words "riparian rights" have a well-defined legal meaning; and riparian rights in the nature of an easement have their own origin in, and are dependent upon, the ownership of the upland contiguous to and attinent on the water, and are attached to and appurtenant to the upland, and not to the soil under the water. *Mobile Dry Docks Co. v. Mobile* (Ala.), 9-1229.

The Alabama statute entitled "An act granting to the city of Mobile the riparian rights to the river front," which purports in

its body to grant to the city of Mobile "the shore and the soil under the Mobile river, situated within the boundary line of the city of Mobile," is violative of the state constitution, in that the subject contained in the body of the statute is not described in the title, as riparian rights do not originate in or proceed from the ownership of the shore or the soil under the water. *Mobile Dry Docks Co. v. Mobile* (Ala.), 9-1229.

Use of water in interstate commerce as enlarging rights of riparian owner.

— A riparian owner cannot enlarge his limited right in the waters of the stream by his desire to use the water in commerce among the states. *Hudson County Water Co. v. McCarter* (U. S.), 14-560.

Right to free access to land from ocean. —

The absolute title of the state to the soil under the tide water does not deprive the littoral proprietor of his right to access from his land to the ocean as against strangers, and an obstruction of this right is a private nuisance for which an action will lie or which may be restrained by injunction. *San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co.* (Cal.), 1-182.

Where a town holds lands under the water of a bay, under crown grants in 1666, 1668, and 1693, and an individual owns a piece of the upland bounded by high-water mark under a title derived from the crown by its grantor in 1697, such individual has the right to build a pier from his upland into and over the waters of the bay to deep water for his own convenience in entering and leaving boats, as the title to the lands under water is held by the town in its corporate political capacity, subject to the reasonable exercise by the riparian owner of his right of access to the navigable waters of the bay. *Brookhaven v. Smith* (N. Y.), 11-1.

A riparian owner has, as an incident to the right of access to navigable water upon which his land fronts, the right to build a wharf or pier out into deep water in front of his premises, subject only to the rights of public navigation generally, and to such rules as the legislature may impose for the protection of public rights in navigable waters, and to the exercise of the power of Congress to improve navigation or regulate commerce. *Brookhaven v. Smith* (N. Y.), 11-1.

The secretary of war cannot grant rights in tide lands owned by the state or authorize the erection by a stranger of an obstruction to the right of access of a littoral proprietor. *San Francisco Sav. Union v. R. G. R. Petroleum, etc., Co.* (Cal.), 1-182.

Respective rights of state and riparian owner. —

A state has an interest in maintaining the rivers that are wholly within its limits, substantially undiminished except by such uses as the public welfare may permit for the purpose of turning them to a more perfect use, and such interest is not subordinate to the right of private property of riparian owners. *Hudson County Water Co. v. McCarter* (U. S.), 14-560.

The constitutional power of a state to insist that its natural advantages, such as its

ivers, shall remain unimpaired by its citizens, is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. *Hudson County Water Co. v. McCarter* (U. S.), 14-560.

Right of riparian owner to remove power of state restriction by contract.

— Riparian owners whose rights are subject to state restriction cannot remove them from the power of the state by making a contract concerning them. *Hudson County Water Co. v. McCarter* (U. S.), 14-560.

Right to recover damages for injury to land by floating timber. — While a riparian owner may recover damages for injuries to his land resulting from the negligent manner in which the timber has been driven down the stream, he cannot recover for injuries which are merely the natural result of the use of the stream as a highway for the driving of timber, where the operations have been conducted with reasonable care and prudence. *Mitchell v. Lea Lumber Co.* (Wash.), 10-231.

Right to recover damages for injury to land caused by flood. — Where a municipal corporation uses as an outlet for its sewer system a natural stream within its territorial limits which it is authorized by law to use and improve for that purpose, it is not, in the absence of a statute imposing an absolute duty as to the maintenance of the stream, liable for injury to property caused by the overflow of the stream during freshet, though it has failed to take steps to avert the consequences of a flood, and though the discharge of sewage into the stream has contributed to the overflow. *O'Donnell v. Syracuse* (N. Y.), 6-173.

(2) Ownership of land under water.

Upon change of course of stream. — Under the common law, as well as under the civil law, a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. *Kinkead v. Turgeon* (Neb.), 13-43.

The common law relating to the rights of such riparian owners is applicable in the state of Nebraska and is not inconsistent with the constitution or statutes of that state or the Constitution of the United States. *Kinkead v. Turgeon* (Neb.), 13-43.

Where the Missouri river suddenly changes its course and abandons its former bed, the respective riparian owners are entitled to the possession and ownership of the soil formerly under its waters as far as the thread of the stream, and may maintain ejectment to oust squatters within such limits. *Kinkead v. Turgeon* (Neb.), 13-43.

Riparian ownership as subject to navigation. — The private ownership of land under navigable water is subject to the public right of navigation, and therefore the

government may dredge a channel on such land for the improvement of navigation without compensating the owner for the consequent injury to oyster beds planted by him. The owner's only recourse in such case is to the generosity of Congress. *Lewis Blue Point Oyster Co. v. Briggs* (N. Y.), 19-694.

Extent of ownership bounded by ordinary low-water mark. — On an issue as to the ownership of land bounded in an ancient grant by ordinary low water mark, where the evidence shows that, owing to natural causes, the land has gradually subsided, thus changing the line of average or mean low water, but there are no marks or boundaries to show exactly where such line was at the time of the grant, or at any later date, the title of the party claiming under the grant will be held to extend only to the present line of average or mean low water. On the doctrines applying to accretion and erosion and to the elevation and subsidence of land affecting the water line along the shore of the sea under such conditions, the line of ownership follows the changing water line. *East Boston Co. v. Commonwealth* (Mass.), 17-146.

(3) Diversion.

Diversion of course of stream for generation of electric power. — The owner of lands riparian to a stream has the right to use the water of the stream for the generation of electric power; and it is no objection to the exercise of this right that the power so generated is applied and used upon other lands not riparian to the stream. Nor is such owner confined to the use of the water in its natural course for the generation of electric power. He also has the right, if it is more convenient and effective to do so, to turn the stream out of its natural channel at the upper end of his possessions, carry it in an artificial channel over the land, use it for generating power thereon, and then turn it back into the stream within his lands, provided such interference with natural conditions does not unduly injure others who have rights in the water. *Mentone Irrigation Co. v. Redlands Electric Light, etc., Co.* (Cal.), 17-1222.

Right to divert resulting in diminution of underground flow. — It seems, that if the action of an upper riparian owner in diverting the waters of a surface stream from their natural channel should result in the diminution of an underground flow connected with the surface stream, a lower riparian owner, whose rights in such underground flow were prior in point of time to those of the upper riparian owner, would be entitled to relief against such diversion. *Mentone Irrigation Co. v. Redlands Electric Light, etc., Co.* (Cal.), 17-1222.

Obtaining right to divert by prescription. — The right to draw from a stream an indefinite quantity of water cannot be acquired by prescription. *Penrhyn Slate Co. v. Granville Electric Light, etc., Co.* (N. Y.), 2-782.

Right to divert for purpose of sale.

— The common law recognizes no right in a riparian owner as such to divert the water from a stream in order to make merchandise of it. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

The state of New Jersey has not by statute so changed the rule of the common law as to make the water of its lakes and streams the subject-matter of commerce in the ordinary sense, nor has it authorized water diversion for other than riparian uses, except for a limited class of purposes beneficial to the people of the state, to whom by right of proximity and sovereignty the water rights of the state naturally belong. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

The state of New Jersey, as owner of the bed of the Passaic river where flowed by the tide, has a proprietary right to the continued flow of the stream which is paramount to the rights of the upper riparian owners to withdraw water for purposes other than those incident to riparian ownership. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

The New Jersey General Corporation Act of 1896 does not authorize the incorporation of companies for the purpose of diverting water from streams and storing and selling the water thus diverted. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

Right of residents of state to divert water to another state. — Neither the state of New York nor the people thereof have any inherent right to withdraw a supply of water by artificial means from the territory of the state of New Jersey. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

If it can be assumed that a corporation organized under the New Jersey General Corporation Act of 1875 and its supplements acquired by its charter the right to transport water out of the state, this right has been taken away by the statute making it unlawful for any person or corporation to transport the waters of any fresh-water lake, pond, or stream of the state into another state. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

A charter acquired under the New Jersey General Corporation Act of 1875 and its supplements, for the purpose of damming rivers and streams, and of storing, transporting, and selling water cannot be deemed to authorize the corporation to deplete the streams of the state for the purpose of conveying the water beyond the borders of the state. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

Limitations on right to divert. — The private right of riparian owners to appropriate the waters of a river is subject not only to the rights of lower owners but to the limitation that it must not be exercised to diminish substantially one of the great foundations of public welfare and health, and such right does not sanction an agreement by the possessors thereof to divert an important stream outside the boundaries of the

state in which it flows. *Hudson County Water Co. v. McCarter* (U. S.), 14-560.

The right to receive water from a river through pipes is subject to territorial limits, and those limits may be fixed by the state within which the river flows, even if they are made to coincide with the state line. *Hudson County Water Co. v. McCarter* (U. S.), 14-560.

What constitutes reasonable use of water. — The question as to what constitutes a reasonable share of water to be taken by a riparian owner, is one of fact, which must be determined upon a consideration of the needs of each owner on the stream, the comparative benefit of the respective uses, the comparative injuries caused to each owner by the deprivation resulting from the use by the others, and all the circumstances of the particular case. *Turner v. James Canal Co.* (Cal.), 17-823.

Right of legislature to prohibit diversion. — The control of fresh water running in natural streams, and in lakes and ponds that have outlets in such streams (subject to the interests of the riparian owners therein) resides in the state in its sovereign capacity as a representative of and for the benefit of the people in common, and the legislature may prohibit the abstraction of such water, saving for riparian uses and for purposes authorized by legislative grants. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

The New Jersey statute making it unlawful for any person or corporation to transport through pipes, conduits, etc., the waters of any fresh-water lake, pond, or stream of the state into any other state is constitutional. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

The New Jersey statute forbidding the abstraction of the waters of any fresh-water lake, pond, or stream within the state for transportation beyond the bounds of the state is not violative of the interstate commerce clause of the Federal Constitution, as water abstracted contrary to statutory prohibition cannot legitimately enter into interstate commerce. *McCarter v. Hudson County Water Co.* (N. J.), 10-116.

The New Jersey statute providing that "it shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches, or canals, the waters of any fresh-water lake, pond, brook, creek, river, or stream of this state into any other state for use therein," and authorizing a proceeding for the enforcement of the act, is within the sovereign power of the state, and is effectual to prevent the carrying out of a contract subsequently entered into by a corporation of New Jersey to furnish water from a New Jersey stream to the inhabitants of a community in New York. *Hudson County Water Co. v. McCarter* (U. S.), 14-560.

(4) Obstructions.

Acquisition of right by prescription.

— The right to maintain a dam may be ac-

quired by prescription as well as by grant. *Ireland v. Bowman* (Ky.), 17-786.

Where a dam across a stream has been maintained for fifteen years—the period of limitation for actions to determine an interest in real property—the right to its continued maintenance cannot ordinarily be assailed by upper riparian landowners. *Whitehair v. Brown* (Kan.), 18-216.

Extent of right to obstruct obtained by prescription.—Rights acquired by prescription are measured strictly by the extent of the user during the prescriptive period. When a dam has been maintained at a certain height during a portion of the period, and at a greater height during the remainder thereof, the only right acquired is the right to maintain it at the lesser height. Similarly, the maintenance of a dam which does not constitute a public nuisance for the prescriptive period, gives no right to maintain one which is a public nuisance. *Ireland v. Bowman* (Ky.), 17-786.

Extent of right to flood upper lands acquired by prescription.—The extent of the right to overflow the lands of another acquired by prescription is not determined by the height of the structure of the dam, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement has been habitually or usually flowed during the period of prescription. *Whitehair v. Brown* (Kan.), 18-216.

Change of use as affecting prescriptive right to maintain obstruction.—The prescriptive right acquired by the maintenance of a dam across a stream for the period of limitation is not affected by the purpose for which the water power is employed. A riparian owner who by lapse of time has lost the right to object to a dam used to operate a flouring mill cannot enjoin its continuance as a means of providing power for an electric light plant, unless upon a showing that such change operates to his prejudice by causing a greater obstruction to the flow. *Whitehair v. Brown* (Kan.), 18-216.

Obstruction by bridges, culverts, etc.—Where bridges, culverts, etc., are constructed across watercourses by railroad companies, municipalities, or other corporations, or by individuals, due care must be taken not to obstruct the natural flow, including that at seasons of either low or usual high water, and the failure to do so will render the offender liable for injuries to landowners caused by the penning back of the waters and the overflow of their lands; but such structures need not be constructed in such a manner as to permit the unobstructed flow of the watercourse in times of unprecedented and extraordinary freshets. *American Locomotive Co. v. Hoffman* (Va.), 8-773.

Right to erect wharf or pier at common law.—At common law a riparian owner could not erect a wharf, pier, or other structure in navigable waters without the permission of the crown, as the title to all lands under water was held by the crown,

and any structure erected thereon was deemed to be a purpresture or encroachment upon the rights of the sovereign, and was subject to removal at the pleasure of the sovereign power. *Brookhaven v. Smith* (N. Y.), 11-1.

Liability for obstructing flow.—A boom company is liable in damages to a mill-owner, as for a nuisance, for interfering with or preventing the working of the mill by obstructing the flow of water furnishing the power. *Pickens v. Coal River Boom, etc., Co.* (W. Va.), 6-285.

If the owner of a boom leases it to another to be operated as a boom, and at the time of the lease the boom is a private nuisance damaging a mill on the stream above the boom, the owner of the boom is liable to the mill owner, notwithstanding the lessee may, by addition to the boom, increase its power to damage the mill. *Pickens v. Coal River Boom, etc., Co.* (W. Va.), 6-285.

A log boom in a river which obstructs the flow of water and interferes with the running of a mill is a continuing but not a permanent nuisance so that each day's injury is a new wrong for which action may be brought within the time limited by the statute though more than the statutory period has elapsed since the completion of the boom. *Pickens v. Coal River Boom, etc., Co.* (W. Va.), 6-285.

Where the public authorities take part of the water of a river and conduct it three-quarters of a mile through a new channel or ditch, thereby making a watercourse which continues for more than twenty years without change, if such ditch is in fact a watercourse, a municipal corporation constructing a dam which obstructs the flow of water through such ditch, thereby sending down the river an increased quantity of water, is liable to a lower riparian owner who sustains special damage on account of such increased flow. *Stimson v. Brookline* (Mass.), 14-907.

(5) Pollution.

Right of grantor of use of waters to pollute.—Where a mine owner who has acquired the right to use the waters of a watercourse, sells the right to use such waters under a contract undertaking to deliver the waters to the grantee by means of an artificial ditch and reserving to the grantor the right to use the waters for placer mining purposes, the grantor is entitled to pollute the waters to a reasonable extent only, and he has no right to deposit therein such a quantity of tailings and debris as to inflict serious injury on the grantee's land by covering it with the substances so deposited. The question as to whether pollution is reasonable or unreasonable in extent is one of fact. *Chessman v. Hale* (Mont.), 3-1038.

Obtaining right to pollute by prescription.—When a part of a stream wholly within a municipal corporation is generally devoted to the purposes of an open sewer as against a riparian owner who contributes to and acquiesces in such use, it becomes charged with a servitude authorizing its like use by

other riparian owners. *Cleveland v. Standard Bag, etc., Co. (Ohio)*, 3-21.

Liability for discharging mine water into stream. — A mine owner who, in order to benefit himself, deliberately collects mine water in pipes and discharges it into a stream near the mine is liable in damages to a lower riparian owner who has been accustomed for a long series of years to use the waters in the stream for running his mill and for domestic purposes, where it appears that prior to the opening of the mine the waters were pure and suitable for the purpose for which they were being used, and that as a result of the mining operations the waters have been contaminated and rendered unwholesome and unfit for use by the lower owner, though the mining operations are conducted in a careful and prudent manner, and though no other practical way of carrying on the mining and of disposing of the mine waters is known. In an action by the lower owner to recover damages, evidence that the mining operations are conducted carefully and in the usual and approved manner is admissible to show the absence of malice and wantonness, but is not a complete defense. *H. B. Bowling Coal Co. v. Ruffner (Tenn.)*, 10-581.

Liability of several persons separately discharging filth in stream causing damage. — Where different parties discharge sewage and filth into a stream, which intermingle and cause an actionable nuisance, they are not jointly liable for damages when there is no common design or concert of action but each is liable only for his proportion of the damages. *Mansfield v. Bristol (Ohio)*, 10-767.

(6) Embankments.

Right of riparian owner to erect embankment casting water upon other lands. — A riparian proprietor cannot embank against the natural overflow from an inland stream, when the effect may be to cast an increased volume of water upon the land of other proprietors to their injury. *Keck v. Venghause (Ia.)*, 4-716.

(7) Actions.

(a) In general.

Injunction to restrain flooding of lands by dam. — Assuming that the right acquired by the maintenance of a dam for the period of limitation is not measured by its height, but by the actual extent to which it has caused the overflow of riparian lands, a showing made by a landowner that it has recently occasioned the temporary flooding of his property to a greater extent than ever before does not necessarily entitle him to an injunction against it. He must also show reasonable grounds for fearing the recurrence of the conditions occasioning his new injury with such frequency as seriously to affect the value of his land, or other considerations rendering his remedy at law inadequate. *Whitehair v. Brown (Kan.)*, 18-216.

Injunction to restrain embanking against natural overflow. — To enjoin a riparian proprietor from embanking against a natural overflow, if an injury to lower land will as certainly occur without the embankment because of the natural overflow, the party seeking the injunction must prove that the additional water cast on his land will in fact damage him. *Keck v. Venghause (Ia.)*, 4-716.

Liability for damages caused by increased flow. — To maintain an action for damages for injuries caused by an increased flow of water due to the obstruction of an artificial watercourse used to draw water from a natural watercourse the riparian owner need not prove actual present damages in the use of his land. It is sufficient if it appears that an injurious effect is produced upon his property by the maintenance of the dam, such as to diminish the value of the property if the defendant, by lapse of time, should acquire the right to maintain the dam. *Stimson v. Brookline (Mass.)*, 14-907.

In such case a riparian owner whose land is specially damaged is entitled to maintain an action, notwithstanding the fact that his damage is precisely like that of every other riparian owner. *Stimson v. Brookline (Mass.)*, 14-907.

Laches barring equitable relief for diversion. — In an action by a riparian proprietor for a perpetual injunction restraining the diversion of water from a stream, it is not necessary for the trial court to examine the question of the alleged diversion and, in the exercise of its discretion, determine whether the injunction should be granted, when the undisputed facts show that the plaintiff has slept upon his rights for fifteen years and has made no protest against the diversion of the water by the defendant during that period and against the erection by the defendant of a costly system for using the water diverted, since such facts create an estoppel which necessitates a dismissal of the complaint. *Penrhyn Slate Co. v. Granville Electric Light, etc., Co. (N. Y.)*, 2-782.

(b) Measure of damages.

Pollution of stream. — An action by a riparian owner against a manufacturer to recover damages for injury to the plaintiff's property resulting from the pollution of the stream is an action to recover damages caused by a temporary or abatable nuisance, rather than for a permanent injury to the plaintiff's premises, and therefore a depreciation of the rental value of such premises is an essential element of the damages recoverable. *Muncie Pulp Co. v. Keesling (Ind.)*, 9-530.

In an action by a riparian owner against a manufacturer to recover damages for injury to the plaintiff's property resulting from the pollution of the stream, where the complaint alleges that by reason of poisonous acids, etc., which have been spread over the plaintiff's lands by polluted waters, grass and other crops will not grow on such lands, and that the lands have to a great extent been

rendered unfit for agricultural purposes and the raising of stock, damages for depreciation or diminution of the rental value of the plaintiff's premises are such damages as naturally or necessarily result from the wrongful acts complained of, and therefore they are not special damages and do not fall within the rule that special damages cannot be recovered unless they are specifically alleged in the complaint. *Muncie Pulp Co. v. Keesling* (Ind.), 9-530.

In an action by a riparian owner against a manufacturer to recover damages for injury to the plaintiff's property resulting from the pollution of a stream, where the facts alleged in the complaint show that the nuisance complained of is not necessarily one of permanent character, but that it is one which may be abated, the measure of damages is the loss or diminution of the rental value of the plaintiff's premises occasioned by the nuisance during the time of its maintenance. *Muncie Pulp Co. v. Keesling* (Ind.), 9-530.

Diversion of stream. — In an action by a riparian owner to recover damages for the diversion of a stream, the fact that the diversion has compelled the plaintiff to use for all purposes a well which only affords sufficient water for drinking purposes, in consequence of which the water in the well has become impure, causing his wife to become sick, does not entitle him to recover damages, as such consequence is due to the plaintiff's act in using the well and is not a proximate result of any act of the defendant. *Woodstock Iron Works v. Stockdale* (Ala.), 5-578.

Obstruction of stream. — An assessment of damages considered, in an action by a mill owner against a boom company for maintaining a nuisance resulting in an interference with the plaintiff's mill, and held to be proper and to be based on competent evidence. *Pickens v. Coal River Boom, etc., Co.* (W. Va.), 6-285.

(c) Defenses.

Other obstructions as defense to action for damages for injuries by dam.

— If it appears that a dam erected by a municipality in a ditch or watercourse not only tends to impede the flow of water through the ditch, but so far increases the flow of a river with which the ditch is connected as to cause injury to the land of a riparian owner, the fact that other obstructions have grown or been placed in a ditch does not preclude such owner from recovering damages from the municipality. *Stimson v. Brookline* (Mass.), 14-907.

(d) Pleading.

Bill in equity to enjoin pollution. — Allegations of a complaint considered in an action by the owner of land on a canal against a number of manufacturers to enjoin the defendants from polluting the waters of the creek flowing into the canal, and held that the action could be maintained by the plaintiff as a bill in equity, whether or not

it would be good if the plaintiff sought only to recover damages at law; and the complaint held not open to the objections that it was multifarious or that it did not state facts sufficient to constitute a cause of action. *Warren v. Parkhurst* (N. Y.), 9-512.

Complaint in action for damages caused by pollution. — Allegations of complaint reviewed, in an action by a riparian owner to recover damages for injury to his property resulting from the pollution of the stream, and held to show that the second paragraph of the complaint states a good cause of action, and that such paragraph is not open to the objection that it is bad pleading because the facts herein stated are not direct, but are mainly in narrative form. *Muncie Pulp Co. v. Keesling* (Ind.), 9-530.

Complaint considered in an action by a riparian owner against a manufacturer to recover damages for injury to the plaintiff's property resulting from the pollution of the stream, and held to contain averments sufficient to entitle the plaintiff to recover for the depreciation or diminution of rental value of his property resulting from the alleged nuisance. *Muncie Pulp Co. v. Keesling* (Ind.), 9-530.

In an action to recover damages for the pollution of waters, the prescriptive right on the part of the defendant to pollute the waters held not to appear on the face of the pleadings. *Cheesman v. Hale* (Mont.), 3-1038.

Necessity of allegation of value of rights to suit to restrain interference.

— In an action brought in a federal Circuit Court by several nonresident plaintiffs against resident defendants to enjoin interferences with water rights, where there are no allegations in the bill as to the value of the individual rights of the several complainants, the deficiency cannot be supplied by evidence of damages to land caused by the interference complained of, as the suit is brought to restrain interference with water rights, and not to recover damages. *Eaton v. Hoge* (U. S.), 5-487.

Defenses admissible under general issue in action for flooding.

— In an action against the owner of a mill race to recover damages for flooding the plaintiff's land, the defendant cannot, under the general issue, set up defenses that by prescription and by virtue of a reservation in a deed he has a right to flood the plaintiff's land. *Scott v. Longwell* (Mich.), 5-679.

(e) Evidence.

Sufficiency of evidence in action for negligent driving of timber in stream.

— In an action by a riparian owner against a lumber manufacturing company to recover damages for an injury to the plaintiff's land resulting from the driving of shingle bolts down the stream, the defendant cannot maintain that the evidence is so indefinite that no specific amount of damage can be found thereunder, where there is definite evidence showing that by reason of the driving of the shingle bolts and of the formation of the

jams incidental thereto the soil on the plaintiff's premises has been cut away for a distance of from six to ten feet laterally from the river, and that the injury extends along the lineal course of the stream for a distance of from eight hundred to one thousand feet upon the plaintiff's premises, and that the resultant damages amount to at least fifty dollars, which is the sum alleged in the complaint. *Mitchell v. Lea Lumber Co.* (Wash.), 10-231.

Evidence reviewed, in an action by a riparian owner against a lumber manufacturing company to recover damages for injuries to the plaintiff's land resulting from the driving of shingle bolts down the stream, and held sufficient to show that the defendant was negligent in the manner in which it conducted the operation. *Mitchell v. Lea Lumber Co.* (Wash.), 10-231.

Evidence reviewed, in an action by a riparian owner against a lumber manufacturing company to recover damages for injury to the plaintiff's land resulting from the driving of shingle bolts down the stream, and held to show that the defendant cannot sustain the contention that the action should not have been brought against it but against the boom company, which is a separate and distinct corporation. *Mitchell v. Lea Lumber Co.* (Wash.), 10-231.

Sufficiency of evidence in action to enjoin diversion causing diminution of underground flow. — In an action by a lower riparian owner on a surface stream to enjoin the diversion of the stream from its natural channel by an upper riparian owner, on the ground that such diversion caused a diminution in the underground flow connected with the stream when in its natural channel, evidence examined and held to sustain the findings of the trial court that the diversion complained of did not offset the underground flow, and, therefore, that the plaintiff was not entitled to relief. *Mentone Irrigation Co. v. Redlands Electric Light, etc., Co.* (Cal.), 17-1222.

Sufficiency of evidence in action to enjoin maintenance of bridge as obstruction. — Evidence in an action for damages caused by the obstruction of a river by a railroad bridge and to enjoin the maintenance of the bridge, held sufficient as against demurrer. *White v. Atchison, etc., R. Co.* (Kan.), 11-550.

(f) Instructions.

Duty of plaintiff to minimize damages. — In an action against the owner of a mill race to recover damages for flooding the plaintiff's land, the defendant is not entitled to an unqualified instruction that "it was the plaintiff's duty to have made the injury as light as possible," as at most the plaintiff was bound to do no more in the way of lessening the injury than a person of ordinary prudence would have done. *Scott v. Longwell* (Mich.), 5-679.

Instruction as to measure of damages for obstruction. — Though the meas-

ure of damages in an action by a mill owner against the owner of a boom for interrupting the flow of the stream and preventing the running of the mill is the rental value of the mill "during" the time it was stopped, it is not reversible error for a trial court to use the word "for" instead of "during" in the instruction. *Pickens v. Coal River Boom, etc., Co.* (W. Va.), 6-285.

4. WATERWORKS AND WATER COMPANIES.

a. Statutory Regulations.

Validity of ordinance relating to repair of leaks. — A city ordinance which provides that it shall be unlawful for any corporation, person, or persons owning or operating a waterworks system, or any person having the supervision, management, or control thereof, to allow the pipes, mains, and conduits to remain out of repair and in a leaky condition for a longer period than two days at a time, is a valid police regulation designed for the protection of the public health, comfort, and safety, and is not unconstitutional as class legislation or as being discriminatory in its character, as it affects all of the same class alike. *Crumpler v. Vicksburg* (Miss.), 10-1098.

Defenses to prosecutions for violation of ordinance. — Where in a prosecution for the violation of a city ordinance in allowing water pipes to remain in a leaky condition, a continuance of the cause is sought on account of the absence of a witness by whom it was expected to prove that the leaky condition of the pipes was due to the vibrations caused by passing locomotives, the continuance is properly refused, as such evidence is immaterial for the reason that it was the duty of the water company under such circumstances to construct its mains so as to prevent a leakage. *Crumpler v. Vicksburg* (Miss.), 10-1098.

Evidence in prosecutions for violation of ordinance. — In a prosecution for the violation of a city ordinance making it unlawful to allow water pipes to remain out of repair for more than two days, evidence as to the condition of the street prior to the time of the filing of the affidavit by which the prosecution was instituted is admissible. *Crumpler v. Vicksburg* (Miss.), 10-1098.

Violation of ordinance as continuing offense. — Where one has been convicted of the violation of a city ordinance in allowing water pipes to remain out of repair on a certain street, he cannot be prosecuted again for allowing the pipes to remain out of repair on such street for any length of time prior to the date of the affidavit by which the first prosecution was instituted. *Crumpler v. Vicksburg* (Miss.), 10-1098.

b. Water rates.

(1) Statutory regulation.

Binding effect on water company of franchise granted on condition as to rates. — Where a municipality grants a

water company a franchise upon the condition that it shall supply private consumers with water at not exceeding certain specified rates, a valid and binding contract is formed, and a private consumer is entitled to an injunction restraining a new water company, which succeeds to the franchises and obligations of the old company, from charging him water rates in excess of those prescribed by the contract. *Pond v. New Rochelle Water Co. (N. Y.), 5-504.*

Binding effect on consumer of ordinance fixing water rates. — Where a water company accepts a valid city ordinance fixing maximum rates, the ordinance is binding not only upon the company but also upon private consumers, and therefore the consumers have no right to litigate the questions of reasonableness of rates fixed by the ordinance. *Griffith v. Vicksburg Waterworks Co. (Miss.), 8-1130.*

Power of municipality to make water rates lien on premises. — In the absence of express statutory authority a municipal corporation has no power to make water rentals a lien or incumbrance upon the property as against a subsequent owner or occupant who has not contracted said rentals or made default in their payment. *Linne v. Bredes (Wash.), 11-238.*

Validity of regulation requiring payment of penalty upon turning on water out off for nonpayment of rate. — Municipal corporations in Ohio are authorized to construct waterworks and to supply water to their inhabitants, and to collect money for water supplied, and to make such by-laws and regulations as they may deem necessary for the safe, economic, and efficient management and protection of the waterworks. Under this power a regulation providing that if any party shall refuse or neglect to pay the water rent when due, the water shall be turned off and not turned on again until all back rent and damages shall be paid, and the further sum of one dollar for turning on and off the water, is a reasonable regulation and may be enforced. *Mansfield v. Humphreys Mfg. Co. (Ohio), 19-842.*

(2) Amount of rates.

Right of water company to discriminate in rates. — If a rate to favored customers of a water company is less than the reasonable rate which it may lawfully demand from all on a basis of uniformity, the discrimination is at the company's expense, and does not impinge on any right of consumers generally. The granting to a considerable number of consumers of a rate more favorable than that fixed for consumers generally, in the absence of possible circumstances of justification, would be evidential that the general rate is unreasonably high, which would call for municipal or legislative revision within constitutional limitations. But making a concession to a consumer does not fix a new schedule of rates for all its consumers. *State v. Birmingham Waterworks Co. (Ala.), 20-951.*

The business of a company furnishing water to the public is naturally monopolistic, and, the power of eminent domain having been given that the company may serve the needs of the public more effectively, its business is affected with a public use, and it must serve all consumers with equal facilities and without discrimination. *State v. Birmingham Waterworks Co. (Ala.), 20-951.*

Liability of water company for discrimination in rates. — If, within the limit of rates fixed by an ordinance contract and by its right to a reasonable compensation, a water company should capriciously and oppressively, for ulterior and unlawful purposes, discriminate so as to wrong and injure its consumers, it would plainly abuse its franchise, and the inquiry in such a case would be whether it might not be punished by indictment or process to revoke or annul its franchise. *State v. Birmingham Waterworks Co. (Ala.), 20-951.*

Finality of determination by city officials. — The determination by the proper city officials of the amount due for water supplied is not final, but the consumer who has good grounds for disputing the correctness of the charge made by the city may apply to the courts to determine the amount due and to restrain the enforcement of the rule pending such determination. *Mansfield v. Humphreys Mfg. Co. (Ohio), 19-842.*

Pleading in action to enjoin discrimination. — On appeal from an order dissolving an injunction issued in a suit brought by consumers against a water company, the appellate court will not reverse the order on the ground that the bill charges the defendant with discrimination against the plaintiffs in the matter of rates, and that the defendant's denial of such discrimination is not sufficiently explicit, where it appears from the record that the injunction as actually issued was directed, not against discrimination, but against the action of the defendant in charging rates in excess of those fixed by a city ordinance. *Griffith v. Vicksburg Waterworks Co. (Miss.), 8-1130.*

(3) Installation of meters.

Right of municipality to require installation at expense of owner. — The water board of a city, which is by ordinance vested with the powers conferred on the city to distribute water and to regulate the use thereof and the prices to be paid therefor, has authority to adopt a regulation requiring meters to be installed in all private fire extinguishing systems at the expense of the owners. *Shaw Stocking Co. v. Lowell (Mass.), 15-377.*

The fact that such regulation, which is applicable to all persons who maintain private fire extinguishing systems, is being enforced only gradually, is not such unjust discrimination as affords a reason for enjoining the enforcement of the regulation in any particular case. *Shaw Stocking Co. v. Lowell (Mass.), 15-377.*

It is not unreasonable for a city which is under no obligation to furnish its residents with water for their private fire extinguishing systems to adopt a regulation requiring the installation of meters in private fire service pipes at the expense of the owners. *Shaw Stocking Co. v. Lowell (Mass.)*, 15-377.

c. Contracts for fire protection.

Construction of contract as to service required. — Where the defendant company made a contract with the plaintiff town to furnish water to the plaintiff town, for protection against fire, and to afford as effective service as furnished to the city of Old Town, and it appeared that the plaintiff town in consideration of a reduced rental agreed that the main pipe should be six inches in diameter instead of eight inches as in Old Town, held that the defendant company was only bound to use reasonable care and diligence to furnish a fire service as near the efficiency of the Old Town service as the six inch pipe would enable it to do; that it was not bound to furnish the same efficiency as the Old Town plant furnished, but only such efficiency as could be reasonably obtained with the plant in the plaintiff town. *Milford v. Bangor R., etc., Co. (Me.)*, 20-622.

Construction of contract in favor of inhabitants. — The contract of a waterworks company to furnish a city with water for the use of the fire department construed, and held not to be a stipulation *pour autrui* in favor of the inhabitants of the municipality. *Allen, etc., Mfg. Co. v. Shreveport Waterworks Co. (La.)*, 2-471.

A contract granting a waterworks franchise of a city on condition of supplying the inhabitants with water and furnishing fire hydrants construed, and held to contain a double set of stipulations, one in favor of the inhabitants generally and one in favor of the municipality for the enforcement of the performance of which the inhabitants have no right of action. *Allen, etc., Mfg. Co. v. Shreveport Waterworks Co. (La.)*, 2-471.

Liability of water company for municipal fire loss. — A water company contracting to furnish water for fire protection is not liable for municipal property burned through the company's failure to furnish an adequate supply, in the absence of an express undertaking to furnish protection to such property. *Milford v. Bangor R., etc., Co. (Me.)*, 20-622.

Liability of water company to private citizen for fire loss. — A private citizen cannot maintain an action against a waterworks company to recover damages for losses by fire sustained by him in consequence of the failure of the company to perform its contract with a municipality to furnish a supply of water for the extinguishment of fires, as there is a want of privity between the citizen and the company which prevents him from suing either for breach of the contract or for breach of duty growing out of the contract. *Lovejoy v. Bessemer Waterworks Co. (Ala.)*, 9-1068.

The owner of property which is destroyed by fire through the failure of a water company to furnish water and fire apparatus to the municipality in which it is situated and to the inhabitants thereof, in accordance with its contract with the municipality, cannot maintain an action against the company to recover the damages resulting therefrom. There being no obligation resting upon the municipality to afford him protection against fire, he is not privy to the contract by substitution. *Blunk v. Dennison Water Supply Co. (Ohio)*, 2-852.

A contract between a water company and a municipality whereby the company, for a valuable consideration, agrees to furnish water for the purpose of extinguishing fires that may occur on the premises of private owners and taxpayers of the municipality imposes no legal public duty in that behalf upon the company, and therefore the company is not liable in damages to a private citizen whose property is destroyed by fire in consequence of its negligent failure to furnish a sufficient supply of water. *Thompson v. Springfield Water Co. (Pa.)*, 7-473.

The inhabitants of a municipality have no cause of action for the breach of a contract entered into with a city to furnish water for its fire department, it being immaterial that there may be no one else who can sue for damages. *Allen, etc., Mfg. Co. v. Shreveport Waterworks Co. (La.)*, 2-471.

A water company which has agreed in its contract with a city to supply water, to keep the hydrants in repair, and has the right to cut off the water flow to make repairs, is not liable to a consumer for a fire caused by a gas heater which is highly dangerous if left burning after the water supply has ceased, though the water supply is cut off without notice, where the company does not know of the installation of the heater. *Brame v. Light, etc., Co. (Miss.)*, 20-1293.

d. Liability of water company to trespassers.

Infant falling in reservoir. — A waterworks company is not liable for the death by drowning of an infant who comes upon its land without invitation and there falls into a reservoir or basin of water while playing about it without the knowledge of the company. *Wheeling, etc., R. Co. v. Harvey (Ohio)*, 11-981.

e. Acquisition of waterworks by municipality.

Power of municipality to acquire. — Under the Nebraska statutes the city of Omaha has power to acquire a system of waterworks which extends ten miles from the corporate limits of the city and supplies other municipalities within such distance. *Omaha Water Co. v. Omaha (U. S.)*, 15-498.

The Montana statute providing that where a city desires to acquire a system of water supply already established and owned by a corporation or private individual, it shall have the right to do so by exercise of the power of eminent domain, in case the owner

refuses to sell, does not limit a city to the acquirement of a system of water supply already operated within its limits by a corporation, under a franchise granted by it; but the city may, if it chooses, acquire an entirely new and independent source of water supply, not theretofore operated by any corporation or individual; and it is no objection to the validity of bonds issued to pay for the acquirement of such new and independent source of supply, that there is an existing source of supply in the city owned by a private corporation. *Carlson v. Helena (Mont.)*, 17-1233.

Decision by majority of appraisers as binding. — Where the matter which is the subject of appraisal is the value of a waterworks system sought to be acquired by a city from a water company, and all of the appraisers are qualified and have assembled and acted, the finding or decision of a majority of the appraisers is a valid execution of the power. This is especially true where the appraisers are regarded by the parties as a board vested with the powers of an aggregate body. *Omaha Water Co. v. Omaha (U. S.)*, 15-498.

Misconduct of appraisers. — A board of appraisers to which has been submitted the question of the value of a system of waterworks sought to be acquired by a city from a water company, with authority to ascertain the facts by any means deemed advisable by it, does not commit such misconduct as will avoid its finding by sending, in good faith and without concealment, the books of the company to another state to have them examined by an auditing company selected by it for that purpose, without giving the city access to the books or permitting it to examine witnesses upon their contents, notwithstanding the fact that the board has previously received evidence in the presence of counsel. *Omaha Water Co. v. Omaha (U. S.)*, 15-498.

Inclusion of improper items as affecting appraisal. — Where it appears that in the appraisal of a waterworks system sought to be acquired by a city from a water company several properties are included which are not part of the system, but that such properties are appraised separately, the value of such properties may be deducted from the entire amount of the appraisal without affecting the validity of such appraisal. *Omaha Water Co. v. Omaha (U. S.)*, 15-498.

Where it appears that there are substantial defects in the title of part of the property so appraised, but that such property is not essential to the integrity of the entire system, the value of such property should, if the company is unable to remedy the defects after having been given an opportunity to do so, be ascertained, and the amount of the appraisal should be abated accordingly, the appraisal not being invalidated thereby. *Omaha Water Co. v. Omaha (U. S.)*, 15-498.

Action to enforce contract by municipality to purchase. — In an action by a water company to compel a city to complete the purchase of the company's water-

works system, the city ordinances examined and held to show that the city had, pursuant to the right reserved in the franchise ordinance of the company, elected to purchase the entire system notwithstanding the fact that it extended beyond the city limits and supplied adjacent municipalities, so as to constitute a contract which could not be impaired by subsequent legislation. *Omaha Water Co. v. Omaha (U. S.)*, 15-498.

The fact that the deed for such waterworks system tendered by the company is not such as the city is required to take will not defeat an action for the enforcement of the contract, it being sufficient that the company is able, ready, and willing to do what may lawfully be required of it. *Omaha Water Co. v. Omaha (U. S.)*, 15-498.

Where it appears in such an action that bonds of the water company are outstanding, the trustees named in the mortgages should, during the progress of the case, be made parties so that the liens of the bonds may be discharged or their payment assumed by the city. *Omaha Water Co. v. Omaha (U. S.)*, 15-498.

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Validity of statutes prohibiting carrying of weapons. — The provision of the Kansas constitution that "the people shall have the right to bear arms for their defense and security" is a limitation on the legislative power to enact laws prohibiting the bearing of arms in the militia or any other mili-

tary organization provided for by law, but it is not a limitation on the legislative power to enact laws prohibiting and punishing the promiscuous carrying of arms or other deadly weapons. *Salina v. Blaksley* (Kan.), 7-925.

A legislature may prohibit the carrying of concealed deadly weapons, but cannot prohibit the carrying of deadly weapons in any manner whatsoever. *Re Brickley* (Idaho), 1-55.

The provisions of the statutes of Oklahoma (Wilson's Rev. & Ann. St. Okla. 1903, §§ 2502, 2503) prohibiting the carrying of the weapons therein set out are not repugnant to each other, or violative of section 26 of article 2 of the Bill of Rights of the Constitution of Oklahoma, but are valid provisions of such statutes extended to and put in force in the state by the provisions of section 21 of the Enabling Act (Act June 16, 1906, c. 3335, 34 St. 277) and section 2 of the Schedule of the Constitution. *Ex p. Thomas* (Okla.), 17-566.

The word "arms," as used in section 26 of article 2 of the Bill of Rights of the Oklahoma Constitution providing that "the right of a citizen to keep and bear arms . . . shall never be prohibited," has reference to such arms as are recognized in civilized warfare, and not to the weapons mentioned in the statute of that state which forbids the carrying of weapons. *Ex p. Thomas* (Okla.), 17-566.

Validity of statute regulating firing of gun or pistol. — An ordinance prohibiting the firing of any gun or pistol or other firearm within the limits of the city except on the occasion of a military parade is a valid exercise of the police power of the city. Such an ordinance is not invalid because it also prohibits the burning of any combustible matter in any street or lot of the city, but makes an exception in favor of coopers. The provision as to fires is not unconstitutional as discriminating between citizens, and even if it were, the validity of the prohibition against discharging firearms in the city would not be affected thereby. *State v. Johnson* (S. Car.), 11-721.

Construction of prohibiting statute. — The Tennessee statute providing that "it shall not be lawful for any person to carry publicly or privately any dirk, razor concealed about his person, sword cane, . . . belt or pocket pistol or revolver," is violated by carrying a pistol in a box or compartment beneath the seat of a vehicle, where the weapon is readily accessible for use for defensive or offensive purposes. Of the weapons enumerated by the statute the razor is the only one that must be concealed about the person. *Kendall v. State* (Tenn.), 11-1104.

When statutory forfeiture of weapon takes effect. — Under the Colorado statute prohibiting the carrying of concealed weapons and providing that "all concealed weapons taken from parties violating this section shall be forfeited to the county," but not requiring that the violation shall be established in any particular manner, a forfeiture takes place

and the title to the forfeited property is divested out of the offender at the time of the occurrence of acts constituting a violation of the statute, and not at the time of the conviction of the offender for such violation. *McConathy v. Deck* (Colo.), 7-896.

Liability for negligent use of fire-arms. — Due care for the safety of others is not exercised by a hunter who fires at an object moving in the underbrush without taking time to ascertain whether it is a deer as he supposes, or a human being as it is in fact. *Rudd v. Byrnes*, (Cal.), 20-124.

In an action to recover damages for the negligence of the defendant in shooting the plaintiff by mistake for game, the question of contributory negligence on the part of the defendant is in issue and should be submitted to the jury, where it appears that the parties were hunting deer together, that each was to take a certain station from which he could shoot at the deer when chased by the dogs, and that the plaintiff, instead of taking his agreed station, went into the brush near the defendant's station where he was mistaken for a deer. *Rudd v. Byrnes* (Cal.), 20-124.

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WHARVES.

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Right of riparian owner to build wharf. — A riparian owner on a navigable stream has the right to build a private wharf out so as to reach the navigable waters of the stream. *Weems Steamboat Co. v. People's Steamboat Co.* (U. S.), 16-1222.

Right of municipal corporation to maintain free wharf at intersection of street with river. — A municipal corpora-

tion has the right to erect and maintain a free wharf at the intersection of a street by a river, notwithstanding the fact that the municipality may have merely an easement in such street acquired by the dedication thereof, the fee being owned by an individual. *Williams v. Gainesville (Ala.)*, 14-1134.

Nature of rights of owner of private wharf. — A person who owns a private wharf on a navigable stream has the same property rights therein as in any other property which he owns. He may reserve it for his own exclusive use, or may permit such persons as he chooses to use it and, at the same time, prohibit its use by others. By permitting certain persons to use it, he does not oblige himself to permit its use by the public in general, either with or without compensation; and if, at any time, it becomes necessary to acquire it for the public use, due compensation must be made therefor, the same as for any other property. *Weems Steamboat Co. v. People's Steamboat Co. (U. S.)*, 16-1222.

Right of public to use private wharf. — The public can obtain no adverse right to a private wharf on a navigable stream, as against the owner, by mere user. To obtain such right there must be an intention on the part of the owner to dedicate the property to the use of the public, and an acceptance of such dedication, either express or implied, on the part of some public authority. In the absence of such dedication and acceptance, the use will be regarded as under a simple license, subject to withdrawal at the pleasure of the owner. *Weems Steamboat Co. v. People's Steamboat Co. (U. S.)*, 16-1222.

The owner or lessee of a private wharf on a navigable stream is entitled to an injunction prohibiting its use by another person who insists on using it without his consent; and in an action to procure such an injunction it is no defense that the defendant is willing to pay for the use of the wharf, that there is no other wharf in the vicinity, that its use is very convenient, and even necessary, for the defendant in order to prosecute his business, and that its former owners have permitted the public, upon occasions, to use it. *Weems Steamboat Co. v. People's Steamboat Co. (U. S.)*, 16-1222.

Liability of consignee for wharfage charges. — The consignee of goods shipped by a water route is liable to a wharfinger at the place of delivery for reasonable wharfage charges, where such charges are customary at the wharf of delivery, and there is no express stipulation contrary to such custom in the contract of carriage. *Riddick v. Dunn (N. Car.)*, 13-382.

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1. CONTRACTS TO DEVISE OR BEQUEATH.

Power of promisor to revoke after performance by promisee. — An agreement to leave property by will is not ambulatory or revocable after the performance on the part of the promisee. *Best v. Gralapp* (Neb.), 5-491.

Sufficiency of agreement. — It is sufficient if an agreement to devise land is that the promisee shall receive the property, or that it shall be left him at the decease of the promisor. There need not be an express promise to make a will. *Best v. Gralapp* (Neb.), 5-491.

An agreement by a person, in consideration of the privilege of naming a child, that he would leave the child something at his death, but failing to state what amount of property he would leave or to provide a means by which the amount could be ascertained, is invalid for uncertainty, and is not aided by the testator's declarations to third persons as to how much he would leave the child or by bequests to the child in revoked wills. *Freeman v. Morris* (Wis.), 11-481.

Specific performance of agreement. — An agreement to devise land, upon a sufficient consideration, may be enforced specifi-

cally in a proper sense. *Best v. Gralapp* (Neb.), 5-491.

2. WHAT CONSTITUTES WILL.

In general. — Any writing, however informal it may be, made with the expressed intent of giving a posthumous destination to the maker's property, if executed in accordance with the statutory requirements, is a good testamentary disposition. *Noble v. Fickes* (Ill.), 12-282.

The Connecticut statute of wills is prohibitive and exhaustive. It permits a person to dispose of his property by will upon complying with certain prescribed conditions, and not otherwise; and one of the conditions prescribed is that each bequest shall be contained in a writing executed with the prescribed formalities. *Hatheway v. Smith* (Conn.), 9-99.

Under the Connecticut statute of wills, a writing is not a will unless it contains in itself language by which the subject and object of the testamentary gift intended is expressed, and unless it is executed in the manner prescribed by the statute. *Hatheway v. Smith* (Conn.), 9-99.

An instrument in the form of and duly executed as a will, which directs the payment of debts and appoints an executor, constitutes a will, though it does not further affect the disposition of the property of the testator. *Mulholland v. Gillan* (R. I.), 1-366.

Instrument authenticated as deed. — An instrument which is authenticated as a deed, but is not authenticated as a will, cannot be probated as a testamentary paper. *Hunt v. Hunt* (Ky.), 7-788.

An instrument in the form of a deed, which is authenticated as a deed and not as a will, and which conveys real property with words of present grant, covenant of warranty, and the like, but with the proviso that the deed shall not take effect until the death of the grantors, gives the grantee a present estate vesting at the time of the delivery of the instrument but not taking effect in possession until the death of the grantors. *Hunt v. Hunt* (Ky.), 7-788.

An unambiguous deed in statutory form made in consideration of natural love and affection and on its face purporting to convey a present interest, cannot be converted into a will by proving an *anima testandi* in the maker by parol evidence, although the instrument was not delivered in the lifetime of the maker and was attested by two witnesses. *Noble v. Fickes* (Ill.), 12-282.

Gift of money to take effect at death of giver. — A gift of money to take effect after the death of the giver is testamentary in character and invalid when not made in the manner prescribed by the statute of wills. *Stevenson v. Earl* (N. J.), 1-49.

Presumption of testamentary intent. — An instrument purporting to be a will and executed with all the statutory formalities is conclusively presumed to have been executed

animo testandi. In re Kennedy (Mich.), 18-892.

What constitutes joint will. — A joint will is one where the same instrument is made the will of two or more persons and is jointly signed by them. Such a will is not necessarily either mutual or reciprocal. As regards probate, it is the will of each of the makers and at the death of one may be probated as his will, and again be probated at the death of the other as the will of the latter. *Frazier v. Patterson* (Ill.), 17-1003.

What constitute mutual wills. — Mutual wills may be defined as the separate wills of two persons which are reciprocal in their provisions. *Frazier v. Patterson* (Ill.), 17-1003.

What constitutes joint and mutual will. — A joint and mutual will is one executed jointly by two or more persons, the provisions of which are reciprocal, and which shows on its face that the devisees are made one in consideration of the other. *Frazier v. Patterson* (Ill.), 17-1003.

3. FORMAL REQUISITES TO VALIDITY.

a. In general.

Necessity that statutory requirements be observed. — In the interpretation of the Ohio statute regulating the execution of wills the intention of the legislature controls, and a will that is not executed as required by statute is invalid, notwithstanding the intention of the testator. *Sears v. Sears* (Ohio), 11-1008.

The statute prescribing the formalities for the execution of wills was enacted for the prevention of fraud, but a failure to comply with such formalities is not excused by showing that there was in that particular case no fraud. *Matter of Seaman* (Cal.), 2-726.

Instrument partly printed as "writing" within statutory requirement. — The word "writing" as used in the Ohio statute relative to the execution of wills, includes printing, and a will is not invalid because it is partly in print. *Sears v. Sears* (Ohio), 11-1008.

b. What law governs.

In general. — The law of a state cannot extend beyond the jurisdiction thereof, and where the rights to property under a will depend on a foreign law the rights are determined in accordance with that law, but where rights depend on the law of the forum the foreign law is immaterial. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Laws in force at time will executed or time of testator's death. — The law existing at the date of the execution of a will disposing of real estate, and not that at the date of the death of the testator, governs the formalities of the execution and attestation thereof. *Barker v. Hinton* (W. Va.), 13-1150.

When a testator makes a will, formally executed according to the law existing at its execution, it would unjustly disappoint his

right of disposition to apply to it a law subsequently enacted, though before his death. *Barker v. Hinton* (W. Va.), 13-1150.

The West Virginia statute of 1882 amending the then existing statute as to the manner of executing wills, by making the additional requirement that witnesses subscribing a will should do so "in the presence of each other," applies only to wills executed, re-executed, republished, or revived, subsequent to the date of that statute. *Barker v. Hinton* (W. Va.), 13-1150.

c. Signature of testator.

Necessity of signature at end of will.

— On the trial of an action to contest the validity of a will, when it appears on the face of the will that it was not signed at the end thereof as required by statute, it is not error for the trial judge to direct a verdict that the writing is not a valid will. *Sears v. Sears* (Ohio), 11-1008.

What constitutes signature at end of will. — Under the statutory provision that a will must be subscribed "at the end" thereof, the signature need not be in immediate juxtaposition with the last words of the instrument, but must be so near as to constitute a substantial compliance with the statute and to indicate that the testator intended to sign at the end. Such an intent of the testator cannot be shown by parol evidence. *Matter of Seaman* (Cal.), 2-726.

A statutory provision that a will must be subscribed "at the end" thereof requires the testator's name to be written at the termination of the testamentary provisions and not at the physical end of the paper. *Matter of Seaman* (Cal.), 2-726.

A will is not signed at the end thereof by the party making the same, when it is written by the party making it, upon a printed blank form containing a testimonium clause with blanks for the name of the place and the date of execution, which he fills, and immediately following this is a blank line for the signature of the maker, which he leaves blank, although he has written his name in the attestation clause, immediately following the testimonium clause, in a blank left for the name of the testator and may have intended such act as a signing. *Sears v. Sears* (Ohio), 11-1008.

A will is not invalidated by the fact that it contains words written by the testator after his signature, where the words do not dispose of any part of the estate and are not testamentary in character. *Beaumont's Estate* (Pa.), 9-42.

An instrument considered and held not signed "at the end" thereof in compliance with the statute and not entitled to probate as a will. *Matter of Seaman* (Cal.), 2-726.

d. Publication.

Necessity of publication. — The Michigan statute does not require publication as one of the formalities requisite to the due execution of a will. *In re Kennedy* (Mich.), 18-892.

e. Attestation.

(1) Nature of requirement.

Attestation as essential to validity.—

The requirement of a certain number of subscribing witnesses to a will is not a rule of evidence, but a rule of substantive law. The subscription by the witnesses is a formal part of the making of the will, without which it cannot operate. *Swanzy v. Kolb* (Miss.), 18-1089.

(2) Competency of witnesses.

Devisee or legatee. — The Mississippi statute (Code 1871, § 1101) providing that if a devisee or legatee under a will is a subscribing witness "and the will cannot otherwise be proved," such devise or bequest shall be void and the witness shall be competent as to the residue of the will refers to proof of the execution of the will, and not to proof of its contents. *Swanzy v. Kolb* (Miss.), 18-1089.

But under the Illinois statute providing that any "beneficial devise, legacy, or interest" given to an attesting witness to a will shall be void unless the will is otherwise attested by a sufficient number of witnesses, and that such attesting witness may be required to testify as to the residue of the will, an executor who attested the execution of the will is competent to testify in reference to such execution. The establishment of the will by his testimony has, however, the effect of barring him from acting as executor or from participating in the administration of the estate. *Jones v. Grieser* (Ill.), 15-787.

Executor. — An executor has such a pecuniary interest in the probating of the will which names him as executor, that, in the absence of statutory authority, he is not a competent witness to the execution of the will. *Jones v. Grieser* (Ill.), 15-787.

Person not previously acquainted with testator. — It is not absolutely essential to the validity of a will that the subscribing witnesses should have been acquainted with the testator prior to the time of its execution. *Harris v. Martin* (N. Car.), 17-685.

Necessity that witness be "credible."

— The word "credible" is used in the sense of "competent" in the Mississippi statute (Code 1871, § 2388) requiring wills to be attested by three credible witnesses. *Swanzy v. Kolb* (Miss.), 18-1089.

Necessity that witness be disinterested. — Under a statute providing that legacies or devises for religious or charitable uses shall be void unless the will is executed at least one month before the testator's death and is attested by two credible and at the time "disinterested" witnesses, the interest which disqualifies a person from being an attesting witness is such an interest as appears to exist at the time of the execution, either by the terms of the will or by reason of the fact that such person is then interested in the religious or charitable institu-

tion for which provision is made by the testator. *Kessler's Estate* (Pa.), 15-791.

Under such statute a person who is a trustee and officer of a church which is a legatee under the will, who is one of two persons to whom stock of a private corporation is given in trust for religious and charitable uses, with power to vote such stock, who is given an option to purchase such stock at a price to be fixed by appraisers, who is a stockholder, director, officer, and employee of such corporation, the benefits thereof accruing to him by reason of having the power to vote the stock so held in trust, and who is entitled to commissions as executor as well as trustee under the will, is disqualified to act as an attesting witness. Consequently if such person is one of the two attesting witnesses the bequests to religious and charitable uses are invalid. *Kessler's Estate* (Pa.), 15-791.

Time for determination of competency. — The competency of an attesting witness is to be determined as of the date of the attestation and not as of the time when the will is presented for probate. *Bruce v. Shuler* (Va.), 15-887.

(3) Subscription by witnesses.

Necessity for subscription. — Under a statute providing that legacies or devises for religious or charitable uses shall be void unless the will is executed at least one month before the testator's death and is attested by two credible and at the time disinterested witnesses, the attesting witnesses must be subscribing witnesses. *Kessler's Estate* (Pa.), 15-791.

Necessity that witness see testator sign. — Under such statute an attesting witness need not see the testator sign the will and need not know the contents thereof. *Kessler's Estate* (Pa.), 15-791.

Necessity that subscription be in presence of testator. — The word "attested," as used in the Colorado statute, providing that all wills of real or personal property shall be "attested in the presence of the testator by two or more witnesses," includes subscription by the witnesses, as well as the mental act of observing the execution of the will, and such subscription must be in the presence of the testator. *International Trust Co. v. Anthony* (Colo.), 16-1087.

When subscription is in presence of testator. — It will be considered that a will was attested in the presence of the testator where it appears that he understood and was conscious of what the witnesses were doing when they subscribed and could, if it had not been for his physical infirmities, readily have changed his position on the bed so that he could have seen and heard what they were doing when they wrote their names if he had been so disposed. *Healey v. Bartlett* (N. H.), 6-413.

Order of subscription by testator and witnesses. — Under the Michigan statute (Comp. Laws 1897, § 9266) providing that no will shall be effectual unless attested and subscribed in the presence of the testator by

two competent witnesses, a will otherwise regularly executed is not invalid because one witness signs before the testator signs and the other signs immediately thereafter, where the signing is done in the presence of the testator. *In re Horn* (Mich.), 20-1364.

The witnesses to a will must subscribe their names as witnesses after the will is signed by the testator, there being nothing to attest until his signature has been annexed. It makes no difference that the signing and attestation are each part of one and the same transaction. *Lane v. Lane* (Ga.), 5-462.

What constitutes subscription. — A person is an effectual subscribing witness to a will notwithstanding her name is written by the other witness, where she has hold of the pen at the time and her taking part is done *animus testandi* at the request of the testator and in his presence; and it does not matter that she is able to write her own name. *In re Pope* (N. Car.), 4-635.

(4) Attestation clause.

Necessity for attestation clause. — If a will is in fact signed, attested, and subscribed as required by statute, a formal attestation clause is not necessary. *Williams v. Miles* (Neb.), 4-306.

(5) Proof of attestation.

Where subscribing witnesses have forgotten transaction. — A will offered for probate, bearing the genuine signature of the testator and properly witnessed, is entitled to probate although the subscribing witnesses are unable to recollect the facts surrounding the execution of the instrument, and although there is no attestation clause reciting the acts necessary to be done in the execution of a will, where there is evidence which establishes that the instrument was duly executed by the testator as his last will, in the presence of the persons who signed as attesting witnesses, and that it was in the handwriting of the testator and was found among his private papers, and that the objects of his bounty designated in the instrument were persons and objects which had received his utmost consideration and care in life. *Mead v. Trustees of Presbyterian Church* (Ill.), 11-426.

Admissibility of evidence of experiments with relation to possibility of testator seeing and hearing. — On an issue as to whether a will was attested in the presence of the testator, where it appears that the testator and the witnesses were in different rooms during the subscription, it is competent to permit the witnesses to testify as to experiments they have made in occupying the respective positions of the testator and the witnesses and as to what they could see and hear from those positions. *Healey v. Bartlett* (N. H.), 6-413.

f. Holographic wills.

Entries in "journal cash book" as holographic will. — A writing consisting of entries in a writer's "journal cash book"

will be admitted to probate as a will, where it disposes of all of the writer's personal property, and the evidence shows that he had no real property, and every fact surrounding the transaction shows a clear intention on the part of the writer that the property should not pass *in presenti* as a gift, but should only pass at his death. *Beaumont's Estate* (Pa.), 9-42.

Caption in handwriting of another as destroying character as holographic will. — A holographic will perfect as to the dispositive part is not invalidated by the fact that the caption thereof is in the handwriting of a person other than the testatrix. *Baker v. Brown* (Miss.), 1-371.

Part of date printed as destroying character as holographic will. — A will is not "entirely written, dated, and signed by the hand of the testator himself" as required by the Montana statute (Rev. Codes, § 4727), so as to constitute it a valid holographic will, if the first three figures of the year in the date are printed, though all the rest of the will is written by the hand of the testator. *In re Noyes's Estate* (Mont.), 20-366.

Sufficiency of misspelled signature. — A holographic will made by an illiterate testator by the name of John W. Bradford will not be held invalid because signed "J. W. Bradfor." *Succession of Bradford* (La.), 18-766.

Necessity that holographic will be found among testator's valuable papers. — Under the Tennessee statute a paper cannot be sustained as a holographic will unless it is found among the testator's valuable papers, or in the hands of a person with whom it has been lodged for safe keeping, though it meets all the other requirements of the statute. *Brogan v. Barnard* (Tenn.), 5-634.

What constitutes "valuable papers." — As used in the Tennessee statute relating to holographic wills, the term "valuable papers" means documentary papers deemed valuable and worthy of preservation by the testator and in which he had an interest of some nature. Hence where the testator was the postmaster, a paper found in a box containing only postage stamps and other papers belonging to the federal government cannot be sustained as a holographic will. *Brogan v. Barnard* (Tenn.), 5-634.

g. Nuncupative wills.

Expectation of death essential to validity. — The term "at the time of the last sickness" of the testator in the provision of the Washington Code relating to nuncupative wills should be construed to apply to cases wherein the illness has progressed to such a point that the testator realizes that he is liable to die therefrom at any time, and, in view of such expected death and as preparatory thereto, makes a verbal will, and he thereafter dies of such illness, the fact that at the time of making such will or thereafter he has an opportunity to make a written will not being determinative of the validity of

such verbal will. *In re Miller* (Wash.), 14-1163.

Under the Kansas statute providing that a verbal will may be made in the last sickness of the testator it is not necessary that the testator must be in *extremis* or *in articulo mortis*, nor is it necessary that he be prevented from making a written will by the surprise of sudden death. *Baird v. Baird* (Kan.), 3-312.

A requirement that a verbal will to be valid must be made in the last sickness is satisfied if a fatal disease has progressed to such a point that the testator expects and is liable to die therefrom at any time, and in view of such expected death and as preparatory thereto, such will is made, and if death ensues in such illness. *Baird v. Baird* (Kan.), 3-312.

Sufficient opportunity to make written will as destroying validity. — A verbal will made in expectancy of death is not rendered invalid by the fact that there had been prior preparation to make it, nor by the further fact that there were sufficient time and opportunity thereafter to make a written one. *Baird v. Baird* (Kan.), 3-312.

Where a verbal will is made in a last sickness, of which the testator dies, when such sickness has progressed to such a point that he expects death at any time, and realizes that he is liable to die therefrom at any time, and in view of such expected death, and as preparatory thereto, makes a will near to the time of his death, such a will is made in the last sickness of the testator, although a sufficient time may have intervened between the making of the oral will and the death of the testator to have permitted the making of a written will. *Godfrey v. Smith* (Neb.), 10-1128.

Formal request to bear witness as essential to validity. — A formal request from the deceased to all or some of three or more witnesses present to bear witness that the words spoken are his will is essential to the validity of a nuncupative will. *Godfrey v. Smith* (Neb.), 10-1128.

Sufficiency of request to bear witness. — The requirement of the statute that one making a verbal will shall call upon a person to bear witness is satisfied where the testator at the time said to those standing near: "I want you to see that it is carried out the way I want it to be." *Baird v. Baird* (Kan.), 3-312.

Proof required to establish. — Nuncupative wills are not favored by the courts, and must be proved in strict conformity with the statute authorizing them. *Godfrey v. Smith* (Neb.), 10-1128.

Establishment by testimony of interested witnesses. — A nuncupative will cannot be established by witnesses having an interest in the will as the only legatees. *Godfrey v. Smith* (Neb.), 10-1128.

h. Codicils.

In general. — The principle of the law of wills which treats a codicil as being attached

to the validly executed will which it modifies and ratifies, and as constituting with the will one document, is not altered by the Connecticut statute of wills. *Hatheway v. Smith* (Conn.), 9-99.

Necessity of physical attachment to will. — An instrument purporting to be a codicil to the last will and testament of one deceased, which unequivocally identifies the will to which it is alleged to be a codicil, becomes effective as such when duly executed and probated, although not physically attached to the will. *Ferrell v. Gill* (Ga.), 14-471.

Sufficiency of attestation of codicil. — Where the evidence in an action to probate a codicil to a will shows that but one of the attesting witnesses subscribed the codicil in the presence of the testator, probate will be refused. *International Trust Co. v. Anthony* (Colo.), 16-1087.

i. Joint and mutual wills.

Validity. — A will executed by both a husband and wife whereby the survivor is entitled to the full beneficial use of the property of the other for his or her life is a valid instrument and may be successfully proved as the separate will of each maker. *Gerbrich v. Freitag* (Ill.), 2-24.

The fact that husband and wife devise their property reciprocally to each other by the same instrument, or that it is a joint will, does not deprive it of validity unless the provisions of the instrument are such that the disposition of the property is suspended after the death of one until the death of the other, so that it cannot be executed as the separate will of the deceased party; and where such single instrument is not of the latter character it may be probated upon the death of one as his or her separate will, and upon the death of the other can be again proved as the separate will of the other. *Gerbrich v. Freitag* (Ill.), 2-24.

4. TESTAMENTARY CAPACITY.

a. In general.

Married woman. — Since the change made by the Georgia Act of 1866, and the constitution of 1868, in the status of married women in respect to rights of property, a married woman may make a valid will disposing of the property constituting her separate estate, without the consent of her husband or any authority vested in her by virtue of a marriage contract between her and the husband. *Ferrell v. Gill* (Ga.), 14-471.

Scope of inquiry. — Under the law of Illinois, a person of requisite age, who is of sound mind and memory, has power to devise all of his property in any way he may elect; and where the validity of the will is challenged on the ground that the testator did not possess the requisite testamentary capacity, the ultimate and final question is, Did the testator at the time when the instrument was executed possess the sound mind

and memory required by the statute of wills? *Owen v. Crumbaugh* (Ill.), 10-606.

Where, in cases of senile insanity, the evidence fails to show that before or at the time of the execution of the will the testator was afflicted with that disease, the inquiry should be conducted according to the general rules applicable to other forms of insanity. *In re Winch* (Neb.), 18-903.

b. Extent of capacity required.

In general. — Any mere mental aberrations resulting in the subnormal exercise of the faculties of a testator, which do not result in such impairment of his reason, judgment, and memory as to render him unable to understand the business of making a will and the effect of the disposition to be made of his property, will not vitiate his will. *Owen v. Crumbaugh* (Ill.), 10-606.

An instruction to the jury upon the issue of testamentary capacity, that "if you find that said testator, at the time in question, was mentally incapable of making a disposition of his property with judgment and understanding with reference to the amount and situation thereof, and the relative claims of those who should have been the objects of his bounty, you may find that he did not possess the testamentary capacity requisite to the making of a will," together with other instructions examined, exceed any admissible application of the principle that a jury may consider what might ordinarily be regarded as an unjust and unreasonable provision of a will as a circumstance in connection with other facts and circumstances in evidence tending to show a want of testamentary capacity at the time of the execution of the will. *Morgan v. Morgan* (D. C.), 13-1037.

c. Persons adjudicated incompetents.

Adjudication that person lacks mental capacity to care for self and property as rendering person prima facie non compos. — An adjudication under the Vermont statute that a person is merely lacking in mental capacity to take care of himself or his property, is not an adjudication that such person is *non compos* and does not render him *prima facie* incapable of making a will. *In re Cowdry* (Vt.), 3-70.

d. Persons harboring insane delusions.

Character of delusions incapacitating. — An insane delusion which will invalidate a will must be such an aberration as indicates an unsound or deranged condition of the mental faculties, as distinguished from a mere belief in the existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence. A belief which results from a process of reasoning from evidence is not an insane delusion, however imperfect the process may be, or however illogical the conclusion. *Owen v. Crumbaugh* (Ill.), 10-606.

Denying paternity of child as insane delusion. — The fact that a testator has

disclaimed the paternity of children born of his marriage and has disinherited them for that reason carries no presumption and is no evidence of an insane delusion, and in the absence of evidence that he had proof of his wife's chastity which no sane mind could fairly reject, instructions upon an insane delusion and monomania in entertaining such belief as to the paternity of his wife's children are without foundation and are erroneous. *Morgan v. Morgan* (D. C.), 13-1037.

e. Evidence.

(1) Presumptions and burden of proof.

Burden of proof of insanity. — In a proceeding to contest the validity of a will on the ground of the insanity of the testator, the burden is on the contestant to show the insanity affirmatively and by a preponderance of evidence. *Estate of Dolbeer* (Cal.), 9-795.

(2) Admissibility.

Condition of testator before and after execution. — In a proceeding to probate a will, where insanity is relied on as a defense, the capacity of a testator to make the will is to be decided by the state of his mind at the time it was executed; and to shed light on that question, evidence showing the condition of the testator's mind long prior, closely approaching, and shortly subsequent to the execution of the will is competent, but such evidence should be admitted for no other purpose. *In re Winch* (Neb.), 18-903.

Admissibility of declaration of legatee that testator was insane. — In a will contest admissions of a legatee that the testatrix was of unsound mind at the time of her death, and had committed suicide, are inadmissible because such declarations cannot bind the other legatees, and the same rule applies whether the evidence relates to mental incapacity or to undue influence. *Estate of Dolbeer* (Cal.), 15-207.

Declaration of third person as to opinion of sanity. — In a proceeding to contest a will on the ground of the testator's lack of testamentary capacity, a witness for the contestant cannot give in evidence a statement made by her to her daughter as to her opinion of the testatrix's actions on a certain occasion. *Estate of Dolbeer* (Cal.), 9-795.

In a proceeding to contest the validity of a will containing several devises or bequests, the contestant cannot introduce in evidence, on an issue of the testator's mental capacity, declarations made by one of the devisees or legatees. *Estate of Dolbeer* (Cal.), 9-795.

Specific acts showing unsoundness of mind. — On the trial of the issue of a testator's sanity, it is within the discretion of the judge to fix the limit of time after the making of the will within which evidence tending to show specific acts of unsoundness of mind on the part of the testator should be confined, and to exclude testimony outside of those limits. *In re Winch* (Neb.), 18-903.

Verdicts of coroner's juries showing suicide of testator and her mother. — In a proceeding to contest the validity of a will on the ground of the testator's mental incapacity, where it appears that both the testatrix and her mother committed suicide at different times, the verdicts of the coroners' juries are not admissible in evidence. *Estate of Dolbeer* (Cal.), 9-795.

Insanity of relatives. — In a proceeding to contest a will on the ground of the mental incapacity of the testatrix, the proponent may introduce evidence that the testatrix's deceased father not only never showed any trace of insanity in his lifetime, but was a man of somewhat exceptional mental vigor and business capacity, who by his own efforts amassed a large fortune, especially where the contestant's contention is that the testatrix was a victim of hereditary insanity and that the taint was in her blood from both her mother's and her father's people. *Estate of Dolbeer* (Cal.), 9-795.

Where it is sought to show that a testatrix was afflicted with paresis at the time she executed her will, testimony by physicians that her mother and brother had been afflicted with general paresis is not admissible in the absence of evidence tending to show that the particular form of the disease from which the testatrix and her relatives suffered was of such transmissible character that she might be said to have derived it from her ancestors. *Matter of Myer* (N. Y.), 6-26.

In an action to contest the validity of a will where there is no proof whatever of insane conduct on the part of the testator, evidence that the testator's sisters suffered from mental derangement due to an inherited tendency is not admissible. *Pringle v. Burroughs* (N. Y.), 7-264.

Opinion of nonexpert as to sanity of testator. — Where the contestant of a will, for the purpose of proving that the testator was of unsound mind, introduces witnesses to testify to certain acts and conversations of the testator, it is not prejudicial error to permit the proponent, on cross-examination, to bring out facts and circumstances tending to show sanity, and to ask the opinion of the witnesses as to the testator's sanity, unless the admission of such evidence upon cross-examination affects the contestant's rights in a manner or to an extent that they would not be affected by the giving of the same evidence by the same persons upon direct examination as witnesses for the proponent. *Westfall v. Wait* (Ind.), 6-788.

In a will contest, it is not prejudicial error to exclude a deposition by the testatrix's banker wherein the deponent testified that on the day the testatrix committed suicide she called at his office and drew some money and handed it to a woman who accompanied her, and that on that occasion the testatrix acted in a rational manner and appeared to be rational, and that "it never entered his head to think she was other than rational," though the deponent on his cross-examination, when asked whether at any subsequent time

he had had any suspicion of the fact that the testatrix was irrational, answered that after he had read the newspaper account of her death it seemed to him "in thinking it over that she was in a tense mood, never irrational." *Estate of Dolbeer* (Cal.), 9-795.

In a proceeding to contest the validity of a will on the ground of the mental incapacity of the testatrix, hypothetical questions involving facts not testified to by the witnesses themselves cannot be put on either direct or cross-examination to nonexpert witnesses who were merely familiar friends of the testatrix. *Estate of Dolbeer* (Cal.), 9-795.

Opinion based on hearsay. — In a will contest, a question which asks a witness to give an opinion as to the mental capacity of the testatrix at a specified time "from what he had learned" of her is incompetent as calling for hearsay evidence. *Estate of Dolbeer* (Cal.), 9-795.

(3) Sufficiency.

In general. — In a contested probate proceeding, evidence examined and held insufficient to support the contention of the contestants that the testator was insane at the time of the execution of the will. *Succession of Bradford* (La.), 18-766.

Evidence reviewed, in an action to contest a will on the ground of the testator's lack of testamentary capacity, and held insufficient to overcome a presumption of sanity, and absolutely insufficient to justify the submission to the jury of the question of the testatrix's mental competency. *Estate of Dolbeer* (Cal.), 9-795.

Evidence that testator was a spiritualistic believer as sufficient. — In a will contest, where there is not a scintilla of evidence of insane delusions in the testator outside of the bare fact that he believed in the general doctrine of the Spiritualist organization, there is no evidence of insanity or of want of testamentary capacity. *Owen v. Crumbaugh* (Ill.), 10-606.

Evidence reviewed, in a proceeding to contest a will for lack of testamentary capacity, and held to show that there is no foundation upon which a finding of general insanity of the testator could rest, notwithstanding the fact that he was an ultraist regarding all the doctrines embraced in the articles of faith of the Spiritualist association. *Owen v. Crumbaugh* (Ill.), 10-606.

Evidence reviewed, in a proceeding to contest a will on the ground of lack of testamentary capacity, and held to show that the trial court erred in refusing to direct a verdict for the proponent, inasmuch as there was no evidence of lack of testamentary capacity other than the bare fact that the testator was a Spiritualist. *Owen v. Crumbaugh* (Ill.), 10-606.

In a will contest, where there is no evidence of insane delusions in the testator outside of the bare fact that he believed in the general doctrine of the Spiritualist organization, and the proponents offer to prove by an officer of

the organization the belief of the organization on a certain point believed by the testator, but this evidence is excluded at the instance of the contestant, the contestant will not be permitted to profit on appeal by the absence of the evidence. *Owen v. Crumbaugh* (Ill.), 10-606.

Opinion of expert, based on hypothetical question, contrary to all other evidence. — In proceedings to contest a will on the ground of lack of testamentary capacity, where the proof shows beyond all doubt that the testator was in the full possession and proper exercise of all his mental faculties, an opinion of an expert, based on a hypothetical state of facts not inconsistent with legal sanity, that the testator was insane, has little or no weight, and in the absence of any other evidence of insanity will not warrant the trial court in refusing to direct a verdict against the contestant. *Owen v. Crumbaugh* (Ill.), 10-606.

In a will contest, evidence by physicians that they are of opinion that the testatrix at the time of her death was suffering from a form of insanity known to medical science as "simple melancholia" has no probative value on the question whether the testatrix was of a sound and disposing mind at the time she executed her will, where neither of the physicians knew the testatrix in her lifetime, where the hypothetical question in response to which the opinions are given eliminates all facts overwhelmingly proved in favor of the testatrix's sanity, bears with emphasis upon and throws into prominence trifling circumstances, and contains many statements not justly borne out by the evidence itself, and where it appears that the death of the testatrix, which was self-inflicted, occurred several months after the execution of the will. *Estate of Dolbeer* (Cal.), 9-795.

Unnatural and unjust disposition of property. — A so-called unnatural and unjust disposition of a testator's estate by a will which in its terms and recitals betrays no other indication of a disordered mind or defective memory on the part of the testator is not alone competent evidence to be submitted to the jury as a circumstance indicative of a want of necessary testamentary capacity, as it is only where there is other evidence tending to show that the testator labored under an insane delusion which influenced the disposition made of his estate that an unnatural or unjust disposition of the property may be considered. *Morgan v. Morgan* (D. C.), 13-1037.

Declarations of testator denying disposition as made in will. — Declarations of a testatrix made more than three years after the execution of her will, denying that she had disposed of her property as therein provided, are too remote to justify any reasonable inference of mental incapacity at the time of such execution, at least where there is no other evidence of such incapacity. *Lipphard v. Humphrey* (U. S.), 14-872.

f. Instructions.

Probative value of evidence of suicide. — In a will contest, an instruction that evidence that the testatrix committed suicide is proper to be considered upon the question of her mental condition, and that if the jury find that she did commit suicide "they may take that fact into consideration in determining whether or not she was of sound mind at the time of the making of the will," is proper and should be given when requested; but a judgment for the proponent will not be reversed on the ground that the trial court refused to give such instruction, where it appears that evidence of the suicide was admitted and that the jury were instructed that they were to consider all the evidence in the case in passing upon the testatrix's mental capacity, especially if it appears that the evidence in the case would not have warranted any other conclusion than that reached by the jury. *Estate of Dolbeer* (Cal.), 9-795.

5. UNDUE INFLUENCE.

a. In general.

Characteristics. — Undue influence is a species of fraud, or it partakes of the nature of fraud, whether it consists of deception or of coercion without any deception. *Whitcomb v. Whitcomb* (Mass.), 18-410.

What constitutes undue influence. — Undue influence may be exerted on a testator either by fraudulent means or devices or by physical or moral coercion practiced on of coercion without any deception. *Whitcomb v. Whitcomb* (Mass.), 18-410.

Extent of undue influence required to invalidate will. — In a proceeding to contest a will on the ground of undue influence, the jury must render a verdict in favor of the will, unless they find from the evidence that undue influence was in fact exercised, and that it was successful in subverting and controlling the will of the testator. *Linebarger v. Linebarger* (N. Car.), 10-596.

b. Effect on validity of will.

Sustaining will in part. — When the probate of a will is contested on the ground of undue influence, one or more of the provisions of the will may be sustained as valid, while others are set aside. The whole will is not necessarily void because of undue influence, but it will be left to the jury to determine what gifts or devises were obtained by such fraudulent influence, and such gifts or devises only will be declared void. *Sumner v. Staton* (N. Car.), 18-802.

A will which is void as to a legatee who exercised undue influence is not necessarily void as to independent legatees who did not exercise such influence. Such a will should not be refused probate as to the valid legacies, certainly without affording the legatees an opportunity to be heard, and the executrix who propounds the will for probate is in a position to object to such refusal. *Snodgrass v. Smith* (Colo.), 15-548.

c. Proof of undue influence.

(1) Presumptions and burden of proof.

Fact that will was written by daughter, also executrix, as raising presumption of undue influence. — The fact that a will is written by the daughter of the testator, who is named as the executrix, but is not otherwise favored over the other children, does not raise a presumption of undue influence. *Seliards v. Kirby* (Kan.), 20-214.

The fact that a will is written by the daughter of the testator, who shares its benefits equally with the other children, does not make a case for the application of the statutory provision (Laws 1905, c. 526, § 1; Gen. St. 1909, § 9787) that a will written by the principal beneficiary, who was the confidential agent or legal adviser of the testator or who occupied any other position of confidence or trust to him, shall not be held valid unless it shall be affirmatively shown that the testator knew the contents and had independent advice with reference thereto. *Seliards v. Kirby* (Kan.), 20-214.

Fact that will was written by legatee as raising presumption of undue influence. — The fact that a will was drawn by a legatee who takes a portion of the estate to the detriment of the natural heir does not render the will void. At most such fact raises a suspicion, the strength or weakness of which depends upon the attendant circumstances, which should, in a proper case, cause the court to require of the proponents, in addition to proof of formal execution, clear and satisfactory evidence not necessarily that the will was read to or by the testatrix, but that she knew its contents and was free from undue influence. *Snodgrass v. Smith* (Colo.), 15-548.

Presumption where ward makes guardian beneficiary. — The law presumes undue influence when a ward makes a will in favor of a guardian. *In re Cowdry* (Vt.), 3-70.

What persons stand in fiduciary relation raising presumption of undue influence. — The fact that a legatee, who is also the executrix of the will, is the cousin and friend as well as the nurse and business partner of the testatrix, does not create a fiduciary relation between them. *Snodgrass v. Smith* (Colo.), 15-548.

Illiteracy of testator as raising presumption of ignorance of contents. — The mere inability of a testatrix to read raises no presumption that she had no knowledge of the contents of a will which was not read to her at the time of its execution, and in the absence of evidence of fraud, undue influence, or testamentary incapacity, affirmative proof of knowledge by her of the contents of a properly executed will is unnecessary. *Lipphard v. Humphrey* (U. S.), 14-872.

(2) Admissibility.

Declarations of testator in general. — In a proceeding to contest a will on the ground of undue influence, declarations by

the testator indicating the state of his mind in regard to the execution of his will, made contemporaneously with the execution of the will, or so near thereto as to fall within the principle of *res gestæ*, are admissible in evidence. *Linebarger v. Linebarger* (N. Car.), 10-596.

In a will contest declarations of the testator merely indicating constraint in certain actions of his are only admissible in evidence on an issue of his mental capacity, and do not tend to prove undue influence. *Westfall v. Wait* (Ind.), 6-788.

Declarations of testator before making will. — Declarations of a testator before executing his will that he was being importuned to make a will are not competent evidence of undue influence. *In re Kennedy* (Mich.), 18-892.

In a will contest, declarations tending to show undue influence, made by the testator prior to the execution of the will, are admissible in evidence. *Linebarger v. Linebarger* (N. Car.), 10-596.

In will contests, declarations made by the testatrix prior to the execution of the will are admissible in evidence for the purpose of showing the mental capacity of the testatrix and her susceptibility to extraneous influence, but are not admissible for the purpose of establishing the substantive fact of undue influence. *Hobson v. Moorman* (Tenn.), 5-601.

Declarations of testator and legatee. — In a will contest, where it is contended that one of the legatees exerted undue influence over the testator, the court may direct that a special issue shall be drawn for the jury to find as to such legatee whether the paper writing propounded, or any part thereof, and if any, which part, is the last will and testament of the testator; and on such issue it is competent to introduce in evidence declarations as to undue influence, made by the testator before the execution of the will and by the legatee before and after the execution of the will. *Linebarger v. Linebarger* (N. Car.), 10-596.

Declarations of one of several legatees. — In a will contest, where there are several legatees, all of whom are parties to the proceedings, and their interests are several and not joint, the declarations of one of the legatees tending to show undue influence by him, made before and after the execution of the will, are not admissible in evidence, in the absence of a showing of a conspiracy or of a showing that the undue influence was the result of a common design. *Linebarger v. Linebarger* (N. Car.), 10-596.

Prior advancements to children to show unreasonableness and unnaturalness of will. — In an action to set aside, on the ground of undue influence, a will which makes an unnatural and inadequate provision for one of the children of the testator, evidence that prior to the execution of the will advancements were made to all the children of the testator except the one insufficiently provided for by the will is competent on the issues of undue influence and testamentary capacity in that it tends to show

an unnatural will. *Meier v. Buchter* (Mo.), 7-887.

Competency of wife to testify to declarations of husband. — A wife's inchoate dower right in her husband's realty is a sufficient interest to disqualify her to testify in a will contest to declarations by the testator tending to show an undue influence, where her husband is one of the caveators and one of the heirs at law, and will, if the contest is successful, become the owner of an undivided interest in the testator's realty. *Linebarger v. Linebarger* (N. Car.), 10-596.

(3) Weight and sufficiency.

Sufficiency in general. — In an action contesting the validity of a will on the grounds of fraud and undue influence, evidence examined and held totally inadequate to support either ground of contest or to warrant the submission to the jury of an issue as to either. *Morgan v. Morgan* (D. C.), 13-1037.

Evidence considered in a will contest, and held insufficient to show that certain of the legatees exerted undue influence over the testator. *Linebarger v. Linebarger* (N. Car.), 10-596.

Where the evidence in a will contest is clearly insufficient to sustain the plaintiff's allegations of undue influence and lack of testamentary capacity, it is proper for the trial court to direct a verdict to sustain the will. *Pringle v. Burroughs*, (N. Y.), 7-264.

Testator's declarations as sufficient. — In a will contest, the testator's declarations afford no substantive proof of undue influence, and before the caveators can recover they must prove by evidence other than the testator's declarations that undue influence was actually exerted over him. *Linebarger v. Linebarger* (N. Car.), 10-596.

Opportunity for exercising influence by friend made principal beneficiary as sufficient. — Evidence of an opportunity for exercising undue influence on a testatrix, and the circumstances that her will makes her preceptress and friend, instead of her relatives, the principal beneficiary, are insufficient to support a charge of undue influence, the will not being under the circumstances an unnatural one. *Estate of Dolbeer* (Cal.), 15-207.

Unnaturalness of will as sufficient. — Evidence that a will makes an unnatural disposition of a testator's property is not of itself sufficient to avoid the will, but such evidence may be considered by the jury as tending to show undue influence or lack of testamentary capacity. *Meier v. Buchter* (Mo.), 7-887.

In a proceeding to contest a will devising the principal portion of a testatrix's estate to a woman not related to the testatrix, it cannot be said that the will is an unnatural one, where it appears that the testatrix and the principal devisee were devoted friends; that the former was practically alone in the world except for the latter; that the testatrix's property had come to her from her father; that there had been a complete es-

trangement between her father and her mother's relatives; that the testatrix had never known or cared for her mother's relatives; and that the contestant is the maternal uncle of the testatrix. *Estate of Dolbeer* (Cal.), 9-795.

Declarations of testator as to legacies as tending to show knowledge of contents. — The declarations of a testatrix relating to the legacies given by her, made subsequent to the execution of her will, tend to show that she had previous knowledge of the contents of such will. *Snodgrass v. Smith* (Colo.), 15-548.

Declarations of testatrix denying disposition made in will as showing ignorance of contents. — In the absence of evidence of fraud, undue influence, or mental incapacity, declarations of a testatrix made more than three years after the execution of her will, denying that she had disposed of her property as therein provided, have no tendency to show that the testatrix did not know the contents of her will when she executed it. *Lippard v. Humphrey* (U. S.), 14-872.

Particularity in will as tending to show knowledge of contents. — The particularity with which a will describes the various items given to each of eight legatees, the names and addresses of such legatees, and the places where the articles bequeathed are located, tends to show that the information was derived from the testatrix and that she knew the contents of her will. *Snodgrass v. Smith* (Colo.), 15-548.

Written words in testator's handwriting at foot of will as showing knowledge of contents. — The writing by the testatrix of the words "I declare this to be my last will and testament" at the bottom of her will before signing it, though it does not conclusively show that she knew what she was doing, has a tendency to show that she knew the contents of her will. *Snodgrass v. Smith* (Colo.), 15-548.

(4) Questions for jury.

In general. — In a contested proceeding for the probate of a will if there is evidence tending to show that the testatrix knew the contents of her will and was free from undue influence, the controverted questions of fact should be submitted to the jury under proper instructions, and it is error for the court to direct a verdict for the contestant. *Snodgrass v. Smith* (Colo.), 15-548.

Age, mental and physical condition of testator as question to be taken into consideration. — On the issue of whether the legatee exerted undue influence over his testator, the age of the testator, his mental and physical condition, and other relative facts, are competent to be considered by the jury. *Linebarger v. Linebarger* (N. Car.), 10-596.

(5) Instructions.

Duty to charge as to fraud. — Under the pleadings and evidence in the case at bar

there was no error in failing to charge that fraud could not be presumed, but that slight circumstances might carry conviction of its existence, or in refusing to give to the jury a requested charge upon that subject. *Mobley v. Lyon* (Ga.), 19-1004.

Harmless error in charge that fraud necessary to make out undue influence.

— An exception to a charge in a proceeding for the probate of a will that fraud must be shown to make out a case of undue influence will be overruled where the bill of exceptions does not show that evidence was adduced of any undue influence other than such as consisted of fraud. *Whitcomb v. Whitcomb* (Mass.), 18-410.

6. REVOCATION AND REVIVAL.

a. In general.

What amounts to revocation and revival. — Where an act is done by the testator which may or may not amount to a revocation, revocation will not result if it appears that the act was dependent upon the efficacy of another act, such as the making of a new will, and the testator did not intend to revoke the will unless the other act was consummated; but where the will is completely revoked, the failure of another contemplated act cannot revive it. *McIntyre v. McIntyre* (Ga.), 1-606.

Conveyance to devisee as revoking and reconveyance to testator as reviving. — A conveyance by a testator to a devisee of land which the former had specifically devised to the latter is an implied revocation of the devise, and such devise is not revived by a subsequent reconveyance of the land to the testator, unless the testator, after such reconveyance, republishes his will in accordance with the statutory provisions relating to the execution of wills. *Phillippe v. Clevenger* (Ill.), 16-207.

Jurisdictions in which common-law rules in force. — With reference to the revocation and revival of wills the common law of England, in so far as it is applicable and of a general nature, is in force in Illinois except to the extent that it has been changed by statute. *Phillippe v. Clevenger* (Ill.), 16-207.

b. Revocation.

(1) In general.

Necessity of joint operation of act and intent. — Joint operation of act and intention is necessary to revoke a will. *McIntyre v. McIntyre* (Ga.), 1-606.

Requirement of same formalities as in executing will. — In order to revoke a will made in Georgia, a revocation must be executed with the same formality and attested by the same number of witnesses as are requisite for the execution of the will. *Castens v. Murray* (Ga.), 2-590.

Revocation by parol. — A valid written will cannot be revoked by parol; and declarations of the testator cannot be received to explain, change, or add to the will. *In re Shelton* (N. Car.), 10-531.

Settlement between husband and wife pending divorce action as revocation of devise by husband in favor of wife. — A settlement of property rights between husband and wife pending an action for divorce, whereby the wife receives substantially one-third of the husband's property, followed by the granting of the divorce and the death of the husband within a very brief period thereafter, revokes by implication of law a will theretofore executed by the husband in and by which he devised and bequeathed to his wife one-third of his property. *Donaldson v. Hall* (Minn.), 16-541.

Jurisdictions in which common-law rule of revocation by implication in force. — In Minnesota the common-law rule of the implied revocation of a will by a subsequent change in the condition of circumstances of the testator has been affirmatively adopted by statute as the law of the state. *Donaldson v. Hall* (Minn.), 16-541.

The provisions of the Illinois Wills Act relating to the manner in which a will may be revoked apply only where there is an express intention on the part of a testator to revoke his will, and do not abrogate the common-law doctrine that a will may be revoked by implication. *Phillippe v. Clevenger* (Ill.), 16-207.

(2) Joint and mutual wills.

Right to revoke joint and mutual will. — A joint and mutual will is revocable during the joint lives of the parties by either of them, so far as relates to his own disposition, upon giving notice to the other party, but it becomes irrevocable after the death of one of the parties if the survivor takes advantage of the provisions made by the other. *Frazier v. Patterson* (Ill.), 17-1003.

Where a husband and wife make a mutual will, each devising his or her property to the other, and further providing that upon the death of the survivor all of the property shall go to their daughter for life, and upon her death to her heirs, the very fact that such will was made is sufficient proof, if evidence to that effect were necessary, of a compact or agreement between them to dispose of their property in that manner; and if the wife, upon the death of the husband, takes advantage of the provisions of the will in her favor, she cannot afterwards revoke the instrument as her own will. *Frazier v. Patterson* (Ill.), 17-1003.

Right to revoke joint will not reciprocal. — A joint will which is not reciprocal is simply the individual personal will of each of the persons signing it, and is subject to the same rules in all respects, including its revocation, that would apply if it were several. *Frazier v. Patterson* (Ill.), 17-1003.

Revocation of mutual wills. — Mutual wills may or may not be revocable at the pleasure of either party, according to the circumstances and understanding upon which they were executed. To deprive either party of the right to revoke such a will, it is necessary to prove, by clear and satisfactory evidence, that such wills were executed in pursuance of a contract or compact between

the parties, and that each is the consideration for the other; and even in cases where mutual wills have been executed in pursuance of a compact or agreement between the parties, the law appears to be well settled that either party may, during the lifetime of both, withdraw from the compact and revoke the will as to him. *Frazier v. Patterson* (Ill.), 17-1003.

(3) Revocation by subsequent will.

Subsequent will as ipso facto revoking former will. — The fact that a subsequent will was made is not sufficient in itself and without some proof of the actual contents to show revocation of a former will. *Williams v. Miles* (Neb.), 4-306.

Manner of revocation by subsequent will. — A subsequent will may have the effect of revoking a prior will either because of an express clause of revocation or of an inconsistent disposition of the testator's property. *Williams v. Miles* (Neb.), 4-306.

Unless a subsequent will expressly revokes a former one, the latter is only revoked so far as it is inconsistent with the later will. A complete revocation will not result unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. *Williams v. Miles* (Neb.), 4-306.

Inclination of courts with reference to revocation by implication. — Courts do not favor revocation by implication, and incline to such a construction as will give effect to both instruments. *Williams v. Miles* (Neb.), 4-306.

Proving subsequent last will to show revocation. — A subsequent will, which has the effect of revoking a prior will, may be shown to defeat probate of the latter, although by reason of its loss the exact dispositions made therein cannot be shown and are incapable of execution. *Williams v. Miles* (Neb.), 4-306.

Nature of evidence required to show revocation by subsequent lost will. — Parol evidence to show that a former will was revoked by implication by reason of a subsequent will which cannot be found must be clear, unequivocal, and convincing. *Williams v. Miles* (Neb.), 4-306.

(4) Revocation by codicil.

Inoperative codicil. — Where a codicil creating a void remainder contains no revocation clause, and it does not appear by implication that the testator intended the codicil to revoke the former will, the will, on the codicil being declared inoperative, remains in force. *U. S. Fidelity, etc., Co. v. Douglas* (Ky.), 20-993.

Extent of revocation by codicil. — The revocation by the codicil of a gift in the will extends only so far as the will is inconsistent with the codicil. *In re Whitehorne* (Eng.), 5-787.

Where a will makes a gift in trust for A for life, with remainder over in trust for his

children, and a codicil revokes the gift of the life interest, reciting that the testator has "reasons for dissatisfaction" with A, but making no mention of the children other than to give them a legacy of a certain sum, the revocation does not extend to the children's interests, but those interests are accelerated; and the legacy to the children is in addition to their interests and not in substitution for them. *In re Whitehorne* (Eng.), 5-787.

Burden of proof of revocation by codicil. — One who asserts that a gift by a will has been revoked by the codicil must show a plain revocation. *In re Whitehorne* (Eng.), 5-787.

(5) Revocation by destruction of will.

Presumption that lost will last shown to have been in testator's possession was destroyed. — Where a will which cannot be found is shown to have been in the possession of the testatrix when last seen, the presumption is, in the absence of other evidence, that she destroyed it. *Miller's Will* (Ore.), 14-277.

Where a will was last seen in the possession of the testator, who was mentally competent, and cannot be found after his death, the presumption is that the testator destroyed the will *animo revocandi*, and the burden is upon the proponent to overcome the presumption. *In re Colbert* (Mont.), 3-952.

Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, the presumption is that the testator destroyed it *animo revocandi*. *Williams v. Miles* (Neb.), 4-306.

Burden of tracing will into testator's possession to raise presumption. — Where a will which cannot be found is shown to have been intrusted by the testatrix to a bank as depository, the burden of retracing it into the hands of the testatrix and thereby raising a presumption that she destroyed it is upon the contestant, especially where it is shown that within a short time of her death the testatrix made declarations to the effect that the will was still in existence and in the bank, after which she could not have had access to it. *Miller's Will* (Ore.), 14-277.

Admissibility of declarations of testator to show no destruction. — Declarations made by a deceased testatrix subsequent to the execution of her lost will, not only showing it to have been deposited with a certain bank, but that it was still there to within a few days of her death, and declarations tending to show her affection toward the devisees and that no change of feeling toward them had taken place, thereby indicating the improbability of her desiring to revoke the instrument, when corroborated by direct evidence that after the making of the declarations she had no opportunity to withdraw the will from the bank or otherwise come into possession of it, are admissible for the purpose of showing that the will was not returned by the bank to the testatrix nor revoked. *Miller's Will* (Ore.), 14-277.

The presumption of revocation of a will not found after the death of the testator may be overcome by evidence to the contrary, and declarations of the testator may be shown for this purpose. *Williams v. Miles* (Neb.), 4-306.

To rebut a presumption that a will last seen in the possession of the testator was destroyed by him *animo revocandi*, declarations of the testator tending to show his satisfaction with the will are not admissible in evidence. *In re Colbert* (Mont.), 3-952.

On an issue as to the revocation of a will, declarations made by the testator after the date of the alleged act of revocation may be introduced in evidence for the purpose of showing that the testator did not revoke his will, and that he knew nothing of such revocation. *In re Shelton* (N. Car.), 10-531.

Sufficiency of evidence of destruction.

— Proof of the due execution of a will raises a strong presumption in its favor, and in an action contesting a will on the ground that the testatrix withdrew the will from the bank in which she is shown to have deposited it, and destroyed it, evidence examined and held sufficient to overcome the inference that the will was destroyed, to be drawn from the fact that several years after the will was deposited and after the testatrix had died, the bank could not find the will in its possession. *Miller's Will* (Ore.), 14-277.

(6) Revocation by cancellation or erasure.

Necessity that obliteration or erasure destroy some material portion of will.

— A will is not revoked by cancellation, obliteration, or erasure which does not in fact destroy some portion of the material substance of the will. *In re Shelton* (N. Car.), 10-531.

Presumption of intent from obliteration of material portion of will.—Where a paper found among the decedent's papers is offered for probate as a will and appears to have been canceled or obliterated in a material part, a presumption is that the cancellations or obliterations were made by the deceased and were intended to operate as a revocation. *McIntyre v. McIntyre* (Ga.), 1-606.

Presumption of intent where cancellation made with pencil.—The rule of the English courts that cancellations with a lead pencil are presumed to have been deliberative and not final has not been generally adopted by the American courts. *McIntyre v. McIntyre* (Ga.), 1-606.

The rule that cancellations appearing upon a will found among the decedent's papers are presumed to have been intended by him to revoke the will applies where the cancellations are made with a pencil, but such fact may be considered by the jury with other evidence in determining whether the presumption of revocation has been rebutted. *McIntyre v. McIntyre* (Ga.), 1-606.

Burden of proof of revocation by marginal words of revocation.—Inasmuch as revocatory words written on the

margin of a paper containing a will form no part of the will, the proponent in a proceeding to contest the will offers the will only for probate, and does not offer the revocatory words, and, therefore, the burden of proving revocation is on the contestant. If the court erroneously instructs the jury that the burden of disproving revocation is on the proponent, the contestant has no ground for complaint. *In re Shelton* (N. Car.), 10-531.

Construction of affirmative verdict where will contains marginal words of revocation.—In a will contest, where the issue submitted to the jury is whether the paper writing propounded for probate, and every part thereof, is the last will and testament of the testator, and this issue is answered by the jury in the affirmative, the verdict is not rendered ambiguous and unintelligible by the fact that the paper contains marginal words of revocation purporting to have been written by the testator, as the marginal words are no part of the will, and are not offered for probate by the proponent as a part of the will. *In re Shelton* (N. Car.), 10-531.

Sufficiency of evidence.—No error appears in the admission to probate of a will, where there was evidence that the testator had duly signed it in ink, below the attestation clause, in the presence of the subscribing witnesses, and a few weeks later had delivered it to the executrix, who retained possession of it until his death, although when it was produced in court the testator's signature had been partially erased by knife scratches, and his name had been written in pencil above the attestation clause, apparently by himself, and no further showing was made as to when, by whom, or with what purpose the changes had been made. *Sellards v. Kirby* (Kan.), 20-214.

(7) Revocation by subsequent marriage and birth of issue.

Common-law rule.—At common law the will of an unmarried man was not revoked by his marriage alone, but it was revoked by his marriage and the birth of issue of such marriage, or, at least, a strong presumption arose that a revocation had been wrought. *Hoy v. Hoy* (Miss.), 17-1137.

Jurisdictions in which common-law rule in force.—The statutes of Mississippi relative to the revocation of wills apply only to acts of direct and express revocation, and do not abrogate the common-law rule relative to the implied revocation of a will by the subsequent marriage, and birth of issue, of the testator. *Hoy v. Hoy* (Miss.), 17-1137.

The common-law rule that the will of an unmarried man is not revoked by his marriage alone, without birth of issue, has not been abrogated or modified by the Mississippi statute which gives a widow the right to renounce the will of her deceased husband and take one-half of his estate as a matter of right. On the contrary, such statute, giving the widow as it does an absolute right to participate in her husband's estate, notwith-

standing any attempt in the will to prevent her participation therein, furnishes an additional reason why marriage alone, without the birth of issue, should not revoke the prior will of an unmarried man, the common-law doctrine of implied revocation by marriage and birth of issue being based upon the consideration that if the will is permitted to stand in the latter case the heir will not receive any part of the estate. *Hoy v. Hoy* (Miss.), 17-1137.

The will of an unmarried woman is revoked by her subsequent marriage, followed by the birth of a child or children, though there is a statute providing that a married woman may make a valid will, and though there is another statute making provision for a child born after the making of his father's will. *Durfee v. Risch* (Mich.), 7-785.

Statutes providing for revocation by marriage alone. — In adopting statutes providing for the revocation of a will by a subsequent marriage and for revival by re-execution or codicil, the legislature did not impair the right to dispose of property by will but only prescribed a reasonable regulation for the exercise thereof. *Francis v. Marsh* (W. Va.), 1-665.

Under the code, a will made by a man is revoked by his subsequent marriage, although made in contemplation of marriage and containing clauses by which provision is made for a wife in case he should have one living at the time of his death. *Francis v. Marsh* (W. Va.), 1-665.

A statute declaring a will revoked by the subsequent marriage of the testator was substituted for the common-law rules governing revocation by marriage and must be enforced without exception. *Francis v. Marsh* (W. Va.), 1-665.

Under a statute providing that a testator's will is revoked by his subsequent marriage if his wife survives him, a revocation so made is unqualified and of the entire will, so that it cannot be admitted to probate; and the objection to admitting the will to probate need not be made by the surviving wife. *In re Larsen* (S. Dak.), 5-794.

c. Revival.

By codicil. — A codicil to effect the revival of a revoked will under the code must show an intent to revive, but any language from which such intent may be inferred is sufficient, it not being necessary for the codicil to contain words of an express revival. *Francis v. Marsh* (W. Va.), 1-665.

The codicil to a former will, revoking the appointment of one executor and naming another, is sufficient to revive the will. *Francis v. Marsh* (W. Va.), 1-665.

By destruction of revoking will. — If a testator destroys a subsequent will, revoking a former one by implication, such an act of itself will not operate to revive the former will; and whether the former will is revived depends upon the intention of the testator, to be deduced from all the circumstances. *Williams v. Miles* (Neb.), 4-306.

By destruction of revoking will and declaration of intent that former will stand. — A revocatory clause in a will properly executed destroys at once an earlier will, and the earlier will, although it has been carefully preserved by the testator, is not revived by the destruction of the later will and by oral declarations of the testator that he desires the earlier will to be executed. Such earlier will can be revived only by a writing formally sufficient within the statute of wills. *Danley v. Jefferson* (Mich.), 13-242.

7. PROBATE PROCEEDINGS.

a. What wills may be probated.

Last wills. — A will, like any other written instrument, when shown to have been lost, may be established on clear proof of such loss, the burden of which is on the proponent, and upon such proof the will may be admitted to probate unless shown to have been revoked. *Miller's Will* (Ore.), 14-277.

The California statute (St. 1907, p. 122, amending Code Civ. Pro., § 1339) enlarging the classes of destroyed wills entitled to probate by adding such as are "by public calamity destroyed in the lifetime of the testator," authorizes the probate of a will thus destroyed before as well as after the enactment of the statute. *Estate of Patterson* (Cal.), 18-625.

Several writings of different dates. — The testatrix, who died in 1908, left two testamentary writings, both properly executed as wills, one dated in 1875 and the other in 1879. The two documents were found, after her death, folded together. The two were in the same words down to and including the fourth paragraph of each. The fifth paragraph of each was the same except that in the later document additional provision was made for paying off a mortgage on a certain cottage. The sixth paragraph of the earlier document provided for the division of the surplus of the estate (except the articles thereafter specifically bequeathed) among three nieces of the testatrix. This paragraph was entirely omitted from the later document; and the later one did not contain any direction as to or disposition of the residue of the estate, nor any revocatory clause. The sixth and seventh paragraphs of the later document disposed of the cottage spoken of; and the subsequent paragraphs disposed of various articles of personal property, some to the same persons to whom they were given by the earlier document, while in some cases the destination was changed. No pecuniary legacy was given by the second document. The same executors were appointed in both. The later one was called "my last will." If the later one alone were admitted to probate, there would be an intestacy as to part of the estate, as there was a considerable residue, and no residuary gift. It was held that the two documents together constituted the last will of the testator, and letters of administration with both documents annexed were properly granted. *In re Molson* (Can.), 18-279.

b. Probate after letters granted.

Necessity that letters be first annulled. — A will may be admitted to probate and letters testamentary granted without first obtaining, by an independent direct proceeding, a judicial annulment of letters of administration previously granted on the supposition of intestacy, and the only remedy for those who have been appointed administrators is to require proof of the will in solemn form. *In re Mears* (S. Car.), 9-960.

c. Probate of foreign wills.

Definition. — A "foreign will" is a will executed in another state by a testator residing there, admitted to probate in such sister state after the death of the testator, and subsequently offered for ancillary probate in the domestic state. *State ex rel. Ruef v. District Court* (Mont.), 9-418.

Necessity for probate. — An exemplified copy of the probate of a foreign will is not a good muniment of title to real estate in Georgia if the will is not probated therein. *Doe v. Roe*, 31 Ga. 593, overruled. *Chidsey v. Brookes* (Ga.), 14-975.

Nature of probate. — Where the will of a nonresident has been admitted to original probate, and the bulk of the property and most of the heirs, legatees, and creditors, are within the state, the administration should be considered a principal one, and any subsequent administration which may be necessary in the state of the testator's domicile will be merely ancillary. *Rader v. Stubblefield* (Wash.), 10-20.

Necessity that will be first proved in state of testator's domicile. — Under the Washington statute, the will of a nonresident may be admitted to probate on original proof thereof, and it is not necessary that it shall have been first proved in the courts of the state of his domicile according to the laws thereof. *Rader v. Stubblefield* (Wash.), 10-20.

In order to entitle a foreign will to admission to probate, it must first appear that it has been duly proved, allowed, and admitted to probate in a court of competent jurisdiction in the sister state; that it was executed according to the law of the place in which it was made or in which the testator was at the time domiciled, or in conformity to the laws of the domestic state; that the record is authenticated in the manner prescribed by the federal statute for the authentication of judicial records; and that there is property within the jurisdiction of the domestic court subject to administration. *State ex rel. Ruef v. District Court* (Mont.), 9-418.

What constitutes will "duly proved and allowed" in foreign state. — A will has not been "duly proved and allowed" in a foreign state or country, within the meaning of the California statute providing for the admission of a foreign will to ancillary probate, unless the proof has been taken in a court whose territorial jurisdiction includes the domicile of the testator. *Estate of Clark* (Cal.), 7-306.

Right to contest probate on ground of undue influence or lack of testamentary capacity. — A foreign will, after it has been admitted to probate in a domestic state, cannot be contested in the courts of that state upon the ground that the testator, at the time of the execution of the will, was not of a sound and disposing mind, or was acting under duress, fraud, or undue influence. *State ex rel. Ruef v. District Court* (Mont.), 9-418.

Collateral attack on decree of probate. — Under the California statutes and decisions, an order admitting to ancillary probate a will offered as a foreign will cannot be attacked collaterally for error either in the proof of authentication or in the proof of the testator's residence, but on the other hand it is the duty of a probate court to refuse ancillary probate to a will offered as a foreign will if it is satisfied from the evidence that the testator was in fact a resident of the state at the time of his death, though the will was executed in a foreign state. *Estate of Clark* (Cal.), 7-306.

d. Jurisdiction.

Jurisdiction of equity to determine validity on bill filed for that purpose.

— A court of equity will not entertain a bill the sole object of which is to set aside a will on the ground of fraud, the powers of the court of probate being ample for the purpose. *Sumner v. Staton* (N. Car.), 18-802.

Jurisdiction of court to determine validity in collateral action. — Although as a general rule the integrity of a will cannot be questioned in Tennessee unless a contest is first instituted in the County Court and then certified to the Circuit Court, yet where, in litigation over specific property, either party claims under a will probated only in common form and the other party contests the validity of the will on the ground of testamentary incapacity, fraud, or undue influence, the court in which such contest arises has, incidentally to the decision of the right of property, jurisdiction to determine the validity of the will. *State v. Lancaster* (Tenn.), 14-953.

e. Parties.

(1) Who may contest validity.

State. — If a testator leaves no heirs, the state may, for the purpose of enforcing its right of escheat, contest the validity of his will on the ground of testamentary incapacity or undue influence. *State v. Lancaster* (Tenn.), 14-953.

Judgment creditor of heir. — A judgment creditor of an heir, who has obtained a lien by levy on property which in the absence of a will would belong by descent to the debtor heir, is a person interested in a will or codicil, within the meaning of a statute giving any person interested the right to contest the validity of a will, and therefore has legal capacity to prosecute an action to contest the validity of an alleged will disposing of such property to a person other

than such heir. *Bloor v. Platt* ((Ohio), 14-332.

Guardian of infant. — The Indiana statute making a guardian the trustee of an express trust does not confer on such guardian power to maintain an action to contest a will. *Campbell v. Fichter* (Ind.), 11-1089.

The guardian of an infant, in the absence of special statutory authority, has no power to maintain in his own name, on behalf of his ward, an action to contest a will. *Campbell v. Fichter* (Ind.), 11-1089.

Infant. — The proceeding to contest a will being a special statutory one and maintainable only by a person having interest in setting it aside, an infant, as the real party in interest, must sue by next friend. *Campbell v. Fichter* (Ind.), 11-1089.

Under the Indiana statute it is competent for an infant, appearing by next friend, to contest a will. *Campbell v. Fichter* (Ind.), 11-1089.

Widow of testator. — The rule denying to a widow the right to contest her husband's will where there are surviving children does not apply where the testator leaves no children, since the reason for the rule fails under the altered circumstances. *Freeman v. Freeman* (W. Va.), 11-1013.

The widow of a person who died, leaving no children, may contest the will of her deceased husband. *Freeman v. Freeman* (W. Va.), 11-1013.

Person accepting benefit under will. — One who accepts the benefit of a provision in his favor under a will is precluded from contesting the validity of the will, especially where other persons interested in the disposition of the testator's property have, upon faith of such acceptance, so acted that their position cannot be restored; and the fact that the person so taking the benefit did so in ignorance of the legal effect of the act, will not prevent the application of the rule. *Utermehle v. Norment* (U. S.), 3-520.

Meaning of phrase "any person" in Indiana statute. — The provision of the Indiana statute that "any person" may contest a will, means any person having an interest in the subject-matter of the contest. *Campbell v. Fichter* (Ind.), 11-1089.

(2) Parties defendant.

Where executor has sold property of decedent. — An action by the state to contest the validity of a will for the purpose of enforcing its right of escheat, instituted after the executor has sold the property of the decedent, is properly brought against the executor and not against the purchasers. *State v. Lancaster* (Tenn.), 14-953.

f. Pleading and issues.

Issues triable in general. — In a proceeding to probate a will under *Mansf. Dig. Ark. 1864*, § 6521 (*Ind. T. Ann. St. 1890*, § 3593), the only issue triable is the *factum* of the will or the question of *devisavit vel non*. *Taylor v. Hilton* (Okla.), 18-385.

Issues triable under complaint alleging undue influence and lack of testamentary capacity. — Where the complaint in an action attacking the validity of a will simply alleges that the signature of the testatrix was procured by undue influence, and that at the time of the execution of the instrument the testatrix did not have the capacity to make and execute a will, it is not open to the plaintiff to contend that the testatrix never signed the will at all, but that it was signed by another person who fraudulently impersonated her; nor is it necessary for the defendant to offer evidence in rebuttal of such contention in order to make out a *prima facie* case in favor of the validity of the will. *Harris v. Martin* (N. Car.), 17-685.

Amendment of pleadings in proceeding to probate nuncupative will. — Where, in a proceeding to probate a nuncupative will the evidence shows that the will was not in form and substance as reduced to writing and set forth in the petition for probate, the court may in its sound discretion allow the alleged will and its records to be amended to conform to the facts proved. *In re Miller* (Wash.), 14-1163.

g. Witnesses.

Right to examine devisee or legatee not attesting witness. — A devisee or legatee who is not an attesting witness may be examined in support of the will like any indifferent person. *Barker v. Hinton* (W. Va.), 13-1150.

Heirs or next of kin as competent to testify to conversations and transactions with testator. — Persons who take as heirs or next of kin in case of intestacy are not disqualified under the Nebraska statutes from testifying as to transactions and conversations with the deceased in a contest over an alleged will. *Williams v. Miles* (Neb.), 4-306.

h. Evidence.

(1) Admissibility.

Declarations of testator. — Although the contents of a lost will cannot be proved solely by the declarations of the testator, such declarations are admissible to prove the existence of the will. *Williams v. Miles* (Neb.), 4-306.

Declaration of alleged conspirator. — In an action to set aside a will, where the petition alleges that there was a conspiracy between all the contestees to defraud the contestants, it is competent, after the introduction of evidence tending to show such privity of design, to interpose in evidence admissions of any one of the conspirators. *Meier v. Buchter* (Mo.), 7-887.

Declarations of deceased attesting witness. — Where a will is offered for probate in solemn form, and is caveated as being a forgery, and it appears that two of the three attesting witnesses are dead, and evidence is introduced to prove their handwriting, and evidence is offered *pro* and *con* as

to the genuineness of the signatures of such witnesses, especially as to one of them, it is competent, in resistance of the implication arising from his signature if it were genuine, to show that after the date of the instrument he made statements tending to show that the alleged testatrix had not made any will. *Mobley v. Lyon* (Ga.), 19-1004.

Testimony of subscribing witnesses to show due execution of lost will. — The subscribing witnesses to a lost will may testify that the testator signed and they witnessed and subscribed in the required manner without proving that there was an attestation clause or establishing the contents thereof. *Williams v. Miles* (Neb.), 4-306.

Evidence of contents of earlier will. — Upon the issue of the validity of a will contested on the grounds of undue influence and mental incapacity, proof of the contents of an earlier will is not necessarily immaterial, and should not be excluded unless it appears beyond a reasonable doubt that the changes appearing in the last will have no bearing upon the result of the contest. *In re Young* (Utah), 14-596.

(2) Weight and sufficiency.

Proof of will consisting of several sheets. — Where a will offered for probate consists of several separate sheets not permanently fastened together, only the last one bearing the signature of the testator, the connection of the subject-matter may be sufficient to establish *prima facie* the identity of the other sheets. *Sellards v. Kirby* (Kan.), 20-214.

Sufficiency of proof of identity of testator and person executing will. — Where the validity of a will is contested on the grounds of undue influence and lack of testamentary capacity only, the testimony of the subscribing witnesses, one a reputable attorney who drew the will and the other a physician, that they were not acquainted with the testatrix prior to the day when the will was executed, but were introduced to her on that day by a third person who represented herself to be a sister of the testatrix, and that the testatrix signed the will in their presence, after it had been read over to her, constitutes *prima facie* proof of the identity of the testatrix, and, in the absence of any evidence in support of the allegation of undue influence and lack of testamentary capacity, warrants a finding by the jury in favor of the validity of the will. *Harris v. Martin* (N. Car.), 17-685.

Declarations of attesting witness as sufficient to show fraudulent destruction of will. — In proceedings to probate a will alleged to have been fraudulently destroyed after the testator's death, declarations of an alleged witness to the will, acknowledging his possession of the instrument after the testator's death, while admissible to impeach such witness, he having denied that he witnessed any will or had possession thereof, are not sufficient to prove the existence of

the will at the time of the testator's death. *In re Colbert* (Mont.), 3-952.

Weight to be given evidence of declarations of testator. — In will contests evidence as to the declarations of the testator should be scrutinized carefully and weighed cautiously. *Williams v. Miles* (Neb.), 4-306.

Declarations of the testator are competent evidence on an issue whether a will was made, but will not suffice of themselves to prove its contents. *Williams v. Miles* (Neb.), 4-306.

Sufficiency of evidence of unintentional omission of grandchildren from will. — Where there was conflicting evidence as to whether the memory of the testator, who was seventy-six years old, was good or bad, and evidence both that he thought he had made provision for all of his grandchildren and that he had deliberately omitted certain grandchildren from the will, coupled with evidence that there had been trouble between him and the omitted grandchildren or some member of the family, the exact nature of which was not clearly disclosed, it was held that the evidence was insufficient to sustain the finding of the trial court that the grandchildren were unintentionally omitted. *Brown v. Brown* (Neb.), 8-632.

i. Instructions.

Burden of proof of forgery. — Where a will is offered for probate in solemn form, and a caveat is filed, raising only contentions that the will was not signed by the purported testatrix and executed as provided by law, but is a forgery, and that if she signed it she had no knowledge of its contents, and where the evidence is conflicting as to whether she signed the instrument, and whether the attesting witnesses whose names appear on it in fact signed it, two of them being dead, and testimony being introduced as to their handwriting, it is error for the presiding judge, after instructing the jury that before they can set up the will and before a case is made out on the part of the propounders, it must be shown to their satisfaction that the alleged testatrix signed the instrument in the presence of all three of the witnesses whose names appeared thereon, to add that when this is done the burden of proving that the instrument is a forgery or is not the last will and testament of the alleged testatrix and that it has not been proved as the law requires is shifted to the caveator, and that in order to carry this burden it is upon him "to satisfy the jury of the truth of his contentions" before they will be authorized to find in his favor. *Mobley v. Lyon* (Ga.), 19-1004.

j. Arguments of counsel.

Right to open and close. — In proceedings for the probate of a will, the contestant has the right to open and close the case. *In re Colbert* (Mont.), 3-952.

Exception as essential to review of misconduct. — In a proceeding to contest a will alleged to have been revoked by a writing on the margin, it is erroneous for the

proponent's counsel, in his argument to the jury, to show them the revocatory words on the margin of the will and point out to them the difference in the formation of the letters, etc., between the signature on the margin and the signature to the will; but the contestant must take exception to such action at the time if he wishes to take advantage of the error on appeal. *In re Shelton* (N. Car.), 10-531.

k. Direction of verdict.

Rule applicable to direction of verdict. — The question whether the court erred in directing the jury to return a verdict in favor of the contestant in a proceeding to probate a will is to be determined by the rules applicable in ordinary civil actions. *Snodgrass v. Smith* (Colo.), 15-548.

Direction of verdict as error. — Evidence reviewed in an action to set aside a will, and held to show that the trial judge erred in directing a verdict sustaining the will, inasmuch as there was substantial evidence before him of undue influence and of lack of testamentary capacity, as well as evidence tending to show fraud in the concoction of the will. *Meier v. Buchter* (Mo.), 7-887.

l. Decree.

Decree for probate in part. — Where on trial of an issue as to the *factum* of the will or the question of *devisavit vel non* without a jury, the court finds the testamentary paper produced to be the last will of the testatrix, it is error to reject from probate any part thereof. *Taylor v. Hilton* (Okla.), 18-385.

The California statute (Code Civ. Pro., § 1339) which declares that no will shall be proven as a lost or destroyed will unless "its provisions are clearly and distinctly proved by at least two credible witnesses," does not change the rule that a part of a lost or destroyed will which is complete in itself and independent of other parts may be proved, though some other part cannot be satisfactorily established. *Estate of Patterson* (Cal.), 18-625.

Time of taking effect of decree. — A will proved and allowed takes effect immediately and title to the property affected by it passes in the same manner as in the case of a deed which has been delivered. *Hubbard v. Worcester Art Museum* (Mass.), 10-1025.

Conclusiveness of decree. — The decree of a surrogate rejecting a will is conclusive on the parties to the probate proceeding in all controversies relating to personality. Thus in an action to probate a will the contestants cannot establish a revocation of such will by introducing in evidence a revocatory provision in a later will which has been rejected by the surrogate on account of the testator's testamentary incapacity. *Matter of Goldsticker* (N. Y.), 15-66.

m. Appeal and error.

Necessity of giving appeal bond. — Rev Codes N. D. 1905, § 7968, which exempts

an administrator, executor, or guardian from the necessity of giving an undertaking on appeal in certain cases, does not apply to one who appeals from a decision of the County Court revoking the probate of a will and also his letters of administration issued under such will. *Ransier v. Hyndman* (N. D.), 20-415.

New trial on appeal. — Where the probate of a will is rejected in the County Court and an appeal has been taken to the Circuit Court, resort may be had, on the trial of the appeal, to any legitimate evidence in support of the will which may be resorted to for establishing a will in chancery. *Mead v. Trustees of Presbyterian Church* (Ill.), 11-426.

Refusal to issue alias citation as harmless error. — In a will contest the refusal of the trial court to delay the proceedings by issuing an alias citation for certain heirs at law who are proper but not necessary parties, will not be held to be error, especially where the contestant has not been successful in having the probate of the will revoked. *Estate of Dolbeer* (Cal.), 15-207.

Law of the case. — Where a judgment by an appellant court revokes the probate of a will on the ground that the probate judge was without jurisdiction, and holds that the will cannot be probated until a previous grant of letters of administration has been revoked by a direct proceeding instituted for that purpose, it is not required that on a subsequent appeal from a judgment of probate of the same will, rendered by an officer having full jurisdiction, the appellate court shall hold that the will cannot be admitted to probate until the previous grant of letters of administration has been revoked in an independent proceeding. *In re Mears* (S. Car.), 9-960.

n. Annulment of probate.

Competency of person attacking probate as witness. — In an action attacking the validity of a will which has been admitted to probate, where evidence of the party attacking the will is excluded under the New York statute on the ground that it relates to personal transactions between the witness and the testator, the evidence cannot be received in behalf of the other parties attacking the will, notwithstanding the fact that the witness claims under a prior will while the other parties seek merely to establish the invalidity of the will in controversy in order that they may take the entire estate as in the case of intestacy. *Pringle v. Burroughs* (N. Y.), 7-264.

Admissibility of evidence of declarations of executor and principal legatee. — In proceedings to revoke the probate of a will, admissions as to the mental incapacity of the testatrix, made by the executor and principal legatee, prior to the execution of the will, are not admissible in evidence where there are other legatees who are parties to the proceedings and whose interests are different from the interest of the executor. *Matter of Myer* (N. Y.), 6-26.

Instructions. — In a proceeding to set aside the probate of a paper alleged to con-

tain the substance of a lost will, a charge to the jury that "if no other or further proof were given in respect to the will or its contents, it being shown that the original will was lost after the death of the testatrix without fault of the defendants as beneficiaries, and at the time of the death of the testatrix it had not been revoked, the defendants would not be entitled to your verdict," uses the words "it being shown" in the sense of "since it already appears," and is not erroneous as placing the burden of proof on the defendants, especially where other portions of the charge are explicit to the effect that the order of the probate court admitting the paper to probate is *prima facie* evidence of its validity. *Bloor v. Platt* (Ohio), 14-332.

Answers to interrogatories. — Where after the admission to probate of a paper alleged to contain the substance of a will claimed to have been in existence after the death of the testatrix and to have been lost, a proceeding is brought to set aside such probate, and the jury returns a verdict that the paper probated is not the last will and testament of the testatrix and at the same time returns the answer, "Don't know," to interrogatories as to whether the paper was signed by the testatrix and as to whether it was signed in her presence by two subscribing witnesses, such answer is not inconsistent with the general verdict. *Bloor v. Platt* (Ohio), 14-332.

o. Contracts relating to probate.

Validity of contract not to contest probate. — A contract whereby one interested in defeating the probate of a will agrees to interpose no objection thereto is not void as against public policy unless made collusively and for the purpose of defrauding other parties interested in the estate. *Grochowski v. Grochowski* (Neb.), 15-300.

Where such party opposes the probate of the will in good faith, a withdrawal of such opposition is a valid consideration for a promise on the part of one interested in sustaining the will. *Grochowski v. Grochowski* (Neb.), 15-300.

Validity of agreement to secure setting aside of will. — An agreement between the heirs at law of a testator to secure the setting aside of his will for the purpose of defeating the remainders which their issue, born and to be born, take under the will, such remaindermen not being parties to the agreement, is against public policy and unenforceable. *Cochran v. Zachery* (Ia.), 15-297.

Such an agreement is especially against public policy if it contemplates the abandonment of his trust by the executor and trustee under the will without regard to the interest of those for whom he is appointed to act as trustee, notwithstanding the fact that such abandonment takes place before he assumes any obligations under the will, and such executor and trustee cannot recover sums of money which the heirs at law agree to pay him in consideration of his relinquishing the

advantages he would receive if the will was probated. *Cochran v. Zachery* (Ia.), 15-297.

Such agreement is likewise void as a species of champerty or maintenance if under it the executor and trustee is to receive from the heirs at law a certain sum of money in the event that the will is successfully contested, in lieu of the compensation which he would receive if the will was probated. *Cochran v. Zachery* (Ia.), 15-297.

Binding effect on court of agreement that probate shall be disallowed. — An agreement between the beneficiaries under a will that probate thereof shall be disallowed does not control the duty of the probate court to adjudicate as to the legality of the will when it is propounded for probate. *Will of Dardis* (Wis.), 15-740.

8. CONSTRUCTION OF WILLS.

a. General rules of construction.

(1) Intent of testator.

Determination from instrument giving words ordinary meaning. — In construing wills it is the duty of the court to ascertain the intention of the testator if it can be determined from the instrument itself, and in ascertaining such intention words should be given their plain and ordinary meaning. *Pabst v. Goodrich* (Wis.), 14-824.

The cardinal rule of testamentary construction is to ascertain the intent of the testator and give it effect, unless prevented by some inflexible rule of law. *Peabody v. Cook* (Mass.), 16-296.

The intent of a testator must be gathered from what he said, and the search therefor confined to his language. *Watson v. Martin* (Pa.), 20-1288.

The controlling rule for construing a will, to which all technical rules of construction must give way, is to give effect to the true intention and meaning of the testator as the same may be gathered from the whole instrument, unless such intention is violative of some established rule of law; and in arriving at the testator's intention his relation to the beneficiaries named in the will and the circumstances surrounding him at the time of the execution of the will is to be read as nearly, as may be from his standpoint, giving effect, if possible, to every clause and portion of it, and to this end words may be supplied or omitted and sentences transposed if necessary. *Grace v. Perry* (Mo.), 7-948.

Presumption of lawful intent. — In the construction of wills, the primary rule is to give effect to the intention of the testator, and the presumption is that the intent was lawful. *Holbrook's Estate* (Pa.), 5-137.

Presumption that will made with view to law of domicile. — A testator is presumed to have made his will, having in view the law of his domicile. *Kingsbury v. Bazeley* (N. H.), 20-1355.

Respecting intention regarding illegitimates. — The intention of a testator regarding illegitimates is to be respected and effectuated by courts to the same extent as

his intention respecting lawful issue. *Estate of Sanders* (Wis.), 5-508.

(2) Presumption against partial intestacy.

Including property not within terms of will. — The presumption that the testator intended to dispose of all his estate and not to die intestate as to any part thereof does not authorize the making of a new will or the inclusion of property that cannot be brought within the terms of the will. *Andrews v. Applegate* (Ill.), 7-126.

The rule that a will should be so construed, if possible, as to prevent partial intestacy, does not require a court to read into an unambiguous devise of a fraction of a tract of land, the remaining portion of which is not disposed of, a word that will work a disposition of the entire tract, where the other property belonging to the testator is not disposed of. *Gilmore v. Jenkins* (Iowa), 6-1008.

Presumption against intestacy as stronger than presumption against intent to disinherit. — The presumption against intestacy as to any part of testator's estate is not stronger than the rule requiring express words or necessary implication to disinherit an heir. *Watson v. Martin* (Pa.), 20-1288.

(3) Construction as a whole.

In general. — The words in each paragraph of a will should be given such force and effect as to harmonize the whole instrument and permit all parts to stand together. *Pabst v. Goodrich* (Wis.), 14-824.

Language used in specific bequest as aid to interpretation of whole will. — While a whole will must be considered in determining the intention of a testator, the language used in making a specific bequest cannot have a controlling influence in interpreting the language used in dealing with the different subjects. *U. S. Fidelity, etc., Co. v. Douglas* (Ky.), 20-993.

(4) Ambiguous language.

What effect given. — When the language of a testamentary disposition of property is ambiguous, the effect will be given to that meaning which will preserve the right of the testator to dispose of the property as he pleases. *Holbrook's Estate* (Pa.), 5-137.

(5) Supplying words.

To correct mistake. — Though under some circumstances a court, in construing a will, may be justified in supplying words omitted, it cannot correct a mistake in a will or make a new will by supplying words. *Gilmore v. Jenkins* (Iowa), 6-1008.

(6) Incorporation by reference.

Where will contains no devise or bequest. — Where, in a writing admitted to probate as a will, there is no language used from which a gift of any property to any

person can be gathered and affirmed, there being nothing but a bare direction that after the testator's death his property shall be disposed of in accordance with a certain deed or trust, the doctrine of incorporation by reference cannot be invoked to make the deed a part of the will, and the estate of the decedent is an intestate estate. *Hatheway v. Smith* (Conn.), 9-99.

When rule applies. — The rule as to the doctrine of incorporation by reference in a will applies only when the paper sought to be incorporated is in existence at the time of the execution of the will, and when the description thereof is such as to be capable of being applied to the particular instrument. *Bryan's Appeal* (Conn.), 1-393.

Sufficiency of reference. — Where a will refers merely to a "sealed letter which will be found with this will," there is no such clear reference to any specific document as will allow a sealed letter actually found with the will to be proved as a part thereof. *Bryan's Appeal* (Conn.), 1-393.

(7) Bequest by implication.

When bequest will be implied. — A will may operate to bequeath property by necessary implication from the will taken as a whole, even though there is no formal disposition thereof. Such implication, however, must be so strong as to preclude the idea of any other intention on the part of the testator. *Earle v. Coberly* (W. Va.), 17-479.

(8) Contingent wills.

What must appear to make will contingent. — To make a will contingent or conditional, it must clearly appear from the language of the will that it was intended to operate only during a certain period or in a certain event. *Forquer's Estate* (Pa.), 8-1146.

A will is not contingent if the contingency expressed in the instrument is referred to as an occasion for making the will at that time, but it is contingent if the contingency is referred to as a reason for disposing of the property in a certain way and the disposition and contingency are so related to each other that the one is dependent upon the other. *Forquer's Estate* (Pa.), 8-1146.

Presumption against contingent character of will. — If the language used in a will can by any reasonable interpretation be construed to mean that the testator referred to a possible danger or threatened calamity only as a reason for making his will at that time, such reasonable interpretation will prevail, and it will be held that the will is not contingent. *Forquer's Estate* (Pa.), 8-1146.

(9) Reception of parol evidence in aid of construction.

In general. — Though a court may receive parol extrinsic evidence in aid of the construction of a will, it will not receive such evidence for the purpose of changing the will or to aid in making a will which the testator

intended to but did not in fact make. *Gilmore v. Jenkins* (Iowa), 6-1008.

In construing a will, it is error to admit, on the question of the testator's intent, parol evidence of statements made by the testator before or after the execution of the will, but such error does not require a reversal if upon the whole record a proper conclusion has been reached, and if there is competent evidence in the record sufficient to support the decree. *Peet v. Peet* (Ill.), 11-492.

The rule that parol evidence is inadmissible to vary or contradict the terms of a valid written instrument is applicable to wills; and such evidence cannot be received to show whether the testator intended a certain instrument as a will or a deed, except to enable the court to give the language used such an interpretation as, in view of the surrounding circumstances, it is reasonable to presume the testator intended it should receive. *Noble v. Fickes* (Ill.), 12-282.

To identify property bequeathed. — Where a will makes a bequest of stock in a named bank in a specified place, and no such bank exists or has ever existed in such place, there is a latent ambiguity in the will, and extrinsic evidence is admissible to explain the ambiguity and to show what stock is the subject of the bequest. *Snyder's Estate* (Pa.), 10-488.

To identify legatees. — In an action to construe a will, where it appears that the charitable association named as the legatee does not exist, extrinsic evidence may be received to show that the name was inserted inadvertently and that the testator intended that the bequest should go to an existing association having a somewhat similar name. *In re Paulson* (Wis.), 7-652.

The law which admits parol proof, including documentary evidence, for the purpose of identifying the object and subject of a bequest actually made and denoted in a will, is not altered by the Connecticut statute of wills, and therefore some documents referred to in a will and properly admitted in evidence for the purpose of such identification do practically become part of the will and may be spoken of as incorporated by reference. *Hatheway v. Smith* (Conn.), 9-99.

To show contingent character of will. — While the question whether a will is contingent in its character depends upon the intention of the testator as expressed in the will itself, without the aid of extrinsic evidence in the form of subsequent declarations made by the testator in an incidental way as to the disposition of his property, it is competent to prove that a contingent will was republished after the event to which the contingency referred had passed; and it is sufficient to show that the republication was by parol. *Forquer's Estate* (Pa.), 8-1146.

To show whether omission to provide for child was intentional. — Under the Nebraska statute, parol evidence is admissible to show whether the omission of a child from the will was intentional, and the burden of proof is on a pretermitted child or grand-

child to show that the omission was unintentional. *Brown v. Brown* (Neb.), 8-632.

To show intent to disinherit after-born child. — Under the Illinois statute providing that a child born after the making of a last will and testament containing no provision for such child shall not be disinherited "unless it shall appear by such will that it was the intention of the testator to disinherit such child," parol evidence of the circumstances surrounding the testator at the time the will was made is admissible on the question of his intention to disinherit an after-born child, not as importing into the will a new intention not expressed therein, but for the purpose of enabling the court to determine what the intention in fact was, as expressed in the will. *Peet v. Peet* (Ill.), 11-492.

To show belief of testator as to amount of his property. — For the purpose of showing what the belief of the testator was as to the status of his business and the sufficiency of his personal property to pay legacies, a paper shown to be in his handwriting and purporting to contain a statement of the assets and liabilities of the partnership in which he owned one-half interest, is admissible. *Estate of Painter* (Cal.), 11-760.

b. Construction of particular words.

"Balance and residue of my estate of every kind." — The words "balance and residue of my estate of every kind," in the residuary clause in a will, held to include the reversionary interest in the real estate in which the life estate has been carved out. *Foil v. Newsome* (N. Car.), 3-417.

The residuary clause in a will giving "estate of every kind" to a certain person, held to include both real and personal property. *Foil v. Newsome* (N. Car.), 3-417.

"Brother" as including half brother. — As used in the Connecticut statute, providing that "when the devisee or legatee, being a . . . brother . . . of the testator, shall die before him, and no provision is made for such contingency, the issue of such devisee or legatee shall take the estate so devised or bequeathed," the word "brother" includes a half-brother. *Seery v. Fitzpatrick* (Conn.), 9-139.

"Cash." — A bequest after various pecuniary legacies by one having at his death money, shares of stock, promissory notes, household furniture, and real estate, of any cash left over, entitles the legatee after the payment of pecuniary legacies to the balance of the personal estate, but not to the real estate. *Watson v. Martin* (Pa.), 20-1288.

"Child or children" as including adopted child. — A bequest of a fund to trustees to pay the income to the testator's nephew during his life and on his death "leaving a child or children surviving him," to pay over the fund to such child or children, refers only to natural offspring of the life beneficiary and does not include adopted children. *Matter of Leask* (N. Y.), 18-516,

Children "living" or "born" as including child en ventre sa mere at time. — It is a general rule of construction that, in the absence of a contrary intention, a gift by will to children "living" or "born" at a given period, includes a child *en ventre sa mere* at that date, and born afterwards, in any case where the application of the rule is for the benefit of the child. *In re Salaman* (Eng.), 12-199.

Where a testator, by his will, gives a stated sum to each of his great-nephews and great-nieces "born previously to the date of this my will," to whom no other pecuniary bequest is given by his will or any codicil thereto, and makes two codicils in his will, a great-niece *en ventre sa mere* at the date of the will and of the codicils and born afterwards is entitled to a legacy. *In re Salaman* (Eng.), 12-199.

There is no fixed rule of construction compelling a court to hold that a child which was *en ventre sa mere* at the time of the testator's death was born in the testator's lifetime, but that the particular rule will be applied only when such construction of the word "born" is necessary for the benefit of the unborn child. *Villar v. Gilbey* (Eng.), 7-130.

A will construed, and held not to include within its provisions, as a child born in the testator's lifetime, a child born three weeks after the testator's death. *Villar v. Gilbey* (Eng.), 7-130.

"Contest" within provision for forfeiture of legacy. — What constitutes a contest within such a provision in a will must be determined by the facts of the particular case. The mere filing of a paper contest, which is afterwards abandoned without action, and which is not employed to thwart the testator's expressed wishes, need not be judicially declared a contest; but wherever an opponent of a will uses the appropriate machinery of the law to the thwarting of the testator's expressed wishes, whether he succeeds or fails, his action is a contest. Thus there is a contest where a beneficiary named in the will files written grounds of opposition to the probate of the instrument, and moves to strike out portions of the proponent's answer thereto, and has the proceeding set for a hearing, and the hearing is continued from time to time until another beneficiary, presumably in fear of losing his legacy under the will, offers a compromise, which is accepted by the contestant. *Estate of Hite* (Cal.), 17-993.

The meaning of the word "contest," as used in such a provision in a will, is to be determined from a consideration of the purpose and end which the testator sought to attain. Ordinarily that purpose is to prevent the invocation of any of the technical rules of law to be employed to thwart his expressed wishes, to prevent all attacks upon his character, reputation, or sanity by dragging into publicity his private life, and to secure the beneficiaries named the fruits of his bounty. *State of Hite* (Cal.), 17-993.

Where the language of a codicil merely

modifies the original will to the extent of the legacies given in the codicil, but expressly reaffirms it in every other particular, the codicil is as much an integral part of the will as though its purport had been expressed in one of the original clauses thereof, and, in such a case, a contest of the codicil is a contest of the will, within the meaning of a provision forfeiting the devise or legacy of any beneficiary who contests the will. *Estate of Hite* (Cal.), 17-993.

"Effects." — The word "effects" in its primary and ordinary meaning includes only personal estate. *Andrews v. Applegate* (Ill.), 7-126.

When the word "effects" is used in a will, it will be construed as not including real property, unless the context discloses an intention on the part of the testator to dispose of his realty by the use of the word; but in its broadest sense of property or worldly substance, it may include land, and should be so construed when it appears from other parts of the will that such was the testator's intention. *Andrews v. Applegate* (Ill.), 7-126.

"Grandchildren." — In a bequest by which the testator created two life estates, one for the use of his daughter and the other for the use of his grandchildren, declaring that, if any of the grandchildren should die leaving descendants living such descendants should take *per stirpes* the same interest they would have taken if the property had been then to descend, and that the rest should be managed and controlled by the trustee for the use of the testator's surviving grandchildren without the right to convey, anticipate, or encumber the same, etc., the word "grandchildren" must be held to have been intended to include not only those born and living or having died leaving issue at the testator's death, but also any who might be born to the testator's daughter during her lifetime, and it is immaterial that the daughter was over fifty years old at the time of the testator's death. *U. S. Fidelity, etc., Co. v. Douglas* (Ky.), 20-993.

"Heirs." — In a bequest to the "heirs" of the children of the testatrix after the termination of a life estate in the property, the word "heirs" will be construed to mean the "children" of the testatrix's children so as to allow the children of a living child of the testatrix to take their share of the property, such being the evident intent of the testatrix. *Kalbach v. Clark* (Ia.), 12-647.

"Lawful issue." — A will construed and held to show that the testator used the term "lawful issue" as synonymous with "lawful children." *Brisbin v. Huntington* (Ia.), 5-931.

The Iowa statute providing that illegitimate children shall inherit from their father when he has recognized them as his children is a statute of descent only, and does not legitimate bastards so as to enable them to take as "lawful issue" under a will wherein that term is used in the sense of "lawful children." *Brisbin v. Huntington* (Ia.), 5-931.

"Monument" as including public library. — The erection of a building for a public library is not within the purview of a trust created by a will by which the testator set apart a certain sum for "a suitable monument" to his memory. *Fancher v. Fancher* (Cal.), 19-1157.

"Or" construed as "and." — The word "or" in a will should be read "and" where the testamentary intent clearly requires it, as in the case of a devise to the testator's daughter with a limitation over should the daughter not be living at the time of the testator's decease "or" die without lawful issue. *Edward's Estate* (Pa.), 19-921.

"Parties mentioned" in will as including persons mentioned in codicil. — A will construed, and the clause dividing the residue among the "parties mentioned" held to refer to the parties mentioned as beneficiaries in the will and not in the codicil. *In re Miles* (Ont.), 8-427.

"Real estate" as including interest in leasehold. — A devise of "all my real estate" does not pass the testator's interest in a leasehold. *Orchard v. Wright, etc., Store Co.* (Mo.), 20-1072.

"Right heirs." — A widow, being a statutory heir of her deceased husband under the laws of Massachusetts, is entitled to take under a will which directs the conveyance and distribution of property, real and personal, to and among the "right heirs at law" of such deceased husband "agreeably to the statutes of Massachusetts regulating the descent of intestate estates." *Peabody v. Cook* (Mass.), 16-296.

Assuming that the phrase "right heirs," when used in a will, is not necessarily and under all circumstances equivalent to legal heirs, it will, nevertheless, be given the latter signification when accompanied by words indicating an intention on the part of the testator to employ it in that sense. *Peabody v. Cook* (Mass.), 16-296.

"Survivor" as meaning "other." — The word "survivor" will not be construed to mean "other," in the absence of other provisions showing that the word "survivor" was used in a different sense from the one living longer, in a will giving a power to the survivor of two persons named, "being single and unmarried," to dispose of property by last will and testament, so as to hold that the donee dying first has the power to make a testamentary disposition of the property, merely because at the time she executes her will and at the time of death she is single and unmarried, whereas the other donee is married. *Hill v. Safe Deposit, etc., Co.* (Md.), 4-577.

"Wife." — Under a will by which the testator devises property to his "wife," the woman with whom the testator is living as a husband at the time of the will, and with whom he continues to live in that relation until his death, is the intended object of the devise and takes the property as against a woman claiming to be the wife of the testator by a former marriage, especially where

such former marriage is not satisfactorily proved. *Marks v. Marks* (Can.), 12-751.

c. Construction of particular provisions

(1) In general.

Persons entitled to share in case of partial intestacy. — A will construed and held to show partial intestacy, and not to show an intention on the part of the testator to exclude his sons, to whom nominal bequests were made, from any further participation in his estate. *Gilmore v. Jenkins* (Ia.), 6-1008.

The fact that there are words in a will signifying an intention to exclude certain heirs of the testator from participating in property other than that devised to them, does not have the effect of excluding them from participating in undisposed of property. *Vaughan v. Langford* (S. Car.), 16-91.

Bequest after termination of life estate as per capita or per stirpes. — Under a bequest directing that at the death of the life tenant the property shall be "equally divided among the heirs of my four children," the legatees take *per capita* and not *per stirpes*. *Kalbach v. Clark* (Ia.), 12-647.

Residuary bequest. — A final clause in a will, whereby the testator devises all of his real property and gives and bequeaths all articles of personal property belonging to him at his decease, which are not therein specifically bequeathed, or designated to be held in trust, will be construed to include all personal property which does not pass under the previous provisions of the will, including money, securities, and deposits, although, by a prior clause of the will, certain money, securities, and deposits are designated to be held in trust by the executors for a specified purpose. The words "designated to be held in trust," as used in such final clause, must be construed to mean given in trust, and not to mean that money, securities, and deposits are excluded as matter of description in all cases from the personal property covered by such clause. *Howland v. Parker* (Mass.), 16-201.

An appointment of a "residuary legatee," standing alone in a will, is a gift of the personal estate only, but in determining whether the "residuary legatee" will take realty, the courts will look at the whole will for the purpose of getting at the real intent and meaning of the testator. *Dann v. Canfield* (Mass.), 14-794.

Where a testator without legal learning who is possessed of both real and personal estate, and whose only heirs at law are two adopted daughters, with one of whom his relations are friendly and with the other of whom his relations are not cordial, draws his own will and disposes specifically of a substantial part of his real estate in addition to several bequests of personalty, with a provision that a certain trust fund therein created shall revert, at the death of the beneficiary, to his "general estate," and names the adopted daughter, with whom he sus-

tains friendly relations, as "residuary legatee—the amount to remain as a trust fund during her lifetime—the income payable to her quarterly," the real as well as the personal estate passes to the residuary legatee. *Dann v. Canfield* (Mass.), 14-794.

Mistaken description of legatees. — Where it appears that a testatrix, after bequeathing a life estate in shares of stock to one of her sons and his wife, who were childless to the knowledge of the testatrix, bequeathed the remainder to "their three children," and it appears that she had three grandchildren (children of a daughter and another son) of whom she was fond, the language used, construed in the light of the knowledge possessed by the testatrix, indicates an unmistakable intent to give the remainder to such grandchildren, and is not ambiguous or uncertain. *Polsey v. Newton* (Mass.), 15-139.

Where a governing intention to benefit the children of a certain person appears from a will, coupled with a mistake in the number of those children, the dominant intention to benefit the persons so described must be given effect by rejecting the inaccurate enumeration, and this rule is not affected by the fact that the persons so described are to share equally with certain colegatees, the estate being in such case divisible according to the entire number of legatees actually in existence. *In re Sharp* (Eng.), 15-42.

Intention to disinherit after-born child. — Under the Illinois statute providing that a child born after the making of a will containing no provision for such child shall not be disinherited "unless it shall appear by such will that it was the intention of the testator to disinherit such child," an intention to disinherit a child born after the making of the will is sufficiently shown where it appears that the testator's estate was heavily encumbered and unproductive; that he had unlimited confidence in the business judgment and ability of his wife, to whom he left all his property; and that he had a son three years old, to whom he was devotedly attached, but for whom he made no provision in the will. *Peet v. Peet* (Ill.), 11-492.

Devise subject to contract of sale. — Where land is devised in fee, subject to a contract for its sale, the devisee is not a simple trustee of the legal title, but takes the testator's title and beneficial interest, and therefore is entitled to the purchase-money notes and proceeds thereof, notwithstanding the fact that the will contains a residuary devise. *Covey v. Dinsmoor* (Ill.), 9-31.

Property intended to pass. — Where a will, after devising certain described real property, provides that upon the death of the testator's widow his children shall share equally in the money received from the sale of real and personal property, it cannot be contended that such provision amounts to a disposition, as money instead of as real property, of real property not mentioned or described in the will, as a power to sell property disposed of by a will does not give either

implied or express power to sell other property. *Andrews v. Applegate* (Ill.), 7-126.

Contingent will. — Will construed and held not to be contingent in character. *Forquer's Estate* (Pa.), 8-1146.

After-acquired property as subject of will. — Lands acquired by a testator subsequent to the execution of his will do not pass thereby unless the testator's intention to include therein such after-acquired property clearly and manifestly appears on the face of the will itself, as required by the Ohio statute (R. S., § 5969). *Wright v. Masters* (Ohio), 18-165.

Gift absolute with addition of descriptive words after beneficiaries' name. — A devisee to whom property is devised "absolutely" takes as an individual although he is designated as "archbishop of Philadelphia." *Flood v. Ryan* (Pa.), 13-1189.

(2) Bequest by implication.

What amounts to. — Where a testator, after directing payment of his debts and giving certain pecuniary legacies without directing how they are to be paid, devises a specific lot of land to L. E., his daughter, who is also named in the will as executrix, but fails to make any disposition of a large part of his real estate, and makes no mention of his personal property except by a clause in the will to the effect that "she the said L. E. is to sell and dispose of my personal property and after paying her for her trouble she can dispose as she thinks best," such clause will be construed as an absolute gift of his personal property to L. E. *Earle v. Coberly* (W. Va.), 17-479.

(3) Joint or several bequest or devise.

What amounts to several bequest. — A bequest to two children of the testator of a certain number of shares of the stock of each of two corporations, "or the value of \$5,000 each, should a charge be made in these investments," means that each child is to have the designated number of shares in each of the corporations. *Palmer v. Palmer* (Me.), 19-1184.

What amounts to joint devise. — Where a testator devises to his five daughters, naming them, "the undivided one-fifth" of a specified tract of land, and provides for the disposition of a daughter's share in the event of her predecease, each daughter takes one-fifth of a fifth, and not one-fifth of the whole tract, though the will makes no disposition of the remaining four-fifths. *Gilmore v. Jenkins* (Ia.), 6-1008.

(4) Conditional devise or bequest.

Devise to religious society for specified purpose as conditional devise. — A devise of land to a church "to be used as a parsonage and nothing else, and to be kept for that purpose and used for nothing else," with no devise over, gives the property to the church absolutely with a direction to use it in a certain way, and does not create a

conditional estate that reverts by reason of the fact that the church trustees do not use the property for a parsonage. *Adams v. First Baptist Church* (Mich.), 12-224.

Title of conditional legatee. — Where a testatrix bequeaths to her son a sum of money, payable in annual instalments for a specified number of years, upon condition that he shall attend regularly certain religious meetings, and the will provides that in the event of the death of the son before the expiration of the specified time the unpaid portion of the bequest shall be paid to his children, and further provides that if the son does not try in good faith to comply with the condition the bequest shall go to a specified charitable association, the will does not vest in the son an absolute title to the bequest at the death of the testatrix. *In re Paulson* (Wis.), 7-652.

Time for fulfilment of condition. — Where a will provides that "if . . . [a named devisee] remains unmarried . . . all that I have . . . belongs to her; should she marry . . . my other children shall divide [it] among themselves," the words "if she remains unmarried" refer to the date of the testator's death, and the will makes an absolute gift to the devisee if she remains unmarried until the time of the testator's death. *Matter of Alexander* (Cal.), 9-1141.

(5) Gifts to classes.

Persons within gift to servants of a "year's wages." — Under a legacy to servants of a "year's wages," no servants can take except those who are hired by the year, or whose wages are reckoned by the year. *In re Ravensworth* (Eng.), 2-865.

Gift to class as including person dead before will executed. — A bequest to a class does not include persons dead before the making of the will, who, had they survived till that time, would have fallen within the description given to the class, in the absence of something in the will or surrounding circumstances to show a different intent. *Pimel v. Betjemann* (N. Y.), 5-239.

(6) Gift of rents and profits or income.

As devise of property itself. — A devise of the rents, profits, and income of specified real property for life is in effect a devise of the property itself for life, but is not a devise of the fee. *Mays v. Beech* (Tenn.), 4-1189.

A devise of the use, income, and occupancy of real property amounts to a devise of the property itself. *Merrill v. American Baptist, etc., Union* (N. H.), 6-646.

(7) Cutting down clear gift by subsequent clause.

Cutting down absolute gift to life estate. — Where a sentence in a will, which standing alone devises and bequeaths the testatrix's estate absolutely to her brother and to other specified persons, share and share alike, is immediately followed by a sentence

directing that the share due to such brother shall be invested by the executors "for his benefit during his natural life, and for the benefit of his wife and his issue after his death," the second sentence so clearly relates to and modifies the effect of the first sentence as to cut down the brother's absolute estate to an estate for life with remainder over to his wife and children. *Mee v. Gordon* (N. Y.), 10-172.

A will construed, and held to give an absolute property in the personality and a fee simple in the realty, the devise not being cut down to a life estate coupled with a trust by a subsequent clause. *McIsaac v. Beaton* (Can.), 3-612.

The provision of a will, "I give and devise to my daughter, Elizabeth Yambert, eleven hundred dollars aside of what she has already received, and I appoint my sons, Jacob Yentzer and Benjamin Yentzer, after my death to purchase with the eleven hundred dollars a home for the above-named Elizabeth Yambert, to be for her use during her life and after her death the property to fall to her children," does not express an absolute and unconditional gift of the sum of money named to Elizabeth Yambert, but requires its investment in real estate for her use during her life, with remainder in fee to her children. *Lohmuller v. Mosher* (Kan.), 11-469.

(8) Trust estates.

Creation of trust without power of sale. — A provision in a will that the share of the testatrix's estate devised to a certain person shall be invested for his benefit during his natural life, and for the benefit of his wife and his issue after his death, creates a trust, though no power to sell is expressly conferred upon the executors, as, if compliance with the direction to invest the share of the beneficiary involves the sale of real estate, possession of power to sell will be implied. *Mee v. Gordon* (N. Y.), 10-172.

Charging executors with duties of trustees. — A provision in a will that the share of the testatrix's estate devised to a certain person shall be invested for his benefit during his natural life, and for the benefit of his wife and his issue after his death, creates a trust, notwithstanding the fact that the executors of the will are charged with the duties of investment and of administering the trust, as where the duties of a trustee are imposed upon a person he will be regarded as being a trustee rather than an executor. *Mee v. Gordon* (N. Y.), 10-172.

What constitutes trust for life with remainder over. — Where a clause in a will devises the testatrix's property to her brother and certain other specified persons, share and share alike, and directs that the brother's share shall be invested by the executors "for his benefit during his natural life, and for the benefit of his wife and his issue after his death," the clause creates a valid express trust to collect the rents and profits for the benefit of the brother during his lifetime, and creates an absolute remainder to the

brother's wife and children. *Mee v. Gordon* (N. Y.), 10-172.

Person entitled to annuity. — Where a will, after devising the testator's estate in trust, provides for an annual accounting by the trustee for the income received by him during the preceding annual period, and further provides that from each annual net balance so ascertained a specified sum shall be paid to the widow and that the remainder of the fund shall be distributed among the testator's children, and further provides that the first of these accountings and distributions shall be made at the expiration of one year from the testator's death and that the succeeding ones shall be made as soon after the end of each year thereafter as is convenient, the intention of the testator is to give to his children, not proportional parts of the income generally, but proportional parts of an ascertained fund when that fund shall from year to year be ascertained; and therefore when a child, who is entitled to share in the income so long as he lives, dies after the making of an annual distribution, but before the arrival of the time for another distribution, his executor is not entitled to share in the income accruing prior to his death and since the last distribution. *Green v. Bissell* (Conn.), 9-287.

(9) Vested or contingent remainders.

What sufficient to create vested remainder. — In a will which, after devising certain land to the testator's wife, provides that the land is "after her death to be sold, and the proceeds to be equally divided between my surviving children and the children of any of my deceased children," the words of survivorship refer to the death of the testator, and at his death the persons designated take a vested remainder interest. Consequently a child of the testator who survives him can make a valid conveyance of his or her remainder interest, and notwithstanding the fact that such child dies before the death of the life tenant, the children of such child who survive the life tenant do not take, as devisees under the will, a title superior to that conveyed by such child of the testator. *Crossley v. Leslie* (Ga.), 14-703.

What amounts to contingent remainder. — A provision in a will granting the residuary estate to one "for his natural life, and after his death to the heirs of his body; but if he dies without any heirs of his body," the property to go to another, contemplates a definite failure of issue of the first taker as a condition for the vesting of the property in the second. *Biscoe v. Thweatt* (Ark.), 4-1136.

In a devise to A for life with remainder to his children as a class, a grandchild whose parent died before the death of the testator cannot share in the remainder with the only child of the life tenant who was *in esse* when the title to the remainder vested at the testator's death and at the time of the vesting of such estate in possession at the life ten-

ant's death. *Crawley v. Kendrick* (Ga.), 2-648.

Remainder to corporation to be formed after testator's death. — Under the provision of a will devising or bequeathing a remainder, after a life estate to the testator's wife, to a corporation to be formed after his death, if the wife survives the testator and the corporation is formed during her lifetime, the devise or bequest to the corporation becomes, upon her death, a gift *in presenti*, but if the wife does not survive the testator, the devise or bequest to the corporation is a gift *in futuro* which takes effect upon the formation of the corporation. *St. John v. Andrews Institute* (N. Y.), 14-708.

(10) Limitations over.

Directions operating as conversion. — Where a will devising real property in trust for life, with remainder over in trust, expressly directs that upon the death of the life tenant or his failure to comply with a specified condition, the property shall be sold and the proceeds invested in securities, the direction operates to convert the property into personalty from the death of the testator. *Iglehart v. Iglehart* (D. C.), 6-732.

(11) Power of disposition and control.

Power of disposition as repugnant to life estate. — A power of disposition added to a life estate is not repugnant to the life estate or the remainder over, as, if it is not exercised by the life tenant, it leaves both estates unaffected by it, and if it is exercised it defeats the remainder in the property disposed of. *Grace v. Perry* (Mo.), 7-948.

Clause creating life estate and giving power of disposition. — The residuary clause in a will construed, and held to show an intent on the part of the testator to devise a life estate with power of disposition. *Grace v. Perry* (Mo.), 7-948.

A will or deed containing two inconsistent provisions, one indicating that a life estate only in real estate is intended to be conveyed to a person, and the other giving or granting to such person an absolute and unlimited power of alienation and disposition of such estate in fee simple, will be held to pass a life estate, or the fee simple, as the one or the other may appear to be the primary intention disclosed by a consideration of the whole instrument. *Morgan v. Morgan* (W. Va.), 9-943.

Execution of power of sale. — A will giving an estate in fee simple with power to sell, the remainder to be distributed, gives the devisee power to convey the fee of the whole or any part of the real estate and such a deed is good against the second devisee. *Bodmann German Protestant Widows Home v. Lippardt* (Ohio), 1-875.

(12) Rule in Shelley's Case.

Application of rule to devise of use for life and lawful heirs of body after death of life tenant. — A devise of the

"use and benefit and profit" of land to the devisee "during her natural life, and to the lawful heirs of her body after her death," passes the estate in the land itself, and the rule in *Shelley's Case* operates to give the devisee a title in fee simple. *Perry v. Hackney* (N. Car.), 9-244.

d. Actions to construe wills.

(1) Jurisdiction.

Jurisdiction of court of equity. — A bill in equity will lie to construe a will where its construction would be necessary if the claim of a certain person to inherit from the testator were to be sustained, and the court having jurisdiction for the purpose of construction will decide the claim of heirship. *Van Derlyn v. Mack* (Mich.), 4-879.

In order to give a court of equity jurisdiction to construe a will, there must be an actual litigation in respect to a matter which is the proper subject of jurisdiction of a court of equity as distinguished from a court of law. *Hart v. Darter* (Va.), 13-1.

A bill in equity for the construction of a will must be dismissed for want of jurisdiction where the will disposes of purely legal estates or interests, and no trust relation is involved in respect to the lands devised, and no other ground of equity jurisdiction is shown. *Hart v. Darter* (Va.), 13-1.

Jurisdiction of United States Circuit Court. — A Circuit Court of the United States has no jurisdiction of a suit brought merely to construe a will, as the "amount in controversy" is lacking, and therefore a legatee who brings but fails to maintain a suit to avoid a bequest to charitable uses contained in his testator's will is not entitled to have his counsel fees paid out of the estate, though his claim renders the construction of the will necessary. *Tincher v. Arnold* (U. S.), 8-917.

Proper court to pass upon construction. — Although a Circuit Court has no jurisdiction over the distribution of estates, yet where the question presented is one to be determined in advance of distribution, the executors are entitled to the aid of such court, the fact that the question may arise in the County Court on distribution being no objection to its determination by the Circuit Court in an action to construe the will. *Pabst v. Goodrich* (Wis.), 14-824.

It is not necessary that the question whether a legacy is specific or demonstrative should be determined as a preliminary question by a court of equity and not upon appeal by the Supreme Court of Probate. Jurisdiction of the probate court in such case is authorized by statute. The decree of the probate court is subject to revision on appeal by the Supreme Court of Probate. *Stilphen, Appellant* (Me.), 4-158.

(2) Parties.

Legatees named in clauses sought to be construed as necessary parties. — Where a person having power to dispose by

will of the principal of a trust fund makes a will exercising such power, but a question arises as to which of two clauses of the will is intended as an execution of the power, such question can only be decided in a suit in which the legatees named in those clauses are parties. *Howland v. Parker* (Mass.), 16-201.

(3) Appeal and error.

Who may appeal. — Under the Wisconsin statute the executrix may appeal from a judgment in an action for the construction of her testator's will, as she is the "person aggrieved" thereby, within the meaning of the statute. *In re Paulson* (Wis.), 7-652.

(4) Liability for costs.

Liability of estate for costs of action by person having no interest. — Where, on account of a claim made against an estate in which the claimant has no interest, the executor brings a bill in equity to construe the will and to determine the legatees thereunder, and the claimant is shown not to have any interest, he and not the estate is liable for costs. *Van Derlyn v. Mack* (Mich.), 4-879.

Liability of estate for costs of action by legatee. — Where a legatee brings but fails to maintain an action in a Circuit Court of the United States to construe his testator's will and to avoid a bequest to charitable uses contained in the will, the action is one for the complainant's interest alone, and he is not entitled to have counsel fees allowed him out of the estate, especially where it appears that the bequest attacked has previously been held valid by the state court of last resort in a proceeding which is binding on all parties to the action for the construction except the complainant. *Tincher v. Arnold* (U. S.), 8-917.

9. VALIDITY OF PROVISIONS.

a. In general.

Imperfect description of legatee. — An olographic will made by an illiterate testator by the name of Bradford, which reads: "I institute my brother James Brother heir to my whole estate, real and personal," etc., will not be held invalid on the ground that it names as universal legatee a nonexistent or unknown person. In such a case the word "Brother" will be treated as an inadvertent repetition of the word "brother." *Succession of Bradford* (La.), 18-766.

Joint life estate with power of disposition and contingent remainders. — Where a will devises real property in equal parts to A and B for life, with remainder to the heirs of their body, but with full power and authority in each of the life tenants to dispose of the absolute estate in fee simple, and with remainder over to C in the event of the death of both A and B without issue, the devise is valid, and each of the life tenants has power to dispose of an undivided

one-half of the property in fee simple. *Grace v. Perry* (Mo.), 7-948.

Limitation after life estate contingent upon alienation by life tenant. —

A limitation after a life estate contingent upon alienation by the life tenant is valid, and a life estate may be given with the power of disposal or appointment superadded, and an executory limitation in default thereof will be good. *Grace v. Perry* (Mo.), 7-948.

Where property is devised in fee simple with a provision that all of the property remaining and not disposed of by the devisee by last will or otherwise shall pass to other named persons, the limitation over is void. *Bernstein v. Bramble* (Ark.), 11 343.

Limitation over upon indefinite failure of issue. — The children of a testator take the fee under a devise of land "to them and their heirs forever" notwithstanding the will contains a subsequent clause providing for the disposition of the property "should my heirs and their heirs cease to exist, and the time ever come when there was no lineal descendant," as the devise over is limited upon an indefinite failure of issue, and is therefore void for remoteness. *Merrill v. American Baptist, etc., Union* (N. H.), 6-646.

Release to tenant of fee conditional to increase estate to fee simple. —

Whether a release to a tenant in fee conditional, so as to make his estate an absolute fee simple, may be made by will, *quære*. *Vaughan v. Langford* (S. Car.), 16-91.

Gift to corporation to be formed. —

In New York as well as in Ohio property may be devised or bequeathed to a corporation to be formed after the testator's death, if it is provided in the will that such corporation shall be formed and that the property shall vest in it within a period not longer than the lives of two persons in being at the time of the execution of the will. *St. John v. Andrews Institute* (N. Y.), 14-708.

Gift to charity in excess of amount permitted by statute. —

The provision of the New York statute to the effect that a person having a husband, wife, child, or parent shall not devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary association or corporation more than one-half of his or her estate after the payment of debts, refers to the time of the testator's death and not the time of the execution of the will, and applies only to testators who are survived by any of the relatives mentioned in the statute. *St. John v. Andrews Institute* (N. Y.), 14-708.

Under such a statute the death of the testator's wife simultaneously with the testator's death has the same effect as if her death had occurred before his death. *St. John v. Andrews Institute* (N. Y.), 14-708.

Statute of mortmain. — Where a domiciled Englishman, who died before the repeal of the Mortmain Act, 1736, by his will gave to charity his residuary estate, which included mortgages on land in Ontario, and at the date of his death the law was the same in Ontario as in England, the gift of the

mortgages was void. *In re Hoyles* (Eng.), 20-713.

b. Restraint of marriage.

Devise in fee with limitation over upon devisee's marriage. —

Under the California statute where a devise in fee is coupled with a condition subsequent that in the event of the devisee's marriage her estate shall terminate and the property shall be vested in other persons, the condition is void as being in restraint of marriage. *Matter of Alexander* (Cal.), 9-1141.

A bequest by a testatrix to her niece of the income of a fund "during the term of her natural life, or so long as she remains unmarried," with a gift over "in case of her death or marriage," is not invalid on the ground that it is in restraint of marriage. While the practical effect of the bequest may be to discourage marriage, there is nothing therein clearly indicating an intent to prohibit marriage; the words employed are equally appropriate to express an intent to supply an income to the legatee so long as she remains unmarried and presumably dependent on her own exertions for her maintenance. *Holbrook's Estate* (Pa.), 5-137.

c. Restraint on alienation.

Devise of life estate prohibiting alienation or attachment for debt. —

Where a devise of a life estate gives the legal title thereto to the devisee, a further provision of the will which attempts to make such estate inalienable by the devisee or exempt from liability for his debts is void. *Mattison v. Mattison* (Ore.), 18-218.

Devise of fee with restriction against sale or mortgage. —

Where a testator devises land to his son in fee, subject to the condition that the son "shall not during his lifetime either mortgage or sell" the land, the restraint on alienation is limited and not absolute, and is valid. *In re Porter* (Ont.), 7-318.

d. Restraint on entering naval or military service.

Condition divesting interest of legatee or devisee upon enlistment. —

A condition in a will divesting the interest of a devisee or legatee in the event that he enters the naval or military service is void as against public policy. *In re Beard* (Eng.), 13-352.

e. Gifts to witnesses.

Invalidity of gift to beneficiary necessary to sustain will as witness. —

If a will cannot be proved without proof of the attestation thereof by a beneficiary thereunder, the interest of such beneficiary is avoided by the provision of the Virginia statute that "if the will may not be otherwise proved," a beneficiary thereunder who has attested the will shall, upon the avoidance of his interest, be deemed competent as an attesting witness. The fact that the due execution of the will is proved by a witness

other than such beneficiary does not affect this rule. *Bruce v. Shuler* (Va.), 15-887.

Validity of gift to necessary but not attesting witness. — The statute (Gen. St. 1909, § 9786) making void a devise or bequest to a witness to a will which cannot be proved without his testimony applies only to attesting witnesses, not to other persons called upon to testify when the will is offered for probate. *Sellards v. Kirby* (Kan.), 20-214.

f. Conditional gifts.

Validity of impossible condition. — A legacy given to a church for use in building a Sunday school room and making such other improvements as may be necessary to certain real property designated in the will, is not defeated where the premises specified as those to be improved are taken from the church for public use, by exercise of the power of eminent domain, after the death of the testator but before the legacy has been paid. The inability of the church, from such cause, to perform strictly the conditions of the gift, by expending the legacy in precisely the manner stated in the will, does not relieve the executors of the testator from the duty of paying the legacy, or furnish ground for a claim of forfeiture or breach of trust after its payment. To the extent of enabling the church to take and retain its legacy, the law will regard the damages awarded to the church in the condemnation proceedings as standing in the place of the property taken. *New Haven County v. Parish of Trinity Church* (Conn.), 17-432.

Validity of condition requiring legatee to attend church. — A condition attached to a bequest requiring the legatee to attend religious worship held not void, either as to being contrary to public policy, or as contravening the constitutional provision for the freedom of worship, or as being indefinite and uncertain. *In re Paulson* (Wis.), 7-652.

g. Forfeiture of legacy by contest.

In general. — A provision in a will forfeiting the devise or legacy of any beneficiary who contests the will is valid. Such a provision not only does no violence to public policy, but is in accordance with that policy. *Estate of Hite* (Cal.), 17-993.

Necessity of gift over in case of forfeiture. — The rule which prevails in some jurisdictions that a provision in a will declaring a legacy forfeited in case the legatee contests the will is ineffectual to work a forfeiture, unless there is a gift of the legacy over to another person in that event, is not recognized in California. *Estate of Hite* (Cal.), 17-993.

h. Erection of tomb.

Bequest to executor for erection of tomb. — A bequest to the executor of a will for the purpose of erecting a tomb for the testator, cannot be held to be against public policy. *Morrow v. Durant* (Iowa), 17-850.

A bequest for the erection of a monument

to the deceased husband of the testatrix will be upheld though it amounts to about half of the value of the estate, where it appears that the testatrix was of sound mind, left no husband or children surviving her, and was under no legal obligation to leave her property for the support of her relatives. *Iglehart v. Iglehart* (D. C.), 6-732.

i. Effect of invalid provisions.

As invalidating will in toto. — The fact that a will contains bequests which are contrary to the California Civil Code relating to charitable devises and bequests is not ground for the revocation of the probate of such will. *Estate of Lennon* (Cal.), 14-1024.

Although it is a general rule that where dispositions of a will are independent, such dispositions as are contrary to law may be rejected without affecting those which are valid, it is necessary to consider the general scheme and intention of the testator and the effect which the rejection of an invalid disposition will have upon that general scheme and upon the shares of the intended objects of his bounty. Thus, where a testator who has no nearer heirs gives by one clause in his will property amounting to practically one-half of his estate to the children of a deceased sister and by other clauses gives certain property comprising the remainder of his estate to the children of a deceased brother, he thereby manifests an intention that the two sets of representatives designated shall share his estate in something like equal proportions, and if the clauses of the will in favor of the children of the deceased brother are void as violating the rule against perpetuities, the clause for the benefit of the children of the deceased sister will also be rejected so that those intended by the testator to take may take by the law of descent in two equal portions in substantial accordance with the manifest purpose of the will. *Reid v. Voorhees* (Ill.), 3-946.

10. LEGATEES AND DEVISEES.

a. In general.

Treating devisee of devise on unlawful consideration as trustee for heirs and next of kin. — If a devise is made in consideration of a promise to execute an invalid or unlawful trust, equity will not allow the devisee to profit by his fraud and will raise a resulting trust in favor of the heir or next of kin of the testator; but where there is no bargain between the testator and his devisee, the devise is good although the intention of the devisee is to carry out what he believes to be a wish of the testator's which could not lawfully be made a condition of the devise. *Flood v. Ryan* (Pa.), 13-1189.

b. Nature of legacy.

What constitutes specific legacy. — A specific legacy is a gift by will of a specific article or part of the testator's estate, which

is identified or distinguished from all other things of the same kind, and which may be satisfied only by the delivery of a particular thing. *Snyder's Estate* (Pa.), 10-488.

Specific designation of the object of the testator's bounty is essential to the creation of a specific bequest. *U. S. Fidelity, etc., Co. v. Douglas* (Ky.), 20-993.

A devise to the testator's wife and sons of particularly described parcels of real estate with the added words, "together with all real estate I may hereafter accumulate," is a specific devise of the lands particularly described notwithstanding the residuary clause. *Estate of Painter* (Cal.), 11-760.

What constitutes general legacy. —

A bequest of a stated number of shares of stock of a designated corporation, without any reference to the particular shares intended to be bequeathed, is not specific, but general. *Palmer v. Palmer* (Me.), 19-1184.

Where a will making bequests of bank stock does not give to the legatees specific shares of the stock, but gives to each of them in general terms a certain amount of the stock without identifying any particular shares or distinguishing those given from all other shares of the same kind of stock, the legacies are general and not specific. *Snyder's Estate* (Pa.), 10-488.

What constitutes demonstrative legacy. — A legacy made payable out of the proceeds of a claim which the testator has against the United States government, and which is not collected until after the testator's death, is a demonstrative legacy. *Matthews v. Targarona* (Md.), 10-153.

Distinction between specific and demonstrative legacy. — The distinction between a specific and a demonstrative legacy involves not merely a technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy, examined in connection with all the other provisions of the will. A specific legacy is a quest of a specific article or particular fund which can be distinguished from all the rest of the testator's estate of the same kind, while a general legacy is payable out of the general assets of the estate. *Stilphen, Appellant* (Me.), 4-158.

While a demonstrative legacy partakes of the nature of a specific legacy by designating the fund from which the bequest is to be made, there is a valid distinction respecting the result in case of the failure of the particular fund mentioned. A specific legacy is deemed or lost by the extinguishment of the specific thing or failure of the particular fund bequeathed, while a demonstrative legacy is still payable out of the general assets if the fund specifically mentioned fails. Two elements are necessary to constitute a demonstrative legacy, viz., it must appear first that the testator intended to make an unconditional gift in the nature of a general legacy, and secondly, the bequest must indicate the fund out of which it is payable. *Stilphen, Appellant* (Me.), 4-158.

Circumstances for consideration in determining intent. — Whether a testator had, when he made his will, sufficient personal property to satisfy general pecuniary legacies without resort to land claimed to have been specifically devised, is a circumstance bearing upon his intent, the sufficiency of his personalty for this purpose furnishing an additional reason for holding a devise of the land specific. *Estate of Painter* (Cal.), 11-760.

The question whether a testamentary gift of real estate is specific or general is to be determined by the same tests as where the subject of the gift is personal property. *Estate of Painter* (Cal.), 11-760.

c. Right to accession.

Specific legacies. — Specific legacies carry with them all accessions by way of dividend or interest that may accrue after the death of the testator, unless the will specifies otherwise. *Palmer v. Palmer* (Me.), 19-1184.

Dividends on stock generally bequeathed, as property of legatee. — Dividends on stocks bequeathed as general legacies, paid within a year after the death of the testator, and after they have been transferred to the legatees, belong to the legatees, and not to the estate; and therefore where the shares are transferred to the legatees on the books of the company prior to a certain date, but are not formally delivered to them until later, the legatees are entitled to a dividend declared to stockholders of record on the books of the company on the former date, payable on the day the shares are delivered. *Palmer v. Palmer* (Me.), 19-1184.

d. Payment of legacies.

(1) Time for payment.

In absence of testamentary provision. — Ordinarily, in the absence of any provision in a will as to the time of payment, pecuniary legacies are payable at the end of a year from the death of testator, without interest; but, if not then paid, they bear interest thereafter. *Kingsbury v. Bazeley* (N. H.), 20-1355.

(2) Priority.

Preference by testamentary provision. — A testator may give one legacy a preference over others in case the assets are insufficient, but the intent to do so must be clearly manifest upon a fair construction of the will. *Matthews v. Targarona* (Md.), 10-153.

Where a testator has set apart a particular fund for the payment of a number of legacies of equal amounts, the fair presumption, in the absence of some definite statement to the contrary, is that he did not intend to give priority to one or more of the legatees over the others, and that he intended to give a particular fund to the legatees named, in equal shares. *Matthews v. Targarona* (Md.), 10-153.

Priority between pecuniary legatee and heir to undivided land. — The right

of a pecuniary legatee to have his legacy charged upon undivided land is superior to the right of the heir. *Earle v. Coberly* (W. Va.), 17-479.

Priority between legacy in consideration of relinquishment of right and legacy as bounty. — The general rule is that where a general legacy is given in consideration of a debt owing to the legatee, or in consideration of the relinquishment of any right or interest, such as the relinquishment of dower, the legacy is entitled to a preference of payment over other general legacies which are mere bounties. *Matthews v. Targarona* (Md.), 10-153.

In order to entitle a legatee to priority over other legatees as a creditor, there must have been a subsisting valid debt at the time of the death of the testator. *Matthews v. Targarona* (Md.), 10-153.

Where a legacy has been given by reason of a sense of moral obligation, or as compensation for services or other favors rendered gratuitously and for which the testator was under no legal obligation to pay, there is no such valuable consideration as entitles the legacy to a priority of payment. *Matthews v. Targarona* (Md.), 10-153.

Burden of proof of priority. — A legatee who claims priority over other legatees has the burden of proving his right of priority. *Matthews v. Targarona* (Md.), 10-153.

Discharge of incumbrance on devised property defeating legacies. — A devisee of real estate which was encumbered by the testator after the execution of his will has the right to disappoint legatees, pecuniary and specific, by having the incumbrance discharged out of the personal estate, where the will directs payment of all the debts of the testator and of his funeral expenses from any ready money or other personal property that he may have at the time of his death. *French v. Vradenburg* (Va.), 8-590.

(3) Contribution.

Between specific and general legacies. — Under the California statute specific devises and legacies are not subject to contribution to the payment of general legacies. *Estate of Painter* (Cal.), 11-760.

Contribution between widow electing to take bequest and legacy in payment of claim. — The rule that a widow who has been given a legacy in lieu of dower should be allowed a preference over other general legacies, even when the legacy exceeds the value of her dower, should not be applied in favor of a creditor where the evidence shows that the alleged consideration for his legacy cannot be sustained as a subsisting valid legal claim to the amount of the legacy. *Matthews v. Targarona* (Md.), 10-153.

Contribution between widow electing to take bequest and devisee whose devise is taken for testator's debts. — If a widow elects to accept a devise in lieu of dower, she is obliged to contribute therefrom, under the Ohio statute, to the devisee

whose devise is taken for the payment of the debts of the testator. *Allen v. Tressenrider* (Ohio), 2-974.

A widow is entitled to the advice of the court as to whether, if she accepts a legacy in lieu of dower, she will be obliged to contribute therefrom to the devisee whose devise is taken for payment of the testator's debts. *Allen v. Tressenrider* (Ohio), 2-974.

e. Interest on legacies.

When legacy begins to draw interest. — Pecuniary legacies draw interest after one year from the death of the testator, unless the will provides otherwise, notwithstanding the provisions of the Vermont statute authorizing the Probate Court to fix and extend the time for payment, as the statute does not itself fix the time. *In re Woodward* (Vt.), 6-524.

f. Advancements.

Presumption that payments were intended as advancement. — The failure of a testator to refer in his codicil to a contract for the benefit of a legatee, made after the will but before the codicil, does not give rise to a presumption that such contract was intended by the testator to be in satisfaction of the legacy. *In re Youngelman* (Ia.), 15-245.

Where the testator does not stand *in loco parentis* to a legatee there is no presumption that a subsequent benefit by way of payment on contract is in satisfaction of the legacy, unless it clearly appears that satisfaction is intended. *In re Youngelman* (Ia.), 15-245.

g. Lapsing and ademption.

In general. — Where a testatrix devises to her husband property which constitutes the homestead of her mother, provided the testatrix at the time of her death is the owner of such property, and the will provides for an annual allowance for the care and maintenance of the property so long as it shall be occupied rightfully by the husband, and the mother survives the testatrix, so that the homestead does not pass under a devise to the husband, the legacy for the maintenance of the property lapses and becomes inoperative. *Appleby v. Appleby* (Minn.), 10-563.

Lapse by death of devisee or legatee before testator's death. — The New York statute construed and held to abrogate, in the case of the death of a child before the testator, the common-law rule that a devise or legacy to him lapses, and to substitute the children of the deceased child for the primary object of the testator's bounty. *Pinel v. Betjemann* (N. Y.), 5-239.

In the interpretation of the Ohio statute to prevent the lapsing of a devise or legacy when made "to any child or other relative of the testator if such child or other relative shall have been dead at the time of the making of the will, or shall die thereafter, leaving issue surviving the testator," the phrase

"other relative" should, in accordance with the maxim *noscitur a sociis*, be restricted to relationships of the character indicated by the associated word "child," and regarded as including those which are consanguineous, but excluding those which are affinitive merely. *Schaefer v. Bernhardt* (Ohio), 10-919.

Notwithstanding the Ohio statute in reference to the prevention of the lapsing of legacies and devises, a devise of real estate by a wife to her husband will lapse if his death precedes hers, although he leaves the issue of a former marriage surviving the testatrix. *Schaefer v. Bernhardt* (Ohio), 10-919.

A legacy given in payment of a debt by the express terms of the will does not lapse by the death of the legatee before the testator, but when by the terms of the will it appears that the intention of the testator was to confer a bounty, it is not competent to show a different intent, and to prevent a lapse by proof that the legacy was given in payment of a debt. *McNeal v. Pierce* (Ohio), 4-71.

Lapse by dissolution of corporate legatee before testator's death. — An incorporated church named in a will as legatee ceases to exist legally when it becomes consolidated with another incorporated church under the New York statute, and if such consolidation takes place before the death of the testator the legacy lapses. *Gladding v. St. Matthew's Church* (R. I.), 1-537.

Lapse of legacy to wife by divorce. — A legacy in the words "one-third to my wife, Mary Brown Jones," does not lapse when the wife subsequently to the date of the will, at her own instance, obtains a divorce *a vinculi matrimonii*, nor is such a bequest revoked, by implication, by reason of the divorce. *Jones's Estate* (Pa.), 3-221.

Effect of lapse. — A lapsed share of a residuary devise and bequest is not primarily liable for debts and charges against the testator's estate in exoneration of the residuary shares which take effect, but becomes intestate property and descends to the testator's heirs at law. *In re Bradley's Will* (Wis.), 3-716.

Ademption of specific legacy by failure of fund. — A bequest to certain legatees of all the sums of money which may at any time become due and payable to the testatrix by or under any insurance policy upon the life of her husband, which may theretofore have been issued in favor of the testatrix, is a specific and not a general legacy, and is adeemed where, subsequent to the execution of the will, the husband dies and the amount of the policy of insurance on his life is received by the testatrix and commingled with her other funds and afterwards reinvested so that after her death the money cannot be traced or identified in the hands of her executors. *Nusly v. Curtis* (Colo.), 10-1134.

A bequest of a certain sum of money out of moneys in the hands of the brothers of the testatrix is a specific legacy and is adeemed by a failure of the fund. *Stilphen, Appellant* (Me.), 4-158.

Ademption of legacy of corporate stock by sale by testator. — A specific legacy of stock in a corporation is adeemed where, after the execution of the will, the testator exchanges the stock for stock in a corporation which has succeeded to the rights, duties, and property of the first corporation. *In re Slater* (Eng.), 8-141.

h. Satisfaction of claim by legacy to creditor.

Presumption of intention of testator.

— Where a testator gives to a creditor, by a will not containing a direction to pay debts, a general pecuniary legacy of a larger amount than the debt, without any time being specified for payment and without any mention of interest, the fact that the legacy is only payable in a due course of administration and after the payment of debts and funeral expenses does not take the case out of the general rule that a legacy to a creditor of an amount equal to or greater than the debt is *prima facie* a satisfaction of the debt; nor does the fact that the creditor is appointed executor take the case out of the rule. *In re Rattenberry* (Eng.), 4-457.

i. Election.

(1) Scope and application of doctrine.

Existence of valid will as condition precedent. — The West Virginia statute providing that if a widow renounces her husband's will, or if no provision has been made for her in his will, she shall have such share of her husband's real and personal estate as she would have had if he had died intestate, leaving children, presupposes a valid will which has passed through, and survived, the ordeals of probate and contest. *Freeman v. Freeman* (W. Va.), 11-1013.

Right of third person to control election. — Under the Pennsylvania statute providing that any husband may, against the will of his wife, "elect to take such share and interest in her real estate and personal estate, as she can when surviving elect to take against his will in his estates, or otherwise to take only her real estate as tenant by the curtesy" the right of the husband to elect to take against the provisions of the wife's will is simply a personal privilege, and not an asset for the payment of his debts, or a right which he can be compelled to exercise so as to discharge his trust liabilities. *Fleming's Estate* (Pa.), 10-826.

Application of doctrine to devise upon condition which has failed. — Where a testatrix devises to her husband certain property which constitutes the homestead of her mother, provided the testatrix at the time of her death is the owner of such property, and the will makes bequests to the mother which she accepts and receives, the doctrine of equitable election does not apply, as the devise to the husband is conditioned upon the testatrix's ownership of the property. *Appleby v. Appleby* (Minn.), 10-563.

(2) What constitutes an election.

Contest of will by widow. — Where a widow is left a legacy in lieu of dower, the fact that she contests the will is not to be construed as an election to take dower if the will is set aside, or to take the legacy if the will is sustained, as her rights are in abeyance until the determination of the will contest. *Flynn v. McDermott* (N. Y.), 5-81.

Qualification by widow as executrix. — The act of a widow in qualifying as executrix under the husband's will held to amount to an election to claim under the will. *Hoggard v. Jordan* (N. Car.), 6-332.

A widow by qualifying as the executrix of her husband's will and by uniting with her coexecutor in foreclosing the mortgages of her husband's estate, and by buying in property for the use of the estate, and who has done no other act as executrix which would make it impracticable for her to repudiate the will without prejudice to the rights of others, is not thereby estopped from electing, within twelve months, to take dower or a child's part in the estate of the deceased husband. *Benedict v. Wilmarth* (Fla.), 4-1033.

(3) Effect of death before election.

Rights of executor. — Upon the death of a widow within the time allowed her by statute for electing whether she will accept a legacy under her husband's will in lieu of dower, the right to collect such legacy vests in the executor. *Flynn v. McDermott* (N. Y.), 5-81.

(4) Effect of election.

Election by widow to take child's part. — Where a widow elects to take a child's part in her deceased husband's estate, and there is one child and heir of such deceased husband, the widow is counted as a child and she will be entitled to one-half of the estate after the payment of the costs of the administration. *Benedict v. Wilmarth* (Fla.), 4-1033.

Accepting devise of property as precluding claims of remainder in other property absolutely devised. — Where a testator, after devising property owned by him in fee to one of his two grandchildren, assumes to devise to the other grandchild property in which the testator has but a life estate and of which the two grandchildren are the remaindermen, the devise of the property owned by the testator, if he accepts the devise with knowledge of all the facts, is precluded from asserting a claim to a share of the property devised to the other grandchild. *Beetson v. Stoops* (N. Y.), 9-953.

Liability for debts and costs of administration. — Where a widow elects to take a child's part in her husband's estate, she takes such part subject to the debts of the estate and the cost of administration up to and including the point of actual distribution. *Benedict v. Wilmarth* (Fla.), 4-1033.

Priority over legatees. — Where a

widow elects to take a child's part in her husband's estate, her rights in the estate of her husband are superior to those of the legatees under the will. *Benedict v. Wilmarth* (Fla.), 4-1033.

Rights of devisees upon renunciation of will by widow. — A testator devised to his widow a life estate in his real estate and provided that after her death his son Joseph should have seventy acres in fee simple, which included the homestead; that his son Enos should receive the sum of \$500 upon the death of the widow; and that the land remaining should go in fee simple to his other children equally. The widow renounced the will and elected to take under the law. By proceedings had for that purpose her portion of the real estate was set apart to her in fee simple, which included the seventy acres devised to Joseph. An action of partition was commenced in the District Court, in which the allotment to the widow was adopted, while Joseph was denied any rights either under the law or the will. Held error. *Fennell v. Fennell* (Kan.), 18-471.

Where the widow renounces the will of her husband, and makes an election by which she becomes the owner in fee of the undivided one-half of all the real estate of which he possessed the entire title at the time of his death, persons to whom the will gives land in fee are entitled only to one-half of the rent on such land falling due after the death of the testator, the widow being entitled to the other half. *Keays v. Blinn* (Ill.), 14-37.

Where a widow renounces the will of her husband and elects to take under the law, and her portion as provided by the statute of descents and distributions is set aside to her, if the estate is then in such a condition that the remaining provisions of the will cannot be enforced consistently with the intent of the testator they will be disregarded, and the remainder of the estate will be distributed under the statute of descents and distributions the same as if no will had been made. *Fennell v. Fennell* (Kan.), 18-471.

(5) Enforcement of rights by suit.

Averment of bill. — A bill by a widow praying that she be decreed to be entitled to a child's part in her husband's estate held to state facts calling for the ascertainment and adjudication of the rights and interest of the parties in a court of equity. *Benedict v. Wilmarth* (Fla.), 4-1033.

j. Actions by legatees or devisees.

Recovery of land by devisee under foreign will. — A devisee under a will executed and probated in another state cannot maintain a suit to recover land held adversely until the will has been probated in the state where such land is situated. *Chidsey v. Brookes* (Ga.), 14-975.

The title to land in Georgia can pass by devise only where the will has been probated in that state according to the statutes thereof. *Chidsey v. Brookes* (Ga.), 14-975.

Pleading in action to establish legacy as lien on realty. — In an action to establish a legacy as a lien upon real estate, the plaintiff must both allege and prove non-payment. *Conkling v. Weatherwax* (N. Y.), 2-740.

Admissibility of evidence in action to establish legacy as lien on realty. — In an action brought to establish a legacy as a lien upon real estate, the oral declarations of the deceased devisee and mortgagor thereof, made in the absence of the mortgagee many years after the mortgage was given, to the effect that the legacy had not been paid, are incompetent to defeat a lien of the mortgage when there is no identity of interest between the mortgagor and the mortgagee. *Conkling v. Weatherwax* (N. Y.), 2-740.

Laches barring right to recover legacy. — Evidence reviewed in a suit to recover a legacy and held not to show that the complainant has been guilty of such laches as to bar his right to recover. *Selden v. Kennedy* (Va.), 7-879.

Estoppel of legatee to assert invalidity of will. — Where a legatee under a non-resident's will, which has been admitted to original probate in the state of Washington, has not only failed to institute a contest within the time prescribed by statute, but has accepted his legacy under the will, and has for an additional valuable consideration released all claims against the estate, he is estopped from contesting the will or asserting the invalidity of any provision thereof in the courts either of Washington or of any other state. *Rader v. Stubblefield* (Wash.), 10-20.

WINDOWS.

Storm windows as fixtures, see **FIXTURES**, 3.

WIRES.

See **ELECTRICITY**; **TELEGRAPH AND TELEPHONES**, 10.

Compelling removal of telephone wires, see **EJECTMENT**, 1.

Erection of poles and wires in street as additional burden, see **EMINENT DOMAIN**, 6.

Injury caused by electric light wires, see **ELECTRICITY**, 2.

Liability for damage to wires in moving buildings along streets, see **STREETS AND HIGHWAYS**, 5 d.

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1. ATTENDANCE AND COMPENSATION.

a. Subpoenas.

(1) In general.

Validity of subpoena. — A subpoena is issued by a magistrate having criminal jurisdiction, which does not name or describe any person as defendant as required by law, and does not state the crime committed, but which merely recites that the magistrate issuing it has "reason to suppose an offense has been committed" and "for the purpose of investigating whether it has been committed" commands the witness to attend before the magistrate, is void on its face, and calls for obedience to its commands on the part of no one. *People v. Wyatt* (N. Y.), 9-972.

Right of witness to ignore void subpoena. — Where a void subpoena is issued in a criminal investigation, the witness is not entitled to a writ of prohibition restraining further proceedings in the investigation, as he may lawfully refuse to obey the subpoena, and if any attempt to punish him is made he has a complete remedy in a writ of habeas corpus. *People v. Wyatt* (N. Y.), 9-972.

Extraterritorial force. — A subpoena issued by a state court has no extraterritorial force, and therefore cannot compel the attendance of a nonresident witness served in the state of his residence. *State ex rel. Suter v. Wilder* (Mo.), 7-418.

Duty of accused to issue. — If the defendant in a criminal action desires to rely upon the attendance of witnesses under a

subpoena by the state, he may notify them and the court of such fact, or may cause them to be subpoenaed in his own behalf. He has no right to rely upon the attendance of a witness merely because the state may have caused a subpoena to issue for such witness. *State v. Campbell* (Kan.), 9-1203.

(2) Subpoena duces tecum.

Sufficiency of subpoena. — A subpoena duces tecum must describe with reasonable certainty the documents required, and it must appear that such documents contain material evidence. *American Car, etc., Co. v. Alexandria Water Co.* (Pa.), 15-641.

In the absence of all particularity in specifying what is wanted, and in the absence of a showing of materiality, an objection to a subpoena duces tecum requiring the production of a list of the persons with whom the plaintiff has made contracts during the year, is properly sustained. *American Car, etc., Co. v. Alexandria Water Co.* (Pa.), 15-641.

b. Compensation.

(1) Persons entitled to compensation.

Public officers. — Chapter 183 of the [Kansas] Laws of 1907, providing that certain public officers shall not be entitled to witness fees in certain cases, does not deprive the officers named of the equal protection of the laws and operates uniformly throughout the state. *Claffin v. Board of Co. Com'rs* (Kan.), 19-168.

Wife of party. — The wife of a litigant is entitled to mileage and *per diem* the same as any other witness would be for the same travel and attendance. *Anderson v. Ferguson-Bach Sheep Co.* (Idaho), 10-395.

Employees of corporate party. — It is no ground for disallowing the fees and mileage of witnesses attending under a subpoena that they are the employees of a corporation, the party for whom they have been subpoenaed. *Parsons Band Cutter, etc., Co. v. Seiscoe* (Ia.), 6-1015.

Witness from without jurisdiction. — Under the provisions of the Idaho statute a witness who resides in an adjoining county and more than thirty miles from the place of the trial is not obliged to attend in response to a subpoena, but the privilege of disobeying the subpoena is personal to the witness, and if he sees fit to waive the privilege and attend and testify he is entitled to his mileage for actual and necessary travel within the state, the same as any other witness who has attended under a compulsory process. *Anderson v. Ferguson-Bach Sheep Co.* (Idaho), 10-395.

Under the Missouri statutes a nonresident witness, who is served at the place of his residence in a foreign state with a subpoena commanding him to appear at the trial of a criminal cause in a domestic state, is not entitled to mileage from his place of residence to the place of the trial. *State ex rel. Suter v. Wilder* (Mo.), 7-158.

Witness not called or appearing in court. — It is no ground for disallowing the fees and mileage of attending witnesses, subpoenaed in good faith but not called, that the witnesses did not appear in open court, or that the counsel for the party for whom they were called failed to disclose their presence when questioned thereabout by the opposing counsel. *Parsons Band Cutter, etc., Co. v. Seiscoe* (Ia.), 6-1015.

(2) Persons liable for compensation.

Liability of county for witness fees of defendant in criminal prosecution.

— As a county cannot be subjected to any liability for services, except in pursuance of statute, and as there is no statute authorizing a county, or any one on its behalf, to employ an expert witness in a criminal case to give testimony, on behalf of the defendant, involving special investigation and labor, it follows that a county is not liable to such witness for anything in excess of the statutory fee, even if it is liable for that. *Philler v. Waukesha County* (Wis.), 17-712.

Before any liability can arise on the part of a county for the statutory fees of a witness on behalf of the defendant in a criminal case, there must be a certificate of the clerk of the court showing his right to such fees, based on an order by the court or a judge directing the issuance of process to compel his attendance. A complaint in an action to recover such fees, which does not show the issuance of a certificate, or the making of such an order, fails to state a cause of action. *Philler v. Waukesha County* (Wis.), 17-712.

(3) Amount of compensation.

Right of expert witness to additional compensation.

— Any witness, whether expert or otherwise, whose attendance is required by subpoena, is bound to attend and testify to such facts as are within his knowledge, even though it may have required professional learning, study, or skill to ascertain those facts, and for such attendance and testimony the witness is not entitled to anything beyond the statutory fee. *Philler v. Waukesha County* (Wis.), 17-712.

A witness, whether expert or otherwise, is not bound by a subpoena alone to equip himself by labor or special investigation with ability to testify to an opinion, or to a fact which can be ascertained only by special investigation, and, consequently, from the mere subpoena and compulsion to testify, no implied contract arises, on the part of any one, to pay the witness anything in excess of the statutory fee. When, however, the witness, by request, performs work in preparation or qualification to enable him to testify, an implied contract may arise, as against the party making the request to pay him additional compensation, or an express contract for additional compensation, will be valid. *Philler v. Waukesha County* (Wis.), 17-712.

Under the Ontario statute a witness called as an expert, whether or not he is a member

of one of the learned professions, cannot, on the ground that he has not been paid his fee for the opinion he is called on to give, refuse to testify as to any matter relevant to the issues as to which he is competent to speak, though it is necessary for him to use his technical knowledge or skill in order to answer the questions put to him, where he has not been required to qualify himself to give an opinion by an examination of the person or thing as to which his opinion is asked or by doing anything else requiring study or preparation. *Butler v. Toronto Mutoscope Co. (Ont.)*, 5-992.

2. SWEARING WITNESSES.

Necessity of swearing. — To permit a witness in a criminal case to testify on behalf of the government without being sworn is a violation of the legal rights of the defendants entitling them to a new trial, although the question is not raised until after the verdict, where the defendants and their counsel have no knowledge of the fact that the witness has not been sworn. *Langford v. United States (Ind. Ter.)*, 4-1021.

Waiver of oath. — Where a police commissioner, in trying a policeman under several charges, swears a witness who is called to testify against the defendant as to one of the charges, but inadvertently omits to swear the witness when he is recalled to testify as to another charge, the defendant, if he is aware of the omission, waives the necessity of the oath by failing to object to the reception of the testimony. *People ex rel. Niebuhr v. McAdoo (N. Y.)*, 6-56.

3. COMPETENCY.

a. Determination of question of competency in general.

Examination of witness by court. — Where an objection is made as to the competency of a witness to testify, the court should examine the witness for the purpose of determining his competency, and may call and examine other witnesses touching such question. *State v. Simes (Idaho)*, 9-1216.

Scope of examination. — The examination of a person offered as a witness for the purpose of testing his competency should be made with special reference to the scope of the inquiry and the subject-matter about which the witness is to testify. *State v. Simes (Idaho)*, 9-1216.

b. Competency of particular persons.

(1) Parties.

In action against assignee of partnership. — Under the Florida statute (Gen. St. 1906, § 1505) a plaintiff in an action is incompetent to testify "in regard to any transaction or communication between such witness" and a member of the partnership of which the defendant is the assignee, where the action is against the assignee. *Hiller v. Ray (Fla.)*, 20-1162.

Propounder of will for probate. — In proceedings to prove a will, the propounder is not an incompetent witness because interested in the result of the suit. *McIntyre v. McIntyre (Ga.)*, 1-606.

(2) Husband and wife.

Common-law rule. — At the common law neither the husband nor wife could be witnesses for or against each other, except in case of necessity as where the offense is directly against the person of the wife. *Ex parte Beville (Fla.)*, 19-48.

The common law made no distinction between the incompetency of one spouse to testify for or against the other as a matter of disability, and incompetency as a matter of privilege. *Ex parte Beville (Fla.)*, 19-43.

Statutory rule. — By statutes in Florida the husband and the wife are made competent and compellable witnesses for or against each other in both civil and criminal cases. *Ex parte Beville (Fla.)*, 19-48.

Validity of statute. — The rules of evidence pertain to the remedy and may be changed at the will of the legislature, and therefore a statute which permits a wife to testify against her husband is not subject to the objection that it is unconstitutional as being a revolution in the law of evidence. *People v. Braun (Ill.)*, 20-448.

Competency of wife of one defendant as witness for codefendants. — In an action against several defendants for a tort, in which the jury may find in favor of one defendant and against the others, the wife of one defendant is competent to testify for the others, the court instructing the jury that the testimony can be considered only as to defendants other than her husband. *Dovey v. Lam (Ky.)*, 4-16.

Woman living in adulterous cohabitation as within rule. — Where a lawfully wedded woman lives in adulterous cohabitation with another man during the life of her husband, she is not the common-law wife of such other man, and therefore may testify against him on his prosecution for murder. *State v. Hancock (Nev.)*, 6-1020.

Husband and wife jointly indicted. — Where husband and wife are jointly indicted, if they are tried together each may testify for himself; but where they are tried separately one cannot testify for the other. *Allen v. Com. (Ky.)*, 20-884.

Wife of claimant against estate. — Under the Colorado statutes providing that "neither parties nor persons who have an interest in the event of an action or proceeding shall be excluded" as witnesses, and that "no party to any civil action . . . or person directly interested in the event thereof, shall be allowed to testify therein . . . when any adverse party sues or defends as the . . . administrator . . . of any deceased person," the wife of a claimant against the administrator of a deceased person is a competent witness in behalf of her husband in a proceeding upon the allowance of the claim. *Butler v. Phillips (Colo.)*, 12-204.

Competency of wife in prosecution of husband for assault upon her with intent to rape. — In a prosecution against the husband for assault with intent to commit rape upon his wife the wife is not a competent witness against him. *Frazier v. State* (Tex.), 13-497.

Competency of lawful wife in prosecution for bigamy. — In a prosecution for bigamy the former spouse of the accused is not a competent witness against the accused, as bigamy is not a crime committed by one spouse against the other, within a statute providing that one spouse shall not be examined against the other, but creating an exception in the case of a prosecution "for a crime committed by one against the other." *State v. Kniffen* (Wash.), 12-113.

Competency of wife in prosecution for murder of child by husband. — A wife is not a competent witness against her husband in a prosecution against him for the murder of his infant child at the age of fourteen months, though the same pistol ball killed the child and wounded the wife while the child was in her arms. *State v. Woodrow* (W. Va.), 6-180.

What is not testimony against spouse. — In a proceeding to eject the occupant of a tenement house, resisted on the ground that the defendant was not to remove until a settlement with him was made, the testimony of his wife that she had frequently heard him say that he would be willing to go if he could get a satisfactory settlement is not testimony against her husband and on that account inadmissible. *Mead v. Owen* (Vt.), 13-231.

Letter from husband to wife intercepted by third person. — A letter written by a husband and addressed to his wife containing matter highly incriminatory against the husband, if intercepted by a third person while in the hands of one to whom the husband intrusted it for delivery, is not a privileged communication, and when offered by the third person is admissible in evidence against the husband. *Hammons v. State* (Ark.), 3-913.

Calling wife and compelling defendant to raise objection as error. — In a prosecution for murder it is error for the court to permit the state to call the wife of the defendant as a witness and thereby force the defendant to object to her testimony as incompetent. *Moore v. State* (Tex.), 2-878.

Effect of divorce. — Where the plaintiff in an action for alienation of affections offers a witness in his behalf and the defendant objects to her testifying on the ground that she is the wife of the plaintiff, it is not error for the court to admit in evidence the decree of divorce for the purpose of showing that the marital relations existing between them have been dissolved, and that she is a competent witness for the plaintiff. *Easterly v. Gater* (Okla.), 10-888.

(3) Persons of unsound mind.

In general. — Incapacity to give intelligent and legal consent to the commission of

an act does not necessarily imply incapacity thereafter to narrate correctly and truthfully the facts constituting the commission of the act. *State v. Simes* (Idaho), 9-1216.

Extent of unsoundness required to render incompetent. — Under the Idaho statute which provides that persons "of unsound mind at the time of their production" cannot be witnesses, a person who can apprehend the obligation of an oath and is capable of giving a fairly correct account of the things he has seen or heard is competent as a witness, although he may be afflicted with some form of insanity. *State v. Simes* (Idaho), 9-1216.

(4) Persons convicted of crime.

Felons not pardoned or punished. — Under the Virginia statute providing that "a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor," a person who has been convicted of a felony and has been subjected to a sentence of fine and imprisonment therefor is not a competent witness unless he has paid the fine and costs of the prosecution, even though he has served out his term of imprisonment and has been held for an additional term under a *capias pro fine*. *Quillin v. Commonwealth* (Va.), 8-818.

Competency in state court of person convicted in federal court. — A person is not disqualified as a witness in a state court of Virginia by reason of having been convicted of perjury in a federal court sitting in that state. The state statute (Code Va. 1904, §§ 3743, 3898) so disqualifying persons who have been convicted of perjury refers only to convictions in the state courts, and the federal statute (Rev. St., § 5392; 5 Fed. St. Ann. 701) on the subject affects witnesses in the federal courts only. *Samuels v. Commonwealth* (Va.), 19-380.

What are "criminal offenses." — Within the meaning of a statute relating to the competency and impeachment of witnesses, the term "criminal offense" includes misdemeanors as well as felonies, but does not include offenses punishable under municipal ordinances. *Koch v. State* (Wis.), 5-389.

Manner of proving conviction. — In the absence of a controlling statute on the subject, the incompetency of a witness by reason of his prior conviction of felony cannot be shown upon his examination, but only by a production of the record or of an exemplified copy thereof. *Bise v. United States* (U. S.), 7-165.

(5) Infants.

In general. — An infant is not incompetent to testify because it is not made to appear that the witness understands that the obligation to speak the truth on the witness stand is greater than at other places, the solemnity of the occasion and the administration of the oath being relied upon by the law to impress the witness with the duty of testifying truthfully. *State v. Meyer* (Ia.), 14-1.

The discretion of the trial court in admitting the testimony of a child eight years of age who has attended school, has been taught to say her prayers, and answers that if she does not tell the truth she will go to the bad place, will not be reviewed on appeal where the testimony itself does not show her to be incompetent. *State v. Jeffries* (Mo.), 14-524.

No error is committed in admitting the testimony of a child six years old, who although unable to define the words "oath" and "testimony," shows an adequate sense of the wickedness of telling a falsehood and of the duty of speaking the truth. *State v. Meyer* (Ia.), 14-1.

Intelligence as proper test. — Intelligence and not age is the proper test by which the competency of an infant as a witness must be determined, and where it appears that such infant had sufficient intelligence to receive just impressions of the facts respecting which he is to testify, and sufficient capacity to relate them correctly, and has received sufficient instruction to appreciate the nature and obligation of an oath, he should be admitted to testify. *Clinton v. State* (Fla.), 12-150.

Presumption of incompetency from age. — In Nebraska no age is fixed by the statute below which a child is presumed to be incompetent to testify and there is no rule of law outside of the statute that a child six years of age is incompetent. In such a case, if the opposing party challenges such witness on the sole ground of age, without requesting an examination of such child by either court or counsel touching its competency, the objection is properly overruled. *Evers v. State* (Neb.), 19-96.

Duty of court to investigate as to competency. — It is the duty of the trial court where an infant of tender years is offered as a witness, especially in a criminal case, to examine him and ascertain whether he has sufficient intelligence and understanding of the nature and obligation of an oath to be a competent witness, and such investigation should be carried far enough to make the infant's competency apparent. *Clinton v. State* (Fla.), 12-150.

Discretion of court in permitting examination. — Where it appears to the trial judge that an infant offered as a witness does not sufficiently understand the nature and obligations of an oath, it is within his discretion to permit such infant to be properly instructed in that respect and afterward to be sworn, provided such infant is of sufficient age and intellect to receive instruction. *Clinton v. State* (Fla.), 12-150.

Whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness is a question for the discretion of the trial judge, and his ruling in that regard will not be disturbed by an appellate court, except in case of a manifest abuse of discretion or where the witness is admitted or rejected upon an erroneous view of a legal principle. *Clinton v. State* (Fla.), 12-150.

The trial judge is vested with a discretion in passing on the competency of an infant to testify, and his decision will not be disturbed on appeal save on a clear abuse of discretion. *State v. Meyer* (Ia.), 14-1.

(6) Atheists.

Statutory rule. — In Florida the common-law rule as to the religious qualifications of witnesses has been changed, and neither belief in a Supreme Being nor in Divine punishment is requisite to the competency of a witness. *Clinton v. State* (Fla.), 12-150.

(7) Foreigners.

Japanese. — An adult citizen of the empire of Japan is *prima facie* competent to take an oath and testify in the courts of Nebraska. If a litigant conceives that such a witness does not understand, or will not give heed to the oath administered, he may interrogate the witness before he is sworn, or prove his incompetency by other relevant evidence. If he fails to do so, the relevant testimony of the witness should be received. *Pumphrey v. State* (Neb.), 18-979.

Chinaman. — Chinese are competent as witnesses where it appears that they believe in the existence of God, and that God punishes falsehood though their ideas on the subject are crude and even absurd. *Birmingham R., etc., Co. v. Jung* (Ala.), 18-357.

A Chinaman who says he believes in the Christian religion, that he can tell what he knows, and that he will tell the truth, is not rendered incompetent to testify against the defendant in a prosecution for murder by the fact that he is unable to tell the nature of the oath administered to him, where there is no attempt to show that he does not understand the obligation of his oath or the penalty for perjury. *State v. Lu Sing* (Mont.), 9-344.

(8) Judicial officers.

Magistrate presiding at preliminary examination. — On a trial in a Superior Court of an information for a criminal offense, the justice of the peace is a competent witness as to what occurred when the defendant was brought before him. *State v. Bringgold* (Wash.), 5-716.

(9) Witnesses not indorsed on indictment.

In general. — Witnesses for the state whose names are not indorsed on the back of the information are not, on that account, incompetent to testify. *State v. Jeffries* (Mo.), 14-524.

(10) Waiver of objections.

By failure to object on trial. — Where no objection to the testimony of a codefendant on the ground of his incompetency as a witness is made when he is sworn or at any time during the trial, the objection is waived. *Bise v. United States* (U. S.), 7-165.

c. Transactions with persons since deceased.

(1) Persons incompetent.

Testimony by plaintiff of transaction with conductor in action against carrier. — Under the Kentucky statute (Civ. Code Prac., § 606, subsec. 2), providing that, subject to certain exceptions, no person shall testify for himself concerning any verbal statement of or transaction with a person since deceased, a passenger ejected from a carrier's train is incompetent to testify to what took place between himself and the defendant's conductor who died prior to the trial. *Ander-son v. Louisville, etc., R. Co. (Ky.)*, 20-920.

Contractor, codefendant with executors of deceased person. — Where a contractor and the executors and heirs at law of the deceased owner of a building, erected under a contract between said contractor and the owner, are parties defendant in an action to foreclose a subcontractor's lien, the evidence of the contractor as to when the building was completed is not objectionable as referring to a transaction with a party since deceased, under the North Dakota statute (Rev. Codes 1905, § 7237). *First National Bank v. Warner (N. Dak.)*, 17-213.

The contractor of a building, pursuant to a contract with the owner of the building, is not a competent witness as to payments made on said contract, where the owner of the building has since died, and his executors and heirs at law are made parties defendant with said contractor in an action by the plaintiff to foreclose its lien as a subcontractor. *First National Bank v. Warner (N. Dak.)*, 17-213.

Cashier of national bank. — The cashier of a national bank, which is a party to an action, is a competent witness to testify to the fact of the mailing of a notice to a deceased person, whose executor and heirs at law are parties to the action, as the North Dakota statute (Rev. Codes 1905, § 7253) prohibits evidence of parties only in such cases. *First Nat. Bank v. Warner (N. Dak.)*, 17-213.

General manager of corporation. — In an action by a corporation against an executor or administrator, the general manager of the corporation is not, by the Ohio statute which provides that a party shall not testify where the adverse party is the executor or administrator excepting to facts that occurred subsequently to the death of the decedent, disqualified to testify to facts occurring before the death of such decedent. *Cockley Milling Co. v. Bunn (Ohio)*, 9-179.

President and secretary of corporation. — As to the transaction between a woman and a building and loan association, by which it awarded a loan to her, its president and secretary are competent witnesses for it against her, though her husband, who acted for her, is deceased. *Spithover v. Jefferson Bldg., etc., Assoc. (Mo.)*, 20-1248.

Guardian suing for ward. — Under the Kentucky statutes, a guardian who brings a suit for an infant ward against the administrators and heirs and a deceased person on an alleged contract between the guardian and

the deceased for the benefit of the infant, is not incompetent to testify to the contract, either as being interested in the result of the action by reason of liability for costs, or as being entitled to compensation for services as guardian, or as being a party to the action as relator. *Doty v. Doty (Ky.)*, 4-1064.

Party defendant having no interest in result. — Where life insurance policies payable to the estate of the insured are invalid because taken out under an agreement to assign them to a third person having no insurable interest, in an action on the policies by the personal representative of the insured, such third person, although made a party defendant, is competent to testify to his transaction and agreement with the deceased relied on by the insurance company to defeat the policy. *Bromley v. Washington Life Ins. Co. (Ky.)*, 12-685.

(2) Evidence excluded.

In general. — Under the provision of the Arkansas constitution concerning the competency of a party as a witness in an action by or against an executor or administrator, it is only as to "transactions with or statements of" the deceased that the opposite party is incompetent to testify. *Strayhorn v. McCall (Ark.)*, 8-377.

Denial that transaction took place. — The purpose of the Alabama statute (Code 1907, § 4007) which prohibits testimony as to conversations or transactions with decedents in certain cases, is to preclude a party to a suit from giving his own version of a conversation or transaction with a deceased person whose estate is interested in the result of the suit, where the fact that the conversation or transaction took place is conceded or conclusively established, or from disputing, contradicting, or corroborating the testimony of other witnesses, or facts which tend to prove what the conversation or transaction was, and not to preclude such party from denying that he ever had a given transaction or conversation with the deceased, which is imputed to him by the adverse party. *Blount v. Blount (Ala.)*, 17-392.

The above statute does not preclude the plaintiff, in an action against the heirs, distributees, and personal representatives of a decedent, from testifying, in his own behalf, that he never executed or acknowledged a deed which is recorded in the probate office and which purports to be a conveyance by him to the decedent. If the court or jury find from all the evidence that the plaintiff was a party to the deed, then he is an incompetent witness, but he is competent until this is conclusively shown or conceded, and the other party to the suit cannot render him incompetent by testifying that he was a party to the deed, or by showing a chain of circumstances tending to prove that he was a party. *Blount v. Blount (Ala.)*, 17-392.

Filing a paper for record which purports on its face to be a deed, and recording it, makes such record, or a certified copy thereof, presumptive evidence of the execution of the alleged or purported deed, and is *prima facie*

proof, as between the alleged parties thereto, of the recitals in the deed. This presumption, however, is merely *prima facie*, and not conclusive so far as concerns the question whether there was in fact a transaction between the alleged parties to the deed, and, consequently, the fact that a deed has been proved, filed, and recorded does not prevent the alleged grantor from denying its execution and acknowledgment, after the death of the grantee, in an action against the latter's representatives. *Blount v. Blount* (Ala.), 17-392.

Handwriting of decedent. — Testimony by a claimant against the estate of a deceased person that the signature to a paper on which his claim is based is the genuine signature of the deceased, is inadmissible under the rule excluding testimony as to personal transactions with a decedent. *Ware v. Burch* (Ala.), 12-669.

In a suit by a corporation against an executor, the agent of the corporation is not incompetent to testify to his opinion as to the genuineness of the signature of the testator, his opinion being given as an expert and being based upon a comparison of the signature with other writings proved to be genuine. *Patton v. Bank of La Follette* (Ga.), 4-639.

Nature of services rendered decedent. — In an action by a physician against the estate of a deceased person to recover for professional services rendered by the plaintiff to the decedent, the plaintiff is incompetent to testify as to the number of professional visits made by him and as to what he did for the deceased. *Duggar v. Pitts* (Ala.), 8-146.

In an action on the allowance of a claim against the estate of a deceased person a letter written by the plaintiff after the death of the deceased setting out in detail the amount and character of services on which the claim is based, is not admissible in evidence, and hypothetical questions as to the value of such services based upon the statements contained in such letter are without foundation in competent evidence. *Butler v. Phillips* (Colo.), 12-204.

d. Privileged communications.

(1) Between attorney and client.

Existence of relation as affected by failure to ask or expect fee. — It is not necessary that a fee be asked or expected in order to entitle a client to invoke the protection of the rule excluding communications made to an attorney. *Mack v. Sharp* (Mich.), 5-109.

Testimony as to relation after admission of evidence. — In a criminal prosecution, where the competency of an attorney as a witness for the state has been inquired into, and his testimony as to a conversation with the defendant has been admitted on the ground that the relation of attorney and client did not exist between him and the defendant at the time of the conversation, it is within the discretion of the trial court to refuse to permit the defendant, when he takes

the stand in his own defense, to testify that he understood that the witness was his attorney. *State v. Louanis* (Vt.), 9-195.

Communications preliminary to retainer as privileged. — In a prosecution of a man for the murder of his wife, the testimony of the prosecuting attorney that prior to the alleged murder the defendant had said to him that his wife had consulted counsel concerning their affairs and that if any trouble arose, he wished the witness to look after his side, is privileged and inadmissible. *State v. Blydenburgh* (Ia.), 14-443.

Privilege in action between two persons who jointly retained attorney. — An attorney employed by two or more persons to give professional advice or assistance in a matter in which they are mutually interested can, on litigation subsequently arising between such persons or their representatives, be examined as a witness at the instance of either, as to communications made when he was acting as attorney for all, although he could not disclose such communication in a controversy between his clients or either of them, and third persons. *Kirchner v. Smith* (W. Va.), 11-870.

Statement that certain matter was referred to in negotiations for contract as privileged. — An attorney for one of the parties to a contract may testify that a certain fact was referred to during the negotiations between the parties concerning the contract, such statement not being privileged. *Atlantic, etc., R. Co. v. Atlantic, etc., Co.* (N. Car.), 15-363.

Communications with reference to drawing will in general. — In an action contesting a will on the grounds of undue influence and want of mental capacity, the doctrine of privilege between attorney and client does not apply to communications between the testator and the attorney preparing the will, in regard to the subject-matter thereof or to knowledge of the attorney concerning the circumstances surrounding its execution; and the privilege is removed whether the attorney is called to testify in support of the will or against it. *In re Young* (Utah), 14-596.

Under the Kentucky statute providing that no attorney shall testify concerning a communication made to him in his professional character without the client's consent, an attorney who has been employed by the owner of a business to draw up articles of incorporation for the same, and at a subsequent date to prepare the will of the same person, is competent to testify that during the former employment his client stated that he intended to give a certain person a named amount of the stock of the corporation, and that during the subsequent employment he stated that he had made such gift. The subject-matter of the testimony does not pertain to any communication made to the attorney in his professional character, and has nothing to do with the confidential relation of attorney and client. *Denunzio v. Scholtz* (Ky.), 4-529.

Reasons or motives in making will as privileged communication. — Where a

transaction between an attorney and his client consists of a preparation of a will in accordance with the directions of the client, and no legal advice is asked or required, the reasons or motives moving the client to make the will, if stated to the attorney, are not privileged, especially if the statements are made in the presence of a third person. *Champion v. McCarthy* (Ill.), 10-517.

Contents of former will on issue of testamentary incapacity and undue influence. — The attorney who prepared a will which is the subject of contest on the grounds of undue influence and mental incapacity cannot refuse, on the ground of privilege as between attorney and client, to testify to the contents of a former will. *In re Young* (Utah), 14-596.

(2) Between physician and patient.

Existence of relation between assistant physician of hospital and patients thereof. — An assistant physician in a hospital, holding a regular position therein by virtue of appointment or contract, is disqualified to testify as to any information acquired by him in attending in a professional capacity a patient in that institution. *Smart v. Kansas City* (Mo.), 13-932.

Existence of relation between physician holding clinics at hospital and patients in hospital. — A physician who, by some arrangement, has access to a hospital and the right to examine patients, to select such as he wishes and to take them into an operating room for use in clinics which he has authority to hold in the institution, sustains the relation of physician to a patient in the institution whom he examines, and as to whom he gives advice, and he is disqualified to testify to a condition found in examining such patient, although he does not treat or intend to treat the patient. *Smart v. Kansas City* (Mo.), 13-932.

Information acquired by examination of patient as privileged. — The statutory disqualification of a physician to testify to information acquired in treating a patient extends to information acquired by looking at or examining the patient, as well as to verbal communications which take place between them. *Smart v. Kansas City* (Mo.), 13-932.

Testimony as to patient's condition at certain time as privileged. — Under the Montana code, a physician who has attended the plaintiff in an action for personal injury is incompetent to testify as to the patient's condition at such time. *May v. Northern Pacific R. Co.* (Mont.), 4-605.

In an action for damages for personal injuries, a physician is not competent to testify as to information acquired by him concerning the plaintiff's condition during his treatment of the plaintiff for a former injury. *Smart v. Kansas City* (Mo.), 13-932.

Record of hospital required to be kept by city ordinance as privileged. — The record of a city hospital required to be kept by an ordinance of the city, and which

contains a diagnosis of a patient's case as made by an examination and questioning of the patient by physicians, is inadmissible against the patient in a subsequent litigation, because privileged within the statute relating to information acquired by a physician concerning his patient. *Smart v. Kansas City* (Mo.), 13-932.

Statement by patient as to cause of injury as privileged. — Under a statute providing in effect that information acquired by a physician or surgeon which is necessary to enable him to prescribe for or treat a patient shall be privileged, a physician may testify that a patient who was injured by the falling of an engine stated to him, in reply to a question as to how the patient was injured, that he kicked or wrung out the jack-screw with which he was raising the engine, the information as to the cause of the fall not affecting the treatment of the patient. *Smith v. John L. Roper Lumber Co.* (N. C.), 15-580.

Testimony relating to deceased patient not party to proceeding or interested therein. — Under the New York statutes, a physician called as a witness "shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity," even though the testimony relates to a patient who is not a party to the proceeding or interested therein and who is in fact dead. *Matter of Myer* (N. Y.), 6-26.

(3) Between priest and parishioner.

In general. — Under the Missouri statute making a minister of the gospel or a priest incompetent to testify concerning a confession made to him in his professional character, a minister may testify in a criminal prosecution as to statements made to him by the defendant after the crime, unless the statements were made under circumstances prescribed by the statute. *State v. Morgan* (Mo.), 7-107.

Voluntary statement of person in presence of minister and members of church as privileged. — A voluntary statement made by a defendant in the presence of the minister and certain members of the defendant's church whom he has called together for the purpose, but not connected with any matter of church discipline, is not a privileged communication within the Colorado statute (Rev. St. 1908, § 7274) which provides that "a clerguman or priest shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." *Milburn v. Haworth* (Colo.), 19-643.

(4) Between husband and wife.

Effect of removing disqualification as witnesses. — The change of the common-law rule by making one spouse a competent witness against the other does not affect the

rule against disclosure of marital communications. *Ex parte Beville* (Fla.), 19-48.

(5) Who may invoke privilege.

Personal representatives of deceased person. — It is the universal rule that the question of privilege, with respect to communications offered in evidence, can be invoked only by the author of the communication. But in the case of persons deceased the general rule is that the right of waiver, when the character and reputation of the deceased are not involved, is lodged in the personal representative, that is, the executor or administrator or the heirs of the deceased. *Le Prohon, Appellant* (Me.), 10-1115.

(6) Persons prohibited from disclosing communications.

Third person overhearing communication. — The rule precluding an attorney from testifying as to a privileged communication made to him by his client has no application to a third person who by accident or design overheard the communication. *State v. Falsetta* (Wash.), 10-177.

(7) Waiver of privilege.

Right to waive privilege. — The Minnesota statute relating to the testimony of a physician without the consent of his patient is for the protection of the patient, and he may waive the privilege, and as a general rule those who represent him after his death may also waive the privilege for the protection of the interests which they claim under him. *Olson v. Court of Honor* (Minn.), 10-622.

The Utah statute providing that an attorney "cannot, without the consent of his client, be examined as to any communication made by the client to him, or to his advice given therein in the course of professional employment," is nothing more than declaratory of the rule existing at common law, and merely confers a privilege which is personal to the client and may be waived by him. *In re Young* (Utah), 14-596.

Right of heir at law to waive privilege as against beneficiary under alleged will. — In the case at bar, testimony, material to the issue, with reference to a certain interview which the deceased had with an attorney at law and which did not involve the character or reputation of the deceased, was offered in evidence by the defendant, an heir at law. The plaintiff, beneficiary under the alleged will of the deceased, objected to this testimony on the ground that the interview was in the nature of a privileged communication of the deceased to the attorney, and the testimony was excluded. Held: Assuming that the interview between the deceased and the attorney, were the deceased living, falls within the rule of privileged communications, yet the defendant as heir at law had a right to waive the question of privilege and did waive the same and that the testimony should have been admitted. *Le Prohon, Appellant* (Me.), 10-1115.

Permitting disclosure of communications on one trial as waiver on subsequent trials. — Where a physician who has rendered professional services to the plaintiff, in an action to recover for personal injuries, has testified in two trials of the cause, without objection, the privilege conferred by statute upon the plaintiff is waived, and it is error to exclude the testimony of the physician to substantially the same facts upon a third trial of the cause. *Elliott v. Kansas City* (Mo.), 8-653.

The plaintiff in an action for personal injuries who fails to object to the disclosure of communications made to his physician waives the right to object to the disclosure of such communications upon his subsequent prosecution for perjury. *People v. Bloom* (N. Y.), 15-932.

The waiver in one action of a privileged communication to a physician is a waiver of the right to claim the privilege in a subsequent action to which the patient is a party. *People v. Bloom* (N. Y.), 15-932.

Bringing action in which existence of ailment essential as waiver. — Under the Missouri statute providing that a physician or surgeon shall be incompetent to testify concerning any information which he may have acquired to enable him to prescribe for his patient as a physician or to do any act as a surgeon, a physician or surgeon is disqualified to testify in any case regarding information acquired by him while attending a patient in a professional capacity, and a patient does not waive the privilege of communications concerning such ailment by bringing an action in which an essential part of the issue is the existence of the physical ailment treated. *Smart v. Kansas City* (Mo.), 13-932.

Waiver by contract. — Since the Idaho statute authorizes a patient to waive the privilege of secrecy imposed on his physician, and does not fix any specific time at which such waiver can or must be made, no reason is discovered why a waiver may not equally as well be made by a contract and in advance of the time of the creation of the relation of physician and patient as at the time of the trial. *Trull v. Modern Woodmen of America* (Idaho), 10-53.

Where, in an application for life insurance, the applicant stipulates and agrees that he waives all the provisions of the law preventing a physician from testifying as to any information acquired by him while attending his patient or rendering him incompetent as a witness as provided in the Idaho statute, such waiver is valid, and entitles the beneficiary named in the policy, as well as the insurer, in an action upon the policy issued on such application, to call and examine the physician who attended the insured during his last sickness and have him answer questions which, but for such waiver, would be regarded as privileged communications that the witness could not disclose. *Trull v. Modern Woodmen of America* (Idaho), 10-53.

An applicant for life insurance may make a valid contract with the insurer waiving

the privilege afforded him by the Kansas Code of Civil Procedure which renders a physician incompetent to testify to professional communications from his patient and to knowledge obtained by a personal examination of the patient. *Metropolitan Life Ins. Co. v. Brubaker* (Kan.), 16-267.

Waiver of privilege by party testifying to transactions. — Where a client goes upon the stand and testifies regarding transactions between himself and his attorney, in an attempt to secure some advantage by reason of such transactions, he waives his right to object to the attorney's being called by the other party to give his account of the matter, such waiver not being against public policy. *Kelly v. Cummins* (Iowa), 20-1283.

(8) Effect of refusal to waive privilege.

Drawing unfavorable inference from refusal to waive privilege. — A federal court, in construing a state statute forbidding a physician to disclose information acquired in a professional capacity except where the patient has expressly waived his privilege, will hold that no unfavorable inference can be drawn from the patient's refusal to waive the privilege, though in the state courts the privileged testimony is admitted unless the objection is interposed, as the prohibition against disclosure is based on public policy. *Pennsylvania R. Co. v. Durkee* (U. S.), 8-790.

Under the New York statute prohibiting a physician from disclosing any information which he has acquired in a professional capacity and providing that the privilege shall be absolute unless it is expressly waived, no unfavorable inference can be drawn from the refusal of a party, who has called his physician as a witness, to permit the physician to disclose on cross-examination information acquired by him while attending the party in a professional capacity, as the prohibition against disclosure is an exercise of public policy, and not merely a measure for the protection of patients. *Pennsylvania R. Co. v. Durkee* (U. S.), 8-790.

Where, in a prosecution for murder, the state introduces as a witness a practicing physician who attended the defendant in a professional capacity, and had a talk with him, and seeks during a long and spirited discussion to have the witness relate the conversation had by him with the defendant, and describe his condition, which testimony is excluded on the ground of privilege, a direct examination of the witness in defiance of the ruling of the court asking what was the nature of the defendant's affliction, and what disease or condition the defendant was suffering from, if any, and whether at that time the defendant was suffering from having taken poison, is evidently calculated to impress the jury with the belief that the witness, if permitted to do so, would swear that the defendant attempted self-destruction, and is so prejudicial to the defense as to constitute ground for reversal although the questions are promptly objected to and excluded. *State v. Blydenburgh* (Ia.), 14-443.

4. EXAMINATION.

a. Mode of taking testimony.

Deaf mutes. — The mode in which the testimony of a deaf mute shall be taken is a matter within the sound discretion of the trial judge, who must determine in the first place the necessity for an interpreter, and in the next place the best method of arriving at the knowledge of the witness and of imparting that knowledge to the jury; but this discretion must not be exercised arbitrarily or to the injury of litigants. *Dobbins v. Little Rock R., etc., Co.* (Ark.), 9-84.

The testimony of a deaf mute should be taken by means of written questions and answers, where that appears to be the better method of eliciting facts from him, and he can read and write; but testimony may be taken through an interpreter by means of signs, where that appears to be the better method, or where the witness is unable to read or write. *Dobbins v. Little Rock R., etc., Co.* (Ark.), 9-84.

b. Examination by court.

Power to examine. — A trial judge has the right to propound such questions to the witnesses as may be necessary to elicit pertinent facts, in order that the truth may be established, provided he does so in a reasonable and impartial way without indicating his opinion of the facts. *Arkansas Central R. Co. v. Craig* (Ark.), 6-476.

It is not error for the trial judge to interrogate a witness while on the stand. *State v. Driggers* (S. C.), 19-1166.

Power of judge or umpire to call witnesses without consent of parties. — Neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties. *In re Enoch* (Eng.), 18-159.

Proper examination. — Where a witness for the defendant in a criminal prosecution has given very positive testimony tending to establish an alibi, and his testimony if unimpeached is of the highest value to the defendant, it is improper for the trial judge to question the witness in such a way as to the correctness of his recollection that the questioning amounts to an effort to break the force of the testimony. *Glover v. United States* (U. S.), 8-1184.

Where a party, for the purpose of impeaching an adverse witness, asks him incompetent questions as to his possession of stolen property and as to a forced payment made by him for such property, the party cannot complain of the action of the trial court in asking the witness a question designed to afford the latter opportunity to make an explanation of the transaction. *Miller v. Oklahoma* (U. S.), 9-389.

c. Mode of examination.

(1) In general.

Testifying in narrative form. — The trial judge in his discretion may refuse to

permit a witness to testify in narrative form, and his ruling will not be reviewed unless that discretion is clearly abused. *Pumphrey v. State* (Neb.), 18-979.

Framing questions in language of medical book. — While the contents of medical books are not admissible as independent evidence, it is permissible for counsel, in cross-examining an expert medical witness, to frame a proposition in medical science in the exact language of the author of such a book and ask the witness whether he agrees to it. Where this course is adopted, however, the jury should be cautioned by the court that it is the testimony of the witness, and not what is read from the book, that constitutes evidence in the case. *Macdonald v. Metropolitan St. R. Co.* (Mo.), 16-810.

(2) Leading questions.

Discretion of court. — A trial court has a large, though not unlimited, discretion in granting or refusing permission to ask the witnesses leading questions. *Edwards v. State* (Neb.), 5-312.

Exercise of discretion in examination of feeble-minded witness. — The action of the trial court in permitting leading questions is largely discretionary, and is properly exercised in the allowance of such questions in the examination of a feeble or simple-minded person. *State v. Simes* (Idaho), 9-1216.

Review of discretion. — In both civil actions and criminal prosecutions it is within the judicial discretion of the trial court to permit the propounding of leading questions to a witness, and the exercise of that discretion is not reviewable by an appellate court. *Falk v. Kimmerle* (Fla.), 17-839.

Leading questions are within the legal discretion of the trial judge, and where such discretion is not abused, this court will not reverse a case because the court allowed leading questions. *McClain v. Lewiston Interstate Fair, etc., Assoc.* (Idaho), 20-60.

An accused person is not prejudiced by permitting him to be asked leading questions relating to facts that are practically admitted by him; nor is there any error in permitting leading questions to witnesses eighteen and fourteen years of age who are testifying upon the trial of their father for the murder of their mother. *State v. Megorden* (Ore.), 14-130.

In a criminal prosecution, the determination of the question how far leading questions are essential to the ends of justice must be left largely to the sound discretion of the trial court, and unless there has been a clear abuse of such discretion, the reviewing court may not interfere. *State v. Miller* (Kan.), 6-58.

(3) Refreshing memory.

Right to refresh memory by referring to books of account. — In an action for the recovery of the amount of a book account, no error is committed in allowing the

plaintiff, who is a witness in his own behalf, to refer to the books and read entries therein, although the witness may be able to recollect the greater part of the transactions independent of the books, where a sufficient foundation has been laid for the admission of the books in evidence. *Moynahan v. Perkins* (Colo.), 10-1061.

Right of adverse party to inspect memoranda. — Where a witness is furnished with a paper for the purpose of permitting him to examine it and refresh his memory therefrom, the paper should be tendered to the opposite party for inspection just as soon as it has been identified and before the witness is permitted to use it; and this rule should be adhered to more rigorously in criminal than in civil cases. *Morris v. United States* (U. S.), 9-558.

d. Cross-examination.

Latitude of cross-examination in general. — In Montana no wider latitude is allowed in the cross-examination of an ordinary witness than is permitted in the cross-examination of the defendant in a criminal case, because the statutes (Rev. Codes, §§ 8030, 8031) prescribe the scope of the examination of witnesses, and provide (§§ 8060, 8061) that there is no common law in Montana in any case where the law is declared by the code or the statute, but that the code establishes the law respecting the subjects to which it relates. *State v. Crowe* (Mont.), 18-643.

A judgment will not be reversed on the ground that the trial court placed an improper limitation upon the appellant's cross-examination of certain opposing witnesses where it appears affirmatively that every reasonable latitude, and in some instances most liberal latitude, was allowed in cross-examination. *Estate of Dolbeer* (Cal.), 9-795.

In a prosecution for homicide, wherein it is not denied that the defendant killed the deceased, the only dispute being as to the circumstances, it is not reversible error to refuse to permit the defendant to cross-examine fully a witness who has testified merely that the defendant told her he had killed the deceased, where it appears that the prosecution sought to prove the entire conversation between such witness and the defendant, but, upon defendant's objection, was improperly prevented from doing so. *Posey v. State* (Miss.), 4-221.

Discretion of court as to latitude. — The course to be pursued in cross-examination is a matter largely within the discretion of the trial court, and the action of the court rarely furnishes ground for a new trial. *State v. Vandemark* (Conn.), 1-161.

Courts are liberal in allowing a broad range of inquiry on cross-examination, and this rule is especially and peculiarly applicable when it comes to the cross-examination of that class of witnesses commonly called experts. *Trull v. Modern Woodmen of America* (Idaho), 10-53.

Limiting cross-examination to scope of direct examination.—The party against whom the witness is called has the right to a full and fair cross-examination of him upon the subjects of his direct examination. The party on whose behalf the witness is called has the right to restrict his cross-examination to the subjects of his direct examination. The violation of these rights is not discretionary with the courts, but is reversible error. It is only beyond the limits of the exercise of these rights that the extent of the cross-examination of witnesses is within the discretion of the courts. *Harrold v. Oklahoma* (U. S.), 17-868.

Ordinarily a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters brought out on his direct examination, and if he wishes to examine him as to other matters he must do so by making him his own witness, and calling him as such in the subsequent progress of the cause. The trial court, however, has a certain discretionary power to allow variations from the customary order, and, as a general rule, the exercise of such discretion will not be interfered with on appeal. *St. Louis, etc., R. Co. v. Raines* (Ark.), 17-1.

The accused in a criminal case is not denied the right of cross-examination by sustaining objections to his questions to a witness as to occurrences concerning which the witness's direct testimony has been stricken out. *Spencer v. State* (Wis.), 13-969.

The extent, manner, and course of the cross-examination of a witness, even though it extends to matters not inquired about in his examination in chief, are very largely within the control of the court in the exercise of a sound discretion, and the exercise of that discretion, unless flagrantly abused, is not reviewable on appeal. *Harrold v. Territory* (Okla.), 11-818.

On cross-examination of a witness, the party cross-examining should be confined to the matters concerning which the witness has been examined in chief, but this rule should be liberally construed so as to permit any question to be asked on cross-examination which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief or to test his accuracy, memory, skill, veracity, character, or credibility. *Harrold v. Territory* (Okla.), 11-818.

Testing recollection of witness.—Where in a prosecution for the larceny of furniture a witness for the state testifies that she bought the furniture from the defendant, she may, for the purpose of testing her recollection, be asked on cross-examination whether, as a matter of fact, she did not buy the furniture from a certain other person. *Coburn v. State* (Ala.), 15-249.

Cross-examination of expert as to insanity.—It is proper cross-examination of a nonexpert witness who had testified that in his opinion the defendant in a criminal case was of unsound mind at the time of the commission of the offense charged, to ask if

he thought the defendant would know that it was wrong to shoot a man, or to steal or to commit burglary. *State v. Crowe* (Mont.), 18-643.

Interest in result.—In a condemnation proceeding, it is competent for the defendant, on cross-examination of an engineer called by the petitioner, to interrogate the witness as to his interest in the result of the proceeding, and to ask him whether he has been promised a sum of money in case the proceeding is successful. *West Skokie Drainage Dist. v. Dawson* (Ill.), 17-776.

e. Re-examination.

Giving witness opportunity to explain answers on cross-examination.—A witness on re-examination may be asked a question for the purpose of affording him an opportunity to explain the answers given on the cross-examination. *Baltimore Belt R. Co. v. Sattler* (Md.), 3-660.

Questioning witness, attacked on cross-examination, as to statement made to him to influence him against testifying.—Where, in a prosecution for murder, a witness for the state is asked on cross-examination, for the purpose of discrediting him, if his brother-in-law and the accused had not previously had some trouble, it is proper for the state, in rebuttal, and not as original evidence, to show by the witness that he had been told by some one that he had better not testify against the accused. *Strong v. State* (Ark.), 14-229.

Opinion as to insanity.—A nonexpert witness who has testified in chief in a criminal case that in his opinion the defendant was of unsound mind at the time of the commission of the offense charged, and on cross-examination that he believed that the defendant knew that it would be wrong to shoot a man or to steal or to commit burglary, may be asked on redirect examination whether the defendant had sufficient mental capacity to do right and avoid wrong. *State v. Crowe* (Mont.), 18-643.

f. Answers.

Improper answers as error.—An improper answer by a witness to a proper question is not ground of error if given without the fault of the court or the examining counsel. In the absence of anything appearing to the contrary, it will be presumed that they are without fault. *Holman v. Edson* (Vt.), 15-1089.

The above rule does not apply to an improper answer given by a party when testifying. As the law presumes that a party knows and intends what he testifies to, such an answer, if material, constitutes reversible error. *Holman v. Edson* (Vt.), 15-1089.

Striking out answers irresponsible or stating conclusion.—It is not reversible error for a trial court to strike out a portion of an answer given by a witness which is in no way responsive to the question asked, or to strike out an answer which states a

in the conclusion of the witness. *Cragg v. Los Angeles Trust Co. (Cal.)*, 16-1061.

Striking out answer stating conclusion. — In a condemnation proceeding, where a witness for the petitioner, upon being asked whether the land sought to be acquired is suitable for agricultural purposes, answers that it is very poor, defendant is entitled to have the answer stricken out as stating the conclusion of the witness, and the denial of a motion to strike it out constitutes error. *West Skokie Drainage Dist. v. Dawson (Ill.)*, 17-776.

g. Privilege of witness.

(1) Statutory abridgment of privilege.

Power of legislature. — The legislature has no power to restrict or abridge the privilege guaranteed by section 13 of the North Dakota constitution which provides that "no person shall . . . be compelled in any criminal case to be a witness against himself." *In re Beer (N. Dak.)*, 17-126.

(2) Who may invoke privilege.

Party to suit where witness does not claim privilege. — Testimony which a witness has given, without objection on his part, cannot be excluded on motion of a party to the case, on the ground that the personal privilege of the witness was violated when such testimony was elicited from him. *McCray v. State (Ga.)*, 20-101.

Custodian of books tending to incriminate another. — The provisions of the Michigan constitution and Federal Constitution that no witness can be compelled to give testimony which may tend to criminate himself are designed for the protection of the witness and not for others, and do not shield the president of a corporation who refuses to produce before the grand jury, in obedience to a subpoena duces tecum, certain books of the corporation, where it appears that during the time in which the books in question were kept, and entries therein made, the president had no connection with the corporation or its officers, and had no part in making the entries or knowledge of them. The fact that the entries may tend to incriminate other officers of the corporation is immaterial. *In re Moser (Mich.)*, 5-31.

One cannot be compelled to produce his own books or the books of another, which are under his control as agent or otherwise, where their production would tend to criminate him, nor can his clerk be compelled to produce them; but when, as agent of a corporation, he chooses to make entries on the books of the corporation, and those books are in the possession and control of another officer of the corporation, such officer may be compelled to produce them, in a proper case, under a subpoena duces tecum, and this does not amount to an unjustifiable search and seizure as prohibited by the Michigan constitution. *In re Moser (Mich.)*, 5-31.

Defendant to whom books were delivered after service of subpoena duces tecum. — Where, in a criminal prosecution

against the general superintendent of a corporation for perjury, the defendant and the auditor of the corporation are served with a subpoena requiring the production before the grand jury of certain books and documents of the corporation, and the auditor, who is the regular custodian of such books and documents and then has possession of them, delivers them to the defendant, in accordance with instructions of the corporation's counsel, on the day before the grand jury meets, it is no violation of the constitutional privilege of the defendant as a witness to order him to place such books and documents in the possession of the auditor, and to commit the defendant to custody until he complies with the order. *Ex p. Hedden (Nev.)*, 13-1173.

(3) Manner of raising question of privilege.

By refusing to produce books pursuant to subpoena. — Where a corporation is required to produce its books for the inspection of a court or grand jury the objection that the books called for will incriminate the corporation is not available upon a refusal to comply with the notice to produce. The court cannot determine the objection as to incrimination until the books are produced for inspection by the court. *Consolidated Rendering Co. v. Vermont (U. S.)*, 12-658.

Where a corporation is ordered, under the Vermont statute, to produce its books and papers before the grand jury, and in violation of the order fails to do so, the claim of the corporation that it cannot be compelled to produce such documents because of the provision of the constitution against compelling a party to give self-incriminating evidence, is not properly or legally presented, and no question as to the validity of the statute in this respect is raised. It is the duty of the corporation to comply with the order by bringing the required documents into court, and then, if it desires to do so, to claim the privilege that the documents, if introduced in evidence, would tend to incriminate it. *In re Consolidated Rendering Co. (Vt.)*, 11-1069.

By motion to dismiss petition to punish for contempt in refusing to produce books. — The claim of privilege that documents ordered to be produced before a grand jury would tend to incriminate the corporation ordered to produce them, can be raised before the grand jury, but cannot be raised by a motion to dismiss a petition to punish the corporation for contempt. *In re Consolidated Rendering Co. (Vt.)*, 11-1069.

(4) Determination of question of privilege.

As question for court. — The claim of privilege that certain evidence will tend to incriminate a witness is for the court and not for the witness to decide. *In re Consolidated Rendering Co. (Vt.)*, 11-1069.

Witness as sole judge. — A witness himself is not the sole judge of whether the answer to a question will tend to criminate him. Unless it may so tend he must answer,

and where it is apparent that it will not have that effect his refusal to answer will subject him to proceedings for contempt. *In re Moser* (Mich.), 5-31.

(5) Testimony privileged.

Answers tending to criminate in general. — A witness, sworn before a grand jury in North Dakota, cannot be compelled to answer questions which would tend to criminate him, and is privileged from answering such questions by section 13 of the state constitution, which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself," unless granted unconditional immunity from prosecution for the offense concerning which he is testifying by statute. *In re Beer* (N. Dak.), 17-126.

Furnishing link in claim of evidence. — Under section 13 of the constitution, the witness is protected from testifying to facts and circumstances from which his connection with, or guilty of, a crime, may be proven through other sources than his answers. *In re Beer* (N. Dak.), 17-126.

Statement by witness before coroner. — The provision of the Colorado constitution that no person shall be compelled to testify against himself in a criminal case renders inadmissible in a criminal prosecution involuntary statements made by the defendant, when a witness before the coroner's jury, without regard to whether the statements so made amounted to a confession of guilt. *Tuttle v. People* (Colo.), 3-513.

Statements made by a witness before a coroner's jury to be admissible in a subsequent prosecution against him for murder, to investigate which an inquest is held, must be made voluntarily. If made under any degree of coercion they will not be admissible. *Tuttle v. People* (Colo.), 3-513.

In ascertaining whether or not statements made by a witness before a coroner's jury were made voluntarily, each case must be governed by its own circumstances. That the person making the statements had been subpoenaed, that he testified under oath, or that he was under arrest at the time, does not control in determining the character of the statements. *Tuttle v. People* (Colo.), 3-513.

A voluntary character cannot be ascribed to statements which, though not confessions or admissions of guilt and made without objection, were made under oath by persons subpoenaed before a coroner's jury as witnesses, and who, though not under arrest and not charged with the crime, were suspected of having committed it, knew of the suspicion, were not represented by counsel, and were not warned that their statements might be used against them, or that they were privileged to refuse to testify. *Tuttle v. People* (Colo.), 3-513.

Answers to insulting or degrading questions. — It is improper, on cross-examination, to ask a witness for the defendant in a criminal case, if he is the same person "who was connected with" a certain other

crime, and if he has not "been more or less directly connected with other offenses of the same character for the past eighteen years," because such questions are within the provisions of the Montana statutes relieving a witness from answering questions which relate to "particular wrongful acts" committed by him (Rev. Codes, § 8024), which "have a direct tendency to degrade his character" (§ 8030), or which are insulting (§ 8031). *State v. Crowe* (Mont.), 18-643.

It is reversible error to compel a witness on cross-examination, in violation of his privilege, to answer questions which serve no other purpose than to degrade and discredit the witness in the eyes of the jury. *State v. Crowe* (Mont.), 18-643.

(6) Immunity as removing privilege.

Right to claim privilege where immunity extended is coextensive with privilege. — The exemption provided by the Kansas bill of rights that no person shall be a witness against himself cannot be claimed by the witness when under a statute the immunity afforded is coextensive with the constitutional privilege of silence. *State v. Jack* (Kan.), 2-171.

Necessity that immunity be coextensive with privilege. — Before a witness can be compelled to answer questions which tend to criminate him, the statute granting immunity must be coextensive in scope and effect with the constitutional guaranty. *In re Beer* (N. Dak.), 17-126.

What constitutes immunity coextensive with privilege. — The immunity afforded by the Kansas anti-trust law of 1897 to a witness subpoenaed to testify of his knowledge of the violations of that law is coextensive with the constitutional privilege that no person shall be a witness against himself. *State v. Jack* (Kan.), 2-171.

The North Dakota statute (section 9383, Rev. Codes 1905) which provides that "no person shall be excused from testifying . . . by reason of his testimony tending to criminate himself, but the testimony given by such person shall in no case be used against him," does not grant immunity from prosecution. *In re Beer* (N. Dak.), 17-126.

Sufficiency of immunity from prosecutions in state courts which does not extend to federal courts. — A witness subpoenaed to testify of his knowledge of the violations of the Kansas anti-trust law cannot refuse to give evidence on the ground that the immunity provided by such act does not protect him against a prosecution for violation of the federal anti-trust law. *State v. Jack* (Kan.), 2-171, *affirmed*, *Jack v. Kansas* (U. S.), 4-689.

(7) Waiver of privilege.

Right to waive. — Constitutional immunity from giving incriminating evidence against one's self is a personal privilege which may be and which is waived if not seasonably asserted. *State v. Duncan* (Vt.), 6-602.

Waiver by accused taking stand in own behalf. — A prisoner who takes the witness stand in his own behalf waives his constitutional privilege of silence, and the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. *Harrold v. Territory (Okla.)*, 11-818.

The defendant in a criminal prosecution who testifies in his own behalf waives the constitutional right to refuse to answer on cross-examination questions tending to prove him guilty of some other crime. *People v. Dupounce (Mich.)*, 2-246.

When a prisoner on trial for a crime voluntarily takes the witness stand in his own behalf, he waives all privileges which he is entitled to by remaining silent, and subjects himself to the same rules of cross-examination and impeachment as any other witness; and he may be asked if he has not made certain statements, admissions, or confessions out of court inconsistent with his testimony in the cause, and if he admits making such statements, he may explain or show the circumstances and conditions under which the statements were made; and if he deny making such statements, then the prosecution on rebuttal may prove the statements or admissions made by him, and this may be done even though the admissions or confessions would not have been admissible had he remained silent, by reason of not having been voluntary. *Harrold v. Territory (Okla.)* 11-818.

Waiver by accused taking stand in own behalf as extending to involuntary confessions. — The waiver by an accused person testifying in his own behalf of his constitutional guaranty against being compelled to testify against himself does not extend beyond a legal cross-examination upon the subjects of his direct examination. Impeaching questions relative to an involuntary confession not treated in the direct examination of the accused, and the introduction of such a confession to contradict the answers to such questions, violate the constitutional guaranty. *Harrold v. Oklahoma (U. S.)*, 17-868.

5. CREDIBILITY, IMPEACHMENT, AND CORROBORATION.

a. Credibility.

(1) In general.

Failure to cross-examine as assent to credibility. — Failure to cross-examine a party who is the sole witness as to a particular issue in the case is an assent to his credibility, and the opposite party cannot attack his credibility in argument. *New Hamburg Mfg. Co. v. Webb (Can.)*. 20-817.

Disregarding evidence because of interest in result. — The testimony of witnesses is not to be disregarded merely because they are interested in the result; but

other reasons for discrediting them must appear. *Miller's Will (Ore.)*, 14-277.

Attorney for party. — Where, upon a bill to set aside a deed, it must be apparent to an attorney for the defendant, upon examination of the bill, that his testimony will be material, it is his duty to confer with his client and associate counsel at once and finally determine whether he will become a witness. If it is decided that he shall be a witness he should immediately sever his connection with the litigation. Where, instead of so doing, he prepares answers and acts for the defendant until the time of trial, his withdrawal at that time is too long delayed, but it will be presumed on appeal that the chancellor, knowing the circumstances, determined properly what weight should be given to his testimony. *Onstott v. Edel (Ill.)*, 13-28.

(2) As question for jury.

In general. — After a court has determined that a person is competent to testify as a witness, the credibility of the witness immediately becomes a question to be determined by the jury. *State v. Simes (Idaho)*, 9-1216.

(3) Instructions.

Relating to interest of witness. — A requested instruction that the testimony of a witness having in view a reward in case of conviction shall be received "with distrust," is properly refused, as the question of the credit to be given to the witness is solely for the jury. *State v. Wisniewski (N. Dak.)*, 3-907.

Relating to disregarding testimony of employee of party. — In an action against a master to recover damages for personal injuries sustained by his servant, an instruction that the jury have no right to disregard the testimony of witnesses for the defendant simply because such witnesses are, or have been, in the defendant's employ, embodies a correct statement of law, and is not open to the objection that it directs the jury not to take into account the fact of the witnesses' employment by the defendant in weighing their testimony. *Christiansen v. William Graver Tank Works (Ill.)*, 7-69.

Relating to disregarding evidence of impeached witness. — An instruction which points out two methods of impeaching witnesses and then tells the jury that if they believe "that any witness for the defendant has been impeached by either of the methods" they are at liberty to disregard his evidence, except in so far as it has been corroborated, is erroneous, as tending to lead the jury to believe that there is something in the testimony of some one of the witnesses for the defense which makes the specified rules of impeachment peculiarly applicable to him. *Godair v. Ham National Bank (Ill.)*, 8-447.

Relating to disregarding testimony of witness falsely testifying as to any matter. — An instruction, in a criminal prosecution, that if the jury "find that the

accused or any other witness has willfully and corruptly testified falsely to any fact material to the issue, . . . they have the right to entirely disregard his testimony," is not open to the objection that it tells the jury that if they find that any witness has committed perjury they have the right to disregard the testimony of the defendant. *Aldrich v. People* (Ill.), 8-284.

It is erroneous to instruct the jury that they may disregard the testimony of a witness whom they believe to have testified falsely in regard to any material matter, unless the jury are also instructed that the false testimony must have been given knowingly and wilfully. *Godair v. Ham National Bank* (Ill.), 8-447.

b. Impeachment.

(1) Impeaching one's own witness.

Right to impeach in general. — The general rule is that a party to an action cannot impeach a witness voluntarily called by him except as that result may be accomplished incidentally by proving a state of facts differing from that sworn to by the witness in question. *Chicago City R. Co. v. Gregory* (Ill.), 6-220.

Impeachment of adverse party called as witness. — The party to an action, who calls his adversary as a witness, is bound by the latter's testimony only in so far as it is entitled to credit, taking into consideration its reasonableness and all the other tests of credibility which are applied to witnesses and the weight of their evidence. *Lasher v. Colton* (Ill.), 8-367.

A party who calls the opposite party as a witness is not bound by his testimony but may contradict him by introducing other evidence to prove a state of facts contrary to that to which the witness testifies. *Mississippi Glass Co. v. Franzen* (U. S.), 6-707.

Where the plaintiff in an action on a bond calls as a witness the defendant, who denies that he signed the bond, the plaintiff may nevertheless introduce any legal evidence of the fact that the defendant did sign it. *Municipal Court v. Kirby* (R. I.), 13-736.

The rule that a party cannot impeach his own witnesses by contradictory statements made out of court is limited to the case of a witness who is not the adverse party. In a civil action the admission by a party of any fact material to the issue, excepting confidential communications the disclosure of which is prohibited by statute, are always competent evidence against him, wherever, whenever, or to whomsoever made. Declarations, as a general rule, are merely hearsay, and therefore incompetent; while admissions of a party to the action are original evidence against the party making them, and are as a rule sufficient to establish a cause of action or defense without further evidence of the fact. *Koester v. Rochester Candy Works* (N. Y.), 16-589.

Proof of contradictory statements of witness not a party. — A party to an ac-

tion cannot prove that a witness whom he has voluntarily called made contradictory statements before the trial, either for the purpose of having the jury consider the statements as independent evidence or for the purpose of impeaching the witness, where there is no attempt to show that the witness has perpetrated a fraud upon the party by giving evidence opposed to that which he represented that he would give when called. *Chicago City R. Co. v. Gregory* (Ill.), 6-220.

A party who is surprised by the adverse testimony of a witness whom he has called may, in the discretion of the trial court, be allowed to cross-examine the witness, and, after laying a proper foundation, show that the witness, prior to testifying, had made statements contrary to his testimony. *Lindquist v. Dickson* (Minn.), 8-1024.

A party who calls a witness who had previously testified fully by disposition cannot introduce declarations made by the witness out of court for the purpose of neutralizing the effect of his testimony, for it cannot be said that such party has been surprised by the hostile affirmative evidence of the witness. Such declarations are particularly inadmissible where the adverse party offers to have the hostile testimony stricken from the record. *Estate of Dolbeer* (Cal.), 15-207.

Exclusion of evidence tending to contradict evidence of another witness for same party. — Under the Massachusetts statute (Rev. Laws, c. 175, § 24) providing that one may not impeach the credit of his witness by evidence of bad character, but may contradict him by other evidence, etc., the fact that the evidence in a criminal case tends to contradict that of other witnesses introduced by the same party is not ground for its exclusion, where it is competent for other purposes. *Com. v. Richmond* (Mass.), 29-1269.

(2) Impeaching evidence.

(a) In general.

Intoxication of witness at time of event testified to. — The fact that a witness was intoxicated at or about the time of the happening of an event concerning which he has testified may be sworn for the purpose of impeaching his credibility, without first interrogating him as to his condition at the time in question. *Bliss v. Beck* (Neb.), 16-366.

Statement by party that he would spend large sum to win suit. — In an action for assault and battery where the defendant has testified in his own behalf, it is competent to show, as affecting his credibility, prior statements by him that he would whip the plaintiff in court and would spend \$50,000 to do it. *Stockham v. Malcolm* (Md.), 19-759.

Refusal to answer questions at coroner's inquest. — In an action against a street railway company to recover damages for the death of the plaintiff's husband, alleged to have been caused by the wrongful

act of the conductor of the car on which he was riding in pushing him therefrom, evidence that such conductor, acting upon the advice of an attorney for the railroad company, refused to make any statement to the jury at a coroner's inquest held to inquire into the death of the deceased is not admissible for the purpose of impeaching his testimony on the trial. *Garrett v. St. Louis Transit Co.* (Mo.), 16-678.

Proof that witness had stolen property in possession and was forced to pay therefor. — Evidence that a witness had stolen property in his possession at a certain time, and that he was forced to pay for the property, is not admissible, even for the purpose of affecting the credibility of the witness. *Miller v. Oklahoma* (U. S.), 9-389.

Matters not proper on cross-examination on other grounds.—Matters brought out on cross-examination, which are legitimate for the purpose of enabling the jury to determine the credibility of a witness, are not objectionable, although they may relate to questions not in issue in the case. *Vindicator Consol. Gold Min. Co. v. Firstbrook* (Colo.), 10-1108.

(b) Contradictory statements.

Necessity of laying foundation for contradiction. — Where it is sought to impeach the testimony of a witness, not a party to the action, by evidence of statements made by him out of court, a proper foundation must be laid by asking him if he made the statements and directing his attention to the time and place and the person to whom or in whose presence they were made. This rule, however, is sufficiently complied with whenever the time, place, person, and substance of the alleged statements are designated with such a degree of certainty that the witness will clearly understand the matter about which he is interrogated and not be misled. *Jaynes v. People* (Colo.), 16-787.

The credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified at the trial, but, in laying the foundation for such impeachment, it is necessary to inquire of such witness as to the time, place, and persons involved in such supposed contradictions, before proof thereof may be submitted to the jury, the statute requiring that "the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement." *Clinton v. State* (Fla.), 12-150.

Nature of questions to lay foundation. — Where on the cross-examination of a witness a foundation is being laid to impeach him by proof of prior contradictory statements, questions asked for that purpose are not rendered fatally objectionable by the fact that they do not relate wholly to matters of fact, but in part call for the conclusions of the witness, where he admits having made prior contradictory statements as to the mat-

ters calling for his conclusions. *Larkin v. Saltair Beach Co.* (Utah), 8-977.

Questioning witness as to prior statements to lay foundation for contradiction. — Where a witness testifies that three or four days before the fall of the rock by which the plaintiff's intestate was killed he noticed the rock and that it appeared to be loose, it is competent on cross-examination, as laying the foundation for impeachment, to ask him if he did not testify at the coroner's inquest that he examined the rock thirty minutes before it fell and thought that it was not dangerous. *Belskis v. Dering Coal Co.* (Ill.), 20-388.

It is proper on cross-examination to ask the witness if he has not made certain statements contradictory to his testimony, as laying the foundation for impeachment. *Linthorpe v. San Francisco Gas, etc., Co.* (Cal.), 19-1230.

For the purpose of laying a predicate for the proof of a contradictory statement, a witness may be questioned on cross-examination as to conversations had by him with a third person. *Birmingham R., etc., Co. v. Mason* (Ala.), 6-929.

Contradiction by proof of conversations when defendant not present. — In a criminal prosecution, the prosecuting witness may testify in rebuttal as to conversations had by him with one of the witnesses for the defendant when the defendant was not present, where the rebuttal testimony is given for the purpose of contradicting the answers given by the defendant's witness on cross-examination in response to questions asked him for the purpose of showing his interest in the case and of affecting the weight of his testimony. *State v. Mulhall* (Mo.), 8-781.

Prior inconsistent statements out of court. — For the purpose of impeaching a witness, it is competent to introduce evidence tending to show that before the trial he made statements contradictory of and inconsistent with his testimony, where the attention of the witness was called on his cross-examination to the specified time, place, and circumstances of each conversation in which it is claimed that the statements were made, and he denied having made the statements. *Larkin v. Saltair Beach Co.* (Utah), 8-977.

Inconsistent statements regarding belief in defendant's guilt. — Where on cross-examination a witness denies having made statements expressing an opinion as to the guilt of the accused, it is improper to allow the prosecution to prove for the purpose of impeachment that the witness had made such statements. *Parker v. State* (Tex.), 3-893.

If there is an inconsistency between the belief of a witness as indicated by his declarations prior to the trial, and his belief as indicated by his examination in chief, the prior declarations may be shown by way of impeachment, though they are not directly contradictory of any specific statement made by him on his examination in chief. *State v. Matheson* (Iowa), 8-430.

Contradiction by stenographic notes of testimony at coroner's inquest not shown to be correct. — In a prosecution for homicide, a witness for the state cannot be contradicted by the reading of the stenographic notes of the testimony at the coroner's inquest or impeached by a production of the transcript of such notes, where the stenographer who took the testimony is unable to say that his notes are a correct statement of the witness's testimony at the inquest. *State v. Martin* (Oregon), 8-769.

Deposition taken in another cause. — A deposition taken in another cause is admissible for the purpose of impeaching the witness by showing that at another time and place he made statements under oath inconsistent with those made upon the witness stand in the case on trial, and it is not required that the whole deposition be read or any greater portion thereof than that which directly relates to the proposed impeachment. *Charlton v. Kelly* (U. S.), 13-518.

Contradiction of collateral and immaterial matters. — Testimony as to collateral and immaterial matters cannot, though given on direct examination, be contradicted for the purpose of impeaching the witness's credibility. *Lambert v. Hamlin* (N. H.), 6-713.

In a prosecution for arson, where one of the state's witnesses has on cross-examination denied having had a conversation with the owner of the building wherein the latter expressed the opinion that the burning had been done by a third person, the defendant cannot impeach the witness by testimony of other witnesses that the conversation took place. *State v. McLain* (Wash.), 10-321.

Admissibility of testimony of magistrate as to contradictory statements at preliminary examination. — A witness on a criminal trial may be impeached by showing that he made contradictory statements when testifying on the preliminary examination of the defendant, and the magistrate before whom such examination was had may be called as a witness for that purpose. *State v. Pirkey* (S. D.), 18-192.

Admissibility of written statement where signature admitted but contents denied. — Where a witness admits having signed a paper containing statements which contradict his testimony, but states that the writing was changed after he wrote his signature and that he did not understand the contents at the time, and there is no evidence to the contrary, such paper is not admissible to impeach him. *Belskis v. Dering Coal Co.* (Ill.), 20-388.

(c) Bias.

Necessity of laying foundation. — Before evidence to show bias on the part of a witness can be introduced, a foundation therefor must be laid by asking the witness whether he said or did the things intended to be proved as showing bias. *Fagan v. Lentz* (Cal.), 20-221.

Showing contribution by witness to aid prosecution. — In a criminal prosecution,

it is prejudicial error to refuse to permit the defendant to show the interest of the witness for the prosecution, and to impair the force of his testimony, by asking him if he has not contributed money to aid in the prosecution, and what his purpose was in so doing. *Miller v. Oklahoma* (U. S.), 9-389.

Showing retainer of witness as attorney in case. — In a criminal prosecution it is competent for the defendant to show that a lawyer who is testifying against him has received a retainer in the case to assist in the prosecution, and to show in what capacity the witness has been so retained; but this should be done decently and respectfully, by proper questions developing the facts, and without making unfounded imputations of corruption on the part of the witness. *Miller v. Oklahoma* (U. S.), 9-389.

Showing aid by witness in securing evidence. — In a criminal prosecution, where a witness for the state has shown his interest by admitting on cross-examination that he went to the county attorney and volunteered his evidence, the action of the trial court in refusing to permit the witness to answer a question as to whether he sent any one else to the county attorney telling him that the witness wanted to testify is technically erroneous as an undue restriction of cross-examination, but the error is without prejudice as an affirmative answer would not add further evidence of the interest of the witness. *State v. Fuller* (Mont.), 9-648.

Interest taken in case by witness. — In a prosecution for rape, where it appears that a relative of the defendant, owing no special duty to the prosecuting witness, has manifested unusual interest in the prosecution of the case, a wide latitude should be allowed in his cross-examination, and the defendant should be permitted to impeach his testimony as to any matter bearing directly on the case. *State v. Griffin* (Wash.), 11-95.

It is competent for either party to show the interest taken in a case by a material witness for the opposite party; and this may be done on cross-examination of the witness himself. *Atlantic Coast Line R. Co. v. Powell* (Ga.), 9-553.

Relation between witness and attorney for party. — It is within the discretion of the trial court to decline to allow inquiries into the relations of client and attorney between a witness and the attorneys for one party to the action, the purpose of which is to show bias of the witness against the other party. *Birmingham Southern R. Co. v. Lintner* (Ala.), 3-461.

(d) Conviction of crime.

Admissibility of evidence of verdict of conviction subsequently set aside. — The statute of the District of Columbia providing in substance that no person shall be incompetent to testify by reason of his having been convicted of crime, but that such fact may be given in evidence to affect his credit as a witness, means conviction by the judgment of a court and not by the verdict

of a jury merely, and evidence of a verdict of conviction against the witness which was afterwards set aside is not admissible under the statute. *Thompson v. United States* (D. C.), 12-1004.

Cross-examination as to previous conviction. — The defendant in a criminal prosecution, offering himself as a witness in his own behalf, cannot be asked on cross-examination, for the purpose of impeaching him, if he has not formerly been convicted of crime, the fact of such previous conviction being provable only by the record. *Commonwealth v. Walsh* (Mass.), 13-642.

Under the statute providing that a person convicted of a criminal offense is competent as a witness to affect his credibility, the defendant in a criminal prosecution is entitled to ask a witness on cross-examination if he has ever been arrested and convicted "of being drunk and disorderly," where the prosecution does not object to the question on the ground that it is not sufficiently specific. *Koch v. State* (Wis.), 5-389.

(e) Indictment for crime.

In general. — Though evidence that a witness has been convicted of having committed a crime is admissible for the purpose of impeaching him, evidence of a mere accusation or indictment is not admissible for that purpose. *Glover v. United States* (U. S.), 8-1184.

The rule that a witness may not be impeached or discredited by showing on his cross-examination, or in any other way, that he has been indicted, applies to criminal as well as to civil actions, and to all witnesses whether parties or not. *People v. Morrison* (N. Y.), 16-871.

Joint indictment of witness and accused. — It was not error, in view of the evidence in this case, to admit in evidence, to be considered solely on the question as to the credibility of a witness testifying in behalf of the accused on trial, an indictment against him and such witness, charging them jointly with the offense of assault with intent to murder, alleged to have been committed upon a named person, who, the evidence in the case on trial showed, accompanied the deceased at the time he was killed, and was assaulted as he was leaving the scene of the homicide. *McCray v. State* (Ga.), 20-101.

(f) Involuntary confession.

Confession incompetent in chief as admissible to impeach accused. — An involuntary confession of an accused person, incompetent to prove the case of the prosecutor in chief, is incompetent to impeach the accused after he has testified in his own behalf relative to other subjects only, (1) because such a confession is unworthy of belief, and (2) because its introduction would violate the constitutional guaranty that the accused shall not be compelled to testify against himself. *Harrold v. Oklahoma* (U. S.), 17-868.

(g) Attacking character or reputation.

Impeaching character of defendant who takes stand. — When the defendant in a criminal case offers himself as a witness he thereby puts himself on the same footing as any other witness and may be examined, cross-examined, or impeached as any other witness, but the state cannot introduce evidence to impeach the general character of the defendant, unless he has first put his character in issue. *Clinton v. State* (Fla.), 12-150.

Showing witness's sweetheart to be niece of fugitive from justice. — The credibility of a witness cannot be impeached by evidence showing that his sweetheart is the niece of a fugitive from justice, or by evidence tending to show that the witness has at times associated with thieves and other criminals. *Miller v. Oklahoma* (U. S.), 9-389.

Time limit of proof of reputation. — A witness may be impeached by proof that his reputation for truth and veracity was bad at places where he formerly resided, within a reasonable time limit. *People v. Mix* (Mich.), 12-393.

Reputation of deceased witness. — Where a transcript of the testimony of a deceased female witness has been introduced in evidence, it is proper to refuse to permit the opposing party to ask a witness a question designed to elicit testimony that the reputation of the deceased witness as to morality was bad. *In re Durant* (Conn.), 10-539.

Cross-examination of impeaching witness as to specific acts of witness. — After a witness has testified that the character of the prosecuting witness in a certain particular is bad, he will not be permitted on cross-examination to testify to specific acts or occupation of the prosecuting witness in rebuttal of such testimony. *State v. Osborne* (Ore.), 20-627.

c. Corroboration.

Evidence of prior consistent statements of witness to rebut prior inconsistent statements. — It is a general rule that where evidence of contradictory statements is offered to impeach the credit of a witness, evidence of statements made by him on former occasions consistent with his evidence are inadmissible. But, where it is charged that the evidence of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive or personal interest, his evidence may be supported by showing that he had made a similar statement before the relation or motive existed. *Driggers v. U. S.* (Okla.), 17-66.

Where a witness has denied having made statements contradictory of those made by him upon the witness stand, and proof has been introduced tending to establish such prior contradictory statements, former statements of the witness consistent with those made by him upon the stand are not admis-

sible in support of his testimony, except possibly where there has been some change in the circumstances or in the relations between the witness and the parties to the cause which may have prompted a recent fabrication or design to misrepresent the facts. *Burks v. State* (Ark.), 8-476.

Declaration of third person to same effect as admissible.—When a witness has testified to a particular fact, he cannot be corroborated by the testimony of another witness that a third person had made a declaration to the same effect in the presence of both of them. *Pegram v. Seaboard Air Line Ry.* (N. Car.), 4-214.

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Validity of statute restricting cutting of trees without compensation.—Legislation to restrict or regulate the cutting of trees on wild or uncultivated land by the owner thereof, etc., without compensation therefor to such owner, in order to prevent or diminish droughts and freshets, and to protect, preserve, and maintain the natural water supply of springs, streams, ponds, and lakes, etc., and to prevent or diminish injurious erosion of the land and the filling up of the rivers, ponds, and lakes, etc., would not operate to "take" private property within the inhibition of the constitution. *Opinion of Justices* (Me.), 13-745.

While such legislation might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched and without diminution of title, estate, or quantity. He would still have large

measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or "taken." Such legislation would be within the legislative power and would not operate as a taking of private property for which compensation must be made. *Opinion of Justices* (Me.), 13-745.

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About. — The word "about" is a word of somewhat flexible signification, which may vary with the circumstances and the connection in which it is employed, but when used in such a sense as to become a part of a contract, it denotes approximation to exactness. It cannot be reasonably interpreted to cover so large a fraction of a total term of credit as three-sevenths or two-thirds, and, consequently, where a person purchasing horses on the 19th and 23d of March, agrees to pay for them about the 1st of April, an action for the purchase price commenced on the 27th of March is premature. *Freeman v. Hedrington* (Mass.), 17-741.

Act of God. — The meaning of the term "act of God" discussed. *Central of Georgia R. Co. v. Hall* (Ga.), 4-128.

Blood relations. — The term "blood relations," used in a will and codicil of an illegitimate person, construed as to its reference to legitimates and illegitimates. *Estate of Sanders* (Wis.), 5-508.

Carrying on business. — The English Money-lenders' Act 1900, in requiring that a money-lender "shall carry on the money-lending business in his registered name and in no other name and under no other description, and at his registered address or addresses and at no other address," does not mean that every stage and every incident of every piece of the money-lending business is to be transacted at the registered office. Whether a certain transaction or series of transactions constitutes carrying on business within the meaning of the act is a question of fact, not of law, and must be answered according to the circumstances of the case. *Kirkwood v. Gadd* (Eng.), 18-25.

Cash. — "Cash" will not be construed to include real estate, in the absence of a clear intent to use it for that purpose. *Watson v. Martin* (Pa.), 20-1288.

Cigarettes. — Little cigars, each a cylindrical roll of tobacco about two and three-fourths inches long by one-third of an inch in diameter, the exterior consisting of a section of wrapper leaf tobacco and the interior of the kind of tobacco used in cigars, are not "cigarettes" within the meaning of the Wisconsin statute prohibiting the manufacture and sale of cigarettes. *Goodrich v. State* (Wis.), 14-932.

Colored. — The word "colored" by a consensus of opinion means of some other color

than white, having a dark or black color of the skin, specifically in the United States belonging wholly or partly to the African race, or having or partaking of the color of the negro. Throughout the United States, except on the Pacific Slope, the word "colored," when applied to race, has the definite and well-known meaning of a person having negro blood in his veins. *State v. Threadaway* (La.), 20-1297.

Damages. — "Damages" means compensation for legal injury. *Jemo v. Tourist Hotel Co.* (Wash.), 19-1199.

Deemed. — The word "deemed" as used in section 151 (3) of the Mining Act of Ontario, 1908, which provides that unless an appeal (to a Divisional Court of the High Court) is set down and a certificate of such setting down lodged within a specified time, "the appeal shall be deemed to be abandoned," means nothing less than "adjudged" or "conclusively considered." *In re Rogers* (Can.), 16-476.

Duly. — The word "duly" has acquired a fixed legal meaning, and when used before any word implying action it means that the act was done properly, regularly, and according to law. It is often used before such words as "convened," "arrested," "qualified," "served," "presented," "discharged," and has in such cases the meaning of the term "legally," "properly," or "according to law." *O'Donnell v. People* (Ill.), 8-123.

Employ. — To employ means to engage in one's service, to use as an agent or substitute in transacting business, to commission and intrust with the management of one's affairs. When used passively, it sometimes has a reflexive meaning, signifying only to be engaged in. It also means to select, to designate. *Weaver v. Ann Arbor R. Co.* (Mich.), 5-764.

Employee. — The word "employee" has a variety of meanings, according to the context, subject-matter, and circumstances in which it is used. One definition is "one who is employed." *Weaver v. Ann Arbor R. Co.* (Mich.), 5-764.

From. — Whether the word "from" is to be construed as inclusive or exclusive of the *terminus a quo* depends upon the subject-matter and the context. When it refers to the time within which an act is required or permitted to be done, the first day is, under certain exceptions, to be excluded under the provisions of the Minnesota statute. *Budds v. Frey* (Minn.), 15-24.

From the date. — When the words "from the date," or "from" a day named, are used in connection with the creation of an estate or interest, and it is not contrary to the expressed intention of the parties, the date named from which the estate or interest is to exist is to be included, and the estate or interest vests on that day. *Budd v. Frey* (Minn.), 15-24.

Graft. — The word "graft" signifies a dishonest transaction in relation to public or official acts, and also an advantage which a person acquires by reason of his peculiar

position of superior influence. *Quinn v. Review Pub. Co.* (Wash.), 19-1077.

Griff. — The word "griff" in the state of Louisiana has a definite meaning, indicating the issue of a negro and a mulatto. A person too black to be a mulatto and too pale in color to be a negro is a "griff." *State v. Threadaway* (La.), 20-1297.

Incident. — The distinguishing characteristic of an "incident" consists in the fact that it "usually or naturally or inseparably depends upon, appertains to, or follows" its principal. *Commonwealth v. Wampler* (Va.), 7-422.

Lynching. — In a statute prohibiting lynching, the use of the term "lynching" is sufficient to define the offense, as the term is one of common knowledge. *State v. Lewis* (N. Car.), 9-604.

Malice. — Malice, in legal proceedings, does not necessarily mean personal ill will or spite, but means a wrongful act done intentionally without just cause or excuse. *Pittsburg, etc., R. Co. v. Wakefield Hardware Co.* (N. Car.), 3-720.

Mulatto. — A person too dark to be white and too bright to be a griff is a "mulatto." *State v. Threadaway* (La.), 20-1297.

Negro. — A "negro" is defined as a "black man, especially one of the race who inhabit tropical Africa, and who are distinguished by crisped or curly hair, flat noses and protruding lips," and the word also includes their descendants in America and elsewhere, but the word is also loosely applied to other dark and black-skinned races and to mixed breeds. The word "negro" of itself, unqualified, does not necessarily include within its meaning persons possessed of only an admixture of negro blood, notably those whose admixture is so slight that even an expert cannot be positive. *State v. Threadaway* (La.), 20-1297.

Profits. — The profits of a business for a given period is the increase shown by a comparison of the total assets at the beginning and the end of such period, due allowance being made for any capital put into or taken out of the business in the meanwhile. *In re Spanish Prospecting Co.* (Eng.), 20-677.

The word "profits" in an agreement to divide equally the profits of a mining company after a certain date held to mean the surplus of the earnings over the expenses, without any deduction on account of depreciation of machinery and plant. *Booth v. Summit Coal Mining Co.* (Wash.), 19-1255.

Schedule. — The term "schedule" implies something written, and when used with reference to a train implies that the operation of the train is governed by rule rather than by particular direction or agreement. *Draper v. Evansville, etc., R. Co.* (Ind.), 6-569.

Settle. — The word "settle" has an established legal meaning, and implies a mutual adjustment of accounts between different parties and an agreement on the balance. *Phipps v. Willis* (Ore.), 18-119.

Similar. — The word "similar," used in a contract of sale of goods, to qualify other goods, is not synonymous with "identical,"

but means "resembling," or "like," or "of like characteristics;" and hence when the price of calf trimmings and fleshings, sold by a tanner to a glue manufacture, is covenanted to be that of "similar stock paid to other tanners," hide trimmings used for the same purpose come within the description. *Canada Glue Co. v. Galibett* (Can.), 18-791.

Successors. — Under a clause in a lease providing for a forfeiture for failure to perform the covenants, the executors of the lessee are included among his "successors." *West Shore R. Co. v. Wenner* (N. J.), 1-790.

Timber. — The word "timber" ordinarily signifies wood suitable for constructive or manufacturing purposes, and it will be so construed in a contract for the sale of "all timber now standing" on certain land, in the absence of any local custom or other fact to indicate a different intention of the parties. *Balderson v. Seeley* (Mich.), 19-1049.

Wilful. — As used in the provision of the National Bankruptcy Act (Act of July 1, 1898, c. 541, § 17; 1 Fed. Stat. Annot. 578), that a discharge in bankruptcy shall not release judgments "for wilful and malicious injuries to the person or property of another," the word "wilful" means nothing more than intentional, and the word "malicious" means nothing more than that disregard of duty which is involved in the intentional doing of a wilful act to the injury of another. *McChristal v. Clisbee* (Mass.), 5-769.

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Compensation for services rendered weak-minded person. — In a proceeding to sell the land belonging to a decedent's estate, where the complainant claims compensation for services rendered by her to the decedent, her sister, and the evidence shows that the decedent was weakminded and as helpless as a baby, and that the complainant took care of her afflicted sister for several years and supplied all her wants, the complainant should be allowed such compensation as the decedent would have accorded her if the decedent had acquired full possession of her mental faculties before her death and had possessed an ordinary sense of justice. *Key v. Harris* (Tenn.), 8-200.

Presumption of gratuitous services between near relatives. — Where near relatives live together as members of the same family, and one of them performs services for the other, it is presumed that no charge intended to be made, and in order to raise a debt out of such circumstances there must be evidence showing expressly a contract was entered into, or the circumstances or origin of the services must be so exceptional as to rebut the presumption against the making of a charge. *Key v. Harris* (Tenn.), 8-200.

There is no legal presumption that services rendered by a son to his parent are regarded by the parties as gratuitous favors, where the son is the head of a family wholly distinct from the parent's family, though the two families reside in different parts of the same house. *Page v. Page* (N. H.), 6-510.

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